No. 13-684

IN THE

Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
Petitioners,
v.

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA N.A.,
D/B/A/ AMERICA'S WHOLESALE LENDER, ET AL.,
Respondents.

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

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 of the Truth in Lending Act ("TILA") by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
INTEREST OF THE *AMICI*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. SECTION 1635(F) IS A STATUTE OF REPOSE THAT EXTINGUISHES THE RIGHT TO RESCIND AFTER THREE YEARS, BARRING ANY SUIT PREMISED ON THAT RIGHT	5
II. PETITIONERS' INTERPRETATION OF SECTION 1635(F) WOULD CAUSE SUBSTANTIAL HARM TO CREDITORS, BORROWERS, AND COURTS.	6
A. After Three Days, a Borrower's Right of Rescission Is Not Unconditional, and Therefore Cannot Be Automatic.	6
B. Petitioners' Interpretation, Under Which Notice of Intent to Rescind Automatically Rescinds the Transaction, Would Increase Unnecessary Litigation	8
III. REQUIRING BORROWERS TO FILE A LAWSUIT WITHIN THREE YEARS PROVIDES CERTAINTY TO THE MARKETPLACE WHILE PRESERVING BORROWERS' RESCISSION RIGHTS.	9

TABLE OF CONTENTS—Continued

Page

A. If a Notice Alone Rescinds the Security Instrument, it Can Impair Foreclosure Actions and Cloud Title to Property for Years. 9

B. As a Public Record Tied to the Land, a Lawsuit is Searchable by Buyers and Insurers, Providing Necessary Certainty to the Market. 12

IV. PETITIONERS' INTERPRETATION THAT NOTICE ALONE IS SUFFICIENT TO EFFECT RESCISSION ACTUALLY PUTS BORROWERS IN A WORSE POSITION 13

A. Forcing Creditors to Litigate Rescission Claims Will Harm Borrowers Seeking to Rescind Their Loans. 13

B. Rather than Helping Distressed Borrowers, Rescission Diverts Borrowers Who Could Be Helped Through Modification and Other Assistance Programs. 16

C. All Borrowers Will Bear the Cost of the Litigation Caused by Making Rescission Automatic Upon Receipt of Notice. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page(s)

Am. Fire & Cas. Co. v. Finn,
341 U.S. 6 (1951) 5

Am. Mortg. Network, Inc. v. Shelton,
486 F.3d 815 (4th Cir. 2007) 7

Beach v. Ocwen Fed. Bank,
523 U.S. 410, 417 (1998) 4, 5, 10

In re Cmty. Bank of N. Va.,
622 F.3d 275 (3d Cir. 2010).......................... 5

Marr v. Bank of Am.,
662 F.3d 963 (7th Cir. 2011) 8

McMahon v. United States,
186 F.2d 227 (3d Cir. 1950).......................... 5

McOmie-Gray v. Bank of Am. Home Loans,
667 F.3d 1325 (9th Cir. 2012) 6

Yamamoto v. Bank of New York,
329 F.3d 1167 (9th Cir. 2003) 6, 7

STATUTES

Truth in Lending Act,
15 U.S.C. § 1601, et seq...............................*passim*

OTHER AUTHORITIES

Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs, Freddie Mac Working Paper 08-01* (Mar. 2008) available at http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf....................................... 18

TABLE OF AUTHORITIES—Continued

Page(s)

Br. for the States of New York, as *Amici Curiae* in Supp, of Pet'r, *Jesinoski v. Countrywide Home Loans, Inc*., No. 13-684 (U.S. filed July 22, 2014) 12

Fannie Mae Foreclosure Time Frames and Compensatory Fee Allowable Delays (Sept. 18, 2013), *available at* https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf 15

Fannie Mae/Freddie Mac Uniform Security Instruments, Minn. Form 3024, *available at* https://www.fanniemae.com/content/ legal_form/3024w. doc 14

Franklin D. Cordell, *The Private Mortgage Insurer's Action for Rescission for Misrepresentation: Limiting a Potential Threat to Private Sector Participation in the Secondary Mortgage Market*, 47 Wash. & Lee L. Rev. 587 (1990) 11

