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IN THE
Supreme Court of the United States

BRYAN ANDREWS and SUSAN ANDREWS,
Petitioners.

v.

CHEVY CHASE BANK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. DEMET*
DONAL M. DEMET
DEMET & DEMET S.C.
815 N. CASS STREET
MILWAUKEE, WI 53202
(414) 291-0800

NINA F. SIMON
JEAN CONSTANTINE-DAVIS
AARP FOUNDATION
LITIGATION
601 E STREET, NW
WASHINGTON, DC 20049
(202) 434-2060

ERIC HALPERIN
KATHLEEN KEEST
DANIEL MOSTELLER
CENTER FOR RESPONSIBLE
LENDING
910 17th STREET, NW
SUITE 500
WASHINGTON, DC 20006
(202) 349-1850

** Counsel of Record* *Attorneys for Petitioners*

QUESTION PRESENTED

This Court's decision *Califano v. Yamasaki*, 442 U.S. 682 (1979), holds that Federal Rule of Civil Procedure 23 allows federal statutory claims to be brought as class actions unless directly and expressly banned by Congress. The plain language of the Truth in Lending Act (TILA), 15 U.S.C. § 1635, permits an action for rescission whenever a lender has committed a material violation, and the clear text of TILA imposes no class action ban. Nevertheless, the court of appeals failed to apply the plain language of TILA and created a ban on class actions for rescission that Congress never expressed.

1. Whether the court of appeals erred in ruling that class actions for a declaratory right of rescission are never permitted under TILA, in conflict with this Court's determination in *Yamasaki* that federal statutory claims may be brought as class actions under Federal Rule of Civil Procedure 23 unless expressly banned by Congress.

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The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 545 F.3d 570. The opinion of the district court granting class certification (Pet. App. 21a-52a) is reported at 240 F.R.D. 612. The opinion of the district court granting a stay pending appeal of the class certification order (Pet. App. 53a-63a) is reported at 474 F. Supp. 2d 1006.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2008. A timely petition for rehearing and rehearing en banc was denied on October 31, 2008 (Pet. App. 66a-67a). On January 14, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix to this petition (Pet. App. 68a-84a): 15 U.S.C. § 1605(f); 15 U.S.C. § 1635; 15 U.S.C. § 1640(a), (i); and 15 U.S.C. § 1649.

STATEMENT

A. Statutory and Regulatory Framework

In 1968, when "consumers remained remarkably ignorant of the nature of their credit

obligations and of the costs of deferring payment," TILA, 15 U.S.C. § 1601 *et seq.*, was enacted to provide consumers with a meaningful opportunity "to compare the cost of credit and to make the best informed decision on the use of credit.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363-64 (1973) (quoting H.R. Rep. No. 90-1040 at 13). This Court observed that prior to TILA's passage, "[b]ecause of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet." *Id.* at 363. This Court further recognized that lenders would attempt to game TILA's rules, and "circumvent" statutory coverage for their deceptive activities by "characteriz[ing] their transactions so as to fall one step outside whatever boundary Congress attempted to establish," or by "'burying' the cost of credit in the price," "to evade the disclosure requirements of the Act." *Id.* at 363-66.

"Accordingly, the Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. See §§ 1631, 1632, 1635, 1638." *Beach v. Ocwen Fed. Bank,* 523 U.S. 410, 412 (1998). In *Beach,* this Court addressed the statutory right of rescission, which was included in TILA from its inception to provide consumers with a powerful tool to redress disclosure violations: "[T]he Act also authorizes a borrower whose loan is secured with his 'principal dwelling,' and who has been denied the

requisite disclosures, to rescind the loan transaction entirely." *Id.* (quoting 15 U.S.C. § 1635(a)). The Court further explained how the rescission process works:

> A borrower who exercises this right to rescind "is not liable for any finance or other charge, and any security interest given by [him], including any such interest arising by operation of law, becomes void" upon rescission. § 1635(b). Within 20 days after receiving notice of rescission, the lender must "return to the [borrower] any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.*

Id. at 412-13 (alterations in original).

TILA's rescission provision has been amended on a number of occasions, with significant amendments occurring in 1974, 1980, 1994 and most recently in 1995. In 1974, after courts had interpreted the right to exercise rescission to be unlimited,[1] Congress decided to limit the right to three years. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517-18 (codified at 15 U.S.C.

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[1] *See Sosa v. Fite*, 498 F.2d 114, 120 (5th Cir. 1974) ("[S]ection 1635(b) explicitly allows rescission indefinitely until such time as the requisite disclosures are actually made. . . .").

§ 1635(f)); *see Beach*, 523 U.S. at 419 ("no federal right to rescind . . . after the 3-year period of § 1635(f) has run"). The 1980 amendments to TILA clarified that § 1635 is jurisdictional by expressly authorizing judicial modification of the rescission process and authorizing the pursuit of rescission through any action. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 612(a)(4), (6), 94 Stat. 168, 175-76 (1980) (codified at 15 U.S.C. § 1635(b), (g)). Most recently, in 1995, Congress amended TILA to eliminate the opportunity for rescission based on the previous "extremely low tolerance for lender flexibility in fee disclosure" which, following the decision of the Eleventh Circuit in *Rodash v. AIB Mortgage Co.,* 16 F.3d 1142 (11th Cir. 1994), triggered the filing of fifty class action lawsuits seeking rescission. *See* Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, §§ 3, 4, 109 Stat. 271, 272-74 (codified at 15 U.S.C. §§ 1605(f), 1649); *see also O'Brien v. J.I. Kislak Mortgage Corp.,* 934 F. Supp. 1348, 1362 (S.D. Fla. 1996) ("[T]he TILA Amendments were enacted to address the filing of multiple class action lawsuits seeking rescission on the basis of technical violations of the TILA disclosure requirements."). At no time was the TILA statutory rescission right amended to "express" a ban on class actions seeking the right to rescind.

