No. 21-35892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Donald E. McCoy III and Maximiliano Olivera, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

v.

Wells Fargo Bank, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon

Case No. 20-cv-00176

Hon. Mark D. Clarke

Brief of *Amicus Curiae* Consumer Financial Protection Bureau in Support of Plaintiffs-Appellants

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QUESTIONS PRESENTED

1. Section 1024.36 of Regulation X requires mortgage servicers to respond when a borrower submits a request for information that "states the information the borrower is requesting with respect to the borrower's mortgage loan." 12 C.F.R. § 1024.36(a). Does this provision require a servicer to respond to a borrower's letter requesting information about the borrower's mortgage loan, including when the request does not relate specifically to the servicing of that loan?

2. Section 1024.35 of Regulation X requires mortgage servicers to respond when a borrower submits a written notice that asserts a "covered error," which that section defines to include the "[f]ailure to provide an accurate payoff balance amount upon a borrower's request in violation of [Regulation Z]." 12 C.F.R. § 1024.35(b)(6). Does this provision require a servicer to respond to a borrower's written notice that asserts that the servicer violated Regulation Z by refusing to provide any payoff balance whatsoever after receiving the borrower's request?

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau is an independent agency of the United States charged with promulgating rules and issuing interpretations under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, as well as enforcing the statute's requirements. 12 U.S.C. §§ 2617, 5512(b), 5564(a); *see also id.* § 5481(12), (14) (including RESPA in the list of "Federal consumer

financial laws" that the Bureau administers). The Bureau's rules implementing RESPA are known as Regulation X. *See* 12 C.F.R. pt. 1024.

This case concerns the scope of mortgage loan servicers' obligations to respond to written inquiries from borrowers regarding their mortgage loans under RESPA and Regulation X. As the agency responsible for interpreting, implementing, and enforcing those obligations, the Bureau has a substantial interest in this Court's resolution of the questions presented in this appeal.

STATEMENT

A. Statutory and Regulatory Background

1. Since 1990, Section 6(e) of RESPA has required mortgage servicers to respond to "qualified written request[s]"—correspondence from borrowers that seeks information about a mortgage loan or requests that an error with the loan be corrected. *See* Pub. L. No. 101-625, 104 Stat. 4079, 4408–09 (1990) (codified at 12 U.S.C. § 2605(e)). The Department of Housing and Urban Development ("HUD"), which then administered RESPA, implemented Section 6 through Regulation X. 56 Fed. Reg. 19506 (Apr. 26, 1991).

In the wake of the 2008 financial crisis, Congress substantially amended RESPA and the requirements it imposes on servicers. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1463, 124 Stat. 1376 (2010). Among other things, the Dodd-Frank Act revised and expanded

servicers' obligations to respond to borrower inquiries: It shortened the time period for complying with the preexisting requirement to respond to qualified written requests for information, *id.* § 1463(c) (codified at 12 U.S.C. § 2605(e)), and also separately required servicers "to respond within 10 business days to a request from a borrower [for] the identity, address, and other relevant contact information about the owner or assignee of the loan," *id.* § 1463(a) (codified at 12 U.S.C. § 2605(k)(1)(D)). The Dodd-Frank Act also transferred authority to implement and enforce RESPA from HUD to the Bureau, *id.* § 1061(b)(7), and it required servicers "to comply with any other obligation" that the Bureau finds, "by regulation, to be appropriate to carry out the consumer protection purposes of [RESPA]," *id.* § 1463(a) (codified at 12 U.S.C. § 2605(k)(1)(E)).

2. In 2013, the Bureau implemented the Dodd-Frank Act's new provisions on mortgage servicing by amending Regulation X. 78 Fed. Reg. 10696 (Feb. 14, 2013) ("2013 Rule") (eff. Jan. 10, 2014). In issuing the 2013 Rule, the Bureau recognized that, in enacting and amending RESPA, Congress aimed "to establish servicers' duties" to "respond[] to borrower requests and complaints in a timely manner" and to "maintain[] and provid[e] accurate information." 78 Fed. Reg. at 10709. The Bureau further found that, in the modern mortgage market where ownership of a loan frequently changes hands after origination, *id.* at 10699,

servicers are "as a practical matter, monopoly providers of information to consumers" about their loans, *id.* at 10843 n.197.