Freddie Mac Single Family State Foreclosure Time Line, *available at* http://www.freddiebmac.com/singlefamily/news/pdf/New_State_Foreclosure_Time_Lines.pdf 15

TABLE OF AUTHORITIES—Continued

Page(s)

Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures, New York University Law and Economics Working Papers* (Sept. 18, 2008), *available at* http://lsr.nellco.org/ cgi/viewcontent.cgi? article=1155&context=nyu_lewp 19

Kristopher Gerardi, Lauren Lambie-Hanson & Paul S. Willen, *Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process, No. 11-9* (Dec. 7, 2011), *available at* http://www.bostonfed.org/economic/ppdp/2011/ppdp 1109.pdf 16

Larry Cordell, *et al., The Cost of Delay, Working Paper No. 13-15* at 3 (Apr. 24, 2013), *available at* http://www.philadelphia fed.org/bank-resources/publications/ presentations/the-cost-of-delay.pdf............. 16

Lee Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. Rev. 171 (2010) 8

Making Home Affordable® Program: Handbook for Servicers of Non-GSE Mortgages (Ver. 4.4 Mar. 3, 2014), *available at* https:// www.hmpadmin.com/portal/programs/docs /hamp_servicer/mhahandbook_44.pdf 17

TABLE OF AUTHORITIES—Continued

Page(s)

Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69 (2011) 11

Stephan Whitaker and Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* (Mar. 2012), *available at* http://www.clevelandfed.org/research/workpaper/2011/wp1123r.pdf 18

BRIEF OF THE FINANCIAL SERVICES *AMICI* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI* [1]

This brief is filed by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Independent Community Bankers of America and Mortgage Bankers Association (collectively the "Financial Services *Amici*" or "*amici*").

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry protecting access to credit and consumer choice. AFSA's members include, among others, banks, mortgage lenders, credit card companies and diversified financial services firms. AFSA has provided services to its members for over ninety years.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Member institutions of the Consumer Bankers Association ("CBA") are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They include most of the nation's largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. The CBA frequently appears as an *amicus curiae* or a party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and service providers, committed to nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as *amicus curiae* in litigation with implications for the national mortgage lending marketplace.

The Independent Community Bankers of America® ("ICBA"), the nation's voice for more than 6,500 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold $1.3 trillion in assets, $1 trillion in deposits and $800 billion in loans to consumers, small businesses and the agricultural community. For more information, visit www.icba.org.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the

association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

The Financial Services *Amici* frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here, because the Eighth Circuit's holding that rescission under TILA requires a borrower to file a lawsuit within three years of consummation of the loan is an appropriate reading of the statute that properly balances a borrower's right to receive disclosures, a creditor's right to repayment, and the market's need for certainty. A contrary holding—that a borrower must merely submit notice of an intent to rescind to a creditor to preserve indefinitely the right to seek rescission—would force creditors to sue borrowers rather than work with them, and would cloud title to properties. In the end, this would harm not only *amici* and their members, but also borrowers.

SUMMARY OF ARGUMENT

TILA gives certain borrowers a right to rescind their mortgage loans. Although that right typically lasts for three days from the time the loan is made, 15 U.S.C. § 1635(a), it can extend to three years if the creditor fails to make certain disclosures required by TILA, 15 U.S.C. § 1635(f). But Congress was unequivocal in saying that, once those three years pass, the rescission right "shall expire." *Id.* This Court has found these terms "so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

Despite Congress's "manifest intent" to put rescission under TILA to rest after three years, *id.* at 419, Petitioners and the Consumer Financial Protection Bureau ("CFPB") (as *amicus curiae*) now propose a new way to evade Congress's three-year bar. They believe the period becomes irrelevant whenever a borrower sends a notice of intent to rescind to the creditor within three years.

The First, Sixth, Eighth, Ninth, and Tenth Circuits have held that Section 1635(f) requires borrowers to file a lawsuit within the three years of consummation of the transaction to invoke TILA's rescission provision, while the Third, Fourth, and Eleventh Circuits have held that Section 1635(f) requires only that a borrower notify a creditor in writing within three years of consummation that he intends to rescind.

