No. 13-684

IN THE

Supreme Court of the United States

LARRY D. JESINOSKI, *et ux.*,

Petitioners,

v.

COUNTRYWIDE HOME LOANS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Truth in Lending Act provides that consumers who enter into credit transactions secured by their principal dwelling shall have the right to rescind the transaction until three business days after the delivery of legally mandated "information and rescission forms" by the creditor. 15 U.S.C. § 1635(a). A consumer exercises the statutory right of rescission "by notifying the creditor, in accordance with [governing] regulations," of his or her intent to rescind. *Id.* The Act further provides that a consumer's "right of rescission shall expire three years after consummation of the transaction." whether or not a creditor has made required disclosures by that time. *Id.* § 1635(f).

The question presented is:

Do consumers timely exercise rescission rights under the Act by notifying creditors of their intent to rescind within three years of consummation of a transaction, or must consumers both give notice and also file a lawsuit seeking rescission within three years of consummation of a transaction to prevent statutory rescission rights from expiring?

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INTEREST OF THE AMICI STATES

Congress enacted the Truth in Lending Act (TILA) to ensure that consumers make informed decisions before entering into credit transactions—particularly credit transactions secured by a consumer's primary dwelling, which expose consumers to the risk of losing their homes through foreclosure. Amici States[1] have a compelling interest in ensuring effective enforcement of TILA, so that consumers fully understand the terms of a loan and their rights with respect to a loan before risking the loss of their homes.

Protecting homeownership is vital state policy. The family home is not only the single most important asset owned by most consumers; home-ownership is also key to the social and economic well-being of neighborhoods and communities as a whole. The personal and public costs of losing homes in foreclosure are staggering. Families not only face devastating financial consequences, but foreclosed homes also reduce neighboring property values, destabilize communities, and erode the property tax base—widespread public harms that state and local governments struggle to mitigate.

Central to TILA's protective scheme is the consumer's statutory right of rescission. When a creditor materially violates TILA, consumers have three years from the date of the original transaction to exercise their right of rescission by giving written

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "amici States."

notice to creditors. 15 U.S.C. § 1635(a). TILA contains no language requiring consumers to *additionally* file a lawsuit to preserve their rescission rights. Imposing that additional hurdle would severely undermine the dual purposes of TILA rescission—to undo harm to injured consumers and, equally important, to create strong incentives for creditors to comply with TILA's straightforward disclosure mandates so that consumers may avoid unaffordable or unsuitable loans in the first place.

Preserving TILA's readily accessible right of consumer rescission is critical to advancement of the Act's purposes. In amici States' experience, few consumers realize that they have been the victims of TILA violations until several years after taking out a loan, both because it is difficult to ascertain violations if mandated disclosures are missing, and because it may not be obvious that key information, such as calculation of annual percentage rates of interest, is misstated. As a result, many consumers do not discover TILA violations until foreclosure is threatened, the first time when consumers may seek legal help. Legal representation is often unavailable, however, due to a severe shortage of attorneys to represent consumers in foreclosure. Thus, in practice, requiring consumers to sue within three years of a loan would bar consumers in many cases from exercising valid rescission rights—preventing effective enforcement of TILA's mandatory disclosure obligations altogether. Requiring a lawsuit would also dilute the deterrent function of rescission by shifting the burden of litigation solely to consumers when creditors can also file court actions after receiving notice of rescission—and are far better

equipped to do so—to resolve any dispute about a consumer's right to rescind.

Amici States strongly support a plain-meaning interpretation of TILA that ensures that TILA rescission is readily accessible to consumers, as Congress intended. TILA rescission rights are key to protecting consumers under both federal and state consumer protection laws: TILA is the primary protection for consumers entering into covered mortgage transactions, and many state consumer-protection statutes expressly incorporate TILA's rescission remedy.[2] As a result, an improperly restrictive reading of TILA not only undermines federal protections; it also undermines the remedial schemes of a wide range of state statutes regulating lending and other consumer transactions.