At the same time, servicers "compete to obtain business from the owners of loans" rather than from borrowers, so are "generally not subject to market discipline from consumers," who "have little opportunity to switch servicers." *Id.* at 10700. Absent regulation, servicers' general incentive was thus to "lower the price of servicing" they charged to loan owners while "look[ing] for opportunities to impose fees on borrowers." *Id.* As relevant here, the market at the time pushed servicers to charge captive borrowers fees for services like responding to their inquiries or providing requested information, *id.*, but not to "invest sufficiently in providing robust error resolution procedures" or "robust procedures for addressing information requests from borrowers," *id.* at 10848. Borrowers require information about their loans in a wide range of circumstances: For instance, they may simply need to "verify[] that payments were received or taxes and insurance were paid from escrow" to assure they avoid negative consequences, *id.*, or they may be facing potential foreclosure and need information about potential loan modification, *id.* at 10700. But before the 2013 Rule, the market encouraged servicers to make it difficult or costly (or both) for borrowers to get even easy questions answered.

Of course, the problems created by the lack of market incentives to invest in borrower-facing functions like responding to borrowers' inquiries were particularly acute for borrowers who fell behind on payments. When the 2008 financial crisis erupted, consumers facing the loss of their homes also often faced "servicers who have misled, or failed to communicate with, borrowers, lost or mishandled borrower-provided documents supporting loan modification requests, and generally provided inadequate service to delinquent borrowers." *Id*. at 10701. One study reported that over 27,000 out of 48,000 complaints to the HOPE Hotline (which offers advice from housing counseling agencies approved by HUD) between late June 2009 and mid-April 2010 were from borrowers "who could not reach their servicers and obtain information about the status of applications they had submitted for options to avoid foreclosure." *Id.* at 10700.

The 2013 Rule therefore addressed, among other things, servicers' obligations to provide information requested by borrowers and to correct errors asserted by them. *Id.* at 10752–62. Before the amendments made in the 2013 Rule, Regulation X obligated servicers to respond to such inquiries only when the borrower submitted a qualified written request for information "relating to the servicing" of the borrower's loan. 76 Fed. Reg. 78978, 78997 (Dec. 20, 2011). "Servicing" is defined in RESPA and Regulation X as the receipt of payments from the borrower and making of payments to the loan's owner or other third

parties pursuant to the loan agreement. 12 U.S.C. § 2605(i)(3); 12 C.F.R. § 1024.2(b). But servicers are often the best (if not only) source for borrowers to obtain information about their loans, 78 Fed. Reg. at 10843 n.197, whether or not such information relates specifically to servicing as so defined.

Accordingly, § 1024.36 of the 2013 Rule broadened servicers' obligations such that they must now respond to requests for information "with respect to the borrower's mortgage loan," 12 C.F.R. § 1024.36(a), including those "that do not specifically relate to 'servicing,'" 78 Fed. Reg. at 10761. The Bureau found that requiring servicers to respond to this "expanded universe" of information requests, *id.*, was appropriate to "achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information," *id.* at 10753. To clarify that § 1024.36 created a unified requirement for servicers to respond to all written requests for information from borrowers—including both qualified written requests "relating to the servicing" of a loan and other requests—the Bureau "ma[d]e clear in the final rule that a qualified written request that requests information relating to the servicing of a mortgage loan is a request for information for purposes of § 1024.36." *Id.* at 10753. It also adopted an interpretive comment clarifying that "[a] qualified written request is just one form that a written … information request may take," and that the requirements of § 1024.36 apply

"irrespective of whether the servicer receives a qualified written request." 12 C.F.R. pt. 1024, Supp. I ¶ 31, *Qualified Written Request* at 2.