Petitioners' approach would fundamentally undermine the finality and clarity Congress intended this statute to provide. It would upset the careful balance of remedies Congress struck in TILA. It would do so for the sake of a remedy that borrowers may invoke—and in the experience of *amici* and their members,

almost invariably invoke—not because there was any mistake or misunderstanding of a loan's terms at inception, but instead when the borrower is in default, has no genuine basis to rescind, and has no ability to tender the loan proceeds as required. It also would allow a borrower to strip a creditor of its security interest instantaneously and unilaterally—even if the creditor complied fully with TILA. But most importantly, Petitioners' approach would cast a shadow of uncertainty over the housing finance market, resulting in additional costs for the very borrowers that TILA was meant to benefit. *Amici* thus agree with Respondents that the Court of Appeals' decision should be affirmed.

ARGUMENT

I. SECTION 1635(F) IS A STATUTE OF REPOSE THAT EXTINGUISHES THE RIGHT TO RESCIND AFTER THREE YEARS, BARRING ANY SUIT PREMISED ON THAT RIGHT.

Section 1635(f) "governs the life of the underlying right [to rescind]," not just the time for bringing a suit to award that remedy. *Beach*, 523 U.S. at 417. Because it limits the underlying right directly, Section 1635(f) is a statute of repose. *E.g.*, *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010). Courts have never assumed the role of awarding a remedy on the basis of a right that has already been extinguished. A cause of action consists of "the unlawful violation of a right which the facts show." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13 (1951) (citation omitted).

A plaintiff must have a valid cause of action (and a present entitlement to effectuate it) to bring a suit. *E.g.*, *McMahon v. United States*, 186 F.2d 227, 230 (3d

Cir. 1950). But by virtue of Section 1635(f), a plaintiff suing after the critical three-year mark lacks the right necessary to support the suit—whether the borrower sought to privately assert that remedy before bringing suit or not. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

Respondents' brief addresses the statutory interpretation of Section 1635 in greater detail, and thus *amici* focus here on the practical—and negative—ramifications of Petitioners' argument. Furthermore, these practical effects support Respondents' interprettation that Section 1635(f) requires borrowers to file suit within three years of consummation of a loan if the lender disputes the borrower's notice of intention to rescind.

II. PETITIONERS' INTERPRETATION OF SECTION 1635(F) WOULD CAUSE SUBSTANTIAL HARM TO CREDITORS, BORROWERS, AND COURTS.

A. After Three Days, a Borrower's Right of Rescission Is Not Unconditional, and Therefore Cannot Be Automatic.

Petitioners argue that, after three days, rescission under Section 1635 is automatic—that is, rescission is complete immediately upon notice from a borrower. Were this true, a borrower could instantly—and unilaterally—void a creditor's note and security instrument, 15 U.S.C. § 1635(b), even if the notice were not valid, and the burden would fall upon the creditor to file suit to disprove the borrower's claimed right of rescission. *See, e.g.*, *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003). This result makes sense within the three-day "cooling-off period," where Section 1635's right of rescission is un-

conditional (i.e. all notices are indeed valid in 3-day period), funds have not been disbursed, and the security interest has not been recorded.

But such a result is neither sensible nor equitable after those first three days. After three days, the right to rescind is conditional rather than automatic—borrowers may only rescind a loan if they did not receive the specified disclosures. 15 U.S.C. § 1635(a). Further, at this point, funds have been disbursed and the security interest has been recorded. "Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 820-21 (4th Cir. 2007). Such a result "makes no sense when, as here, the lender contests the ground upon which the borrower rescinds." *Yamamoto*, 329 F.3d at 1172.

