NO. 12-1054

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

CARLOS MIRANDA,

Plaintiff-Appellant,

— v. —

WELLS FARGO BANK, N.A., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND CONSUMER MORTGAGE COALITION SUPPORTING APPELLEES AND AFFIRMANCE

Of Counsel:
Jeffrey P. Naimon
Kirk D. Jensen
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
(202) 349-8000

Michael R. Williams
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
(202) 349-8000

Attorneys for Amici Curiae American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are all non-profit corporations headquartered in Washington, D.C. Pursuant to Fed. R. App. P. 26.1 and 29(c), none of the *amici curiae* has a parent corporation or publicly held corporation that owns 10% or more of its stock. No similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded stock owns 10% or more of an amicus curiae. No publicly held corporation has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement. No similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded stock has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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INTRODUCTION

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

In line with *Beach*, the substantial majority of courts agree that suits asserting a right to rescission must be brought within three years, regardless of whether the borrower filed a notice with the lender within the three-year period. *See Sobieniak v. BAC Home Loans Servicing, LP*, No. 11-110, 2011 WL 6122318, at *4 (D. Minn. Dec. 8, 2011) (listing cases). For a time, every district court to consider the issue in the Fourth Circuit had endorsed the majority position as well.[1] And every federal appellate court to address the question—except one—has done

[1] *See Wolf v. Fed. Nat'l Mortg. Ass'n*, 830 F. Supp. 2d 153, 158 (W.D. Va. 2011); *Yowell v. Residential Mortg. Solution, LLC*, No. 3:10-cv-00063, 2011 WL 3654388, at *8 (W.D. Va. Aug. 17, 2011); *Bradford v. HSBC Mortg. Corp.*, 799 F. Supp. 2d 625, 632 (E.D. Va. 2011); *Sall v. Buonassissi*, No. 10-2245, 2011 WL 2791254, at *6-7 (D. Md. July 13, 2011); *DeCosta v. U.S. Bancorp*, No. 10-0301, 2010 WL 3824224, at *4-5 (D. Md. Sept. 27, 2010); *Gilbert v. Deutsche Bank Trust Co. Ams.*, No. 4:09–CV–181–D, 2010 WL 2696763 (E.D.N.C. July 7, 2010).

the same.[2] *Amici*—the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), and the Consumer Mortgage Coalition ("CMC")—believe that these courts are right. Actions for rescission must be brought within three years.[3]

Nevertheless, a panel of this Court recently held otherwise. *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 275-78 (4th Cir. 2012). In *Gilbert*, the Court—relying on "the plain meaning" of Section 1635(f) and a related regulation—concluded that mere notice from the borrower was sufficient to exercise and preserve the rescission right. *Gilbert*, 678 F.3d at 277. Because the statute and the regulation "say[] nothing about the filing out of a lawsuit," the Court determined that Section 1635(f) places no time limit on rescission suits so long as the borrower filed a notice within three years. *Id.* at 277.

Amici respectfully disagree with the approach taken in *Gilbert* and suggest that its analysis should be reconsidered.[4] *Gilbert*'s approach fundamentally

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[2] *See Rosenfield v. HSBC Bank USA*, No. 10-1442, 2012 WL 2087193, at *4-11 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012); *Williams v. Wells Fargo Home Mortg., Inc.*, 410 F. App'x 495, 499 (3d Cir. 2011).

[3] No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the brief's preparation or submission to the Court. No person other than the *amici curiae*, their members, or their counsel contributed money to fund preparing or submitting it.

[4] *Amici* recognize that this panel is bound by the prior reported decision. *United States v. Ruhe*, 191 F.3d 376, 388 (4th Cir. 1999). But given that *amicus*

undermines a statute of repose meant to promote finality and clarity. It upsets the careful balance of remedies found in TILA. It does so for the sake of a remedy that borrowers may invoke—and often do invoke—when they are in default, when they have no genuine basis to rescind, and when they have no ability to tender the loan proceeds as required. And it allows a borrower to strip a lender who complied with TILA of its security interest instantaneously and unilaterally. But most importantly, it casts a shadow of uncertainty over the housing finance market, resulting in additional costs for the very borrowers that TILA was meant to benefit. *Gilbert* should be laid to rest.