Section 1024.36 thus generally requires a servicer to respond to "any written request for information from a borrower that includes the name of the borrower, information [sufficient] to identify the borrower's mortgage loan account, and states the information the borrower is requesting with respect to the borrower's mortgage loan." 12 C.F.R. § 1024.36(a). Section 1024.36(a) establishes two exceptions to this requirement: Servicers need not respond to requests made "on a payment coupon or other payment form supplied by the servicer" or to requests "for a payoff balance." *Id.* (stating a request of either type "need not be treated by the servicer as a request for information").[1] When a servicer receives "any" other "written request for information . . . with respect to [a] borrower's mortgage loan," including but not limited to "[a] qualified written request that requests information relating to the servicing of the mortgage loan," it must comply with § 1024.36's requirements for responding to the request. *Id.*

[1] The 2013 Rule explains that the Bureau excluded payoff requests from the scope of § 1024.36 because "borrowers already have a mechanism by which to request payoff balances" for home loans covered by § 1026.36(c)(3) of Regulation Z. 78 Fed. Reg. at 10755. The Bureau declined to expand the scope of servicers' obligations to require them to also provide payoff balances for the largely overlapping but distinct category of loans covered by section 6 of RESPA. *Id.*

Typically, complying with § 1024.36 means promptly acknowledging an information request, 12 C.F.R. § 1024.36(c), and then timely providing the requested information or explaining why it is unavailable, *id.* § 1024.36(d). But the specific regulatory requirements differ for different types of requests. For instance, mirroring the statutory requirement specifically imposed on requests for the identity and contact information for "the owner or assignee of a mortgage loan," 12 U.S.C. § 2605(k)(1)(D), § 1024.36 requires a servicer to respond to such requests within 10 days, 12 C.F.R. § 1024.36(d)(2)(i)(A), but gives 30 days to respond to "all other requests for information," *id.* § 1024.36(d)(2)(i)(B). In addition, § 1024.36(f) permits servicers to decline to provide some or all requested information in certain circumstances, such as where a request is duplicative of a request to which the servicer has already responded; seeks confidential, privileged, or proprietary information; seeks information "not directly related to" the borrower's account; or is overbroad or unduly burdensome. 12 C.F.R. § 1024.36(f)(1). But in such cases, the servicer must still timely notify the borrower that it has determined that it need not respond under a § 1024.36(f) exception. *Id*. § 1024.36(f)(2). And where an information request is overbroad or unduly burdensome, the servicer still must comply with the normal requirements to acknowledge and respond substantively to the request "to the extent [the] servicer

can reasonably identify a valid information request" within the submission. *Id.* § 1024.36(f)(1)(iv).

The 2013 Rule also defined servicers' obligations to respond to borrower notices of error in § 1024.35, which "parallel" the requirements for information requests under § 1024.36. 78 Fed. Reg. at 10736; *see also* 12 C.F.R. § 1024.35(d)-(g). Under § 1024.35, servicers must respond to notices that assert one of ten specifically enumerated types of covered errors, *id.* § 1024.35(b)(1)-(10), or some "other error relating to the servicing of [the] borrower's mortgage loan," *id*. (11). As particularly relevant here, because the Bureau found that servicers had previously "failed, or refused, to provide payoff statements to certain borrowers," 78 Fed. Reg. at 10742, it specifically included in the ten enumerated categories of covered errors the "[f]ailure to provide an accurate payoff balance upon a borrower's request in violation of [Regulation Z]," *id.* at 10878 (codified at 12 C.F.R. § 1024.35(b)(6)).

In the 2013 Rule, the Bureau also clarified that servicers should look to "[s]ubstance [o]ver [f]orm" when determining whether a submission from a borrower constitutes an information request requiring response under § 1024.36, a notice of error requiring a response under § 1024.35, or both. 78 Fed. Reg. at 10737. "A servicer should not rely solely on the borrower's description of a submission." 12 C.F.R. pt. 1024, Supp. I ¶ 35(a)-2. Instead, a servicer must

"evaluate whether the letter fulfills the substantive requirements" of either or both categories of inquiry. *Id.*

B. Factual and Procedural Background

1. Plaintiff Donald E. McCoy III is a borrower whose mortgage loan is currently serviced by Wells Fargo, ER-029, and was at all relevant times the subject of a separate foreclosure litigation, ER-007-009. On April 4, 2018, McCoy sent through his counsel three letters to Wells Fargo seeking information about his mortgage loan. One (McCoy's "Payoff Request") invoked Regulation Z and requested a payoff statement for his mortgage loan. ER-045-046. The other two invoked Regulation X and requested (1) the identity and contact information for his loan's owner or assignee, current servicer, and master servicer (McCoy's "Ownership Request"), ER-047-049, and (2) miscellaneous other information and documents about his loan (McCoy's "Miscellaneous Information Request"), ER-050-052.