Protecting consumers from mortgage- and foreclosure-related abuses is one of the highest enforcement priorities for amici States. In 2012, for example, the Attorneys General of forty-nine States entered into a landmark $25 billion federal-state settlement with mortgage servicing companies to remedy past mortgage-loan servicing and foreclosure abuses. Many individual States have also pursued

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[2] *See, e.g.*, Ark. Code § 23-53-106 (incorporating TILA's "right of rescission" into state-law recoupment remedy under Arkansas Home Loan Protection Act); Colo. Rev. Stat. § 5-3.5-201 (incorporating TILA's rescission remedy into Colorado Consumer Equity Protection Act); Ind. Code § 24-4.5-5-204 (making a violation of TILA's right of rescission a violation of Indiana Uniform Consumer Credit Code); Ohio Rev. Code § 1345.09(C)(2) (incorporating TILA's rescission remedy, including expiration period imposed by § 1635(f), into Ohio Consumer Sales Protection Act).

significant enforcement actions against creditors and mortgage servicers for lending- and foreclosure-related violations. But state and federal officials lack the resources to pursue and deter all potential violations related to home loans or mortgage lending—the very reason that TILA (and parallel state statutes) empower consumers to act as private attorneys general when creditors violate the law. Both federal and state law depend upon robust private enforcement to ensure compliance with truth-in-lending and other statutory protections, and Congress made rescission a centerpiece of TILA's remedial and deterrent scheme. Restricting consumers' ability to seek rescission beyond TILA's express language would leave a sweeping enforcement gap that amici States could not feasibly fill.

STATEMENT OF THE CASE

Congress enacted TILA in 1968 to protect consumers against unfair credit practices.[3] *See* 15 U.S.C. § 1601(a). The Act requires creditors to provide borrowers with clear and accurate disclosures of credit terms (such as annual percentage rates of interest) before a credit transaction is consummated. *Id*. §§ 1631-1632, 1635, 1638. Although TILA provides for public enforcement by both federal and

[3] TILA is implemented by Regulation Z, as promulgated by the Bureau of Consumer Financial Protection (CFPB). *See* 12 C.F.R. pt. 226; Truth in Lending (Regulation Z), 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23)).

state officials,[4] the Act primary relies on private enforcement by consumers to deter violations and police creditors. *See, e.g., McGowan v. King, Inc.*, 569 F.2d 845, 848-49 (5th Cir.1978) (explaining that TILA is designed to foster enforcement through a system of private attorneys general). To encourage private enforcement, TILA provides consumers with remedies for both actual and statutory damages and awards attorney's fees to consumers who prevail in establishing a TILA violation in court. 15 U.S.C. § 1640(a).

In addition to damages, TILA also grants consumers rescission rights when they enter into credit transactions that pledge their "principal dwelling" as security. *Id.* § 1635(a). The rescission right reflects Congress's intent to prevent consumers from placing their homes in jeopardy for loans and other credit transactions without a clear understanding of the potential risks of the underlying transaction.[5] *See* S. Rep. No. 96-368, at 28 (1980*), reprinted in* 1980 U.S.C.C.A.N. 236, 264. To ensure that consumers make a deliberate and informed choice, and that consumers can reconsider their choice after full disclosure of loan terms, TILA grants consumers an absolute three-day cooling-off period during which the consumer may rescind covered transactions for

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[4] *See* 15 U.S.C. § 1607 (providing for enforcement by federal agencies); *id.* § 1640(e) (providing for enforcement by state Attorneys General).

[5] TILA rescission rights do not apply to purchase-money mortgages (mortgages financing the initial purchase of a home), 15 U.S.C. §§ 1602(x), 1635(e)(1), presumably because such loans enable consumers to become homeowners rather than risking the loss of an already-owned home.

any reason merely by giving notice to creditors. 15 U.S.C. § 1635(a). Creditors are responsible for "clearly and conspicuously" disclosing a consumer's right to rescind and for providing "appropriate [rescission] forms" to the consumer. *Id*.

As initially enacted, TILA placed no time limit on consumer rescission where a creditor failed to make statutorily mandated disclosures about the terms of the loan or the consumer's right to rescind. If a creditor failed to comply with TILA, the consumer had an open-ended right to rescind and had no deadline to provide notice of rescission to the creditor. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 82 Stat. 146, 152-53 (1968). In 1974, Congress amended TILA in response to concerns that an unrestricted right of rescission might potentially cloud title to residential properties. To address potential clouds on title, Congress added a new subsection (f) to 15 U.S.C. § 1635. *See* Pub. L. No. 93-495, tit. IV, § 405, 88 Stat. 1500, 1517 (1974). Under § 1635(f), if no government enforcement proceeding is pending, the consumer's right to rescind "expire[s] three years" after the consummation of a covered transaction, or upon the sale of the property, "whichever occurs first," even if the creditor fails to make required disclosures within the three-year period.

