No. ____

In the Supreme Court of the United States

ALAN G. KEIRAN AND MARY JANE KEIRAN,
Petitioners,

v.

HOME CAPITAL, INC., A GEORGIA CORP.; BAC HOME LOANS SERVICING, L.P.; BANK OF NEW YORK MELLON, AS TRUSTEE FOR THE HOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2007-6; AND JOHN AND JANE DOES 1-10,
Respondents.

STEVEN J. SOBIENIAK and VICTORIA MCKINNEY,
Petitioners,

v.

BAC HOME LOAN SERVICING, LP, AS SUCCESSOR IN INTEREST TO COUNTRYWIDE HOME LOANS SERVICING, LP; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., A DELAWARE CORPORATION; JOHN AND JANE DOES 1-10,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, gives consumers the right to rescind certain mortgage loans. To exercise the right to rescind, is it sufficient for a consumer to notify the creditor in writing within three years of obtaining the loan (as the Third and Fourth Circuits have held, and as the Consumer Financial Protection Bureau has concluded) or must the consumer also file suit within that three-year period (as the Eighth, Ninth, and Tenth Circuits have held)?

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INTRODUCTION

These two consolidated cases present an ideal vehicle for resolving an important and recurring question under the Truth in Lending Act (TILA). TILA gives a consumer the "right to rescind" a transaction by "notifying the creditor, in accordance with the regulations … of his intention do so." 15 U.S.C. § 1635(a). The regulations, in turn, provide that, "[t]o exercise the right to rescind, the consumer shall notify the creditor" in writing. 12 C.F.R. § 226.23(a)(2). The right "expire[s] three years after consummation of the transaction." 15 U.S.C. § 1635(f).

The question presented is this: Does a consumer exercise the right of rescission by providing written notice to the lender within three years, or is the consumer *also* required to file a lawsuit within the three-year period to exercise the right? The circuits are hopelessly split. The Third and Fourth Circuits hold that the written notice contemplated by the regulation is sufficient. That is also the position of the federal agency with exclusive authority over TILA. The Eighth, Ninth, and Tenth Circuits, by contrast, all require consumers to exercise their right of rescission *both* by providing notice *and* by filing suit.

The Eighth Circuit's decision below deepens this split and departs from the relevant statutory text. It thereby thwarts Congress's intent to establish a private, nonjudicial rescission process and encourages a flood of unnecessary lawsuits by consumers, who are now *required* to sue. It also disregards the relevant agency's interpretation in a context in which this Court's precedents recognize that heightened deference is warranted. Because the question arises with great frequency, particularly in the aftermath of the mortgage crisis, this Court should grant certiorari to correct the Eighth Circuit's erroneous decision and restore certainty to the housing market.

OPINIONS BELOW

The Eighth Circuit's opinion in these consolidated cases is reproduced at 1a and reported at 720 F.3d 721. The district court's decision in *Keiran v. Home Capital, Inc.* is reproduced at 37a and can be found at 2011 WL 6003961. The district court's decision in *Sobieniak v. BAC Home Loans Servicing* is reproduced at 47a and reported at 835 F. Supp. 2d 705.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2013. Pet. App. 2a. On October 2, 2013 and November 6, 2013, Justice Alito granted extensions of the time within which to file this petition until December 9, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.,* and the Consumer Financial Protection Bureau's Regulation Z, 12 C.F.R. Part 226, are reproduced in the appendix at 57a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq*., is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. § 1601(a). TILA requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

The statute confers on the federal government broad authority to issue regulations to carry out the Act. *See* 15

U.S.C. § 1604(a). On July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred exclusive authority to interpret and promulgate rules regarding TILA from the Board of Governors of the Federal Reserve System to the newly created Consumer Financial Protection Bureau. *See* 12 U.S.C. § 5581(b)(1), (d). The Bureau, exercising this authority, republished the Federal Reserve's principal regulation under the Act, known as Regulation Z. *See* 76 Fed. Reg. 79, 768-01, 79,803 (Dec. 22, 2011) (codified at 12 C.F.R. § 1026 *et seq.*).