B. Factual Background

1. In the spring of 2004, Chevy Chase Bank (Chevy Chase) offered homeowners a "unique" thirty-year loan product, a "cashflow payment option" mortgage, which allowed them to pay fixed

payments for five years based on a low "teaser" interest rate. Pet. App. 2a-3a. After the first month, however, the loan charged interest at a significantly higher adjustable rate than the low "teaser" rate Chevy Chase used to set the fixed payment, causing more interest and principal to accrue each month than would be covered by the fixed required payment. *Id.* at 3a-4a. Consequently, even after making all the payments required by the loan's terms, a borrower had an increased principal balance, the result of "negative amortization." *Id.* at 4a. As soon as the loan's balance increased to 110% of the original principal amount, or after five years, whichever was sooner, the borrower's payments increased dramatically. Thereafter, she was required to cover all interest owing on the loan and enough principal that the loan would be fully paid off at the end of thirty years. *Id.* at 3a.

The court below recognized this was a "complex" mortgage product that created "a potential trap for the unwary." *Id.* at 2a. Judge Evans went further, describing its "seductive Siren call" that concealed the fact that the loan created "a booby trap waiting to explode." *Id.* at 17a.

2. Chevy Chase gave the borrowers who received these loans a federally mandated Truth in Lending Disclosure Statement (TILDS) that: (1) informed the borrowers they were receiving "5-year fixed" loans, *id.* at 35a; (2) prominently stated the low "teaser rate" used to calculate the initial monthly payments, *id.* at 33a; and (3) contained a schedule of payments that did not reveal the payment interval (e.g. bi-weekly, monthly, etc.), *id.*

at 28a; *see also* 12 C.F.R. §§ 226.17, 226.18 (requiring a TILDS).

3. Chevy Chase employed computer software to generate uniform TILDSs containing one or more of these three features and provided them to borrowers in approximately 7,000 "cashflow payment option" loans. Pet. App. 46a ("plaintiffs' claims and those of members of the putative class arise out of the same documents"); Chevy Chase 7th Cir. Br. 7-8 (acknowledging "its loan origination software was programmed to include [the] product tracking notation in the upper right-hand corner" of the TILDS).

4. Susan and Bryan Andrews, a married Wisconsin couple with four children, took out a Chevy Chase "cashflow payment option" loan in June 2004 to refinance a fixed rate loan with another lender. Pet. App. 21a-22a. The Andrews believed that the loan's interest rate was fixed at 1.95% for the first five years and would only vary after that date. *Id.* at 22a. But the 1.95% rate, which was used to set the payment amount for the first five years of the loan, was applicable only for the first month of the loan. After the first month, the interest rate charged on the loan adjusted upward and continued to adjust each month thereafter. *Id.*

The following loan description was included in Chevy Chase's TILDS to the Andrews:

> "Type of Loan": WS Cashflow 5-Year Fixed
> Note Interest Rate: 1.950%

Id. at 52a. The payment interval—monthly under the terms of the Andrews' note—was left blank on the TILDS:

> PAYMENTS ARE DUE
> [BLANK LINE]
> BEGINNING

Id.

C. Procedural History

1. The Andrews filed this action in April 2005 on behalf of a putative class of homeowners, alleging Chevy Chase's disclosures to "cashflow payment option" loan borrowers violated TILA. They sought: the opportunity for class members to rescind their loans, statutory damages, attorneys' fees, and other equitable relief, and moved to certify the class under Federal Rules of Civil Procedure (Rule) 23(b)(2) and 23(b)(3). First Chevy Chase, and then the Andrews, moved for summary judgment on liability under TILA.

2. The district court, which had jurisdiction under 28 U.S.C. § 1331, granted the Andrews' motion for summary judgment in part, granted Chevy Chase's motion for summary judgment in part, and certified the class. It held that Chevy Chase's disclosures violated TILA and the Federal Reserve Board's regulations in three respects that gave borrowers the right to rescind. First, by failing to clearly and conspicuously specify the monthly payment interval, it violated 15 U.S.C. § 1638(a)(6). Pet. App. 28a-29a; *see also* 15 U.S.C. § 1632 ("clear[]

and conspicuous[]" requirement). Second, by including confusing references to the 1.95% interest rate, the TILDS (and other loan documents) violated 15 U.S.C. § 1638(a)(4), which requires clear and conspicuous disclosure of the loan's 4.047% "annual percentage rate." Pet App. 31a. Finally, the TILDS's description of the loan as a "5-year fixed" product violated the regulatory mandate, 12 C.F.R. § 226.18(f), to clearly and conspicuously disclose the loan's variable interest rate feature. Pet. App. 35a. The court held that borrowers who received TILDSs with these deficiencies were entitled to rescind their loans. *Id.* at 40a.

Turning to the Andrews' request for class certification, the district court first held that "nothing in the language of TILA . . . precludes the use of the class action mechanisms provided by Rule 23 to obtain a judicial declaration whether an infirmity in the documents, common to all members of the class, entitles each member of the class individually to seek rescission." *Id.* at 41a-42a (quoting *Rodrigues v. Members Mortgage Co.*, 226 F.R.D. 147, 153 (D. Mass. 2005)) (internal quotation marks omitted). Moreover, "public policy strongly favors allowing class actions" seeking TILA rescission declarations because "[d]enial of class action status would reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated." *Id.* at 42a. The district court then held that the Andrews met the requirements of Rule 23(b)(2) because "plaintiffs' claims and those of members of the putative class arise out of the same documents and are based on the same legal theory," "defendant has 'refused to act

on grounds generally applicable to the class,'" and "a declaratory judgment would settle the issue of whether defendant violated TILA and, if so, whether such violation gives rise to the right to rescind." *Id.* at 46a, 48a (quoting Rule 23(b)(2)).