INTEREST OF THE *AMICI CURIAE*

Amici are three large financial services trade associations in the United States. They recognize that *Gilbert* upsets the housing finance market just as it is recovering from one of the worst economic shocks in history.

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

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submissions are disfavored at the rehearing stage, *LaRue v. DeWolff , Boberg & Assocs., Inc.*, 458 F.3d 359, 361 (4th Cir. 2006), *amici* believe it is most helpful to put their views forward at the outset of this case.

The CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

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

ARGUMENT

I. Section 1635(f) Is a Statute of Repose That Extinguishes the Right to Rescind After Three Years, Barring Any Suit Premised on that Right.

A. *This Court has already determined that Section 1635(f) is a statute of repose.*

Section 1635(f) "completely extinguishes" the right to rescind after a given time. *Beach*, 523 U.S. at 411; *see* 15 U.S.C. § 1635(f) ("[The] right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first[.]"). The Supreme Court has read

this provision to "govern[] the life of the underlying right," not just the time for bringing a suit to enforce it. *Beach*, 523 U.S. at 417. Because it limits the underlying right, Section 1635(f) is a statute of repose. *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998). Such statutes are typically "absolute time limit[s]" that cannot be "tolled for any reason," *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), as the right that would otherwise sustain the action no longer exists, *Goad v. Celotex*, 831 F.2d 508, 511 (4th Cir. 1987). *See also Anderson v. United States*, 669 F.3d 161, 164-65 (4th Cir. 2011) ("[S]tatutes of repose are substantive limitations on liability.").

Statutes of repose serve a number of useful purposes. For example, such statutes require suits to be filed in a timely fashion, before the difficulties of proving a complex case increase with the passage of time. *Johnson v. Davis*, 582 F.2d 1316, 1319 (4th Cir. 1978) ("[Statutes of repose] secure the prompt enforcement of claims during the lives of witnesses and when their recollection may be presumed to still be unimpaired."). They also "relieve potential defendants from anxiety over liability for acts committed long ago." *Goad*, 831 F.2d at 511.

B. Gilbert *strips Section 1635(f) of its force as a statute of repose while compelling the Court to enforce an expired right.*

If *Gilbert* remains in place, Section 1635(f) will no longer achieve the purposes of a statute of repose. Indeed, "[t]he notion that a borrower could keep a lifeless right alive indefinitely merely by filing even a groundless rescission notice

is offensive to the very idea of a statute of repose." *Sall*, 2011 WL 2791254, at *7. Stale cases will become common unless lenders simply caved to pressure to settle. *Rosenfield*, 2012 WL 208713, at *9 ("[T]he underlying circumstances in no small number of cases are likely to have changed significantly."). And the section will no longer provide the certainty of a repose period. *Wallace v. Kelo*, 549 U.S. 384, 395 (2007) ("Defendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense; and a statute that becomes retroactively extended, by the action of the plaintiff …, is hardly a statute of repose."). If courts determine to "borrow" limitations periods from other statutes, lenders will be forced to guess at the applicable limitations period. Courts could borrow from *state* limitation periods, destroying the uniform application of this statute of national reach. Lenders would then be forced to wrestle with perhaps 50 different standards in 50 different states. This patchwork of periods would be detrimental to housing finance and the cost and flow of mortgage credit to consumers.

Perhaps more fundamentally, courts have never assumed the role of enforcing a right that has already been extinguished—a role evidently assumed by *Gilbert*. *Gilbert,* 678 F.3d at 277 (stating that, assuming the creditor does not agree to rescission, "the borrower must file a lawsuit so that the court may *enforce the right* to rescind" (emphasis added)). "While the question of the right of

plaintiff to maintain the suit is frequently treated as going to the question of jurisdiction, it goes, in reality, to the right of plaintiff to relief." *Carolina Power & Light Co. v. S.C. Pub. Serv. Auth.*, 94 F.2d 520, 526 (4th Cir. 1938). By virtue of Section 1635(f), a plaintiff suing after the critical three-year mark lacks the "right to relief" necessary to support the suit—whether the borrower sought to privately assert that right before bringing suit or not. *See Rosenfield*, 2012 WL 2087193, at *7; *McOmie-Gray*, 667 F.3d at 1329.