Although Congress established a new three-year expiration period, Congress did not alter the procedures for exercise of TILA's rescission remedy, which were designed to make the rescission process uncomplicated, easily accessible, and consumer-friendly. A consumer exercises the right to rescind under TILA simply by giving written notice to the creditor. *See* § 1635(a); 12 C.F.R. §§ 1026.15(a)(2),

1026.23(a)(2). Once a consumer exercises his right to rescind by sending notice, he "is not liable for any finance or other charge, and any security interest given by [him] . . . becomes void." 15 U.S.C. § 1635(b). Written notice of rescission also triggers a set of default statutory procedures for unwinding the loan transaction, which, absent modification by a court, require the creditor to take steps to terminate its security interest and require consumer to return (*i.e.*, "tender") all loan proceeds back to the creditor.[6] *Id.*

The TILA rescission "process is intended to be [a] private," out-of-court remedy "with the creditor and debtor working out the logistics of a given rescission." *McKenna*, 475 F.3d at 421. In some cases, however, the parties will not be able to work out a voluntary resolution: the creditor may dispute or deny the consumer's right to rescind; a creditor may also simply ignore or refuse to respond to the consumer's rescission notice; the parties may also agree to rescind in principle but disagree over proper rescission procedures. When rescission is contested for whatever reasons, either party—the consumer or the creditor—may bring an action to enforce or clarify TILA rescission rights. *Id.* at 422.

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[6] Because of the tender requirement, not all consumers "who suspect (or know) that they have been subjected to a TILA violation will choose to rescind." *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421-22 (1st Cir. 2007). Tender of loan funds may not be feasible if the consumer has used loan funds to pay off credit-card or other outstanding debt. Likewise, tender may not be possible because the consumer's house has less current market value than the amount of the loan—preventing the consumer from selling the house or obtaining a refinancing loan.

TILA does not expressly limit the time period for bringing such suits. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (noting that § 1635(f) does not address time for "bringing an action" nor contain language governing "a suit's commencement"). Some courts, including the Eighth Circuit in this case (Pet. App. 2a), have nonetheless concluded that § 1635(f) requires consumers to file suit within three years of consummation of a credit transaction to exercise TILA rescission rights. Other courts have held instead that the provision of written notice to the creditor within three years is sufficient to satisfy § 1635(f) even if a later court judgment is necessary to enforce TILA rescission rights. *See, e.g., Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 258 (3d Cir. 2013).

SUMMARY OF THE ARGUMENT

The plain language, structure, and purpose of TILA establish that consumers exercise their right of rescission under the Act by providing written notice to the creditor within three years after the consummation of a loan. *See* Pet. Br. 14-30. In contested rescission cases, creditors or consumers may also seek a judicial ruling to determine the validity of a consumer's rescission demand, or to alter TILA's default, nonjudicial procedures for carrying out rescission. But Congress did not draft § 1635(f) to require consumers to file such lawsuits in order to timely exercise their TILA rescission rights.[7]

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[7] This case does not involve, and amici States take no position on, the statute of limitations that should apply to suits to enforce timely exercised TILA rescission rights. TILA itself provides no express limitations period for actions regarding rescission, and courts have taken a variety of approaches in

(*continues on next page*)

The courts that have reached the opposite conclusion have justified their departure from § 1635(f)'s plain text by citing generic (and unproven) creditor assertions about the need to limit rescission to prevent clouding of title for residential properties. *See, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 727-28 (8th Cir. 2013) (citing and adopting cloud-on-title rationale of *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184-85 (10th Cir. 2012)), *pet. for cert. filed*, 82 U.S.L.W. 3383 (Dec. 9, 2013) (No. 13-705). Amici States submit this brief to make three points about why such cloud-on-title concerns are an inappropriate ground for implying additional restrictions on consumer rescission rights beyond the express limitations that Congress included in TILA:

First, Congress specifically addressed creditors' concerns about clouds on title by requiring borrowers to give notice of their intent to rescind within three years of a transaction's consummation—a time limitation not present in the original enactment of TILA. If such notice does not give creditors sufficient certainty, creditors may file suit to obtain a ruling on whether rescission is available without waiting for the consumer to initiate a court action, as creditors routinely do in both state and federal court. *Second*, there is nothing unusual or unworkable about Congress authorizing rescission suits beyond the three-year exercise period provided under 15 U.S.C.

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considering the timeliness of TILA rescission actions, including borrowing TILA's one-year limitations period for damages claims, 15 U.S.C. § 1640(e). *See, e.g., Stewart v. BAC Home Loans Servicing, LP*, No. 10-cv-2033, 2011 WL 862938, at *6 (N.D. Ill. Mar. 10, 2011) (listing cases applying one-year statute of limitations).

