

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LARRY D. JESINOSKI, ET UX., :

4 Petitioners :

5 v. : No. 13-684

6 COUNTRYWIDE HOME LOANS, :

7 INC., ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, November 4, 2014

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:07 a.m.

15 APPEARANCES:

16 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf
17 of Petitioners.

18 ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of United States, as amicus curiae, supporting
21 Petitioners.

22 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
23 Respondents.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 13-684, Jesinoski v. Countrywide Home
5 Loans.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE PETITIONERS

9 MR. FREDERICK: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The narrow question in this case is whether
12 the Truth in Lending Act rescission provision in 1635(a)
13 requires borrowers to file a lawsuit to exercise their
14 right to rescind. The answer is no, and the court of
15 appeals should be reversed for three reasons: The plain
16 language of Section 1635(a); the statutory context of
17 1635; and the long-standing regulatory interpretation by
18 the two agencies who have been charged with
19 administering the provision.

20 I'd like to start with the plain text of
21 1635(a), and we've set out the language in the first
22 page of our addendum to the blue brief, where a couple
23 of things are quite important to take note of.

24 One is that the rescission right, the
25 mechanism that is set forth in the statute is by

1 notifying the creditor, and that's true whether the
2 rescission occurs within 3 days or 3 years of the
3 closing of the loan transaction.

4 The second thing that's important to point
5 out --

6 JUSTICE SCALIA: Well, let's talk -- let's
7 talk about the first thing you say rescission is
8 affected by. Okay? It seems to me that it's -- it's
9 common usage to, for instance, one could say on Election
10 Day you vote by going to the precinct and presenting
11 identification. Now, that is not how you vote. That's
12 a preliminary step to your voting, and I think that it's
13 possible to read the "by giving notice" as -- as to say
14 where -- where that's the only thing you have to do, as
15 it is for the 3-day cancellation rescission, that's the
16 end of it.

17 But where there is something else to be
18 done, where you have to return whatever you have
19 received under the -- under the transaction, it seems to
20 me more reasonable to read it as, you know, you vote by
21 presenting yourself at the precinct and -- and offering
22 identification.

23 MR. FREDERICK: Well, Congress could have
24 written Section 1635(a) that way, but it didn't. And
25 when it wrote "by notifying," even if it was within the

1 3-year period, Justice Scalia, it also provided that it
2 had to be done in accordance with regulations of the
3 Bureau. And when Regulation Z was promulgated in 1969,
4 the Federal Reserve Bank took exactly the same position
5 that we're arguing now, which is that the notification
6 to the lender could occur in a writing, and they used
7 their regulations to spell out the various --

8 JUSTICE SCALIA: Well, wait, wait, wait,
9 wait. By notifying in accordance with regulations, it
10 seems to me that speaks to the manner of notifying, not
11 to the consequence of notifying. And Regulation Z may
12 indeed say what the consequence is, but I don't think
13 that the statute authorizes Regulation Z to say that.

14 MR. FREDERICK: Well, the statute actually
15 does say that in the (b) provision, Justice Scalia.
16 We'll get to that in a moment.

17 But the point here is that nowhere in
18 1635(a) did Congress say you had to file a lawsuit, and
19 nowhere in Regulation Z is there a provision that a
20 borrower has to file a lawsuit in order to rescind. And
21 remember, the definition of rescission is a unilateral
22 cancellation of the transaction.

23 JUSTICE SCALIA: Yes, but -- but in common
24 law you had to give back in what you had received, and
25 you have -- you -- you are urging that the statute

1 creates a system in which a -- a creditor who has a
2 secured interest, simply because somebody comes up
3 almost 3 years later and says, you didn't give me two
4 copies of this particular document, I got only one copy,
5 and even if that's not true, immediately the secured
6 interest is converted into an unsecured interest. That
7 is a huge difference. And I find it difficult to
8 believe that that's what Congress intended.

9 MR. FREDERICK: Well, the language of the
10 statute actually makes that very clear, and so do the
11 regulations. And notably, Justice Scalia, in three
12 places in three successive sentences in 1635(a, Congress
13 said the manner of rescission is going to be done in
14 accordance with regulations, the disclosures that need
15 to be done have to be done in accordance with
16 regulations, and there have to be appropriate forums for
17 the obligor to exercise his right to rescind. And that
18 is also set forth in the regulations.

19 So I don't think 1635(a) could be any
20 clearer that it is notification by writing in accordance
21 with the regulations set forth by the Federal agency.
22 Again --

23 JUSTICE ALITO: Could you just explain how
24 you -- how you think this would play out? So the
25 obligor sends a letter and says: I'm rescinding, and

1 then the creditor fulfills its obligations, and then the
2 obligor is required to tender the property?

3 MR. FREDERICK: Correct.

4 JUSTICE ALITO: And what if the obligor says
5 at that point, I don't have it, I've spent it.

6 MR. FREDERICK: Okay. So --

7 JUSTICE ALITO: Then what happens? So the
8 rescission is rescinded?

9 MR. FREDERICK: The statute answers that
10 question, Justice Alito, in 1635(b), and that's the
11 second page of the addendum to our blue brief.

12 JUSTICE ALITO: How does it answer it?

13 MR. FREDERICK: It answers the question by
14 making clear that the process that you set forth is
15 what's supposed to happen automatically, but then the
16 very last sentence, which reads, "The procedures
17 prescribed by this subsection shall apply except when
18 otherwise ordered by a court." That sentence was added
19 in 1980, 12 years after the Truth in Lending Act was
20 originally promulgated. And the reason why Congress
21 added that sentence was because there had been case law
22 that raised the problem that you are identifying.

23 So what that sentence is intended to do is
24 to give courts the flexibility to reorder the various
25 provisions or slow things down so that the tender back

1 actually happens in a way that does -- is not unfair to
2 the lender.

3 And we've not found a single case in the
4 45-year history of this Act where the borrower has
5 gotten any kind of windfall. We've looked extremely
6 hard at this.

7 But notably, the reason why this precision
8 happens this way, there's a rationale for it, and the
9 rationale is that after the borrower has put forth all
10 this money to get the loan in the first place, unless
11 the borrower can get back those proceeds and have the
12 security interest released, it's virtually impossible,
13 or extremely difficult, to get a refinancing on the
14 property.

15 JUSTICE KENNEDY: Well, suppose -- suppose
16 the rescission notice is really improper. The borrower
17 had received the two copies. And 2-1/2 years into the
18 loan, it sends to the bank notice: We're rescinding.
19 The bank sends back a letter saying: You can't rescind
20 because we gave you all the documents.

21 Then nothing happens for a year. And then
22 the -- or say for 5 years. Then the borrower sues. I
23 take it at that point, the bank could say your State
24 statute of limitations has run?