3. The Seventh Circuit accepted Chevy Chase's Rule 23(f) petition for an interlocutory appeal of the class certification ruling. *Id.* at 64a-65a. In granting Chevy Chase's request for a stay pending completion of the interlocutory appeal, the district court also explained why the First Circuit's intervening ruling in *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007), was in error. Pet. App. 55a. The district court criticized the First Circuit's improper use of legislative history "to create a rule not found in the text "— that a class action seeking the right of rescission could never be certified. *Id.* at 59a. "[T]he *McKenna* court should have asked 'what the statute means' rather than 'what the legislature meant.'" *Id.* (quoting *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989)). The district court also rejected the First Circuit's reasoning that TILA rescission was too inherently personal to satisfy class certification standards because "[t]here is nothing personal about declaring that a class of borrowers who received the same misleading disclosure incurred a TILA violation and that as a result the statutory right to rescind is extended from three days to three years." *Id.* at 61a.

4. A divided panel of the Seventh Circuit reversed the district court's class certification decision, holding "as a matter of law that TILA rescission class actions may not be maintained." *Id.*

at 17a. While acknowledging that "TILA does not explicitly *prohibit* the use of a class action for rescission" and that *Califano v. Yamasaki*, 442 U.S. 682 (1979), holds that class relief is available in federal civil actions "'[i]n the absence of a direct expression by Congress,'" the panel nevertheless distinguished *Yamasaki* on the ground it dealt with a jurisdictional statute and held the absence of an explicit prohibition was "not dispositive." *Id.* at 10a (quoting *Yamasaki,* 442 U.S. at 700) (alteration in original). The panel read Congress's silence with respect to rescission classes as compared to TILA's explicit limit on class actions seeking statutory damages to require a complete ban on rescission class actions. *Id.* at 10a-11a. "[F]or completeness" the panel noted its "serious questions" whether classes seeking the right to rescind could ever meet the requirements of Rule 23(b) because of the personal nature of the remedy. *Id.* at 14a-15a.

Judge Evans dissented, describing the Andrews' loan as a "booby trap" that had "explode[d]." *Id.* at 17a. According to Judge Evans, "the majority shrugs off too lightly the Supreme Court's command" from *Yamasaki*. *Id.* at 18a-19a. He criticized the majority's creation of a class action ban as a "construction [that] takes more than a little massaging" and fails to "construe the statute in the way most supported by the statute's language and in a fashion that protects the innocent, not the guilty." *Id.* at 19a. He stated that the majority's observation about the personal nature of the rescission remedy "does not mean that a TILA rescission class action may not be maintained *as a matter of law*." *Id.*

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION CONTRAVENES SUPREME COURT AUTHORITY IN *CALIFANO V. YAMASAKI.*

The Seventh Circuit created a judicial ban on class actions seeking the right to rescind mortgages that are materially defective under TILA. The decision conflicts directly with this Court's holding in *Yamasaki*, allowing federal statutory claims to be brought as class actions unless directly and expressly banned by Congress. The plain language of 15 U.S.C. § 1635 permits an action for rescission when a lender has given materially defective loan disclosures,[2] and the clear text of TILA imposes no class action ban.

The Seventh Circuit decision, which has been followed closely by media and the mortgage lending industry, forecloses class action relief for thousands of homeowners throughout the country who seek to have their disclosure rights vindicated and their loans rescinded. It forces each homeowner to file an individual action against the bank with a lien on his home, a virtually impossible task. Chevy Chase's customers were refinanced into loans that contained uniformly defective disclosures. Compliant lenders lost business to lenders like Chevy Chase who did not comply with TILA. This disrupted the mortgage

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[2] Rescission is available only when there have been "material" violations, whereas monetary damages are available for technical violations that may or may not be material. *Compare* 15 U.S.C. § 1635(a), *with id.* § 1640(a).

marketplace. This Court should address this important federal question to remove the judicially created ban on class actions and reaffirm the integrity of the marketplace.

A. The Seventh Circuit Flatly Rejected this Court's Holding and Reasoning in *Yamasaki*.

No one—including the circuit courts that have addressed the question and Chevy Chase—contends that *anything* in the text of 15 U.S.C. § 1635 or any other section of TILA expressly prohibits class actions seeking a declaration of the right to rescind. Pet. App. 9a; *McKenna*, 475 F.3d at 423. Under this Court's holding in *Yamasaki*, class actions are possible, as governed by Rule 23, for claims brought under any statute absent a "clear expression of congressional intent" to the contrary. 442 U.S. at 700. The Seventh Circuit nevertheless held that "as a matter of law" TILA prohibits class actions. Pet. App. 17a. This Court, therefore, should grant a writ of certiorari to correct the Seventh Circuit's "conflict[] with the relevant decisions of this Court" on the important question of whether American homeowners will have effective access to the Congressionally authorized remedy for a lender's manifest failure to properly disclose the terms of their loans. Sup. Ct. R. 10(c).

In *Yamasaki,* the Secretary of Health, Education, and Welfare argued that Social Security beneficiaries harmed by impermissible recoupment procedures for overpayments could not bring class actions. The Social Security statute provided that

"any individual . . . may obtain a review of [the Secretary's] decision by a civil action," but it had no provision for class actions. *Yamasaki*, 442 U.S. at 698 n.12 (quoting 42 U.S.C. § 405(g)). This Court rejected the Secretary's argument, instead holding that "[i]n the absence of a *direct expression by Congress* of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, *class relief is appropriate in civil actions brought in federal court*." *Id.* at 700 (emphasis added) (quoting Rule 1).

The Seventh Circuit correctly *conceded* that Congress did not directly ban class actions for civil suits seeking a declaration of the right to rescind under TILA: "It is true, as the Andrews point out, that TILA does not explicitly prohibit the use of the class action for rescission." Pet. App. 9a; *see also McKenna*, 475 F.3d at 426 n.3. ("[E]ven though . . . not memorialized in the text of the statute, we find an express congressional intent to exempt rescission actions from class treatment . . . ."). Under the clear holding of *Yamasaki*, the Seventh Circuit's inquiry should have concluded there: because there is no direct expression from Congress to prohibit class actions for rescission, class actions are available.