§ 1635(f). State consumer-protection laws grant consumers comparable rescission rights for home loans and provide for rescissionary periods longer than three years, but no actual clouding-of-title concerns have arisen in States with such laws. *Third*, TILA's rescission remedy serves a deterrent as well as a remedial purpose. The availability of statutory rescission not only protects consumers in cases where creditors fail to make legally mandated disclosures, but also deters creditor violations in the first place. Creditors can file suit to clarify title after receiving a consumer's rescission notice. Shifting the burden from creditors to consumers to sue to avoid potential clouds on title, however, dilutes the deterrent effect of TILA rescission rights, thus hampering the private enforcement scheme Congress intended.

ARGUMENT

I. TILA's Timely-Notice Requirement Already Ensures That Creditors Can Resolve Title Disputes Promptly.

In *Beach*, this Court noted that § 1635(f)'s time limitation for exercising the right of rescission makes "good sense" because the "statutory right of rescission could cloud a bank's title on foreclosure." 523 U.S. at 417-18. But nothing in *Beach* or in the text or history of § 1635(f) suggests that concerns about clouded title require consumers to go to court to exercise their right to rescind, rather than simply giving notice of rescission to a creditor. To the contrary, TILA's requirement that consumers give notice of rescission within three years after the origination of a loan adequately prevents delayed rescission claims from clouding title.

Congress amended TILA in 1974—adding 15 U.S.C. § 1635(f)—specifically to address concerns about clouds on title to residential properties. When first enacted, TILA contained no timely notice requirement in cases where the creditor had failed to make material disclosures. As a result, a consumer effectively faced no deadline to exercise his or her right to rescind, even years after the origination of a loan, because the consumer's time to seek rescission (by giving notice of rescission to the creditor) did not run until the creditor's actual delivery of legally mandated disclosures. *See* Consumer Credit Protection Act, § 125, 82 Stat. at 152-53. The general concern raised in 1974 was that this open-ended right of rescission could potentially cloud title to residential real estate properties indefinitely due to ongoing "uncertainty" about valid, yet-unexercised consumer rescission claims. *See* Bd. of Governors of Fed. Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972,* at 19 (Jan. 3, 1972) (cited in *Beach*, 523 U.S. at 419).

The 1974 amendments to TILA resolved these cloud-on-title concerns by limiting consumers' rescission rights in two key ways. As one safeguard, Congress provided that any statutory "right of rescission shall expire . . . upon the sale" of the consumer's home, 15 U.S.C. § 1635(f), thereby cutting off any rescission remedy potentially affecting title if ownership of the underlying property changes hands. The regulations implementing TILA clarify that other transfers of the consumer's home, such as

transfer through gift or bequest, also cut off a consumer's time to exercise rescission rights.[8]

Even without a sale, § 1635(f) imposes a timely-notice requirement, arming creditors with the information necessary to resolve any title disputes or issues. Unlike the original version of TILA, § 1635(f) imposes a three-year deadline for consumers to exercise their rescission rights. If consumers do not exercise their right to rescind by giving written notice to the creditor, the statutory right of rescission "expire[s] three years" after the consummation of the relevant loan transaction—whether or not proper TILA disclosures were made. 15 U.S.C. § 1635(f). Requiring notice to creditors within a three-year expiration window thus eliminates the uncertainty under the pre-amendment Act by guaranteeing that creditors will know within three years whether a consumer will seek rescission.

Banks (including defendants here) have complained that mere notice does not provide sufficient certainty when there is a dispute over whether the consumer has a right to rescind at all, because only a judicial proceeding may resolve such a dispute. *See* Response to Cert. Pets. 24-27. But nothing prevents creditors themselves from taking immediate steps to resolve disputes to title, including by seeking a court ruling on the validity of the consumer's rescission claim. Creditors routinely file such actions

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[8] *See* Official Interpretations, 12 C.F.R. pt. 1026, supp. I, §§ 1026.15(a)(3)-(4), 1026.23(a)(3)-(4) (CFPB); Official Staff Interpretations, 12 C.F.R. pt. 226, supp. I, §§ 226.15(a)(3)-(4), 226.23(a)(3)-(4) (Federal Reserve Board).

in both state[9] and federal court.[10] Given creditors' ability to sue for relief themselves, there is no danger that exercise of TILA rescission rights could "cloud the title of the property for an *indefinite period* of time." *Rosenfield*, 681 F.3d at 1187 (emphasis added). To the extent creditors want certainty over title, TILA's three-year notice requirement ensures that lenders can file suit to obtain definitive resolution of consumer rescission demands made within a fixed and certain period after closing of a loan.