25 MR. FREDERICK: That -- that's right. But

1 the way that your hypothetical most commonly arises,
2 Justice Kennedy, is in judicial foreclosure States, and
3 that would be where the bank would wait for a period of
4 time before bringing a foreclosure action in court, and
5 then the borrower would assert the rescission as a
6 defense, as an affirmative defense, like the Beach v.
7 Ocwen situation, except that in your hypothetical, the
8 borrower had timely sent the written notification of
9 rescission in time, within the 3-year period, and so,
10 therefore, would have preserved the right to rescind as
11 an affirmative defense.

12 JUSTICE KENNEDY: So -- so the borrower has
13 to send its notice that it's not -- does not agree with
14 the right to rescind within the 3-year period?

15 MR. FREDERICK: The -- the -- yes, that's
16 right. Our -- under our position, the written
17 notification --

18 JUSTICE KENNEDY: Suppose -- suppose the --
19 suppose the notice comes 3 days before the 3-year period
20 ends, and the bank just doesn't have time?

21 MR. FREDERICK: No, the bank under the
22 procedures in Section (b) has 20 days in which to
23 tend -- to pay back the loan proceeds that had been
24 conferred to the borrower. So the way this works in
25 practice is that the bank takes its 20 days, and if it

1 investigates the loan file and it comes to the
2 conclusion that it has an argument that the borrower has
3 improperly sent a notice of rescission, it does what the
4 bank did here, which is to write a letter back and say:
5 We contest or we dispute your rescission.

6 The question is, in this case, did the
7 Jesinoskis timely send their written notification of
8 rescission in the face of that, and our position is that
9 the court of appeals was wrong.

10 JUSTICE SOTOMAYOR: Mr. Frederick, the bank,
11 as soon as it receives the notice of rescission -- one
12 of the benefits for people who don't want to pay a
13 mortgage is that it suspends the mortgage payments;
14 correct?

15 MR. FREDERICK: That's correct.

16 JUSTICE SOTOMAYOR: All right. So isn't it
17 in the bank's --

18 MR. FREDERICK: Although if I could
19 interrupt --

20 JUSTICE SOTOMAYOR: -- isn't it -- I'm
21 sorry.

22 MR. FREDERICK: Sorry. If I could interrupt
23 you, many times borrowers will send their rescission
24 notice and actually continue to pay.

25 JUSTICE SOTOMAYOR: But for those who don't,

1 the bank can file a declaratory judgment suit?

2 MR. FREDERICK: That's correct.

3 JUSTICE SOTOMAYOR: All right. And even for
4 the ones who do, they could do the same thing?

5 MR. FREDERICK: That's correct. And in
6 nonjudicial foreclosure States, where -- to go back to
7 your hypothetical, Justice Kennedy, there's -- there's a
8 harder wrinkle on this. A bank would not need to go to
9 court to foreclose on the borrower. It would simply do the
10 notices provided under State law and have the sheriff,
11 you know, send a -- provide a notice saying we're going
12 to sell your house. And then in that case, the burden
13 really shifts to the borrower to go to court to get a
14 temporary restraining order or preliminary injunction to
15 say, hey, I sent my rescission notice, the bank is
16 ignoring it. Please don't sell my house out from under
17 me.

18 And -- and that kind of procedure makes a
19 lot of sense in the real world, where these kinds of
20 written notifications provided by the expert agency
21 charged with administering it create a simple process by
22 which the rights of both sides can fairly be determined.
23 That's been the way this statute has been understood up
24 until very recently when the circuit conflict developed,
25 really, in response to this Court's decision in Beach.

1 In Beach, simply reading the plain language of 1635(f),
2 and if I could turn to that, it's on page 4.

3 JUSTICE GINSBURG: Before -- before you do,
4 Mr. Frederick, you are recognizing that the only
5 recourse the lender has if the borrower is -- is
6 claiming something that is baseless, the only recourse
7 is to bring a declaratory judgment action?

8 MR. FREDERICK: No. Actually, I don't agree
9 with that, Justice Ginsburg. The borrow -- lender has
10 several recourses. First, it notifies the lend -- the
11 borrower that it doesn't agree with its position about
12 the rescission. And then it depends really on whether
13 we're in a judicial foreclosure State or a nonjudicial
14 foreclosure State.

15 In the judicial foreclosure States, the next
16 thing that's likely to happen is that the bank would go
17 to State court and file a foreclosure action, at which
18 point the validity of the rescission notice would be the
19 first issue that would be decided by the court in
20 determining whether or not the foreclosure was proper to
21 begin with.

22 But if we're in a nonjudicial disclosure
23 State, and we're roughly 50/50 among the States in terms
24 of which are which, then we have the problem that I was
25 identifying with Justice Sotomayor, where the buyer is

1 going to have to take the initiative to go to court to
2 get a declaratory judgment that it had -- he or she had
3 properly rescinded the loan.

4 JUSTICE KAGAN: So why do you think it is
5 that Congress didn't say how we resolve disputes in this
6 context?

7 MR. FREDERICK: Well, I think that the --
8 the answer to that is that Congress expected that this
9 unilateral right of rescission was going to be exercised
10 in a simple way through the written notification and
11 that what has happened is --

12 JUSTICE KAGAN: But Congress couldn't have
13 thought that every time there was a notification, the --
14 the lender was going to agree with the borrower that it
15 was appropriate. Congress must have thought that --
16 that there were going to be some cases where the lender
17 and the borrower disagreed, and yet Congress didn't say
18 anything about how those cases would be resolved and
19 that's a puzzling feature of this statute.

20 MR. FREDERICK: It is a puzzling feature,
21 Justice Kagan, and I can't deny that. But I can say
22 that Congress revisited the language of the statute four
23 times after its initial enactment in 1974 and 1980 and
24 1995 and in 2010, and it never changed the mechanism of
25 rescission that it set forth in the original provision

1 of 1635(a). And so when it put in these provisions like
2 expiring the right, which it did in (f) and it did that
3 in 1974, it provided a termination of the right which we
4 think dovetails with (a).

5 And if you look at the two key linguistic
6 points here, the obligor's right of rescission -- this
7 is in (f) now, and I'm on page 4 of the addendum to our
8 blue brief -- really tracks the language of right to
9 rescind in (a). And when it says in (a) "this section,"
10 the right to rescind in "this section," when Congress
11 subsequently enacted (f) to put the expiration of three
12 years, it's mirroring that language when it says, "the
13 obligor's right of rescission."

14 And then secondly in (f), when it says, the
15 information and forms required under this section is
16 also a mirror to what had been put forth in (a) where it
17 provides that there are disclosures and forms that are
18 going to be promulgated under the regulations.

19 So in that regard, I think what Congress was
20 trying to get at was to keep the process simple. If
21 there was going to be litigation, as there invariably
22 has, courts would be able to sort that out using what
23 they added in 1980, which is the last sentence of
24 subsection B, which is to give the Court some
25 flexibility in determining how to do the payback and the

1 tender back scheme.

2 JUSTICE ALITO: You're reading an awful lot
3 into that section. "The procedures prescribed by the
4 sub" -- that sentence, "The procedures prescribed by the
5 subsection shall apply except when otherwise ordered by
6 a court," doesn't tell the Court what to do. It doesn't
7 tell the Court what it can't do.