The Act provides that, with respect to certain mortgage loans, a consumer "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction of the information and rescission forms required under this section … whichever is later, by notifying the creditor, in accordance with the regulations of the Bureau, of his intention do so." 15 U.S.C. § 1635(a). Thus, § 1635(a) establishes an unconditional right to rescind during a three-day "cooling off" period. But because this period is meaningful only if consumers are made aware of the material terms of their transactions and their right to cancel, § 1635(a) permits consumers to rescind until midnight of the third business day following the latter of (1) loan consummation, (2) delivery of notice of the right to cancel, or (3) delivery of the material disclosures. Where those conditions are not satisfied, the right is extended beyond the cooling-off period.

In 1980, Congress amended § 1635 to limit the time period within which consumers must exercise the right to rescind even if a creditor does not deliver the required disclosures. *See* Pub. L. No. 96-221, § 612 (1980). As amended, § 1635(f) provides that the consumer's "right

of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to [the consumer]."

Regulation Z, as adopted by the Federal Reserve Board and as republished by the Bureau, specifies that "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. §§ 1026.15(a)(2), 1026.23(a)(2). When a consumer exercises a valid right of rescission under § 1635, the transaction is cancelled. The effect of cancellation is governed by § 1635(b): The consumer "is not liable for any finance charge or other charge, and any security interest given by the obligor … becomes void upon such a rescission." 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1), 1026.23(d)(1). Section 1635(b) also governs the process of cancellation: Within 20 calendar days after receipt of a notice of rescission, the lender must return any money or property given in connection with the transaction and take all necessary action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2). When the lender has performed its obligations, the consumer must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(3), 1026(d)(3). This statutory procedure may be modified by court order. 15 U.S.C. § 1635.

B. Facts and Proceedings In the District Court

These two consolidated cases were filed as separate actions in the district court and assigned to the same dis-

trict judge. In both cases, the consumer plaintiffs, a husband and wife, sent written notice of their intent to rescind their mortgage loans within three years of obtaining the loan. In both cases, their lenders refused to honor the rescission and they later filed suit, outside the three-year period but within one year of the refusal. And in both cases, the district court concluded that their claims seeking enforcement of the rescission were untimely as a matter of law. Pet. App. 3a-4a.

1. On December 30, 2006, Alan and Mary Jane Keiran entered into a mortgage with Home Capital, Inc. on their home in Lakeville, Minnesota. Pet. App. 4a. The loan was later assigned to, and is currently held, by, Bank of New York Mellon. On October 8, 2009, within three years of obtaining the loan, the Keirans sent a written notice of rescission to the bank and its servicer, BAC Home Loans Servicing. The notice alleged that the lender had failed to comply with TILA's disclosure requirements at the time of the transaction, requested an accounting of all payments, and offered to pay tender obligations so that they could restore all parties to the status quo ante. BAC refused to honor the rescission. On October 29, 2010, the Keirans filed suit, seeking an order enforcing the rescission, a declaratory judgment terminating the security interest in their home, and damages.

2. The facts in *Sobieniak* are similar. Pet. App. 3a. On March 22, 2007, Steven Sobieniak and Victoria McKinney entered into an agreement with Countrywide Home Loans to refinance the mortgage on their home in Wayzatta, Minnesota. The loan was later assigned to BAC, which merged with Countrywide and became its successor in interest. On January 15, 2010, within three years of obtaining the loan, Sobieniak and McKinney sent a notice of rescission to Countrywide and BAC.

They alleged that Countrywide violated TILA's disclosure requirements at the time of the transaction. BAC refused to honor the rescission. On January 14, 2011, three years and nine months after obtaining the loan, Sobieniak and McKinney filed suit, seeking the same relief as the Keirans.