Not only does the Seventh Circuit's holding contravene *Yamasaki*'s language allowing any claim to be brought as a class action, subject to Rule 23, absent a "direct" and "clear" statutory ban, but it flies in the face of the very arguments rejected by this Court in *Yamasaki*. The Secretary argued that the structure of the Social Security statute was incompatible with class representation because it

required beneficiaries individually to exhaust their administrative remedies prior to seeking court review: "In making [his] argument, the Secretary relies on the language of [the statute] which authorizes suit by '[a]ny individual,' and speaks of judicial review of 'any final decision of the Secretary made after a hearing to which [the plaintiff] was a party' . . . ." *Yamasaki*, 442 U.S. at 698 (third and fourth alterations in original) (quoting 42 U.S.C. § 405(g)). Like Chevy Chase, the Secretary in *Yamasaki* asserted his statutory right to address each beneficiary's claim individually in a case-by-case hearing, which he claimed made class treatment inappropriate. This Court disagreed:

> The fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them.

Id. at 700.

The Seventh Circuit therefore compounded its error in failing to follow *Yamasaki*'s "direct" and "clear" expression requirement by focusing on the personal nature of the rescission remedy as the

reason that TILA banned class actions seeking such relief—just the consideration that *Yamasaki* holds irrelevant to whether class actions are prohibited as a matter of law. *See* Pet. App. 8a ("[T]he rescission remedy described in § 1635 appears to contemplate only individual proceedings; the personal character of the remedy makes it procedurally and substantively unsuited to deployment in a class action."); *see also McKenna*, 475 F.3d at 424-25 ("The highly individualized character of this [rescission] process and the range of variations that may occur render rescission largely incompatible with a sensible deployment of the class-action mechanism.").

Indeed, the process of unwinding a loan transaction afforded by TILA's statutory rescission remedy bears many similarities to the administrative review process addressed in *Yamasaki*. Having won the determination on liability in *Yamasaki*, each class member was entitled to a highly individualized oral hearing to assess whether the financial severity of recovering the overpayment would be "against equity and good conscience." *See* 442 U.S. at 696-97. Likewise, some additional proceedings may be necessary to finalize the rescission process after a court declares class members' right to rescind. *See* Pet. App. 44a-45a.

However, the rescission process is an easier case for class representation than are the ultimate individualized hearings at issue in *Yamasaki*. Once a court has ruled on common questions of TILA liability, class rescission becomes ministerial; unlike *Yamasaki*, there is no need for full blown

individualized hearings. Only two questions remain: what is the rescission tender amount and who is properly eligible for the rescission remedy? The rescission or tender amount is a simple arithmetic calculation involving the subtraction of certain fees and interest payments from the principal of the loan. The question "who is eligible for rescission" can be adjudicated through further proceedings. *See, e.g.*, *Tower v. Moss*, 625 F.2d 1161, 1163-64 (5th Cir. 1980). These eligibility issues are few and easy to evaluate: Is the loan for refinancing, and not for purchase? 15 U.S.C. §§ 1602(w), 1635(e)(1). Is the loan secured on a principal residence, and not a second home or investment property? 15 U.S.C. § 1635(a). Is the loan for personal, family or household use, and not a business loan? 15 U.S.C. §§ 1602(h), 1635(a). Does the borrower still own the home, or was it sold prior to institution of this lawsuit? 15 U.S.C. § 1635(f).

Although the Seventh Circuit does ultimately acknowledge that its ruling conflicts with *Yamasaki*, this candor is quickly undermined by the false distinction it draws with this Court's holding. The Seventh Circuit dismisses *Yamasaki*'s relevance to this case on the basis that *Yamasaki* interpreted a jurisdictional statute. Pet App. 10a;[3] *see also*

[3] This focus on the jurisdictional nature of the statute is in stark contrast to the Seventh Circuit's decision in *Matter of American Reserve Corp.*, where *Yamasaki* informed the court's interpretation of the availability of class representation in bankruptcy proceedings, unlimited by a restrictive jurisdictional reading. *See* 840 F.2d 487, 492 (7th Cir. 1988) ("*Yamasaki* requires us to determine whether § 501 is a 'direct expression by Congress of its intent to depart from the usual

McKenna, 475 F.3d at 425. Nothing in *Yamasaki* discusses the jurisdictional nature of the statute or remotely suggests that its holding is limited to jurisdictional statutes.

However, *Yamasaki* would authorize class rescission even if the Seventh Circuit correctly created this jurisdictional statute limitation. At bottom, 15 U.S.C. § 1635 is a jurisdictional clause for rescission, as the 1980 amendments to TILA make clear. Prior to the adoption of § 1635(g) and the last sentence of § 1635(b) in 1980, consumers had an implied cause of action for rescission. *See, e.g., Gerasta v. Hibernia Nat'l Bank*, 575 F.2d 580, 584 (5th Cir. 1978) ("It has now been judicially determined that the [borrowers] were entitled to rescind . . . ."); *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974). That changed with the amendment to 15 U.S.C § 1635 which created a direct expression by Congress conferring jurisdiction on the court to grant rescission "in any action." Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 612(a)(4), (6), 94 Stat. 168, 175-76 (1980) (codified at 15 U.S.C. § 1635(b), (g)). Accordingly, even the Seventh Circuit's narrow reading of *Yamasaki* supports class actions for rescission that meet the requirements of Rule 23.

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course' of employing class actions." (quoting 412 U.S. at 700)). There, despite reservations about barriers imposed by the bankruptcy process, Judge Easterbrook refused to eliminate completely the opportunity for class representation in the bankruptcy courts. *See id.* at 490 ("Presumptively, too, representational litigation is available in federal courts."). *Yamasaki* requires no less with respect to class actions for rescission under TILA.