8 MR. FREDERICK: That's right. And,
9 Justice Alito, if you read the cases -- and I would -- I
10 would point you to Footnotes 9 and 10 of the State's
11 amicus brief, they set forth in one a long list of State
12 cases and in the other a long list of Federal cases.

13 The way I read them is that these are like
14 mini bankruptcy proceedings the -- where the -- where
15 the lender and the borrower are going into court and --
16 and they are -- they're making arguments about the
17 propriety of the rescission. They're making arguments
18 about how much is owed. They're making arguments about
19 what claims need to go back and forth, and that the
20 Court ultimately is making a decision that tallies up
21 based on the loan proceeds and all the back and forth,
22 who's going to owe what to whom.

23 JUSTICE SOTOMAYOR: Mr. Frederick, does your
24 argument depend on us agreeing with the proposition that
25 the rescission is completed at the time the notice is

1 set?

2 MR. FREDERICK: I think that it -- no, but
3 it does depend on accepting the idea that rescission is
4 just cancellation. And then if restitution occurs,
5 which are all the (b) procedures, those are going to
6 happen after the cancellation.

7 If I could save the balance of my time for
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Goldenberg.

11 ORAL ARGUMENT OF ELAINE J. GOLDENBERG
12 FOR UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING PETITIONERS

14 MS. GOLDENBERG: Mr. Chief Justice, and may
15 it please the Court:

16 We agree with Petitioners that
17 Section 1635(f) is very tightly linked to Section
18 1635(a). Section 1635(a) opens a three-day window for
19 exercising the right to rescind. And if the disclosures
20 and forms that the lender is required to give the
21 borrower aren't given, then that three-day window
22 essentially marches forward in time all the way up to
23 the three-year mark.

24 What Section 1635(f) does is put a backstop
25 on how far that three-day window can proceed and an

1 endpoint on the exercise of the right of rescission
2 through a written notice.

3 But nothing in Section 1635(f) refers to
4 bringing an action in court, to a cause of action, to
5 any of the language that one would expect to find in a
6 statute of repose. And that provision, I think, can't
7 fairly be described as a statute of repose under this
8 Court's --

9 JUSTICE SOTOMAYOR: Or the statute of
10 limitations.

11 MS. GOLDENBERG: Or a statute of limitations
12 as this Court has already decided in Beach, that was one
13 of the holdings of Beach. This Court's recent decision
14 in CTS vs. Waldburger defined a statute of repose as
15 something that puts an outer limit on the time for
16 bringing an action, running from the date of the
17 defendant's last culpable act or omission.

18 And that's not what Section 1635 does. It
19 doesn't have any language to that effect. Respondent's
20 position would actually create an anomaly that's not
21 seen under statutes of limitations or statutes of
22 repose, and that would be that in some circumstances,
23 they would require the borrower to file a suit before
24 the violation that the borrower was complaining about
25 had even taken place. And that would be in a situation

1 in which the borrower is sending the notice of
2 rescission, say, a few days before the three-year period
3 runs. At that point, the lender has 20 days to respond
4 and to say whether it's going to accept the notice of
5 rescission as valid and whether it's going to
6 voluntarily comply with the unwinding procedures in section
7 1635(b).

8 The kind of suit that a borrower would bring
9 in that circumstance would be complaining about a
10 violation of Section 1635(b) that the lender refused to
11 do the unwinding that it was required to do under the
12 statute. But it might now --

13 JUSTICE KENNEDY: Suppose the bank --
14 suppose the bank thinks that the notice of rescission is
15 just completely baseless. Does it still have to respond
16 within 20 days?

17 MS. GOLDENBERG: No.

18 JUSTICE KENNEDY: It can -- it can just sit
19 there and wait and be sued.

20 MS. GOLDENBERG: That's right, Your Honor.
21 In our view, an invalid notice of rescission that's not
22 timely has no effect in the world. It has no -- it puts
23 no requirement on the lender to do anything and you can
24 see that from the language of Section 1635(b). I'm
25 looking now at 2(a) of the appendix of the government's

1 brief which says that --

2 JUSTICE KENNEDY: Excuse me, (b), boy?

3 MS. GOLDENBERG: (B), boy, yes.

4 When an obligor exercises his right to
5 rescind under subsection (a) of this section, then the
6 unwinding procedures unfold at that point. If the
7 obligor hasn't exercised the right in compliance with
8 subsection (a) because it has fallen outside that
9 three-day window for whatever reason, then I think (b)
10 isn't triggered and the lender doesn't have an
11 obligation to do anything.

12 JUSTICE GINSBURG: How would that apply in
13 this case where I take it the -- the lender's position
14 is we're being charged with not providing a second copy,
15 and we did provide a second copy; therefore, this is a
16 baseless claim.

17 MS. GOLDENBERG: At that point, I think the
18 lender is making -- going to have to make a judgment in
19 this case and in other cases about whether it thinks the
20 notice is valid. If the lender guesses wrong, then it
21 may be that it will subsequently be held liable for
22 damages for guessing incorrectly and for failing to
23 follow the unwinding procedures under Section 1635(b)
24 when it should have done so.

25 But that kind of retrospective determination

1 is extremely common in commercial arenas and commercial
2 actors have to make decisions like that all the time.
3 An insurance company that gets a claim from its insured
4 saying, I've been injured and I'm telling you within a
5 certain amount of period after the accident -- a certain
6 time period after the accident that I've been injured,
7 please pay me, that insurance company might pay or it
8 might not pay. And if it's wrong about the insured not
9 being entitled to the benefits, then subsequently, it
10 may be liable for damages there.

11 JUSTICE ALITO: What would you do if you
12 were the lender or the lender's attorney and you had a
13 situation where just before the 3 years expire, the
14 borrower sends a letter and they say: We didn't get two
15 copies? You look at your file, if you still have the
16 file, and you have a document where they acknowledge
17 that they got two copies. So what do you do? Do you
18 take your chances on whether this would be a jury
19 question down the road whether you believe them that
20 they actually didn't get the second copy or whether they
21 believe your documentation.

22 MS. GOLDENBERG: I think what you would do
23 would depend on the circumstances.

24 JUSTICE ALITO: Those are the circumstances.
25 I don't think you're going to know a lot more than that.

1 What would you do?

2 MS. GOLDENBERG: Right. In that
3 circumstance, I would certainly start by going to the
4 borrower and trying to work it out privately, which is,
5 I think, what Congress primarily intended when it set up
6 the scheme. If I were unable to do that, it would
7 depend, I think, on whether I thought that the prospect
8 that that notice of rescission could someday be enforced
9 down the line, that the borrower could go to a court and
10 say: Please recognize that I validly exercise my right
11 of rescind -- the right to rescind, and give me the
12 entitlements that flow from that.

13 It would depend on what I wanted to do. If
14 I wanted to foreclose, for instance, on the property and
15 I needed my security interest to be absolutely rock
16 solid in order to do that, then I might be bring a
17 declaratory judgment action or I might, in the context
18 of the foreclosure, ask the court to declare that the
19 rescission was invalid.