C. Proceedings in the Eighth Circuit

1. On appeal, the Eighth Circuit consolidated the two cases and the Consumer Financial Protection Bureau appeared as *amicus curiae*, as it has in recent appeals presenting the same question in the Third, Fourth, and Tenth Circuits. Invoking its exclusive authority to interpret and promulgate regulations implementing TILA, the Bureau explained that "[t]o rescind a mortgage loan under TILA and Regulation Z, consumers must notify their lenders within three years of obtaining the loan, but are not also required to sue their lenders within that same timeframe if lenders contest the rescission." CA8 Br. of CFPB in *Sobieniak*, at 3 (April 13, 2012). The district court's contrary view, according to the Bureau, disregarded the text and purpose of TILA, the Bureau's regulations, and the historical understanding of rescission at common law. *Id.* at 10-12.

2. In a split decision, a panel of the Eighth Circuit affirmed, holding that "a plaintiff seeking rescission must file suit, as opposed to merely giving the bank notice, within three years in order to preserve that right." Pet. App. 10a.

The majority acknowledged at the outset that "our sister circuits are split on this issue." *Id.* at 7a. The Third and Fourth Circuits, the opinion explained, have held that "the plain meaning of the statute and the regulation compelled the conclusion that the plaintiffs exercised their right to rescind by signaling their intent to do so in

a letter to the bank." *Id.* (citing *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Scherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013)). But the Tenth Circuit, joining the Ninth Circuit, "could not accept the view that notice without suit was enough" and held instead "that commencement of suit was required." *Id.* (citing *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012)).

Following the Tenth Circuit, and its reading of this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), the majority characterized § 1635(f) as a "statute of repose" that can be satisfied only by filing a lawsuit. *Id.* at 9a. It also justified its holding on the ground that "remedial economy" would be threated by "uncertainties as to title that would likely occur if the right is not effectuated by court filing within three years." *Id.* at 10a. The majority was "not unmindful of the language of Regulation Z or the interpretation of that regulation" by the Bureau, but concluded that "the text of the statute … establishes that filing suit is required." *Id.* at 11a.

3. Judge Murphy dissented. The majority's opinion, in her view, is "contrary to the plain language of TILA, the congressional intent behind it, and the position of the agency responsible for enforcing it." *Id.* at 16a. "Nowhere in the TILA statute," she wrote, "is there any requirement that a consumer must file a lawsuit in order to exercise a right of rescission." *Id.* To the contrary, all that TILA and Regulation Z require is that a consumer "exercise the right to rescind" by "notify[ing] the creditor" in writing, 12 C.F.R. § 226.23(a)(2), and that is just what the Keirans and the Sobieniaks did. *Id.* at 19a.

This Court's decision in *Beach*, the dissent explained, "provides no answer to the question in this case" because, while it made clear that the right of rescission expires if it is not exercised within a three-year period, it "does not address *how* an obligor must exercise his right of rescission within the three year period." *Id.* at 18a (quoting *Scherzer*, 707 F.3d at 258). Moreover, while Congress may certainly use a statute of repose to make filing a lawsuit necessary to exercise a statutory right, "when it has chosen to do so, it has done so explicitly." *Id.* at 19a. Unlike other statutes, like ERISA or the Securities and Exchange Act of 1934, TILA has no language "even hinting that a lawsuit is required to exercise the right of rescission." *Id.* at 20a. Finally, the dissent dismissed the majority's chief policy concern—that the Bureau's position would "permit a clouding of title that could persist for more than three years after closing"—because lenders remain free at any time to seek a declaration from a court establishing whether a rescission is valid and because, and because forcing consumers to sue interferes with the Congress's objective that "rescission should ideally be a private matter worked out between the parties." *Id.* at 22a.

4. Neither set of plaintiffs sought rehearing en banc. In two later-decided cases presenting the same issue, however, Judges Colloton and Melloy took the unusual step of writing separate opinions criticizing the panel opinion in *Keiran* as wrongly decided. *See Hartman v. Smith,* 734 F.3d 752, 762 (8th Cir. 2013) (Melloy, J., concurring in the judgment) (reproduced at Pet. App. 32a); *Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092 (8th Cir. 2013) (Melloy, J., concurring in the judgment) (reproduced at Pet. App. 31a); *id.* at 1094 (Colloton, J., concurring) (reproduced at Pet. App. 31a).