This is not to suggest that Congress left borrowers without *any* remedy after three years. To the contrary, Section 1640(a) specifically contemplates a damage award for a violation of the TILA rescission provision. *See* 15 U.S.C. § 1640(a) (permitting damages for a failure to comply with "any requirement under Section 1635" as well as attorney's fees). Consequently, if a borrower could establish that a creditor wrongfully refused to rescind, the borrower could still receive both actual and statutory damages, as well as attorney's fees, making it possible even for borrowers in dire straits to seek these remedies. But that relief, unlike the rescission right, would not present a potential cloud over a property's title for years to come. (And actual damages presumably would be unavailable to a borrower who has not, or cannot, tender back the loan proceeds.) Congress

anticipated that borrowers would receive a measure of relief, but not by warping the rescission right into a perpetual cause of action that imposes significant expense on the creditor and the marketplace.

B. Petitioners' Interpretation, Under Which Notice of Intent to Rescind Automatically Rescinds the Transaction, Would Increase Unnecessary Litigation

Petitioners' approach would force courts to grapple with largely groundless rescission suits for many years to come. Indeed, the enormous body of recent rescission-related case law cited by the parties and the CFPB reflects the substantial growth in rescission litigation in the wake of the financial crisis. Petitioners' interpretation would increase, rather than stem, the flow of unnecessary rescission litigation, overwhelming the courts.

Furthermore, in the experience of *amici* and their members, TILA rescission claims frequently lack merit. Borrowers often raise such claims on the eve of bankruptcy or in the midst of a foreclosure proceeding as a last ditch effort to avoid enforcement of their obligations. These borrowers rarely have the ability to "return the loan principal" as TILA requires. *Marr v. Bank of Am.*, 662 F.3d 963, 966 (7th Cir. 2011) ("[T]his requirement often has the practical effect of ruling out rescission[.]").[2] And having reviewed countless loan files for rescission claims, *amici's* members rarely

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[2] "[A]n underwater TILA plaintiff typically cannot refinance her mortgage, and the sale of her home usually cannot generate sufficient proceeds to fully finance the borrower's tender obligation." Lee Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. Rev. 171, 181 (2010).

encounter loans where the borrower did not receive the required disclosures and is entitled to rescission, further illustrating that often there is no TILA violation at all.

Under Petitioners' approach, creditors would need to file lawsuits even where borrowers clearly did not have meritorious claims for rescission in order to prove that no such claim existed. While courts can identify such meritless claims, they cannot do so preemptively and before the parties and the court incur the costs of litigation. Conversely, the requirement that borrowers initiate litigation where there is a dispute regarding their entitlement to rescind highlights the costs of making futile rescission claims to potential plaintiffs, requiring them to consider whether it is worth investing time and money in groundless claims.

III. REQUIRING BORROWERS TO FILE A LAWSUIT WITHIN THREE YEARS PROVIDES CERTAINTY TO THE MARKETPLACE WHILE PRESERVING BORROWERS' RESCISSION RIGHTS.

A. If a Notice Alone Rescinds the Security Instrument, it Can Impair Foreclosure Actions and Cloud Title to Property for Years.

Petitioners' interpretation of Section 1635 would increase uncertainty and risk in the marketplace. If a borrower can bring a rescission action at any time if the borrower files notice within three years, this will create a perverse incentive for borrowers to "pre-file"—or claim that they have pre-filed—a notice of rescission during the three year period. The borrower could then hold that right of rescission indefinitely until the borrower finds it useful to challenge the

creditor's security interest (e.g., as a defense to a creditor's foreclosure action).

Indeed, even the logistics of affecting a rescission by notice creates uncertainty; unlike a lawsuit, a borrower's notice might be lost or misdirected and a creditor may never know of the borrower's purported rescission. So long as the borrowers are willing to allege that they have mailed a rescission notice within three years from closing, borrowers would enjoy a potentially indefinite right to rescind. A creditor or subsequent holder may never be confident that its security interest is clear and may always face the prospect of being reduced to unsecured status.

If Section 1635 only requires notice to rescind a mortgage loan, not even a completed foreclosure would necessarily guarantee that the creditor had eliminated a borrower's interest in the property. If the creditor subsequently sold the property securing the loan through foreclosure and the borrower did not raise rescission as a defense,[3] under Petitioners' view, the creditor would have effectively enforced an extinguished security interest, an action that could have further legal consequences under various unfair trade practices theories.