20 What Section 1635(f) does is it gives the
21 lender the power to eliminate any uncertainty if it
22 feels the need to do so in a particular case. Before
23 Section 1635(f) existed, the borrower could rescind
24 basically, indefinitely. It could pop up years later
25 and rescind, and the lender couldn't file a lawsuit

1 before then because there would be no adversity between
2 the parties. They couldn't just file a lawsuit saying,
3 please declare that there can't be a rescission.

4 What Section 1635(f) does is it creates
5 adversity, essentially. The lender now knows that the
6 borrower has exercised the right to rescind or believes
7 that it's does so validly and now there's adversity
8 between the parties, and if the lender needs to, it's
9 now in a position to bring a declaratory judgment action
10 or some other kind of claim to make the uncertainty go
11 away. So the uncertainty is cabined by Section 1635(f).

12 JUSTICE ALITO: Mr. Frederick just said that
13 what has happened in a lot of these cases is like
14 mini-bankruptcy proceedings in State court. Is that
15 rescission?

16 MS. GOLDENBERG: Well, I think what's
17 happened under Section 1635(b) is that courts have taken
18 that last sentence of Section 1635(b) as essentially the
19 power to do equity in a particular case. I don't think
20 the unwinding procedures are rescission. I agree with
21 what Mr. Frederick said, that the definition of
22 rescission is the annulment, abrogation, cancellation of
23 the contract.

24 What follows from rescission is a common law
25 restitution under this statute, the restitutionary

1 procedures of Section 1635(b), but I think the exercise
2 of the right to rescind amounts to rescission. And
3 again, I think you can get that directly out of the
4 statute, and I'm now looking at the same provision I was
5 referring to before. Section 1635(b) says in its first
6 sentence: "When an obligor exercises his right to
7 rescind under Subsection (a), then the security interest
8 becomes void upon such a rescission." So it's treating
9 the exercise of the right to rescind as the rescission,
10 as the thing that is canceling or unmaking the contract,
11 and then what flows from that are various entitlements
12 under Section 1635(b) that are analogous to the kind of
13 restitution that you would get at common law.

14 As I say, I think Respondents' position has
15 a number of anomalies associated with it and it is not
16 consistent with the purposes of TILA. TILA was enacted
17 to make things simpler and clearer for borrowers who are
18 being confused and duped and didn't fully understand
19 their rights. And what Respondents' position amounts to
20 is that there's essentially a hidden requirement that is
21 not in the statutory language, not in the regulatory
22 language, not in the forms that borrowers get, which
23 come from the agency, in which lenders get a safe harbor
24 if they use.

25 So there is nowhere any explanation to the

1 borrowers that they have to file suit within this period
2 of time to exercise their rights, and that's very hard
3 to reconcile with what Congress was getting at under
4 TILA.

5 Also, to the extent that there's any doubt
6 about the interpretation of these provisions, we do
7 think that deference to the agency is warranted, both
8 with respect to the regulation, which was adopted as a
9 result of notice-and-comment rulemaking. That's an
10 interpretation of the statute that makes a judgment that
11 the right to rescind is exercised the same way in every
12 context, whether it's in the first three days or at the
13 end of the 3-year period, and we think that's entitled
14 to Chevron deference, and if there were any doubt about
15 that we think the agency's interpretation of the
16 regulation is itself entitled to deference.

17 If the Court has no further questions --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Waxman.

20 ORAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE RESPONDENTS

22 MR. WAXMAN: Thank you, Mr. Chief Justice,

23 and may it please the Court:

24 When a borrower sends a notice of intent to
25 rescind and the lender disputes that the notice is

1 timely or otherwise valid, then rescission, which is the
2 unwinding of the transaction, will not occur unless and
3 until a court awards it.

4 And, Justice Kagan, in response to your
5 question, TILA does provide how and by when that should
6 be done. Section 1635(g) provides for an award of
7 rescission and Section 1635 -- I'm sorry. These are all
8 on -- (f) is -- (g) is on page 4 of the appendix to the
9 blue brief.

10 JUSTICE GINSBURG: Mr. Waxman, please review
11 what you just said because, as I understand it, the
12 lender has to give the borrower a notice of opportunity
13 to rescind which says, the borrower may cancel. How?
14 By notifying the lender at the lender's place of
15 business by mail or telegram, period. And then two
16 copies of that are to be given, with the instruction,
17 use one to cancel the transaction. So it's a form that
18 says, "This notice cancels the transaction."

19 MR. WAXMAN: That's correct.

20 And what it also says is that your right to
21 rescind -- and here I think we are in agreement with
22 what I think I understand my friend from the government
23 to just say: If a notice of intent to rescind under A
24 is sent in a timely fashion, that is within the 3-day
25 window or the 3-day -- the follow-up 3-day window if the

1 disclosures aren't provided, then rescission is
2 triggered. The rescissionary process is triggered. But
3 if -- and again, I think this is what the government
4 conceded, that if the borrower's notice is untimely, and
5 the notice that's provided at closing tells you the
6 periods of time in which it is timely, it doesn't do
7 anything.

8 And after 3 days, that is within 3 days of
9 the consummation, the question of whether it's timely or
10 not depends upon whether the lender violated TILA at the
11 closing, and where the lender says, as happened here, I
12 am holding your signed acknowledgment that you received
13 these forms, their position, the plaintiffs' position,
14 depends on a construction of the statute that says even
15 if -- once that notice is sent, even if it is completely
16 invalid, the security interest is vitiated, the lender
17 is required to return all monies paid, you know, except
18 in an instance -- I suppose, this is not textual -- in
19 which the bank runs in and tries to get a TRO.

20 JUSTICE KENNEDY: But that's not the
21 position that the government has. Let's assume that the
22 notice of rescission is baseless, the documents were
23 received. The Petitioners, as I understand it, can say
24 the bank -- can say: So what; you owe us money; we're
25 doing nothing; we're not giving you your money back.

1 And the bank's rights are protected.

2 MR. WAXMAN: Well, that is our position, and
3 when my friend, Mr. Frederick says, you know, we've
4 never found any case of a windfall under (b), the answer
5 isn't because in an amendment in 1995 Congress said that
6 -- in the last sentence of (b) -- that a court can
7 modify this. It's that everybody understands that
8 unless and until the lender agrees that the notice is
9 timely and valid, no rescission occurs.

10 JUSTICE KENNEDY: But it happens in the law
11 all the time. Sometimes you're right, sometimes I'm
12 right. And we wait and see who sues first and you take
13 your chances. And if the bank -- if you are the bank
14 and you're wrong, ultimately the borrower is going to
15 get damages, et cetera.

16 MR. WAXMAN: That's correct. And what this
17 is --

18 JUSTICE SOTOMAYOR: But you don't get the
19 right to rescission. You don't get a rescission just by
20 filing a lawsuit either. So under your theory, the
21 right of rescission has to be the award. You can't
22 guarantee that a court is going to act in 3 years.
23 There are many State courts where that's just not true
24 any more.