Wells Fargo sent no response, so on May 9, 2018, McCoy sent (again through counsel) three new letters labeled "Notice[s] of error(s)," ER-053-079, complaining about Wells Fargo's failure to respond. Wells Fargo ultimately responded on May 25, 2018 with a letter that referenced the pending foreclosure action regarding McCoy's loan and stated: "We won't be providing a response to

your inquiry because the issues raised are the same or very closely related to the issues raised in the pending litigation." ER-082.

On June 14, 2018, McCoy then sent (again through counsel) another letter labeled as a "Notice of error," which complained about Wells Fargo's failure to provide the information requested in McCoy's prior Miscellaneous Information Request and asked Wells Fargo to "provid[e] the information requested." ER-086-088. On August 15 and 16, McCoy sent two additional letters also labeled as "Notice[s] of error." ER-094-122. The first stated "[t]here is no litigation exception to [Wells Fargo's] obligation to respond to [a notice of error] pursuant to 12 C.F.R. § 1024.35," ER-096, and both asserted that Wells Fargo had not properly responded to his prior complaints raising Wells Fargo's failure to respond to his initial requests, ER-094-096, 107-111. Wells Fargo did not respond. ER-041.

2. Plaintiff Maximiliano Olivera is likewise a borrower whose mortgage loan is currently serviced by Wells Fargo, ER-029, and was at all relevant times the subject of a separate foreclosure litigation, ER-008, 010-011. On September 9, 2019, Olivera sent through counsel two letters invoking Regulation X and seeking information about his mortgage loan—one seeking copies of broker's price opinions performed or obtained for his mortgage loan and another (Olivera's

"Ownership Request") seeking the identity and contact information for the owner or assignee, current servicer, and master servicer of Olivera's loan. ER-127-130.[2]

On September 25, 2019, Wells Fargo responded with a letter like the one it had previously sent to McCoy, similarly refusing to provide the requested information "because the issues raised are the same or very closely related to the issues raised in" the pending foreclosure action regarding Olivera's loan. ER-133. On October 28, Olivera responded through counsel with a letter labeled as a "Notice of error," which complained that Wells Fargo had improperly refused to provide the requested information on that basis. ER-135. Wells Fargo did not respond. ER-041.

3. On January 31, 2020, McCoy and Olivera filed a putative class action in the District of Oregon. D. Ct. Docket No. 1 ¶¶ 60–86. The operative complaint asserts claims for violations of RESPA and Regulation X based on Wells Fargo's failure to respond to their various Requests and subsequent complaints. ER-040-042. The magistrate judge issued a Findings and Recommendation recommending

[2] Olivera's Ownership Request also included a statement that it was "also a written request for a payoff statement" and, like McCoy's Payoff Request, referenced Regulation Z. ER-130. However, neither party addressed below this aspect of Olivera's Ownership Request, and neither did the district court. *See* ER-036; D. Ct. Docket No. 35 at 17; ER-011. The Bureau therefore similarly declines to address it.

granting Wells Fargo's motion to dismiss, ER-014-019, which the district court adopted in full, ER-004.

The district court dismissed the plaintiffs' claims because it concluded that none of the plaintiffs' letters triggered Wells Fargo's obligations to respond under Regulation X. The court first noted that, under this Court's precedent interpreting section 6(e) of RESPA, "a mortgage loan servicer only has an obligation to provide a written response to a [qualified written request] that seeks 'information relating to the servicing of such loan.'" ER-012 (citing 12 U.S.C. § 2605(e)(1)(A)); *see also id.* (citing *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012)). The court further noted that § 1024.36(a) of Regulation X in turn states that such a qualified written request "is a request for information," *id.* (quoting 12 C.F.R. § 1024.36(a)). The court concluded that this statutory and regulatory language meant that, under Regulation X, a servicer has a "duty to respond" only if a request for information "relates to the servicing of the loan." *Id.* The court noted that the inquiries "were sent . . . after each plaintiff's mortgage loan had already entered foreclosure litigation." ER-015. In the court's view, all of the information requests related only to McCoy's and Olivera's "challenge[s] of the foreclosure[s] and the validity of the loan[s], not to servicing." ER-014-018. The district court also separately held that section 6(k)(1)(D) of RESPA, which requires servicers to respond to a borrower's request for "the identity, address, and other relevant

contact information about the owner or assignee" of the borrower's mortgage loan, 12 U.S.C. § 2605(k)(1)(D), did not require Wells Fargo to respond to McCoy's and Olivera's Ownership Requests because they did not "relate to servicing of the loan." ER-013.