Gilbert casts these principles aside. Instead, the Court noted the absence of any particular words about a timely lawsuit in the statutory or regulatory texts, and then declined to "graft such a requirement [to file suit] upon them."[5] *Gilbert*, 678 F.3d at 277. *But see Rosenfield*, 2012 WL 2087193, at *9 ("Read plainly, these provisions suggest only that the giving of notice is a necessary predicate act to the ultimate exercise of the right, … not that it is sufficient for such exercise."). There is no need to "graft" any additional requirements onto Section 1635(f); Congress

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5 The Court also seemed to rely on Regulation Z. *Gilbert*, 678 F.3d at 277 (citing 12 C.F.R. § 1026.23(a)(2)). Regulation Z does not actually specify how the statute of repose operates; it just provides a method for the borrower to provide notice. And the Court did not use the regulation in the ordinary manner—in the context of basic *Chevron* analysis. *Hosh v. Lucero*, 680 F.3d 375, 378-79 (4th Cir. 2012) (setting for the two-step analysis of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). In any event, if Regulation Z is read to say that notice may toll the statute of repose, then that interpretation would deserve no deference because it would go "beyond the meaning that the statute can bear." *Freeman v. Quicken Loans*, 132 S. Ct. 2034, 2040 (2012) (internal marks omitted).

has done the work already by making Section 1635(f) a statute of repose. "[W]here a statute of repose has been enacted, the time for filing suit is engrafted onto the substantive right created by law." *Goad*, 831 F.2d at 511.

II. *Gilbert*'s Interpretation of Section 1635(f) Will Cause Substantial Harm to Lenders, Borrowers, and Courts.

A. Gilbert *will open the floodgates to meritless litigation.*

Gilbert ensures that courts in the Fourth Circuit will be forced to grapple with rescission suits for years to come. And in the experience of *amici* and their members, TILA rescission claims frequently lack merit. Borrowers often raise such claims on the eve of bankruptcy or in the midst of a foreclosure proceeding in a last ditch effort to avoid enforcement of their obligations. These borrowers rarely have the ability to "return the loan principal" as TILA requires. *Marr v. Bank of Am.*, 662 F.3d 963, 966 (7th Cir. 2011) ("[T]his requirement often has the practical effect of ruling out rescission[.]").[6] Often there is no TILA violation at all. In the context of litigation, these defects may be quickly identified and non-meritorious claims may be dispensed with efficiently. What is more, the requirement of litigation imposes some discipline on potential plaintiffs, requiring

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

them to consider whether it is worth investing time and money in futile claims. Of course, not every rescission claim is unsupported. But applying *Gilbert*'s new reading of Section 1635(f), borrowers will have no disincentive to attempt a meritless rescission; they will be free to file their notice and wait.

Allowing a rescission action to proceed at any juncture without limitation, so long as a notice was filed within three years, creates a perverse incentive for borrowers to "pre-file" a notice of rescission before the three-year period expires. The borrower can now hold that right of rescission indefinitely, until it becomes useful. If, for instance, the lender later chose to foreclose, the borrower might try to assert a tardy recoupment claim (while avoiding the decision in *Beach* by invoking the notice). The lender could not even borrow statutes of limitations from elsewhere to defeat the recoupment claim, as it has long been understood that statutes of limitation generally do not bar the use of stale claims brought defensively. *See, e.g.*, *Bull v. United States*, 295 U.S. 247, 262 (1935). The lender's only option to avoid this problem will be to litigate the matter itself, immediately upon receiving the rescission notice, by bringing its own costly action every time a rescission notice is filed—even if the notice is facially without merit.