25 MR. WAXMAN: That is not our position, and I

1 don't think the other side has ever cited a case in
2 which -- we can debate whether this is called a statute
3 of repose, but let's just accept what this Court said in
4 Beach, which is after 3 years the substantive right for
5 which the remedy of rescission is available expires.

6 JUSTICE GINSBURG: But in Beach there was no
7 notice within the 3 years.

8 MR. WAXMAN: Justice Ginsburg, I don't think
9 anybody is disagreeing that everything that the Court
10 said in Beach was not -- that we're each relying on, is
11 dicta because there was no notice. But my point here is
12 if the underlying right disappears after 3 years and the
13 question is: What is that a right to? And it is a
14 right to rescission. And what happens in an instance
15 where the lender says your notice is either untimely or
16 invalid for another reason is the borrower has to -- has
17 3 years in order to take some action to obtain an award
18 of rescission, which is exactly the remedy that Congress
19 specifies in 1635(g) and which is referred back to in
20 1640(a)(3) and 1640(c), which is, you can accomplish
21 rescission. That is -- and rescission is at common law
22 and common understanding the return of the parties to
23 the status quo.

24 JUSTICE GINSBURG: This isn't at common law.
25 This is a statute and (b) describes how rescission works

1 under this statute, 1635(b).

2 MR. WAXMAN: And there is -- nobody is
3 arguing that Congress didn't tinker with the common law
4 procedure either in law or equity. The point that I'm
5 trying to make here is, Congress said in (g) what
6 happens in order to accomplish rescission where the
7 lender doesn't agree.

8 CHIEF JUSTICE ROBERTS: That's a very --
9 that's a very -- you're putting an awful lot of weight
10 on a tiny, one-sentence provision in (g) that's called
11 "additional relief" that -- I think it would be very odd
12 if that's where Congress decided to place the provision
13 that tells you what happened -- what happens when
14 there's exercise of the right to rescind.

15 MR. WAXMAN: Well, Mr. Chief Justice, I
16 think one needs to understand the context in which that
17 provision was enacted. There was always an
18 understanding from the start -- and, in fact, the
19 understanding is reflected in subsection (c) which is --
20 establishes a presumption that the required forms were
21 delivered, a presumption that can only apply in a
22 judicial proceeding. Everybody understood that in many,
23 many cases in which a notice was sent after -- beyond 3
24 days after consummation, that there would be litigation
25 about this.

1 JUSTICE KAGAN: Well, that seems right, Mr.
2 Waxman, that people understood that there would be
3 litigation and (g) is an acknowledgment of that. It's
4 an acknowledgment that there are going to be some suits
5 out there and it might be a Declaratory Judgment Act or
6 it might be a foreclosure proceeding or it might be a
7 bankruptcy proceeding, in which the question of
8 rescission was going to come up and on which it was
9 going to be adjudicated. And all that (g) says is that
10 in those cases the court can award not only rescission
11 but damages.

12 But that's hardly a requirement that the
13 borrower bring suit subject -- you know, bring suit
14 subject to the (f) clause of 3 years. It's just not the
15 way you would write a dispute resolution provision.

16 MR. WAXMAN: Justice Kagan, the -- (g) was
17 intended -- and we know this very clearly and I think
18 it's pretty obvious from the language -- what had
19 happened in litigation before 1995 was that borrowers --
20 where a lender said, nope that's not valid, I'm not
21 rescinding, I'm not going to go through the unwinding
22 process of (b), the borrowers had a choice of filing a
23 suit for damages under 1640, which has a 1-year statute
24 of limitations, or pursuing in an action for rescission,
25 for a court award of rescission.

1 And what was happening that precipitated (g)
2 was that courts were requiring the borrowers to elect
3 remedies. And what (g) says is: No, no, no, no; if you
4 are suing for an award of rescission, you can also get
5 relief under 1640. And similarly, they amended
6 1640(a)(3), which involves a suit for damages, to say
7 that if it is also a request for an award of rescission
8 and you prevail, you get attorneys fees.

9 But every provision in here that talks about
10 a suit for rescission says just that. It's not a suit
11 by the borrower for restitution of a rescission that has
12 already occurred. It's not a suit for a return of
13 monies provided under the loan. It is a suit for
14 restitution, and that -- that formulation had a very,
15 very specific --

16 JUSTICE SCALIA: For rescission, you mean?

17 MR. WAXMAN: For rescission, I'm sorry.

18 That had a completely unexceptional,
19 widespread understanding at the common law.

20 Now, Justice Ginsburg, I'm not suggesting
21 that Congress didn't tinker with procedures under the
22 common law. But this Court has warned again and again
23 that Congress is not presumed to abrogate common law
24 principles and Congress, when it does so, has to speak
25 directly.

1 So in this instance, for example --

2 JUSTICE SOTOMAYOR: It hasn't spoken
3 directly when it sets out a specific procedure for the
4 parties to follow?

5 MR. WAXMAN: It sets out a --

6 JUSTICE SOTOMAYOR: It tells out -- tells
7 the borrower: with the notice. It tells the lender to
8 take 20 days to say yea or nay. And if it says yea, it
9 has to return the money and the other side has to give
10 the property.

11 MR. WAXMAN: Spoken utterly clearly about
12 all of those things and it also said what happens in the
13 mine run of these late notification cases that -- I mean
14 between 3 days and 3 years of the consummation of the
15 transaction, that if the borrower -- if the lender says
16 your notice is invalid, no rescission -- by any
17 definition rescission has not taken place and the
18 borrower's recourse is a suit for an award of rescission
19 as it would have been under common law. And I think
20 it's important to --

21 JUSTICE SCALIA: Am I correct the government
22 says rescission has taken place if the borrower is right
23 and it has not taken place if the borrower is wrong?

24 MR. WAXMAN: I'm not exactly sure what the
25 government's position is. I did hear the government say

1 that rescission by definition hasn't occurred if the
2 borrower -- if the lender disputes the notice.

3 JUSTICE SCALIA: No, no, no, no. Not if the
4 lender disputes. If in fact the notice has been given,
5 the rescission is ineffective. I think that's the
6 government's position.

7 MR. WAXMAN: Well, our -- I don't know what
8 the government's position is on that, but I know what
9 our position is, which is if the lender receives the
10 notice and says, yep, this is timely, subsection (b)
11 very specifically -- you know, with respect to the
12 common law -- explains the steps that have to occur to
13 achieve rescission. There's no question about that
14 whatsoever.

15 But those steps - that no court has held -- at
16 least since 1974, in a case that neither of my friends
17 have cited, no court has held that just by sending in a
18 piece of paper, valid or invalid, the steps of (b) have
19 to occur, even where the , even where -- I mean, another
20 typical instance in these cases, and by the way --

21 JUSTICE KENNEDY: Well, I take it they do
22 have to occur or there are going to be damages at least.
23 Let's assume a valid notice of rescission 2-1/2 years
24 down the line. The bank has a choice. There is a
25 rescission. If the bank says we are -- we are wrong, we

1 have to return the property, it returns the property, it
2 complies with (b), it does it within 20 days, there's a
3 rescission. There's no court order, there's nothing.