The court similarly concluded that servicers need only respond to notices that assert "errors pertaining to loan servicing," and "cannot be used simply to assert the failure to respond to a[] [request for information]." ER-013 (cleaned up). It further found that none of McCoy's or Olivera's inquiries pertained to a covered error or otherwise related to servicing. ER-014-016, 018. In reaching that conclusion, the court separately addressed in a footnote § 1024.35(b)(6), which makes a covered error the "[f]ailure to provide an accurate payoff balance upon a borrower's request in violation of [Regulation Z]." 12 C.F.R. § 1024.35(b)(6). The court held that this provision applies only where the notice "identif[ies] an error or an inaccuracy in a payoff statement provided." ER-018 n.2. Because McCoy's complaint about his Payoff Request asserted instead that Wells Fargo failed to provide any payoff balance at all, the Court held it was "not an actionable [notice of error]." *Id.*

SUMMARY OF ARGUMENT

Under § 1024.36 of Regulation X, servicers generally must respond to "any written request for information from a borrower" that seeks "information . . . with

respect to the borrower's mortgage loan." 12 C.F.R. § 1024.36(a). Although "a qualified written request that requests information relating to the servicing of the mortgage loan" is such a request, *id.*, it is just one type of request that seeks information "with respect to" a loan and thereby triggers a servicer's obligation to respond under § 1024.36. In holding that servicers may ignore § 1024.36's requirements unless a request seeks information relating specifically to the servicing of a loan, not just information "with respect to" the loan itself, the district court incorrectly equated a servicer's obligation to respond to information requests under that regulation with what this Court has held is a servicer's narrower duty to respond to "qualified written requests" under section 6(e) of RESPA (codified at 12 U.S.C. § 2605(e)). *See Medrano*, 704 F.3d at 666–67.

Under § 1024.35 of Regulation X, servicers likewise must respond when a borrower submits a notice of error asserting that the servicer failed to provide the borrower a payoff statement as required under Regulation Z. The "[f]ailure to provide an accurate payoff balance amount upon a borrower's request in violation of [Regulation Z]" is a specifically enumerated "covered error[]" to which servicers must respond under § 1024.35 of Regulation X. 12 C.F.R. § 1024.35(b), (b)(6). Where a servicer fails to provide any payoff balance at all, it "fail[s] to provide an accurate" one. A borrower's assertion of that error thus triggers the servicer's obligations to respond as required by § 1024.35.

Finally, to the extent that the Court finds either § 1024.36 or § 1024.35 of Regulation X to be ambiguous, it should defer to the Bureau's reasonable and long-standing understanding of the scope and application of those provisions.

ARGUMENT

I. Section 1024.36 of Regulation X requires servicers to respond to a borrower's request for information "with respect to" the borrower's mortgage loan even if the request does not relate specifically to servicing.

Section 1024.36 of Regulation X requires a servicer to respond to requests for information about a borrower's mortgage loan, regardless of whether that information relates specifically to servicing. The text of the provision makes that clear:

> A servicer shall comply with the requirements of this section for any written request for information from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and *states the information the borrower is requesting with respect to the borrower's mortgage loan*.

12 C.F.R. § 1024.36(a) (emphasis added). Section 1024.36 thus broadly requires servicers to respond to requests that seek information "with respect to" a borrower's mortgage loan. 12 C.F.R. § 1024.36(a). "Respect" means "a relation to or concern with something." Webster's Third New International Dictionary 1934 (2002); *see also Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (construing "with respect to" to mean "concern[ing]"). Accordingly, as the Bureau explained when it issued the 2013 Rule, § 1024.36 "does not limit information

requests to those related to servicing," 78 Fed. Reg. at 10761, but instead generally applies to borrowers' requests for information concerning their mortgage loans.

The regulation carves out two specific exceptions from the general obligation to respond to "request[s] for information," 12 C.F.R. § 1024.36(a), but neither exception is based on whether a request relates to servicing. If a request is "on a payment coupon or other payment form supplied by the servicer" or "for a payoff balance," then it "need not be treated by the servicer as a request for information" under § 1024.36. *Id*. But if a borrower sends "*any*" other type of request for information "with respect to" the borrower's mortgage loan, the servicer must "comply with the requirements of" § 1024.36. *Id.* (emphasis added); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S 214, 218–19 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (cleaned up)).