Requiring *consumers* to sue to exercise rescission rights, as the court below held, is not a more effective tool for clarifying title disputes. A lawsuit does not put "a definitive end to the uncertainty" about the enforceability of a lender's mortgage lien, nor guarantee timely resolution of disputes over title. *See* Response to Cert. Pets. 8. Commencing litigation simply moves the dispute over TILA rescission into

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[9] *See, e.g.*, *Fin. Freedom Senior Funding Corp. v. Fischer*, No. L–5900–08, 2011 WL 1161123 (N.J. Super. Ct. App. Div. Mar. 31, 2011); *Cornerstone Mortg., Inc. v. Ponzar*, 254 S.W.3d 221 (Mo. Ct. App. 2008); *Pac. Shore Funding v. Lozo*, 138 Cal. App. 4th 1342 (2006); *Aames Capital Corp. v. Sather*, No. C9-99-1435, 2000 WL 343218 (Minn. Ct. App. Apr. 4, 2000).

[10] *See, e.g., Bank of Am., N.A. v. Peterson*, 746 F.3d 357 (8th Cir. 2014); *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815 (4th Cir. 2007); *Decision One Mortg. Co. v. Fraley*, No. 00-3270, 2000 WL 1889700 (6th Cir. 2000); *WMC Mortg. LLC v. Baker*, No. 10-cv-3118, 2012 WL 628003 (E.D. Pa. Feb. 28, 2012); *Aurora Loan Servs., LLC v. Britton*, No. 08–cv–1535, 2009 WL 2501192 (E.D. Cal. Aug. 14, 2009*); Aurora Loan Servs., LLC v. Lucero*, No. 08-cv-950, 2009 WL 2485356 (S.D. Cal. Aug. 12, 2009); *AFS Fin., Inc. v. Burdette*, 105 F. Supp. 2d 881 (N.D. Ill. 2000); *New Me. Nat'l Bank v. Gendron*, 780 F. Supp. 52 (D. Me. 1991).

court where final adjudication of a consumer's rescission rights might occur far after § 1635(f)'s three-year expiration deadline. As a result, a consumer-suit requirement does not end uncertainty about title by a known and defined date; it simply shifts the burden of suits to clear title from creditors to consumers. But nothing in TILA suggests that Congress intended to protect bank interests—even for banks that materially violated TILA—by compelling injured consumers to sue to clear bank title once consumers have provided written notice of rescission. TILA was enacted to protect consumers, not to ensure that creditors have maximal commercial certainty at the expense of consumers' rescission remedies when creditors violate TILA's disclosure requirements.

Nor would shifting the burden of litigation to consumers make sense, given the imbalance of resources between creditors and consumers. Creditors are generally far better situated to pursue litigation in cases where genuine concerns over title arise. In sharp contrast, there is a severe shortage of attorneys who are willing and able to represent consumers in foreclosure proceedings (when defects in creditors' disclosures are usually discovered), and nonprofit and other publicly funded legal services programs cannot meet the urgent needs of all consumers facing foreclosure. Many consumers are simply unable to obtain the legal help they need. *See, e.g.*, Brennan Ctr. for Justice, *Foreclosures: A Crisis in Legal Representation* (2009).

Shifting the burden to consumers to sue thus does more than cut off a consumer's time to exercise TILA rescission rights: it makes the exercise of that right substantially more difficult, and may

undermine it altogether, regardless of whether a genuine dispute over title is present. Instead of mitigating uncertainty, a sue-to-prevent-expiration rule overwhelmingly tips the balance in favor of creditors, who would be shielded not only from disputed rescission claims, but also from indisputably valid rescission claims where timely notice was given but the consumer failed to take the additional, non-statutorily-mandated step of suing for rescission. Such an erroneous interpretation of TILA would impair rescission rights drastically beyond what is necessary to fully address the theoretical problem of clouds on residential property.[11]

II. State Laws Confirm That Longer Statutory Rescission Periods Are Workable and Do Not Hamper Lending Transactions.

While citing generic cloud-on-title concerns, banks seeking to restrict consumer rescission rights have never explained concretely how TILA rescission potentially clouds title if timely notice of rescission is given. The courts that have required consumers to sue for rescission within three years of consummation of loan have often accepted the banking