When properly evaluated, the Andrews' complaint against Chevy Chase presents a canonical case of the common issues of fact and law that should be consolidated in a class action. As the district court explained, 7,000 homeowners share common questions of liability based on the receipt of computer generated forms with identical defects. Pet. App. 43a. The court identified the common question: "[W]hether defendant's disclosures of the payment schedule, the cost of the loan as an annual percentage rate and the variable interest rate feature of the loan violated TILA is a question common to the class." *Id.* at 44a. Thus, just as the claims in *Yamasaki*, "class relief for claims such as those presented by [plaintiffs] in this case is peculiarly appropriate. The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class." 422 U.S. at 701.[4] And, as Judge Evans correctly notes, even if the rescission unwinding process might "prove too complicated to satisfy the Rule 23 dictates in a given case . . . that does not mean a TILA rescission class action may

[4] The Seventh Circuit dicta, included as a "note for completeness," that the Andrews' desired relief does not meet the finality requirement of Rule 23(b)(2), Pet. App. 14a, fails to recognize that class actions seeking declaratory relief are proper when they "serve[] as a basis for later injunctive relief," Rule 23(b)(2) advisory committee notes (1966). In this case, class members who desired rescission would be entitled to an injunction ordering Chevy Chase to refrain from acting inconsistently with their rescission if they tendered within the timeframe established by the court.

not be maintained *as a matter of law*." Pet. App. 19a.

Moreover, TILA plainly confers expansive authority on district courts to manage and modify the rescission process. *See* 15 U.S.C. § 1635(b) ("The procedures prescribed by this subsection shall apply except when otherwise ordered by a court."). TILA's judicial modification authority supports rescission class proceedings, as it confers great flexibility on district courts to manage class actions, empowering them to adopt streamlined procedures for resolving computational disputes, questions of class membership or any other issues that might present themselves in a rescission class proceeding. In contrast, the Seventh Circuit's erroneous reading would insert a restriction on courts, limiting them to case-by-case modifications, although no limitation appears in the statute. *See* Pet. App. 9a (The "'procedures prescribed by this subsection shall apply except when otherwise ordered by a court,' suggesting that the remedy must proceed on a case-by-case basis." (quoting 15 U.S.C. § 1635(b)). Nothing in TILA's plain language restrains district courts from modifying the rescission process on a class basis, and any such reading is inconsistent with this Court's instruction in *Yamasaki*.

B. The Seventh Circuit's Dismissal of *Yamasaki* Disregards Well-Established Rules of Statutory Construction.

Yamasaki dictates that a statute must contain a "clear" and "direct" expression of Congressional intent in order to preclude class treatment. *See* 442

U.S. at 700. But not only does TILA fail to contain such an expression, it also fails to preclude class actions when interpreted using the standard rules of statutory construction. This Court has repeatedly and consistently held that when "statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Here, the statute plainly does not ban class actions in suits seeking rescission.[5]

TILA states that a court may award rescission in any action under § 1635. *See* 15 U.S.C. § 1635(b), (g). Section 1635 contains no language limiting rescission to individual actions. Moreover, Congress significantly amended TILA on a number of occasions after it was first enacted in 1968. In no instance did Congress add any language permanently limiting TILA class actions seeking rescission, including after the *Yamasaki* decision specified the statutory clarity—a "direct expression by Congress"—necessary to bar class actions. *See Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2209 (2007) (noting "the interpretive assumption that Congress knows how we construe statutes and expects us to run true to form"). In fact, the 1995

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[5] To be clear, this suit seeks a declaration that Chevy Chase violated TILA in a manner that gives class members an extended right of rescission. As the dissent correctly notes, affirming the district court would not automatically rescind any loan absent a request from the class member. *See* Pet. App. 19a.

amendments offered a perfect opportunity for Congress to enact such a ban if that had been its intent—an opportunity Congress passed up. *See infra* section I.C (detailing that these amendments are an *affirmation* that rescission class actions are available).

Indeed, Congress has enacted clear class action bans, demonstrating it knows how to eliminate the opportunity for class claims when that is its object. Congress enacted just such a ban against TILA class actions for a brief period in 1995. That ban, a temporary moratorium effective between May 18 and October 1, 1995, specified that "no court may enter any order certifying any class in any action" brought for violations of certain TILA disclosure requirements. Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, § 2, 109 Stat. 161 (codified at 15 U.S.C. § 1640(i)). Congress's demonstrated understanding of how to ban class actions adds significance to its failure to include any language in TILA permanently banning rescission class actions. *See Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007) ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to [deal with the relevant concern] in express terms.").

Moreover, Congress has enacted class action bans in a number of other statutes. For example, as this Court recognized in *Legal Services Corp. v. Velasquez,* Congress made plain its intent in the Legal Services Corporation Act of 1974 that "[f]und recipients are barred from bringing class-action suits unless express approval is obtained from LSC. [42

U.S.C.] § 2996e(d)(5)." 531 U.S. 533, 537-38 (2001). That act provides an unambiguous class action ban: "No class action suit, class action appeal, or amicus curiae class action may be undertaken, directly or through others, by a staff attorney, except with the express approval of a project director of a recipient in accordance with policies established by the governing body of such recipient." 42 U.S.C. § 2996e(d)(5). Congress later enlarged this ban on class actions by specifying that "[*n*]*one* of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53. Similarly, Congress eliminated the opportunity for class actions by certain vocational rehabilitation service providers in the Workforce Investment Act of 1998 by mandating that "[t]he agency . . . may not bring any class action in carrying out its responsibilities under this section." 29 U.S.C. § 732(d).

Congress also has banned certain class actions regardless of the source of funding for the lawyers bringing the actions. For instance, Congress imposed a limitation on remedies with respect to some, but not all, securities lawsuits when it enacted the Securities Litigation Uniform Standards Act of 1998. That act contains two explicit limits on the availability of certain class actions with respect to certain claims. It specifies:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b). *See also* 15 U.S.C. § 78bb(f)(1). Similarly, Congress amended the Social Security Act in 1984 to ban the certification of certain class actions:

> No class in a class action relating to medical improvement may be certified after September 19, 1984, if the class action seeks judicial review of a decision terminating entitlement (or a period of disability) made by the Secretary of Health and Human Services prior to September 19, 1984.

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(d)(5), 98 Stat. 1794, 1798.