Citing these opinions and the split in the circuits, the plaintiffs in *Jesinoski* sought rehearing en banc. Four judges would have granted rehearing. Pet. App. 27a. Judge Colloton, however, concurred in the denial of rehearing based in part on a prediction that this Court might resolve the split. "No matter how this court decides this case, he pointed out, "there will remain a well-developed conflict on the circuits on the question how a consumer may exercise his or her right to rescind under the Truth in Lending Act." Pet. App. 28a. Because no party had previously sought certiorari from this Court, it could not be said that "the Court has resolved to leave the issue to individual circuits despite a conflict in authority." *Id.* Accordingly, he concluded that it would be a waste of en banc resources "simply to move this court from one side to the other in what may prove to be a short-lived conflict in the circuits." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Federal Circuits Are Intractably Divided Over Whether Written Notice Is Sufficient To Exercise the Right of Rescission.

Certiorari is warranted to resolve the deep, mature, and intractable conflict among the federal circuits concerning the manner in which a consumer exercises his or her right to rescind under the Truth in Lending Act.

1. The Third and Fourth Circuits have both squarely held that "the borrower need only assert the right to rescind through a written notice within the three-year period" and is not required to also "file a lawsuit within three years after the consummation of a loan transaction to exercise her write to rescind." *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012); *accord Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255, 261 (3d Cir. 2013) ("We thus join the Fourth Circuit holding

that an obligor exercises his right of rescission by sending the creditor valid written notice of rescission, and need also file a lawsuit within the three-year period."). In these circuits, the consumer must exercise their right of rescission by notifying their lenders before the right to rescind expires, but courts can determine in subsequent litigation whether the rescission was valid, even if that litigation begins after the three-year period has run. These decisions rest on a straightforward reading of the plain language of the statute and regulations. Adopting a contrary interpretation, they conclude, "would require [them] to infer that the statute contains additional, unwritten requirements with which obligors must comply." *Id.* at 261; *see also Gilbert*, 678 F.3d at 277 (emphasizing "the plain meaning of these texts, and assuming that the words say what they mean and mean what they say").[1]

2. The Eighth, Ninth, and Tenth Circuits, by contrast, have created a new requirement, found nowhere in the statute or the relevant regulation, that consumers must *both* notify the lender of their intent to rescind *and* sue their lender within the three-year period to exercise their right to rescind. *See* Pet. App. 1a; *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir.

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[1] The Eleventh Circuit has not directly addressed the question presented, but has held that TILA provides "the consumer with the right to rescind a credit transaction … *solely by notifying the creditor* within the time limits of his right to rescind." *Williams v. Homesake Mortgage Co.*, 968 F.2d 1137, 1139 (11th Cir. 1992) (emphasis added); *see id.* at 1140 ("[A]ll that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded and the creditor must, ordinarily, tender first."). *In Sherzer*, the Third Circuit noted that its "interpretation of § 1635 accords with the Eleventh Circuit's description of the rescission process in *Williams*." 707 F.3d at 257.

2012); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012). In addition, the Sixth Circuit, unaware of the fast-developing circuit split, has issued an unpublished decision agreeing with the position of the Eighth, Ninth, and Tenth Circuits. *Lumpkin v. Deutsche Bank Nat. Trust Co.*, No. 12-2317, 2013 WL 4007760, at *3 (6th Cir. Aug. 6, 2013) (incorrectly stating that "other circuits have uniformly" adopted that view). These decisions rely in part on this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), in which this Court held that a borrower may not assert the right to rescind for the first time as an affirmative defense more than three years after the transaction.