Not only does Petitioners' view of Section 1635's rescission right create a perpetual hurdle to a creditor's ability to foreclose on a delinquent borrower, but it would likely "cloud a bank's title on foreclosure." *Beach*, 523 U.S. at 418. Because any rescission notice by borrowers would not be recorded, a purchaser could

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[3] This could occur either because the property was located in a state which permits foreclosures to occur without judicial supervision or because the borrower simply failed to defend a judicial foreclosure action.

not run a title search to confirm that buying a previously-foreclosed home would provide clear title to the property. Such uncertainty has real consequences for the lending market. Buyers will only be willing to purchase homes coming out of foreclosure if they can be confident that they are taking clear title. Likewise, the secondary mortgage market can only deliver a steady supply of reasonably-priced loans if securitizers and investors can be certain that loans are valid and enforceable.[4]

Adopting Petitioners' approach would increase the costs to creditors and their assignees on every loan in other ways. To obtain marketable title to the property, creditors would have to file a quiet title action against the borrower as part of every foreclosure. And litigation would increase not just between creditors and borrowers, but also between (a) creditors themselves; (b) secondary market participants and creditors; and (c) home buyers and home sellers. Ultimately, these costs would be borne by borrowers. TILA rescission also serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan. Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69, 79 (2011). Petitioners' approach would expand both the reach and the potential payout of this "insurance," further increasing costs.

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[4] "Commentators have estimated that the existence of an efficiently operating secondary mortgage market may reduce the cost of home mortgage credit by up to two percent." Franklin D. Cordell, *The Private Mortgage Insurer's Action for Rescission for Misrepresentation: Limiting a Potential Threat to Private Sector Participation in the Secondary Mortgage Market*, 47 Wash. & Lee L. Rev. 587, 593 (1990) (footnote omitted).

In support of Petitioners, the States argue that *amici's* "cloud-on-title concerns" are unfounded because some states allow for longer rescission periods and these states have not suffered "systemic clouding-of-title problems." Br. for the States as *Amici Curiae* in Supp, of Pet'rs at 16-17, *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (U.S. filed July 22, 2014). However, the States misunderstand *amici's* concerns. The cloud on title is not created by the long rescission period—a title search would reveal a long rescission period and buyers could account for this in making an offer on the property. Rather, the potential cloud on title would result from Petitioners' claim that a borrower can rescind a mortgage loan merely by sending a private note to the creditor. If this were the law (and it is not), a third-party purchaser would never know of the rescission and thus could never be sure that he possesses clear title.

B. As a Public Record Tied to the Land, a Lawsuit is Searchable by Buyers and Insurers, Providing Necessary Certainty to the Market.

While a private notice of rescission is not recorded, a lawsuit creates a public record that reduces subsequent litigation and gives all parties a fair opportunity to understand who has an ownership interest in the land. Importantly, a party to a lawsuit involving land can file a *lis pendens* in the local land records to provide notice of a superior legal interest and alert potential purchasers or creditors of the dispute.[5] Under the Eighth Circuit's holding, a creditor could either agree to rescind the loan (and file

[5] Even if a *lis pendens* were not filed, the existence of the lawsuit would be a public record searchable by interested parties.

the appropriate documents in the local land records) or the borrower could file suit to establish rescission (and file a *lis pendens* in the land records); either way, there would be a public record that potential buyers and title insurance companies could review to determine the ownership status of the property. Were the Court to adopt Petitioners' position, however, buyers and insurers would be required to prove a negative—to show that the borrower did not send an unrecorded rescission notice to the creditor.