In each of these legislative enactments, Congress took careful aim to eliminate class actions in a very specific context. With respect to recipients of legal services funds, Congress imposed a broad prohibition—disqualifying any "staff attorney" from participating, directly or indirectly, in a "class action suit, class action appeal, or amicus curiae class action." 42 U.S.C. § 2996e(d)(5). In the Workforce Investment Act of 1998, Congress prevented certain federally funded agencies from pursuing class actions in "carrying out [their] responsibilities." 29 U.S.C. § 732(d). In the Securities Litigation Uniform Standards Act of 1998, Congress prohibited private, state law-based class actions asserting certain claims with respect to covered securities, but permitted such suits in the case of other allegations. 15 U.S.C. §§ 77p(b), 78bb(f)(1). And in amending the Social Security Act, Congress took surgical aim at particular class action certifications. Social Security Disability Benefits Reform Act of 1984, § 2(d)(5), 98 Stat. at 1798. Thus, Congress unquestionably knows how to legislate a class action ban. It did not do so in TILA.

As the dissent observed, "Congress wrote a statute, and if it sought to further such a policy [to ban class actions] in the rescission context we should assume it would have said so." Pet. App. 18a. This Court has "'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Murphy*, 548 U.S. at 296 (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992)). TILA unambiguously grants a district court power to award rescission without imposing any restriction on

the form of the action. *See* 15 U.S.C. § 1635(b), (g). Thus, when it inserted a prohibition on class rescission that does not exist in the statute, the Seventh Circuit defied this Court's instruction: "[W]hen the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States v. Temple*, 105 U.S. 97, 99 (1881). As Justice Frankfurter explained:

> A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533-35 (1947).

Here the Seventh Circuit inserted a ban after reasoning that Congress could not have intended that class actions for statutory damages be subject to a ceiling,[6] while permitting class actions seeking

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[6] TILA caps statutory damages in "individual actions" at $4,000 and in "class actions" at $500,000. 15 U.S.C. § 1640(a)(2)(A), (B). There is no corresponding limit on class claims for actual damages, attorney fee awards, damages related to "high cost" mortgages or rescission. *See* 15 U.S.C. §§ 1640(a)(1), (3), (4), and 1635. Congress could also have capped or limited each of these remedies in TILA, but it did not.

another remedy—rescission—to proceed without any limitation. *See* Pet. App. 11a ("[T]he absence of a similar cap [to the cap on class statutory damages] in § 1635 strongly suggests that class actions are not available for rescission."). The Seventh Circuit justified this insertion, in part, on a faulty application of this Court's decision in *Bates v. United States*. *See id.* at 10a-11a. But that decision held that "'[w]here Congress includes particular language in one section of a statute but *omits it in another section of the same Act*, it is generally presumed that *Congress acts intentionally and purposely in the disparate* inclusion or *exclusion*.'" *Bates*, 522 U.S. 23, 29-30 (1997) (emphasis added).

Following that presumption, the Seventh Circuit should have reasoned, as the dissent did, that Congress's omission of a class liability cap from § 1635 evinced an intent to allow uncapped class rescission liability—its ordinary and natural reading in light of § 1640. Instead, the Seventh Circuit imposed its view as to proper public policy and interpreted the absence of a liability cap in § 1635 as a class ban. It does not "strain credulity," as the First Circuit claimed, that Congress would allow classes to recover an unlimited *restorative* remedy of rescission, but limit *punitive* statutory damages to $500,000. *McKenna*, 475 F.3d at 424. Even if the Seventh Circuit judged that creating a ban on rescission class actions improves TILA, the court was not free to rewrite the statute. As this Court has instructed, "[o]ur task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entm't Group,* 493 U.S. 120, 126 (1989).

Moreover, the absence of a rescission class action ban is consistent with the borrower protective purpose of TILA. *See* 15 U.S.C. § 1601(a); *Mourning,* 411 U.S. at 377 (1973). As this Court has clearly stated, "[t]he Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'. . . Congress has determined that such purchasers are in need of protection." *Id.* at 377; *see also Beach,* 523 U.S. at 412. Thus, as noted by Judge Evans, to the extent there is any lingering question about Congressional intent, it should be resolved in favor of the borrowers, the Andrews. Pet. App. 19a-20a. However, under the Seventh Circuit's ban on TILA class actions, lenders, not borrowers are protected; all lenders are insulated from class actions seeking the right of rescission, no matter how egregious their violations or how widespread.

In sum, the Seventh Circuit's reasoning—which it admits is based on what it "think[s]" is the "more plausibl[e]" Congressional intent and not a clear meaning of the statute—ignores *Yamasaki*'s instruction as well as this Court's most fundamental principles of statutory interpretation. *Id.* at 11a-12a. As the dissent points out, it is not the role of courts to divine intent: "If Congress intended to preclude rescission class actions, it should amend the statute and correct the error itself." *Id.* at 19a.

C. The 1995 Amendments to TILA Demonstrate That the Seventh Circuit's Decision Contravenes *Yamasaki*.

Although the Seventh Circuit asserted that "[t]he 1995 amendments to TILA confirm th[e] interpretation" prohibiting class actions for rescission, *id.* at 12a, it can point to no statement in the 1995 amendments of Congressional intent to prohibit rescission class actions, because none exists. To the contrary, the 1995 amendments actually reaffirmed that rescission class actions are available under TILA: in addressing the problem raised by large potential class rescission liability, Congress chose to modify the substantive standards of what constitutes a TILA violation, but declined to limit rescission class actions. Accordingly, the 1995 action by Congress not only fails to provide the "clear" and "express" direction of Congressional intent demanded by *Yamasaki*, but it also demonstrates that Congress accepts class actions for rescission to remedy TILA violations.

In 1995, Congress confronted the issue of class action rescissions because of the mortgage industry's exposure to uncapped class rescission liability resulting from an Eleventh Circuit decision. That court had permitted rescission of a mortgage loan based on the failure to include two commonly charged fees, totaling $226, in the finance charge disclosed under TILA. *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). The fees exceeded TILA's tolerance for errors, which at that time was only $10.