3. The split is open and entrenched. *See* Pet. App. 7a ("Our sisters circuits are split on this issue."); *Gilbert*, 678 F.3d at 276; *Rosenfield*, 681 F.3d at 1188 n.12. As Judge Colloton made clear in his opinion respecting the denial of rehearing en banc, this "well-developed conflict" cannot be resolved absent intervention by this Court. Pet. App. 28a. "In the interim, the split has implications for lenders, borrowers, and the mortgage industry." Levi Smith, *Notice is Not Enough: Why TILA Requires More Than a Letter of Intent*, 2 U. Mich. J. L. Reform A13 (2012). In particular, "the circuit split … creates unnecessary uncertainty for borrowers," who must investigate the state of the law and may need to "ensure that the right to rescission is not lost." *Id.* Industry commentators, too, have complained about the "uncertainty over the housing finance market" created by the circuit split. Br. of *Amici* Am. Bankers Ass'n, *et al.*, at 12, in *Wolf v. Fed. Nat'l Mortg. Ass'n*, No. 11-2419, 2013 WL 749652 (4th Cir. 2013). This Court's immediate intervention is therefore warranted.

II. The Decision Below Is Wrong on the Merits.

Certiorari is also warranted because the Eighth Circuit's decision, like those of the Ninth and Tenth Circuits, is wrong for several independent reasons. It is contrary to the text of TILA and Regulation Z. It fundamentally misunderstands the nature of rescission, thwarting Congress's intent to establish a private, nonjudicial remedial process. Unless corrected by this Court, the decision will therefore have significant unintended and undesirable consequences, including encouraging unnecessary litigation by consumers. The decision also disregards basic principles of administrative deference—effectively abrogating a federal regulation—despite this Court's precedents requiring heightened agency deference under TILA. This aspect of the decision is particularly troubling in light of the Dodd-Frank Act, in which Congress delegated the exclusive authority to interpret TILA to the new Consumer Financial Protection Bureau. And finally, the decision misreads this Court's decision in *Beach v. Ocwen Federal Bank*, which did not address *how* consumers exercise their right to rescind.

1. The text of TILA and its implementing regulations make clear that consumers exercise their right to rescind by *notifying* their lenders of their intent to rescind, not by filing suit. TILA grants consumers a unilateral "right to rescind" certain mortgage loans for up to three years after obtaining their loans. 15 U.S.C. § 1635. Consumers are required to do only one thing before the three-year period expires—exercise their right to rescind by notifying their lenders in writing. Yet the Eighth, Ninth, and Tenth Circuits have read the statute to require consumers to also sue their lenders within the three-year period.

That reading is wrong and can only be corrected by this Court.

Section 1635(f) provides that the "right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first[.]" It specifies *when* consumers must rescind, but is silent on *how* they must do so. The answer to the latter question is supplied by §§ 1635(a) and (b) and Regulation Z. Section 1635(a) provides that the consumer "shall have the right to rescind" "by notifying the creditor" using "appropriate forms" provided "in accordance with regulations of the Bureau." The regulations of the Bureau (Regulation Z), in turn, require consumers to "exercise the right to rescind" by "notify[ing] the creditor of the rescission" in writing. 12 C.F.R. §§ 1026.15(a)(2), 1026.23(a)(2). And section 1635(b) entitles consumers to relief when they *exercise* a valid rescission right: "When an obligor exercises his right to rescind … he is not liable for any finance or other change, and any security interest given by the obligor … becomes void upon such a rescission."

When a consumer has a right to rescind under the Act, therefore, "all that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded." *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992). There is no basis in the statute or the regulations for the Eighth Circuit's holding that consumers must also sue their lenders to exercise their right to rescind. Subsection (f) provides that the rescission right "expire[s]" after three years. It says nothing about bringing lawsuits.

2. The absence of such language is consistent with the non-judicial nature of rescission: Consumers achieve rescission under TILA by providing notice, not by winning

a lawsuit. Consequently, interpreting § 1635(f) as controlling the time to file lawsuits makes little sense. Although litigation may ensue after a consumer exercises a unilateral right to rescind a loan, rescission itself is achieved as of the date the consumer provides notice. The purpose of any subsequent litigation is to determine if the consumer in fact *had* a right to rescind. This understanding of the purpose of the litigation is consistent with the historical understanding of rescission. "[W]here one contracting party … serve[s] notice of rescission on the [other], 'the rescission [is] complete and perfect'" as of the notice, not the litigation that may ensue. *Prewitt v. Sunnymead Orchard Co*., 209 P. 995, 995 (Cal. 1922) (quoting *Am. Type Founders' Co. v. Packer*, 62 P. 744, 746 (Cal. 1900)); *see* Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* 462 (1993) ("[T]he plaintiff effects the rescission and the court gives a judgment for restitution if that is needed."); 2 Henry Campbell Black, *A Treatise on The Rescission of Contracts and Cancellation of Written Instruments* § 577 (1916) (party rescinds merely by "giv[ing] notice of his intention to do so").