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[11] Because a consumer's written notice of rescission under TILA sets in motion a series of default procedures for unwinding a loan transaction, including automatic voiding of a security interest, 15 U.S.C. § 1635(b), some courts have expressed concern that consumers will unfairly profit by sending baseless rescission notices. *See, e.g., Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003). But TILA's procedures apply only if the consumer asserts a legitimate right to rescind. If the consumer lacks statutory grounds for rescinding, the creditor's security interest remains intact and unaffected by a rescission notice.

industry's claim that suits for rescission beyond a three-year window are commercially unworkable. *See Rosenfield*, 681 F.3d at 1187; *see also* Br. of Am. Bankers Ass'n et al. as Amici Curiae Supporting Appellees 13-14, *Rosenfield*, 681 F.3d 1172 (No. 10-1442), 2012 WL 1656043.

But TILA's rescission remedy is not unique: state consumer-protection laws often grant longer, and even open-ended, statutory rescission rights in cases where consumers fail to receive legally mandated disclosures. The States' experience with four-year, five-year, and longer statutory rescission periods refutes the banking industry's assertion that any rescission window beyond three years is commercially unviable or would lead to vast disruption of lending and credit transactions due to systematic clouding-of-title problems.

For example, under the Massachusetts Consumer Credit Cost Disclosure Act, which governs lending transactions in Massachusetts in place of TILA,[12] consumers have up to four years to exercise statutory rescission rights by giving written notice if a lender fails to make material disclosures. Mass. Gen. Laws ch. 140D, § 10(f). There is no evidence that the longer rescission period in Massachusetts, which has been in place since 1981, *see* Ch. 733, § 2, 1981 Mass.

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[12] States may request an exemption from TILA's requirements if state laws protect consumers by imposing disclosure requirements that are substantially similar to federal law. *See* 15 U.S.C. §§ 1633, 1666j, 12 C.F.R. §§ 226.29, 1026.29. Massachusetts is one of five States that have been granted exemption from TILA requirements. *See* 12 C.F.R. pt. 1026, supp. I, § 1026.29(a).

Acts 1143, 1155, has hampered lending or other credit transactions or in any way led to systematic clouding-of-title problems.

Likewise, other States have enacted specific laws to protect consumers from high-cost or subprime home loans by permitting rescission well after three years. Under the New York Banking Law, for example, the "remedy of rescission shall be available as a defense *without time limitation*" for certain high-cost home loans upon a judicial finding that the loan violates statutory requirements. N.Y. Banking Law § 6-*l*(11) (emphasis added). Other States give borrowers up to five years from consummation of a covered loan to seek rescission. S*ee, e.g.*, Ga. Code § 7-6A-7(e) (granting borrowers five years to seek rescission of a high-cost home mortgage loan); Mass. Gen. Laws ch. 183C, §§ 15(b)(1), 18(c)(1) (same).

Similarly, States have enacted home-equity protection laws governing the sale of homes in foreclosure that extend unlimited statutory rescission rights to homeowners in cases where purchasers fail to comply with statutory disclosure requirements. *See* Cal. Civ. Code § 1695.5(d) (homeowner has right to cancel sale until purchaser provides homeowner with required notice of right to cancel); Md. Code Real Property § 7-311(f) (homeowner's time for rescinding sales contract "does not begin to run until the purchaser has complied" with statutory requirements).

Finally, all fifty States have enacted cancellation remedies for in-home solicitation sales—*i.e.*, sales of goods or services arising from personal solicitation of a consumer at his or her residence. Nat'l Consumer Law Ctr., *Truth in Lending* § 10.2.10, at 609 (8th ed.

2012). Many state statutes provide no limitation on consumers' right to cancel so long as the seller fails to provide proper disclosures.[13] These continuing cancellation rights may overlap with TILA rescission rights when a security interest on a consumer's home arises from a home solicitation sale. *See id.*; s*ee also* Ky. Rev. Stat. § 367.420(6) ("for home solicitation sales on loans in which a security interest is taken in the principal dwelling of the buyer, the buyer shall have the right to rescind or cancel the transaction until . . . delivery of the material disclosures required under the Truth in Lending Act"). Continuing rights of rescission are also common under other state statutes extending protections to consumers in home-lending transactions.[14]

It is thus far from unusual or aberrant that Congress chose to permit rescission under TILA more than three years after consummation of a loan, so long as the consumer provided written notice to the creditor within that time period. Such a rescission right operates little differently from the comparable remedies that many States have adopted. In this

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[13] *See, e.g.*, 815 Ill. Comp. Stat. 505/2B (three-day statutory cancellation right "does not commence" until seller complies with statutory requirements for furnishing consumer with notice of cancellation form); Vt. Stat. tit. 9, § 2454(b)(3) (same); *see also* Nat'l Consumer Law Ctr., *Federal Deception Law* § 2.5.6.3, at 27 (2012) (discussing continuing rights of rescission under state law).