IV. PETITIONERS' INTERPRETATION THAT NOTICE ALONE IS SUFFICIENT TO EFFECT RESCISSION ACTUALLY PUTS BORROWERS IN A WORSE POSITION

A. Forcing Creditors to Litigate Rescission Claims Will Harm Borrowers Seeking to Rescind Their Loans.

Petitioners rightly state that a borrower is entitled to rescission after three days only if the creditor did not timely provide the borrower with the required disclosures under Section 1635. Based on the experience of *amici* and their members, it is the rare exception that a borrower does not timely receive the required disclosures. These documents are part of the closing documentation for all loans, and nearly all borrowers' loan files plainly indicate that the borrower did in fact receive the required disclosures. Finally, borrowers rarely litigate their rescission claims; were these meritorious allegations, borrowers would raise their claims in court.

The large number of meritless rescission notices is driven by borrowers who have defaulted on their loans and are attempting to stave off foreclosure. Were the

Court to adopt Petitioners' interpretation of Section 1635, this would leave creditors with only two options upon receipt of a notice of rescission: (i) begin the rescission process for those few borrowers actually eligible for rescission, or (ii) file a lawsuit in the overwhelming majority of cases to prove that the borrower did receive the required disclosures, or is otherwise ineligible for rescission, and that the note and the security instrument remain valid. Since Petitioners' interpretation of the law would not require the borrower to identify the defect that the borrower believes enables an extended right to rescission but merely to send in their rescission notice, even determining which of these two paths to follow will cost hundreds, if not thousands, of dollars since the creditor must analyze the loan file to attempt to identify any required disclosure the borrower may not have received.

If a creditor has to file suit to refute a borrower's meritless claim of rescission on the eve of default or foreclosure, this only serves to weaken the borrower's already tenuous financial position. According to the terms of most security instruments, borrowers are responsible for any legal costs incurred by creditors to enforce or protect their security interests. *See, e.g.*, *Fannie Mae/Freddie Mac Uniform Security Instruments*, Minn. Form 3024 ¶ 9, *available at* https://www.fanniemae.com/content/legal_form/3024w.doc (if "(b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding . . . to enforce laws or regulations) . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . [and a]ny amounts

disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.").[6] If a borrower could not pay these costs, these costs would either reduce the borrower's equity or be added to a potential deficiency balance (and additional cost by the creditor) if the property were sold through foreclosure.

Furthermore, Petitioners' interpretation will unnecessarily lengthen the foreclosure process, which also harms borrowers. The time between a borrower defaulting on their home mortgage loan and the completion of a foreclosure action is at an all-time high, with foreclosure timelines in several states already exceeding a year. *See, e.g.*, *Fannie Mae Foreclosure Time Frames and Compensatory Fee Allowable Delays* (Sept. 18, 2013), *available at* https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf (providing for more than a year between a borrower's last paid installment and a foreclosure sale date in thirty states); *Freddie Mac Single Family State Foreclosure Time Line*, *available at* http://www.freddiemac.com/singlefamily/news/pdf/New_State_Foreclosure_Time_Lines.pdf (providing for more than a year between the due date of a borrower's last paid installment and a foreclosure sale date in twenty-five states). If borrowers could force creditors to file suit to prove that a borrower's rescission claim is meritless, this will lead to further frivolous litigation in courts that will further slow foreclosure actions. Longer foreclosure actions prolong the period of adverse credit

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[6] Counsel for *amici* notes that they have never seen a security instrument that did not hold the borrower responsible for repaying the creditor's costs to enforce or protect its security interest.

reporting, increase the deficiency balance that the borrower must repay, and further delay the borrower's efforts to move forward. *See, e.g.*, Larry Cordell, *et al*, *The Cost of Delay, Working Paper No. 13-15* at 3 (Apr. 24, 2013), *available at* http://www.philadelphiafed.org/bank-resources/publications/presentations/the-cost-of-delay.pdf (concluding that longer foreclosure timelines greatly increase the costs associated with foreclosure); Kristopher Gerardi, Lauren Lambie-Hanson & Paul S. Willen, *Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process, No. 11-9* (Dec. 7, 2011), *available at* http://www.bostonfed.org/economic/ppdp/2011/ppdp1109.pdf (finding that legal protections, such as judicial supervision of foreclosures, do not have any effect on the number of borrowers who cure delinquencies and avoid foreclosure).