In addition to being textually unsupported, the Eighth Circuit's decision thus rests on a fundamental misunderstanding of the nature of rescission as intended by Congress. "[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005). When consumers have a right to rescind under § 1635 and "elect[ ] to rescind, the mechanics of rescission are uncomplicated." *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 422 (1st Cir. 2007). As explained above, Section 1635(a) and Regulation Z specify that consumers exercise their right to

rescind by providing written notice to their lenders. Section 1635(b) entitles consumers to relief when they exercise a valid rescission right. And § 1635(f) limits the period of time consumers have to notify their lenders in accordance with subsections (a) and (b) and Regulation Z. This statutory scheme is consistent with the historical understanding that rescission may be achieved unilaterally upon notice to the counterparty to a contract.

If left undisturbed, the Eighth Circuit's decision (and the decisions of the Ninth and Tenth Circuits) will greatly undermine the non-judicial rescission process established by Congress. As the CFPB explained in its amicus brief to the Eighth Circuit, this will inevitably have "unintended and inefficient results." CA8 CFPB Br. at 19. Among other things, requiring consumers to not only notify lenders but file suit within three years would "incentivize consumers to file suit immediately, rather than working privately with their lenders to unwind the transaction," thereby creating unnecessary litigation. *Id.* And it would "encourage lenders to stonewall in response to a notice of rescission" because, under the Eighth Circuit's decision, "all a lender need do is refuse to rescind and wait." *Id.* If the consumer does not file suit within three years, even an indisputably valid rescission becomes void. These consequences, the Bureau concluded, are "inefficient for lenders, consumers, and the courts" alike. *Id.*

3. Apart from these practical consequences, the decision below independently warrants review because it seriously departs from settled principles of agency deference in a context in which Congress has recently endorsed this Court's precedents mandating especially *heightened* deference. Indeed, the decision not only rejects the interpretation put forward in the CFBP's ami-

cus brief, but effectively abrogates a federal regulation first adopted by the Federal Reserve Board and recently readopted by the CFPB.

This aspect of the Eighth Circuit's decision cannot be reconciled with this Court's precedents under TILA, which make clear that "deference is especially warranted in the process of interpreting [TILA] and Regulation Z" unless such deference would lead to "demonstrably irrational" results. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565 (1980). That is because TILA itself reflects "a decided preference for resolving interpretive issues by uniform administrative decision." *Id.* at 568 ; *see also Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973) ("Congress determined to … entrust [TILA's] construction to an agency with the necessary experience and resources to monitor its operation.").

Moreover, in the wake of the national mortgage crisis, Congress determined to vest this same authority in a new agency, with interpretation and enforcement of the federal consumer protection laws as its principal function. Because the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 transferred exclusive authority to interpret TILA from the Federal Reserve Board to the CFPB, 12 U.S.C. § 5581(b)(1), the CFPB is now "the primary source for interpretation and application of truth-in-lending law." *Household Credit Servs. v. Pfenning*, 541 U.S. 232, 238 (2004) (discussing Federal Reserve Board's authority). Reflecting the importance of the issue to the agency, the CFPB has filed amicus briefs in the Third, Fourth, Eighth, and Tenth Circuits explaining that, in the agency's judgment, the view adopted by the Third and Fourth Circuits is correct.