4 MR. WAXMAN: So here's what happens, if the
5 bank --

6 JUSTICE KENNEDY: There is a rescission.

7 MR. WAXMAN: There is a rescission -- I
8 think there are two very different things here that
9 address -- in 1635(g) and 1640 and this Court's decision
10 in Beach underscores just exactly how much those two
11 things are different. A borrower -- I can generalize it
12 by saying any party to a contract. In this case, it's
13 the borrower to a refinancing. Anybody can say, hey,
14 you're not performing under the contract and I want to
15 -- I want to file a suit to require you to perform,
16 which is the ordinary contract remedy, or give me
17 damages for not having performed, which is what is in
18 1640(a), a suit for damages for not having -- for having
19 violated TILA or at common law and under the statute
20 there can be a suit for a very different, much more
21 Draconian remedy, which is a suit for rescission, and a
22 suit for rescission is what this lawsuit is about.

23 The -- the question in this case is what
24 must a borrower do to obtain resolution of a contested
25 assertion of rescission and by when must it do it. And

1 the amazing thing is that my friends on the other side
2 say the statute is silent about that point. We say, no,
3 it's not. The statute provides for, maybe not as
4 directly and in suffice -- in a clear exposition in (g)
5 as one would have hoped to avoid all this litigation,
6 but nonetheless, (g) has been construed and construed by
7 Congress in 1640(a)(3) as providing the borrower a cause
8 of action for an award of rescission.

9 And in a situation where, you know, the
10 loss -- where the borrow -- where the lender says no,
11 we're not rescinding, rescission, by any definition, has
12 not occurred, and the lawsuit is about whether a court
13 should award rescission --

14 JUSTICE SOTOMAYOR: Let's talk about (g),
15 about the rescission occurring or not. It talks about
16 the exercise of a right.

17 MR. WAXMAN: Yes. And --

18 JUSTICE SOTOMAYOR: But the exercise of the
19 right doesn't mean that the act will have come about.

20 MR. WAXMAN: Of course.

21 JUSTICE SOTOMAYOR: You -- you answered me
22 earlier that a court doesn't have to finish within the
23 three years. You just want to say that it requires the
24 exercise to be a court action, but the statute says
25 something else. It's just notification.

Official

1 MR. WAXMAN: No, no --

2 JUSTICE SOTOMAYOR: Why is that so
3 illogical? I -- I don't understand why it has to be a
4 court action.

5 MR. WAXMAN: The right --

6 JUSTICE SOTOMAYOR: An exercise of a right
7 is in accordance with the terms of the contract.

8 MR. WAXMAN: The question -- I mean, the
9 right of rescission means in (a), as it says, the
10 timely -- I mean, it doesn't define what the right of
11 rescission is. What it says is this -- these are the
12 circumstances in which the borrower has the right to
13 rescind. And those circumstances are if within three
14 days you send a notice of intention to rescind, you have
15 exercised your right to rescind. And what that means
16 is, as it was at common law, you have put to your
17 counterparty an intention to unwind the transaction.
18 And the quest -- and the right, not the -- not the --
19 this isn't a case -- the issue in this case is not how
20 you exercise the right of rescission under (a).

21 JUSTICE SOTOMAYOR: You just gave -- you
22 just gave your case away when you said the exercise of
23 the right is when you sent the notice.

24 MR. WAXMAN: No, but the -- but the
25 problem -- no, no. By all -- don't let me be mistaken

1 here. This is not a question about how you exercise
2 your right to rescind. Everyone agrees that you
3 exercise your right to rescind, that is, to initiate the
4 unwinding process that constitutes rescission by sending
5 a timely and valid notice. Sending that notice does not
6 accomplish rescission. And the quest -- and the
7 question in -- the quest --

8 JUSTICE SOTOMAYOR: The question is whether
9 that's the exercise of the right within three years.

10 MR. WAXMAN: And the answer is no, because
11 where the -- where the lender says I'm not -- I don't
12 agree and we are not going to accomplish rescission in
13 (b), the statute says, very commonsensically, the party
14 that wants this extraordinary remedy can sue for an
15 award of rescission. And the loss -- because the
16 lawsuit is about whether a court should, quote, "award
17 rescission," the borrower needs to have a live right of
18 rescission at the time that suit is initiated.

19 JUSTICE BREYER: Where does it say all that?
20 I mean, what it seems to say is that a person who
21 borrows some money borrows money. Now, he can tell the
22 lender, I changed my mind. When? Well, within three
23 days or later of the time he sends them certain
24 information. Okay? Three days later he has to get the
25 information. So he has three days after that.

Official

1 MR. WAXMAN: No argument.

2 JUSTICE BREYER: That's the end of it. And
3 how do you do it? It says you do it by sending him a
4 notice. That's what it says. So -- so send him a
5 notice, and you do it. When do you have to do it? You
6 have to do it three days after he sends you certain
7 information, but in no case beyond three years. Now,
8 that's what it seems to say.

9 MR. WAXMAN: You are -- yes, Justice Breyer.

10 JUSTICE BREYER: Now -- now, how -- how do
11 you get out of that? That's what I don't quite
12 understand. It's like you're Houdini, I mean --

13 MR. WAXMAN: Justice Breyer, the "it" --

14 JUSTICE BREYER: What?

15 MR. WAXMAN: -- when you say "doing it" --

16 JUSTICE BREYER: Yes.

17 MR. WAXMAN: -- the "it" that you're
18 required doing is sending the notice. There's no
19 dispute among anybody as to two things.

20 JUSTICE BREYER: No, that's not what it says
21 at the beginning. It says, "You shall have the right to
22 rescind by notifying the creditor."

23 MR. WAXMAN: Yes, exactly. That is what --

24 JUSTICE BREYER: So it doesn't say that's
25 notice by notifying the creditor. It says, "the right

1 to rescind by notifying the creditor." I mean, okay.
2 Go ahead. Now, that -- I'm just expressing my -- you
3 see the problem I have. I read the words, and it seems
4 to me it's pretty tough.

5 MR. WAXMAN: Let me -- let -- I don't think
6 so. I mean, I think you have to view this --

7 JUSTICE BREYER: I know you don't. That's
8 why we're here.

9 MR. WAXMAN: You have to view the statute as
10 a whole, and you have to view it in the context of how
11 rescission -- what rescission meant at common law, what
12 rescission means today, and how the rescissionary
13 process -- what constitutes rescission.

14 There is no dispute among any parties that
15 when a valid, timely notice is filed, that triggers the
16 rescission. It triggers the rescissionary process. But
17 there is also no dispute, as Ms. Goldenberg said, that a
18 borrower's notice doesn't do anything unless the notice
19 was timely and otherwise valid.