In concluding that § 1024.36 requires a servicer to respond only to an information request that "relates to . . . servicing," ER-012, the district court disregarded the text of Regulation X and instead applied language from section 6(e) of RESPA, 12 U.S.C. § 2605(e), which this Court has held requires a servicer to respond to a qualified written request only "if it requests . . . 'information relating to the servicing of [a] loan,'" *Medrano*, 704 F.3d at 665 (citing 12 U.S.C. § 2605(e)(1)(A), (e)(2)). But whether section 6(e) of RESPA, which predates the

2013 Rule, only requires servicers to respond to qualified written requests for information relating to the servicing of a loan is beside the point here, because the issue in this case is what obligations a servicer has under Regulation X's provision governing requests for information, 12 C.F.R. § 1024.36.[3] To be sure, under that regulation, "a qualified written request that requests information relating to the servicing of the mortgage loan is a request for information" governed by § 1024.36. ER-012 (quoting 12 C.F.R. § 1024.36(a)). The Bureau included explicit language to that effect in the 2013 Rule to make clear that the rule created a unified set of requirements such that servicers' obligations to respond were the same for a qualified written request as for any other information request. *See* 78 Fed. Reg. at 10753. But the Bureau did not exclude information requests that do not relate to servicing from the scope of § 1024.36 as it did with payoff requests. 12 C.F.R. § 1024.36(a). To the contrary, the Bureau made clear that a qualified written request seeking information related to servicing is "just one form that [an] . . . information request may take." *Id*. pt. 1024, Supp. I ¶ 31, *Qualified Written Request* at 2; *see also* 78 Fed. Reg. at 10753. Section 1024.36 thus requires servicers to "respond to an *expanded* universe of information requests, including requests for information that do not specifically relate to 'servicing.'" 78 Fed. Reg.

[3] Section 1024.36 rules for responding to borrowers' information requests were adopted not only under section 6(e) of RESPA, but also sections 6(k)(1)(B), (D), and (E). 78 Fed. Reg. at 10753; *see also* 12 U.S.C. § 2605(e), (k)(1)(B), (D), (E).

at 10761 (emphasis added); *see also* 12 C.F.R. pt. 1024, Supp. I, *Qualified Written Request* at 2 ("[T]he information request requirements in . . . [§ 1024.36] apply . . . irrespective of whether the servicer receives a qualified written request.").

Here, Wells Fargo does not dispute that each of McCoy's and Olivera's initial information requests sought information "with respect to," *i.e.*, concerning, their respective mortgage loans. And while McCoy's Payoff Request fell within the exception for "request[s] for a payoff balance" that took it outside the scope of § 1024.36, 12 C.F.R. § 1024.36(a), no such exception applied to any of McCoy's and Olivera's other Requests.[4] Wells Fargo was thus obliged to "comply with [§ 1024.36's requirements]" when it received each of those other Requests whether or not the information requested therein "with respect to" McCoy's and Olivera's mortgage loans also related specifically to the loans' servicing.[5]

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[4] As McCoy and Olivera correctly noted in their letters to Wells Fargo, ER-096, 135, there is no litigation exception to a servicer's obligation to respond to information requests under Regulation X. 12 C.F.R. § 1024.36(a) (not including requests made in the context of litigation in identifying requests that "need not be treated . . . as a request for information" under § 1024.36); *see also generally* 12 C.F.R. § 1024.36(f) (specifying requests—not including requests made in the context of litigation—for which the servicer may notify the requesting borrower that § 1024.36 does not require the servicer to provide some or all requested information); *see also Schmidt v. Wells Fargo Bank, N.A.*, No. 2:17-cv-01708, 2019 WL 4943756, at *2 (D.N.J. Oct. 8, 2019) (declining to "read a 'litigation exception' into [RESPA]").