B. Gilbert *transforms rescission into an equitable remedy that produces fundamentally inequitable results.*

Rescission in this context is an equitable remedy guided by equitable principles. *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 819 (4th Cir. 2007)

("Although the right to rescind is statutory, it remains an equitable doctrine subject to equitable considerations." (internal marks omitted)); *see also Powers v. Sims and Levin*, 542 F.2d 1216, 1221 (4th Cir. 1976).[7] Courts have also read requirements into TILA rescission that are supported primarily by equitable—rather than textual—considerations. *See, e.g.*, *Shelton*, 486 F.3d at 821 (relying on equitable considerations to hold that courts may condition rescission on demonstration of ability to tender); *accord Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171-73 (9th Cir. 2003).

Congress could not have intended an equitable remedy to create substantial inequities, but that is what *Gilbert* threatens to do. It would only be possible to bring a suit after three years if the borrower completed the rescission via the "timely" notice.[8] (Otherwise, as explained above, the borrower has no right to

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[7] Congress underscored the equitable nature of TILA's rescission provision by empowering courts to develop their own rescission procedures. *See, e.g.*, *FDIC v. Hughes Dev. Co., Inc.*, 938 F.2d 889, 890 (8th Cir. 1991); *Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 n.2 (D.C. Cir. 1982).

[8] Elsewhere, the Consumer Financial Protection Bureau has advanced exactly this argument, recharacterizing rescission suits as quasi-declaratory judgment actions concerning a borrower's unilateral act. But several courts—including this one—held that a unilateral notice of rescission does not automatically rescind a mortgage. *Shelton*, 486 F.3d at 821; *accord Yamamoto*, 329 F.3d at 1172; *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). At least where a lender disagrees with a borrower's (typically unsupported) rescission notice, a borrower has advanced only a *claim* for rescission until the relevant decisionmaker decides whether the conditions for rescission have been met. *Large*, 292 F.3d at 55.

relief at the time of filing suit.) Yet if this were true, the lender's security interest would become instantly void by law, 15 U.S.C. § 1635(b), even if the notice were not valid, *Yamamoto*, 329 F.3d at 1172. This result makes sense in the context of rescission within the three-day "cooling-off period," where the right is unconditional, funds have not been disbursed, and the security interest has not been recorded. But such a result is not equitable after those first three days, when the right becomes conditional, funds have been disbursed, and the security interest recorded. "Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *Shelton*, 486 F.3d at 820-21.

This is not to suggest that Congress left borrowers without *any* remedy after the three years pass; to the contrary: Section 1640(a) specifically contemplates a damage award for a violation of the TILA rescission provision.[9] *See* 15 U.S.C. § 1640(a) (permitting damages for a failure to comply with "any requirement under Section 1635"). Consequently, if a borrower could establish that a creditor wrongfully refused to rescind, the borrower could still receive both actual and statutory damages. But that relief, unlike the rescission right, would not present a

[9] A borrower would be entitled to damages, for instance, if he were able to establish that (a) the lender failed to make a material disclosure, (b) the borrower filed a rescission notice within three years, (c) the borrower had an ability to tender, and (d) the lender did not comply with the rescission requirements.

potential cloud over a property's title for years to come. Congress anticipated that borrowers would receive a measure of relief, but not by warping the rescission right into a never-ending cause of action.

Above all, TILA is an interconnected and comprehensive scheme. *See, e.g.*, *Christ v. Beneficial Corp.*, 547 F.3d 1292, 1297-98 (11th Cir. 2008). Consequently, its provisions should not be given highly technical readings that are divorced from the broader statutory context. Rather, the remedial provisions must be read together. When they are, Congress' intent becomes clear: rescission should be treated as a limited and controlled remedy, while ample other remedies remain available to the borrower. That *Gilbert* creates gross inequities further evidences that it could not have been what Congress intended.