20 And after three days -- and I -- I do think
21 it's worth pointing out what the three-day period is and
22 what it was meant to be. After three days, that depends
23 on whether the -- the lender violated TILA and where the
24 lender and the borrower disagree again. There is a
25 right of action in (g) and referenced in (a) (3) for a --

1 an award of rescission. No lender is suing for an award
2 of rescission.

3 And as to the three-day period, let -- let
4 me just say a couple things about context here and what
5 Congress thought.

6 JUSTICE SCALIA: Could I -- could I
7 interrupt before you get to that? You don't take
8 breaths between sentences. It makes it hard.

9 (Laughter.)

10 JUSTICE SCALIA: As I understand your case,
11 you're -- you're drawing a distinction between
12 exercising the right to rescind and obtaining
13 rescission. Is -- doesn't your case hinge on that?

14 MR. WAXMAN: Yes.

15 JUSTICE SCALIA: That -- that the notice is
16 simply an exercise of your right to rescind, but
17 rescission does not occur until there's the exchange
18 that the common law?

19 MR. WAXMAN: Yes. And correlatively, the
20 fact that an untimely or otherwise invalid notice
21 doesn't do anything. Now, if --

22 JUSTICE KAGAN: But, Mr. Waxman, if that's
23 right, so exercising the right to rescind is by notice.
24 But then you look at (f) and it says, "an obligor's
25 right of rescission shall expire."

1 So I read that and I say, okay, that means
2 when you can no longer exercise your right to rescind,
3 which you've just said is when you can send notice. So
4 that's what expires after three years, your ability to
5 send notice.

6 MR. WAXMAN: No, I think it's not. What it
7 talks --

8 JUSTICE KAGAN: But it just says right there
9 it's the right to rescission shall expire, and you agree
10 that exercising the right of rescission is done by
11 notice.

12 MR. WAXMAN: The -- as the -- no. As this
13 Court explained in multiple places in Beach, all of
14 which are dicta, admittedly, the operation of (f) not
15 only -- is not only to put a cutoff for the last date at
16 which you can send a notice, but it, quote, "operates to
17 extinguish the right," which is the foundation for the
18 claim, and, therefore, it necessarily, quote, "limits
19 the time for bringing suit by governing the life of the
20 underlying right."

21 And so in a circumstance in which a notice
22 is sent, which is a notice of intent to rescind under
23 (a), if the -- if the lender says, you're right, and
24 this is the common instances within the three day of
25 closing, which I'd like to address, the -- the statute

1 says here's how you unwind it. You go through the
2 procedures in (b).

3 If the -- if the lender says no, that's not
4 a valid right, it's not timely, the borrow -- the
5 statute gives the borrower not only a cause of action
6 for damages under 1640, but a cause of action for an
7 award of rescission. And because the lawsuit is about
8 whether the Court should, quote, "award rescission," the
9 borrower needs a live right of rescission at the time
10 the lawsuit is filed, and that -- that is our position.

11 Now, as to this three-day point.

12 JUSTICE BREYER: By that, if you say the
13 rescission doesn't -- the right to rescission has to
14 be -- it just expires after three years. Well, we don't
15 know if he has a right to rescind until the lawsuit is
16 actually terminated.

17 MR. WAXMAN: Well --

18 JUSTICE BREYER: So -- so he -- we're just
19 as much in the dark. He happened to have filed a piece
20 of paper called a lawsuit, but the judge is extremely
21 slow. I have known some.

22 MR. WAXMAN: Deliberative.

23 (Laughter.)

24 JUSTICE BREYER: And -- and ten years later,
25 there it is, sitting on his docket and -- and nobody

1 knows. How are we any more -- how are we any more
2 enlightened than the day before he filed the lawsuit?

3 MR. WAXMAN: Justice -- Justice Breyer, no
4 one is contending in this -- in this case that a statute
5 of repose, that is, a statute provides that an
6 underlying right expires after some date certain. It
7 disables a court from rendering judgment in that case.

8 JUSTICE BREYER: Of course not. Of course
9 not.

10 MR. WAXMAN: Of course not.

11 JUSTICE BREYER: Of course not. But I'm
12 just saying why pick the date that you file a lawsuit
13 in -- in terms of the validity of the notice --

14 MR. WAXMAN: Because --

15 JUSTICE BREYER: Since the -- the filing of
16 the lawsuit no more determines the validity of the
17 notice than it was determined three days before.

18 MR. WAXMAN: Because -- because 1635(f)
19 refers to the obligor's right of rescission and where
20 the obligor has not obtained the rescission that he or
21 she claims he has a right to, he can go to a court for
22 an award of rescission and the statute tells him, you
23 have to have a live underlying right of rescission
24 before you invoke the court's jurisdiction to do it,
25 which is exactly what happened at the common law in

1 these circumstances.

2 Now, I just want to say that I think, you
3 know, the other side says, well, we're making a big
4 distinction between whether the notice is sent within
5 three days or after because somehow nobody could believe
6 that a lawsuit would be filed within three days.

7 1635(a) doesn't govern when a lawsuit is
8 filed. It governs when the notice of an intention to
9 rescind has to be sent. If there is a dispute about
10 whether that notice is timely or whether it's otherwise
11 valid, for example, it's often invoked in cases where
12 there is a refinancing with the original lender, which
13 this doesn't apply to, or a purchase money mortgage
14 where this doesn't apply to.

15 If there is a dispute about it, let's say
16 the -- the -- I think this has happened, so far as we've
17 all been able to determine, one time in history where it
18 comes -- assertedly comes within three days of closing,
19 and the lender says, no, no, no. That's four days.
20 You're too late. Ordinarily, what Congress and the
21 Board understood is that within the three-day period,
22 that is, the period that in this borrower-friendly
23 statute where Congress was concerned about borrowers
24 being hoodwinked in high-pressure loans, the statute
25 gives the borrower an absolute right for any reason or

1 no reason within three business days to say, you know,
2 I've gone back and I've looked at the disclosures and
3 I've changed my mind.

4 JUSTICE SCALIA: What about the Board? You
5 mentioned the Board. Are you going to say anything
6 about Chevron?

7 MR. WAXMAN: There's nothing to say about
8 Chevron in this case. The Board's -- the Board's
9 regulations, which are now the Bureau's regulations,
10 speak to how one -- you know, what kind of notice is
11 really notice. And the exercise of the notice of intent
12 to rescind, it says nothing about what's at issue in
13 this case, which is what a lender disputes that the
14 notice is valid, what and by when does the borrower have
15 to do.

16 Now, the Board -- the Bureau has asserted
17 the position that it's asserted in amicus briefs in this
18 case, but those -- that position is entitled, I think as
19 this Court has said, to, at best, Skidmore deference.
20 And in this case, they fail Skidmore deference because
21 their reading is completely inconsistent with the common
22 law, inconsistent with the statute, that is, the
23 provisions of (g) and (f). And in any event, nobody is
24 claiming that the Bureau has any expertise about this
25 aspect of TILA. This isn't the mine-run of cases where,

1 you know, what does -- what does excessive interest or
2 adequate notice mean.