The Eighth Circuit, however, dismissed the agency's position without even considering the appropriate stand-

ard of deference. The majority wrote that it was "not unmindful of the language of Regulation Z or the interpretation of that regulation" by the Bureau, but concluded that "the text of the statute … establishes that filing suit is required." Pet. App. at 11a. That is a far cry from holding that deferring to the regulation would lead to "demonstrably irrational" results. *Milhollin,* 444 U.S. at 565. The Tenth Circuit likewise rejected the CFPB's position, including its interpretation of Regulation Z, in a footnote—treating the agency's interpretation as if it were just one of two competing views entitled to equal consideration. *See Rosenfield*, 681 F.3d at 1186 n.10.

That approach also cannot be reconciled with *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011), which deferred to an agency amicus brief interpreting Regulation Z because it was neither "plainly erroneous" nor "inconsistent with the regulation." *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

4. Finally the decision below misread this Court's decision in *Beach v. Ocwen Federal Bank.* In *Beach*, a consumer attempted to rescind a loan "as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction." 523 U.S. at 411-12. This Court held that § 1635(f) "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." 523 U.S. at 419. As the Third Circuit has recognized, that holding makes clear that the right of rescission expires if not exercised within the three year period, but it "does not address how an obligor must exercise his right of rescission within the three year period." *Scherzer*, 707 F.3d at 258. In other words, *Beach* clarifies *when* consumers must rescind their loans. But it does not resolve the question here, which is *how* consumers must do so.

The Eighth Circuit nevertheless read *Beach* as holding that § 1635(f) is a "statute of repose" that, by definition, requires consumers to file suit. To be sure, "Congress may choose to use a statute of repose to make the filing of a lawsuit necessary in order to exercise a statutory right, but when it has chosen to do so, it has done so explicitly." Pet. App. 19a (Murphy, J., dissenting) (providing examples from ERISA and the Securities and Exchange Act of 1934). "That Congress provided a statute of limitations governing suits for damages demonstrates that it knew how to impose such a limitation and would have done the same regarding suits for rescission if it so desired." Pet. App. 33a (Melloy, J., concurring in the judgment in *Hartman v. Smith*).

III. These Cases Present a Superior Vehicle for Resolving the Question Presented.

These two consolidated cases present an ideal vehicle to address the question presented, which is squarely presented on two fully developed summary-judgment records. The district court produced lengthy opinions in both cases and the court of appeals published an extensive opinion, with a thorough dissent, addressing the arguments of the parties and amici in the context of the facts. In *Jesinoski v. Countrywide Home Loans*, No. 13-684 (pet. docketed Dec. 6, 2013), by contrast, the record is undeveloped, the case was decided on the pleadings, and the facts are not described in any detail in either the decisions of the district court or the court of appeals. *See Jesinoski v. Countrywide Home Loans, Inc.*, CIV. 11-474 DWF/FLN, 2012 WL 1365751 (D. Minn. Apr. 19, 2012), *aff'd*, 729 F.3d 1092 (8th Cir. 2013).

These cases also provide a superior vehicle for addressing a subsidiary issue that may be necessary to the resolution of the question presented: If section 1635 does

not expressly limit the time period for filing suit to enforce the right to rescission, then what is the relevant time limit? In its amicus brief below, the CFPB notes that "the fact that 1635 does not expressly limit the period for litigation does not mean no time limit exists. CA8 CFPB Amicus Br. in *Sobieniak*, at 25 n.5. The agency further observes that "some courts have concluded that TILA's general one-year statute of limitations, 15 U.S.C. § 1640, applies." *Id.* In *Jesinoski*, the plaintiffs sued their lender "[o]ne year and one day after mailing the letters" notifying it of their intent to rescind, and "more than four years after consummating the loan." 729 F.3d at 1093. The Sobieniaks, by contrast, filed their action within one year (on January 14, 2011) of sending notices of rescission to Countrywide and BAC (on January 15, 2010). Pet. App. 49a. The facts of these consolidated cases may therefore provide the Court with a better vehicle for exploring whether suits for rescission are timely filed within one year of the mailing of a notice of rescission.

For these reasons, the Court may wish to hold the petition in *Jesinoski* pending the disposition of these cases or, alternatively, may wish to grant both petitions for plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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