[5] The Bureau takes no position here as to whether McCoy's and Olivera's Requests sought information "relating to the servicing" of their mortgage loans. This Court has previously held that, under 12 U.S.C. § 2605(e), qualified written requests

Further, in concluding that Wells Fargo had no duty to respond to McCoy's and Olivera's Ownership Requests, *see* ER-017-018, the district court disregarded particularly relevant statutory and regulatory text. When amending RESPA through the Dodd-Frank Act, Congress specifically prohibited servicers from "fail[ing] to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan," 12 U.S.C. § 2605(k)(1)(D). Section 1024.36 reiterates that requirement. 12 C.F.R. § 1024.36(d)(2)(i)(A); *see also* 78 Fed. Reg. at 10753. The district court nevertheless held that such information does not pertain to servicing and therefore does not trigger a servicer's obligation to respond. ER-013, 017. But this holding would mean RESPA's statutory requirement that servicers respond to requests for information about a loan's owner or assignee (along with Regulation X's implementation of that mandate) has no

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addressing issues "like a loan's validity or its terms" or the "modification of a loan agreement" do not "relat[e] to the servicing" of a loan. *Medrano*, 704 F.3d at 667. The Bureau respectfully submits that this unduly restricts the scope of information "relating" to servicing to the far narrower category of information about issues "in" the servicing of a loan. *Cf. Naimoli v. Ocwen Loan Servicing, LLC*, 22 F.4th 376, 386, 383 (2d Cir. 2022) ("[Section 1024.35] does not limit [§ 1024.35(b)(11)'s] application to errors 'in' the servicing of a consumer loan, which would mean that only errors directly involved with loan servicing would be covered."). However, because 12 C.F.R. § 1024.36 does not limit information requests to those seeking information relating specifically to servicing, *Medrano*'s narrow construction of when an inquiry "relates to servicing" under 12 U.S.C. § 2605(e) has no application here.

effect—violating "one of the most basic interpretive canons, that a statute or regulation should be construed . . . so that no part will be inoperative or superfluous, void or insignificant." *See United States v. Grandberry*, 730 F.3d 968, 981 (9th Cir. 2013).

II. Section 1024.35 of Regulation X requires a servicer to respond to a borrower's notice of error that asserts the servicer did not provide any payoff balance in response to a borrower's request under Regulation Z.

Regulation X also requires a servicer to respond when a borrower writes to assert that the servicer committed an error in failing to provide a payoff statement as required by Regulation Z. In particular, § 1024.35 of Regulation X requires a servicer to respond to a borrower's written notice if it asserts a "covered error," 12 C.F.R. § 1024.35(b), which the provision defines to include the "[f]ailure to provide an accurate payoff balance amount upon a borrower's request in violation of [Regulation Z]." *Id.* § 1024.35(b)(6). The district court, however, held that a notice of error complaining that a servicer did not provide a payoff statement at all does not "pertain to the list of errors enumerated in 12 C.F.R. § 1024.35(b)." ER-012. The district court apparently agreed with Wells Fargo's argument that "Regulation Z is the sole source of servicer's [sic] obligations concerning payoff statement [sic]." D. Ct. Docket No. 37 at 16 (cleaned up); *see also* ER-018 n.2. The district court reasoned that § 1024.35 therefore does not govern notices that assert

the "failure to respond to an inquiry," but only notices that "identify an error or an inaccuracy in a payoff statement provided." *Id*.

That would make sense if the Bureau had written § 1024.35(b)(6) to cover the "provision of an inaccurate payoff balance," but that is not what the Bureau did. The provision's text identifies as a covered error the "[f]ailure to provide an accurate payoff balance," which by its terms includes the failure to provide a payoff balance at all. To be sure, it is Regulation Z, not Regulation X, that requires servicers to respond to a borrower's initial request for a payoff balance. But if the servicer fails to comply with Regulation Z, whether by providing an inaccurate payoff statement or failing to provide one altogether, the servicer has committed an error covered by § 1024.35(b)(6) of Regulation X. Section 1024.35(b)(6) thus reaches any situation in which a borrower asserts that the servicer failed to respond to a payoff request as required by Regulation Z. *See* 12 C.F.R. § 1026.36(c)(3).