Congress's reaction to the Eleventh Circuit decision—particularly legislative discussions on the magnitude of lender liability created by the decision—demonstrates that it understood that TILA authorized rescission class actions. Numerous members of Congress identified potential liability of about $217 billion from the approximately fifty class actions filed on the heels of the Eleventh Circuit's ruling. *See* 141 Cong. Rec. S5614-15 (daily ed. Apr. 24, 1995) (statement of Sen. D'Amato) ("If a class-action rescission is granted, every class member would be released from their mortgage lien, and the obligation to pay finance charges and other charges. . . . The potential for massive rescissions . . . has been estimated to be as high as $217 billion"); *id.* at H4121 (daily ed. Apr. 4, 1995) (statement of Rep. Roukema); *see also* Editorial, USA Today, Sept. 12, 1995 ("Horrified mortgage lenders then claimed they potentially faced rescission of all 12 million mortgage refinancings during the last three years.").[7] That $217 billion figure could only result

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[7] Both Congressional floor statements and the press identified approximately fifty class rescission lawsuits. 141 Cong. Rec. H4120 (daily ed. Apr. 4, 1995) (statement of Rep. Roukema) ("As a result of the Rodash decision, nearly 50 class action lawsuits have been filed and in virtually all of the cases, the remedy sought is rescission."); *id.* at S14567 (daily ed. Sept. 28, 1995) (statement of Sen. D'Amato); Postal, *Deals, Deadlines Near for Rodash Bill,* Am. Banker, Sept. 4, 1995 (*Rodash* "spawned 50 class-action lawsuits in several states"); Kelly, *Consumers Could Be Losers In Court Ruling,* Seattle Times, July 9, 1995 ("Since the [Rodash] decision, 50 class-action lawsuits have been filed. Each suit has the potential of rescinding the majority of refinance loans less than 3 years old made by each defendant.").

from *rescission* class actions because Congress had already capped awards in TILA *statutory damages* class actions at the lesser of 1% of a lender's net worth or $500,000 per company. 15 U.S.C. § 1640(a)(2)(B). Accordingly, statutory damages could amount to no more than $25 million from the fifty class actions—orders of magnitude less than the liability Congress believed the Eleventh Circuit had created. In other words, Congress knew that fifty class actions seeking rescission filed post-*Rodash* posed $217 billion of potential liability, and Congress took no legislative action to "directly express" that TILA did not permit rescission class actions. *See Wyeth v. Levine*, --- S.Ct. ----, 2009 WL 529172, at *10 (2008) ("Its silence on the issue, coupled with its certain awareness of the prevalence of [rescission class] litigation, is powerful evidence that Congress did not intend" to eliminate class rescission in the 1995 amendments.).

Congress did take two actions in 1995 to address the large rescission class action liability created by the Eleventh Circuit. First, in May, Congress enacted the Truth in Lending Class Action Relief Act of 1995. That act placed a temporary moratorium on the certification of all class suits seeking relief based on certain disclosure and form errors. *See* Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, § 2, 109 Stat. 161 (codified at 15 U.S.C. § 1640(i)) (specifying between May 18 and October 1, 1995 that "no court may enter any order certifying any class in any action" brought

for violations of certain TILA provisions).[8] The moratorium gave Congress time to consider the proper resolution of the *Rodash* problem.

Second, in September, Congress enacted the Truth in Lending Act Amendments of 1995. That act permanently amended TILA to address the liability created by borrowers seeking rescission based on the Eleventh Circuit opinion. Congress chose to address the issue by changing the substantive standard of what constitutes a "finance charge" violation. *See* Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, §§ 3, 4, 109 Stat. 271, 272-74 (codified at 15 U.S.C. §§ 1605(f), 1649) (replacing the prior $10 tolerance for finance charge disclosure error with an exemption from liability for finance charge disclosure errors if the variance between the disclosed sum and the actual amount falls within a tolerance range of 1/2 to 1% of the loan principal).

These 1995 amendments lack any statement, as would be required by *Yamasaki*, that Congress intended to prohibit rescission class actions for TILA disclosure violations. In fact, Congress directly rejected continued efforts made during the moratorium period for a wholesale restructuring that would have eliminated TILA's right of rescission for first lien refinancings or imposed greater burdens on consumers seeking to avail

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[8] Congress did not stay the certification of class actions with claims based on incorrect disclosure of the payment schedule or the delivery of confusing or conflicting disclosures, which are at issue in this case.

themselves of relief under TILA.[9] *See e.g.,* 141 Cong. Rec. S14567 (daily ed. Sept. 28, 1995) (statement of Sen. Sarbanes) ("Under the original House bill, consumers would have lost the right of rescission for a whole class of loans even if the most egregious violations of the Truth in Lending Act were committed. The bill before the Senate preserves that vital consumer protection."); *id.* (statement of Sen. D'Amato) ("H.R. 2399 provides greater certainty for lenders without eliminating the substantive protection available to consumers.).

Accordingly, the facts do not bear out the Seventh Circuit's (or the First Circuit's) assertion that Congress eliminated class rescission liability through the 1995 amendments. *See* Pet. App. 12a; *McKenna*, 475 F.3d at 425 ("Every indication is that Congress, while making no provision for class actions in the rescission context [in the 1995 amendments], intended to keep at bay the ominous prospect of large-scale liability that would be inherent in rescission class actions."). As many

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[9] Numerous press articles make clear the industry's disappointment that Congress did not provide the far reaching, permanent relief they sought including elimination of the right of rescission for refinancings. *See e.g.,* Kenneth R. Harney, *Mortgage Companies Take Fight Over Truth-in-Lending to Capitol Hill*, Wash. Post, Sept. 24, 1994, at F1 (discussing industry pressure to retroactively reverse the *Rodash* decision); Postal, *supra* ("A provision that would restore the three-day right of rescission for consumers on some mortgage refinancings is seen as the price credit unions and other mortgage lenders will have to pay for Senate support of legislation to resolve the potential financial nightmare posed by the Rodash group of lawsuits.").

members of Congress made clear, it was not class rescission liability *per se* that prompted them to act. Rather their concern was with the low tolerance for error in TILA—"technical disclosure errors of as little as $10, [which] create[] a potential for liability that has been estimated to be as high as $217 billion." 141 Cong. Rec. S5614-15 (daily ed. Apr. 24, 1995) (statement of Sen. D'Amato); s*ee also id.* at H9514 (daily ed. Sept. 27, 1995) (statement of Rep. Leach) (expressing concern about "the ambiguity surrounding the proper treatment of a number of fees under current law and the extremely low tolerance for lender flexibility in fee disclosures"). Moreover, members made clear that the solution they enacted was targeted to their concerns about the low tolerance. *See id.* at H9515 (statement of Rep. Roukema) ("This legislation that we are considering here today addresses the Rodash problem by exempting a number of charges from inclusion in the finance charge and provides a tiered tolerance approach on finance charge miscalculations. The bill does not extend any exemptions on the right of rescission.").