C. Gilbert *upsets the careful balance of remedies found in TILA.*

Gilbert also upsets the delicate balance that Congress struck in the statute. Legislatures often use statutes of repose to strike a "legislative balance" to service the "economic best interest" of the public. *Jones*, 537 F.3d at 327. That balance should not be lightly upset. *U.S. Gypsum*, 882 F.2d at 866 (observing that judicial manipulation of a statute of repose "would upset the economic balance struck by the legislative body"). This is especially so in the TILA context, where Congress has taken special care to balance competing purposes and deliberately limited certain remedies to achieve that balance. *See, e.g.*, *Turner v. Beneficial Corp.*, 242

F.3d 1023, 1025 (11th Cir. 2001) ("Congress has amended TILA to ensure that it provides for a fair balance of remedies.").

Congress crafted the right of rescission to give borrowers a limited chance to reconsider their decision to enter into certain credit transactions involving their homes. Rescission, however, is a "restorative rather than compensatory remedy." *Rosenfield*, 2012 WL 2087193, at *9; *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008). It was not designed for recurrent use. In fact, Congress enacted higher "tolerance" levels for TILA disclosure violations in 1995 partly because it was concerned that rescission, the "most draconian remedy available under [TILA]," had become too common and threatened too much liability on the lenders. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007) (quotation marks omitted).

By extending indefinitely the length of time during which a borrower could rescind, *Gilbert* pushes this "draconian remedy" beyond the balance of interests carefully struck by Congress. Because rescission is effectively an "interest-free loan[,] … the longer one allows the right of rescission to be exercised, the greater the benefit to the consumer, and the greater the penalty to the creditor." Daniel Rothstein, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L. Rev. 633, 657 (1994). By permitting a borrower to rescind upon notice, the borrower can pre-file a notice and then—years later—seek the return of all

their payments and interest, having lived rent-free at the expense of the lender. This disrupts both the equipoise Congress intended and the long-established expectations of the participants in our nation's housing finance market.

D. Gilbert *increases uncertainty, litigation costs, and risk, resulting in higher costs for borrowers.*

Gilbert will increase uncertainty and risk in the marketplace. *See Rosenfield*, 2012 WL 208713, at *10 ("Allowing uncertainty of title to drag on past the already-generous three-year repose period would run counter to the commercial-certainty concerns of Congress."). Even the logistics of effecting a rescission by notice creates uncertainty; a borrower's notice might be lost or misdirected and a lender might never become aware of the purported rescission. A lender or subsequent holder can never be confident that its security interest was clear and might always face the prospect of being reduced to unsecured status.

Uncertainty has real consequences for the lending market. The secondary mortgage market can only deliver a steady supply of reasonably-priced loans if securitizers and investors can be certain that loans are valid and enforceable.[10] Likewise, buyers will only be willing to purchase homes coming out of foreclosure

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

if they can be confident that they are taking clear title. But *Gilbert*'s approach to rescission will "cloud the bank's title on foreclosure." *Beach*, 523 U.S. at 418.

Gilbert will increase the costs to lenders and their assignees on every loan in other ways; these costs will be borne by borrowers at the closing table. Lenders, for instance, should incur additional litigation expenses. Litigation will increase not just between lenders and borrowers, but also between (a) lenders themselves; (b) secondary market participants and lenders; and (c) home buyers and home sellers. And TILA rescission serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan. Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69, 79 (2011). *Gilbert* expands both the reach and the potential payout of the insurance, further increasing costs.

CONCLUSION

The law is clear as to how the statute of repose limiting the rescission remedy should operate; practical and equitable considerations counsel the same result. The district court should be affirmed and *Gilbert* put aside.

Respectfully Submitted,

/s Michael R. Williams

Michael R. Williams
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-8030 (Telephone)
(202) 349-8080 (Facsimile)

Of Counsel:
Jeffrey P. Naimon
Kirk D. Jensen
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-8030 (Telephone)
(202) 349-8080 (Facsimile)

Attorneys for American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on June 29, 2012 via ECF on the following counsel:

Ivan Yacub
Suite 201
307 Annandale Road
Falls Church, VA 22042-0000

Syed Mohsin Reza
Billy Bernard Ruhling, II
Mary Catherine Zinsner
TROUTMAN SANDERS, LLP
Suite 600
1660 International Drive
Tysons Corner
McLean, VA 22102-3805

/s Michael R. Williams
Michael R. Williams