[14] *See, e.g.,* Okla. Stat. tit. 14A, § 5-204(1) (providing continuing right of rescission for loans secured by consumer's home until creditor delivers statutorily required information and forms); Tex. Code Occ. § 1201.162(c) (providing continuing right of rescission for manufactured-home transactions until retailer complies with statutory disclosure requirements).

case, for example, petitioners exercised their right to rescind under TILA by sending written notice within § 1635(f)'s three-year time limit and then filing suit in federal court one year later. Pet. Br. 8-9. Petitioners' lawsuit was thus brought within four years of the closing of their mortgage refinancing loan, the same rescission period Massachusetts grants under its state-law TILA analogue. Contrary to the banking industry's speculation about theoretical cloud-on-title problems, a four-year rescission period has proved commercially viable in Massachusetts for the last thirty-three years. Banks have not declined to make loans to Massachusetts consumers for fear that rescission claims will render their mortgage liens uncertain; nor has a longer consumer rescission window created any real-world confusion over title to residential properties in Massachusetts. As state law thus demonstrates, a rescission window beyond three years for unwinding a loan transaction does not so cloud title as to render such a remedy commercially impractical.

III. Requiring Consumers to File Court Actions to Timely Exercise TILA Rescission Rights Would Improperly Dilute the Deterrent Purpose of TILA's Rescission Remedy.

Limiting TILA rescission rights to accommodate lender concerns about the financial burdens of consumer rescission is also inappropriate for another fundamental reason. TILA's remedial scheme was designed to deter and prevent disclosure violations by creditors. *See Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 480 (5th Cir. 1995) (quoting *Williams v. Public Fin. Corp.*, 598 F.2d 349, 356 (5th Cir. 1979)). And, rather than relying solely on government

enforcement efforts, Congress deliberately provided remedies to consumers to encourage consumers to act as private attorneys general in enforcing TILA's disclosure requirements. Thus, for example, TILA entitles consumers to collect statutory damage awards, even when they suffered no actual damages. *See* 15 U.S.C. § 1640(a)(2)(A), (3).

Like statutory damages, TILA's extended right of rescission also encourages consumers to police lender conduct. Rescission is uniquely important, however, and central to TILA's deterrent scheme because it serves a function not replicated by other TILA remedies. Recovery of actual damages under TILA generally requires proof of detrimental reliance, a difficult showing for consumers to establish. *See, e.g., Turner v. Beneficial Corp.*, 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc). Although statutory damages are available without proof of reliance, TILA caps statutory damages awards to only $4,000 for credit transactions secured by a consumer's home—a relatively low amount that limits consumer incentives to enforce TILA. *See* 15 U.S.C. § 1640(a)(2)(A)(iv). In addition, TILA damages are frequently unavailable to consumers for practical reasons. In amici States' experience, many consumers fail to realize that TILA violations have occurred until a threatened foreclosure or impending bankruptcy forces them to seek legal help. But TILA requires that damages claims be brought within a year of a creditor's violation, *see id.* at § 1640(e), a time limitation that frequently precludes damages recovery.[15]

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[15] The one-year limitation does not bar consumers from asserting TILA damages claims "'as a matter of defense by

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Rescission is also particularly important as a means for deterring TILA violations because many mortgage loans are sold on the secondary market or securitized, effectively exempting the loans from consumer damages claims. In many cases, the original lender goes out of business or becomes insolvent after selling the loan. Assignees are liable under TILA only if the original creditor's TILA violations were apparent on the face of loan disclosure statements—an exceedingly difficult standard to meet. *Id.* § 1641(a), (e). Indeed, one of the very purposes of securitization is to insulate parties from responsibility for the liability-producing conduct of the original lender by taking advantage of assignee-liability limitations. *See, e.g.*, Lynn M. Lopucki, *The Death of Liability*, 106 Yale L.J. 1, 23-30 (1996). Congress specified, however, that consumers may exercise TILA rescission rights "against any assignee," 15 U.S.C. § 1641(c), thus ensuring that rescission would remain as a deterrent even if a mortgage loan is sold or securitized. The potential for rescission also gives the secondary mortgage market strong incentives to police loan originators to prevent threshold TILA violations.