Further support for the proposition that Congress did not ban rescission class actions *per se* is found in regulators' and courts' contemporaneous understanding of the amendments' effect on those class actions pending at the time the temporary moratorium went into effect. On October 1, 1995, when the moratorium expired, courts were once again permitted to evaluate whether to certify the class actions that had been filed before the moratorium. *See* 15 U.S.C. § 1640(i). The Federal Reserve reported that certification of those classes

"will now *proceed* under the new law, which limits the lenders' liability." Board of Governors of the Federal Reserve Board, 82nd Annual Report: 1995, at 227 (1996) (emphasis added), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/ann95.pdf. Similarly, courts dismissed these cases because they could not meet the new materiality standards for proving a TILA violation, not because Congress had banned rescission class actions in the 1995 amendments. *See e.g., O'Brien v. J.I. Kislak Mortgage Corp.*, 934 F. Supp. 1348, 1364 (S.D. Fla. 1996) (holding that "[a]fter applying the 1995 TILA Amendments, the Snyders and the O'Briens have largely been deprived of the necessary standing to represent a class seeking damages and rescission on mortgage loans for the relevant time periods" because the errors in disclosure were within the new tolerances).

* * *

In summary, the Seventh Circuit's decision that TILA silently prohibits class action rescission as a matter of law squarely conflicts with this Court's holding in *Yamasaki*. The refusal to follow *Yamasaki* is even more inexcusable in light of the principles of statutory interpretation and relevant legislative history that belie any silent Congressional intent to prohibit such actions. Accordingly, this Court should grant a writ of certiorari to correct the Seventh Circuit's ruling.

II. THE CIRCUITS ARE NOT ALIGNED ON THE QUESTION OF CLASS RESCISSION.

The First Circuit's decision to eliminate the opportunity to bring class actions seeking the right to rescind under TILA created a split in the circuits. The Seventh Circuit's decision in *Andrews* followed the First Circuit and exacerbated that division.

Prior to the First Circuit's ruling in *McKenna,* the Third Circuit's *In re Community Bank* decision*,* 418 F.3d 277 (3d Cir. 2005), recognized that TILA authorized rescission class actions. There the court reversed the district court's certification of a settlement class involving an "illegal home equity lending scheme" that extinguished class members' TILA rescission and damages claims, without in any way compensating them for those claims. *Id.* at 283. Concluding that many of the class members had live TILA rescission and damages claims that might be certifiable in the class actions, the court stated "class counsel provide no persuasive support for the proposition that TILA . . . claims cannot be asserted as part of a class action, or at the very least incorporated into the negotiations of a settlement." *Id.* at 305. The court reversed and remanded in part because of "[o]ur concern that the value of potential TILA . . . rescission claims is not adequately represented by the named plaintiffs." *Id.* at 307. At least one other circuit has remanded a rescission class for adjudication on the merits without questioning the right to bring such a case. *Grimes v. New Century Mortgage Corp.,* 340 F.3d 1007 (9th Cir. 2003).

Moreover, the First, and subsequently the Seventh Circuits, have failed to appreciate the novelty of creating a judicial ban on rescission class actions in TILA. Both *McKenna* and *Andrews* purport to rest in part on their assessment that the Fifth Circuit in *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980), ruled out class rescission. *See McKenna*, 475 F.3d at 423; Pet. App. at 2a. But the Fifth Circuit has never articulated that interpretation of the *James* decision.[10] The Fifth Circuit has cited *James* only once—ruling in an individual rescission action that a complaint sufficed to provide notice of rescission. *See Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 100 (5th Cir. 1996). Furthermore, no district court bound by the *James* decision[11] has subsequently held that TILA rescission class actions are never allowed as a matter of law. *See, e.g., O'Brien,* 934 F. Supp. at 1364 (determining that the class representative would have had standing to bring a rescission class action but for the tolerances added by the 1995 TILA amendments).[12]

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[10] Two months after *James,* the same panel directed that a homeowner be included as a class member in a rescission class action settlement, a ruling that is contrary to *McKenna*'s interpretation that *James* ruled out rescission class actions. *See Tower v. Moss,* 625 F.2d 1161 (5th Cir. 1980).

[11] Under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), courts in the Eleventh Circuit are bound by Fifth Circuit precedent issued prior to September 30, 1981.

[12] The Eleventh Circuit has cited *James* on only two occasions, never discussing its impact on the availability of class rescission. *See United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir.1993); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859,

Thus, the circuits are not aligned with respect to class actions seeking the right to rescind.

CONCLUSION

Accordingly, it is important for this Court to take this case to overrule the Seventh and First Circuit decisions that refuse to follow *Yamasaki*, the well-established and long-standing rules of statutory construction, and to resolve a split among the circuit courts. For the foregoing reasons, the Petition for a

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876 (11th Cir.1986) (discussing the survivability of a federal statutory claim).

Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

Kevin J. Demet*
Donal M. Demet
Demet & Demet S.C.
815 N. Cass Street
Milwaukee, WI 53202
(414) 291-0800

Nina F. Simon
Jean Constantine-Davis
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Eric Halperin
Kathleen Keest
Daniel Mosteller
Center for Responsible Lending
910 17th Street, NW
Suite 500
Washington, DC 20006
(202) 349-1850

Attorneys for Petitioners

* Counsel of Record