3 Now, I think it's important to understand
4 that within the -- what Congress understood was it was
5 providing borrowers a three-day period. And in that
6 three-day period rescission is pretty uncomplicated,
7 because the -- the Board and the Bureau in the
8 regulation that's at issue in this case says to the
9 lender, you may not, you may not disburse the loan
10 proceeds to the borrower, or I think record your
11 security interest. You may not do it during the
12 "rescissionary period," and for such time thereafter
13 until you are satisfied that no rescission will occur.
14 That is the Board's and the Bureau's directive.

15 Now, what happens in this case, in a case
16 like this, is the transaction -- the security interest
17 has been recorded. A lot of money has been dispensed.
18 And the question is, at that point, whether the borrower
19 will, by rescinding, be able to obtain essentially an
20 interest-free loan for whatever that period of time is.

21 The Bank of America alone receives between 4
22 and 6,000 of these after 3-year notices every year and
23 the number has increased every single year since they
24 started recording this. The notion that the -- what
25 Congress had in mind is that the lender who thinks that

1 the notice is invalid and in most instances, the
2 borrower is in default, has to run in -- no matter how
3 frivolous this complaint is -- and file what would be,
4 among all lenders, tens of thousands of lawsuits a year.

5 JUSTICE SOTOMAYOR: Well, they'd have to do
6 that anyway to foreclose. The only time that it's a
7 problem is when the borrower is not paying the loan, but
8 in most of these, the borrower stops paying the loan.

9 MR. WAXMAN: In most -- most foreclosure --
10 first of all, foreclosures may or may not occur,
11 depending on whether the bank wants it and many, many,
12 if not most, foreclosures are nonjudicial; so there's no
13 judicial proceeding and a sale at foreclosure will, by
14 everybody's understanding, vitiate the underlying right.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Four minutes, Mr. Frederick.

18 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

19 ON BEHALF OF PETITIONERS

20 MR. FREDERICK: Thank you, Mr. Chief
21 Justice.

22 I think if the Court were to accept the
23 bank's position here, the Truth in Lending Act would
24 become even more complicated, because the rules of the
25 road under the statute are pretty clear that if within

1 three years you've exercised the right by sending the
2 notice, that starts a process. And sure, the bank can
3 contest it, but at least you know by reading the statute
4 that you've got three years in order to exercise that
5 right.

6 And the reason why that right is important
7 is that these disclosures can be very complicated and
8 these transactions can be very complicated. So if you
9 don't get the disclosures within the three-day period of
10 the closing of the loan, you can go into the loan and
11 you can determine this is very complicated. I'm now
12 seeing my rate increase. I'm seeing my payment
13 increase, and I don't really understand all of these
14 various things.

15 Now, the point about the -- the reason why
16 the disclosures are important and the reason why the
17 number of the disclosures is important is really clear
18 if you actually look at the disclosure in this case.
19 And it's at Joint Appendix page 38. It says "right to
20 cancel" all over it. If you want the right to cancel,
21 you can cancel it if you do certain things. It never
22 says file a lawsuit. So the form that the bank used
23 here didn't, you know, preserve its argument that the
24 statute requires filing a lawsuit. It just says you --
25 send us the notification of your intent to cancel.

1 Now, importantly, and this question came
2 up --

3 JUSTICE SOTOMAYOR: Why are two of these?

4 MR. FREDERICK: I'm sorry?

5 JUSTICE SOTOMAYOR: Why are two of these? I
6 mean, some of the reaction against these lawsuits is
7 premised on the one as opposed to two copies. It seems
8 rather immaterial whether you get one or two. You got
9 it.

10 MR. FREDERICK: And let me explain that.
11 Four were required in this case. The reason for that is
12 that each person who is on the loan, each borrower was
13 entitled to get two copies. One so that they can sign
14 it and send it back to the bank and the other so they
15 can keep it in their file. And there is no dispute at
16 that point that everybody is operating by the same rules
17 of the road.

18 Why are four necessary? Well, we know from
19 the financial crisis and common sense that when two
20 people are on a loan together, they might not agree when
21 the rubber meets the road and the rate resets or the
22 payment increases or all these other things, and they
23 may decide, I have an individual right to rescind that's
24 given by statute and by the original regulations of
25 Regulation Z.

1 So here, if I don't have my forms, I can't
2 exercise my statutory right. And that's why from the
3 very beginning the Fed said, each borrower gets two
4 forms. So that everybody knew what the rules were and
5 everybody knew how to exercise them and everybody was on
6 the same page.

7 And so although it is -- to be -- to be
8 fair, this is not the kind of disclosure violation that
9 would entail an interest rate change or the change in a
10 payment or something like that. The same principle
11 applies for whether or not the borrowers timely exercise
12 their right.

13 JUSTICE SOTOMAYOR: It -- it's always -- you
14 know, I've signed two loans in I don't know how many
15 years, two homes, but I thought at closing, I signed
16 something acknowledging --

17 MR. FREDERICK: Yes. And let me --

18 JUSTICE SOTOMAYOR: -- the bank kept one and
19 presumably, it gave me another. So those were the two.

20 MR. FREDERICK: No, it's actually you get
21 two. And if I can actually direct --

22 JUSTICE SOTOMAYOR: I don't remember sending
23 it back to the bank saying --

24 MR. FREDERICK: No, because you probably
25 didn't cancel yours, Justice Sotomayor.

1 JUSTICE SOTOMAYOR: Ah.

2 MR. FREDERICK: You keep the two --

3 (Laughter.)

4 JUSTICE SCALIA: But it -- but it's not too
5 late.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: It already is. I've
8 been here six years.

9 MR. FREDERICK: Well -- but I -- but I
10 do want to make one -- I do want to make one point.
11 There's -- there is confusion here on this particular
12 form because the -- what this says -- what it says is,
13 "The undersigned each acknowledge receipt of two
14 copies." It doesn't say, "The undersigned each
15 acknowledge each receiving two copies." And so you can
16 understand why there is confusion about these kinds of
17 disclosures. And I just point out that over last years,
18 during the financial crisis, home loan originators have
19 gotten into a lot of trouble. And within the last two
20 months, this bank paid \$5 billion for its shoddy loan
21 origination practices.

22 It is not a surprise why we're here. It is
23 not a surprise why, as Mr. Waxman says, they get a lot
24 of these notifications. Because they were churning out
25 loans so fast, they wanted people to get loans under

1 virtually any circumstances so they could then pedal
2 that to the Wall -- to Wall Street bankers who would
3 then sell them to unsuspecting investors.

4 Now, the last thing I want to say with
5 respect to (g) is that it doesn't say exactly what he's
6 saying. There's no suit for rescission in (g). What it
7 says is that in addition to rescission, which you could
8 read as an addition to the self-help remedy of the
9 exercise of rescission, a Court may award.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 12:07 p.m., the case in the
13 above-entitled matter was submitted.)

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