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recoupment or set-off'" in foreclosure proceedings or other actions to collect a debt. *Beach*, 532 U.S. at 418 (quoting 15 U.S.C. § 1640(e)). But consumers would face the same difficulties in establishing actual damages and be limited to same statutory damages caps. Moreover, damages are of limited help once a consumer is facing the irreparable harm of losing his or her home, and damages do not remedy the widespread public harm of home foreclosures. See *supra* at 1.

For all of these reasons, rescission may be the only practical remedy in many cases and, as a result, the only effective way to hold lenders accountable for faulty consumer disclosures. Moreover, because the purpose of rescission is deterrence as well as restoration, the difficulty or expense of unwinding a loan transaction is not an independent reason to restrict TILA rescission rights. *See* Response to Cert. Pets. 29-30. The fact that lenders may find it onerous to unwind a loan transaction—and fear that consumers will readily seek rescission because TILA requires only written notice to exercise statutory rescission rights—confirms that rescission is serving its intended deterrent function. Rescission may be strong medicine, and defending against rescission demands may impose burdens on creditors, but that should motivate lenders to make true and accurate disclosures and keep careful records to respond to and refute consumer rescission claims if necessary.

By contrast, adding a consumer litigation requirement to § 1635(f) substantially reduces creditor compliance incentives. There is a direct correlation between the accessibility of TILA's rescission remedy to consumers and its power to incentivize due diligence on the part of lenders. TILA was drafted to make rescission a private, out-of-court process. *See, e.g., Belini v. Wash. Mut. Bank*, 412 F.3d 17, 25 (1st Cir. 2005). A consumer-suit requirement would place rescission out of reach for many consumers due to delayed discovery of TILA violation and the difficulties consumers face in obtaining legal help and representation. See *supra* at 2, 14, 20. Sending written notice, as the statute specifies, presents far fewer burdens, especially if consumers are nearing § 1635(f)'s three-year exercise deadline when they

discover TILA violations. Additional time beyond three years to file suit further removes creditor incentives to stall or ignore consumer rescission notices in hopes that consumers will not sue in time.[16] Adherence to the plain language of § 1635(f) also gives consumers critical time to obtain legal assistance and ensures that attorneys representing consumers can preserve the rights of more consumers rather than devoting resources to pursuing individual rescission actions to avoid a potential TILA time bar.

To be sure, there are many potentially different ways to balance the remedial and deterrent purposes of rescission, and Congress could have required consumers to file suit to preserve rescission rights under § 1635(f). But § 1635(f) does not contain the clear language that Congress included in other statutes to impose a strict time limitation for actions to enforce statutory rescission rights. The federal Interstate Land Sales Full Disclosure Act (ILSFDA), for example, protects consumers by mandating certain disclosures for the sale or lease of lots in subdivision when sales are effectuated through use of interstate commerce or mail. Similar to TILA, the ILSFDA grants consumers an absolute right to

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[16] Many cases interpreting § 1635(f) involve instances where lenders simply ignored consumers' written rescission notices. *See, e.g.*, *Rosenfield*, 681 F.3d at 1176 (bank failed to respond to rescission notice). In other cases, banks stalled in rescinding transactions—for example, by negotiating with a consumer, eventually refusing to rescind, and then seeking to bar the consumer's later rescission action as time-barred. *See, e.g., McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326-27 (9th Cir. 2012)

revoke a purchase agreement within seven days of signing of a contract, 15 U.S.C. § 1703(b), and extends that right by two years if a developer fails to make statutorily mandated disclosures at the time of sale. *Id.* § 1703(c)-(d). But unlike in TILA, Congress expressly clarified that "[n]o *action* shall be maintained" to enforce consumer revocation rights "unless brought within three years after the signing of the contract or lease," *id.* § 1711(b) (emphasis added), specific and affirmative language distinguishing between timely exercise of statutory revocation rights and suits to enforce the revocation.

Comparable language is absent from TILA. Inferring a limitation that Congress did not impose because "banks must be protected from the possibility that a foreclosed home could have a 'cloudy title' because of a delayed rescission claim by a borrower," *Rosenfield*, 681 F.3d at 1177, ignores that Congress may well have considered and accepted that risk—in fact intended that possibility as an extra spur for banks to scrupulously comply with TILA's disclosure requirements. Creditors are free to make their policy arguments to Congress, but until Congress acts, TILA's consumer rescission remedy should not limited so as to dilute its deterrent effect and central place in TILA's remedial scheme.

CONCLUSION

This judgment of the court of appeals should be reversed.

Respectfully submitted,

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