B. Rather than Helping Distressed Borrowers, Rescission Diverts Borrowers Who Could Be Helped Through Modification and Other Assistance Programs.

Borrowers in distress have options for working with their creditors to avoid foreclosure. Borrowers can apply for relief through federal programs, such as the Home Affordable Modification Program ("HAMP") and Home Affordable Refinance Program ("HARP"). Most creditors also offer proprietary modification programs and forbearance options. Sometimes a clean break from an unsustainable mortgage is a better alternative for a borrower; in such situations creditors can provide their own short sale or deed-in-lieu arrangements or guide borrowers to the federal Home Affordable Foreclosure Alternatives ("HAFA") program—thereby allowing these borrowers to exit an

unaffordable loan with dignity and with substantially less damage to their credit scores.

Currently, creditors can work with borrowers who improperly notify a creditor that they are eligible for rescission. However, Petitioners' interpretation of Section 1635 would impair creditors' ability to work with borrowers in distress. Under Petitioners' position, once a borrower submitted a notice of rescission, rescission would have to be treated as if it would occur automatically, and the creditor would be forced to file a lawsuit to preserve its interest in the property. Once the parties were adverse in litigation, the creditor would be impeded in its ability to pursue loss mitigation options with the borrower. *See, e.g.*, *Making Home Affordable® Program: Handbook for Servicers of Non-GSE Mortgages* at 176 (Ver. 4.4 Mar. 3, 2014), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_44.pdf (noting that a short sale deal can be terminated if "[l]itigation is initiated or threatened that could affect title to the property"). Further, if the Court found that the borrower timely received the correct notices and was not entitled to rescind, the borrower would owe even more under the loan and be less likely to qualify for these alternatives to default and foreclosure.

C. All Borrowers Will Bear the Cost of the Litigation Caused by Making Rescission Automatic Upon Receipt of Notice.

Perhaps the greatest costs associated with Petitioners' interpretation of Section 1635, however, fall upon those who are least responsible for this situation—those who are able to make their payments on-time.

As discussed above, most rescission claims are filed by borrowers who are in default or are on the cusp of bankruptcy or foreclosure. Although borrowers are obligated to pay creditors' costs to defend against rescission claims, many—if not most—distressed borrowers will be unable to pay their own mortgages, let alone these additional legal fees. These un-recouped costs ultimately will be passed on to borrowers who pay their mortgage loans on time in the form of higher borrowing costs.

Further, the drawn-out foreclosure process has well-documented, negative effects on homeowners generally. A lengthy foreclosure process discourages the borrower from maintaining the home, which leads to neighborhood blight and depresses nearby property values, causing the surrounding homeowners to lose equity. *See, e.g.*, Stephan Whitaker and Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* at 3 (Mar. 2012), *available at* http://www.clevelandfed.org/research/workpaper/2011/wp1123r.pdf ("During foreclosure, homeowners have little incentive to maintain their homes, as every dollar put into upkeep or improvements will primarily benefit the foreclosing lender."); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs, Freddie Mac Working Paper 08-01* at 1 (Mar. 2008) *available at* http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf (finding that the costs associated with foreclosures "rise significantly with the length of the foreclosure timeline"); Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures, New York University Law and Economics Working Papers* at 15 (Sept. 18, 2008),

available at http:// lsr.nellco.org/cgi/viewcontent. cgi? article=1155&context=nyu_lewp (noting that "the magnitude and duration of spillover effects [from foreclosures] depends on the extent and timing of visible signs of deterioration, when and to whom the property is sold, when and by whom it is occupied, etc.");. This reduction in equity can make it more difficult for surrounding homeowners to avoid foreclosure through refinancing, loan modifications, or other means.

Finally, lower property values also lead to a drop in property taxes to provide services to communities. The housing market is just now beginning to recover from financial-crisis lows; by lengthening the foreclosure process as described above, Petitioners' approach would lengthen this recovery as well at the expense of all homeowners.

CONCLUSION

For the reasons stated above and in Respondents' brief, the Circuit Court's decision should be affirmed.

Respectfully submitted,

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