Any remaining doubt as to the provision's scope is resolved by the preamble to the 2013 Rule. The Bureau specifically noted there that § 1024.35(b)(6) was intended to address situations in which servicers had "failed, or refused, to provide payoff statements to certain borrowers." 78 Fed. Reg. at 10742. It further explained that "borrowers require accurate payoff statements to manage their mortgage loan obligations," and a servicer's refusal to provide them "has the perverse effect of impeding a borrower's ability to pay a mortgage loan obligation in full." *Id*. Of

course, when servicers refuse or fail to provide any payoff statements at all, borrowers are left without the "accurate payoff statements [necessary] to manage their mortgage loan obligations" just as much as if the servicer provided inaccurate statements.[6] The district court's strained construction thus rewrites § 1024.35(b)(6) so that it no longer addresses a problem the provision was specifically intended to solve.[7]

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[6] The district court appeared to find it significant that Regulation Z provides what it characterized as "an indeterminate timeline for responding to a payoff request when the loan is in foreclosure" as McCoy's loan was at the time of his complaint about Wells Fargo's failure to properly respond to his Payoff Request. ER-018 n.2; *see also* 12 C.F.R. § 1026.36(c)(3) (requiring payoff statement to be provided "within a reasonable time"). But Regulation Z's specific requirements for payoff requests under different circumstances are relevant only to determining whether McCoy *correctly* asserted that Wells Fargo's failure to provide a payoff statement violated Regulation Z. Rightly or wrongly, McCoy "assert[ed]" in his complaint a "covered error" he "believe[d] had occurred," 12 C.F.R. § 1024.35(a), (b), so Wells Fargo was required to investigate and respond under § 1024.35 even if McCoy was mistaken, *see id.* § 1024.35(e)(1)(i)(B).

[7] Wells Fargo was also obligated to respond to Plaintiffs' other letters labeled as "notices of error," *i.e.*, those that did not relate to McCoy's Payoff Request. While neither party nor the district court addressed this issue below, those other complaints appear to be, in substance, information requests under § 1024.36(a) and thereby triggered anew Wells Fargo's obligations to respond under § 1024.36. The 2013 Rule advises servicers not to "rely on the borrower's characterization" in determining how to respond to a particular inquiry, and instructs servicers to instead "evaluate whether the letter fulfills the substantive requirements of a notice of error, information request, or both." 12 C.F.R. pt. 1024, Supp. I ¶ 35(a)-2. Here, the other complaints asserted as errors Wells Fargo's various failures to properly acknowledge or respond to McCoy's and Olivera's initial information requests that did not seek payoff balances. *See, e.g.*, ER-135. When a notice of error complains that a servicer did not properly respond to a prior information request, that is in substance a new information request under § 1024.36 because correcting such an

III. To the extent the Court finds Regulation X ambiguous, the Bureau's interpretations of Sections 1024.35 and 1024.36 are entitled to deference.

To the extent the Court finds Regulation X ambiguous, the Bureau's interpretations of §§ 1024.35 and 1024.36 as contained in the preamble to the Bureau's rules are entitled to deference under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *See Goffney v. Becerra*, 995 F.3d 737, 746–47 (9th Cir. 2021) (applying *Kisor* to grant deference to interpretation by the Department of Health and Human Services of ambiguous Medicare rule).

First, the Bureau's interpretations are reasonable. For all the reasons discussed above, the Bureau's construction of Regulation X's requirements concerning information requests and notices of error fall well "within the bounds of reasonable interpretation" in light of the regulation's text, structure, and history. *Kisor*, 139 S. Ct. at 2416.

Second, the "character and context" of the Bureau's interpretations "entitle[them] to controlling weight" in light of each of the markers the Supreme Court has identified for deciding when deference is appropriate. *Id.* The Bureau's interpretations of §§ 1024.35 and 1024.36 squarely "implicate its substantive

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error means providing the requested information. Because Wells Fargo was obligated to respond to McCoy's and Olivera's other complaints under § 1024.36, the Bureau takes no position on whether those complaints also constitute "notices of error" triggering a servicer's separate obligations to respond as required by § 1024.35.

expertise." *Id.* at 2417. Interpreting the scope of §§ 1024.35's and 1024.36's application to different types of borrower inquiries implicates a number of significant policy questions concerning the regulation of the mortgage servicing market and the right of borrowers to obtain information and to seek correction of errors about their mortgage loans from servicers they have no practical ability to choose. Likewise, the Bureau's interpretations—in Federal Register notices signed by the Bureau's Director—"authoritative[ly]" reflect the Bureau's "fair and considered judgment." *Id.* at 2416–17; *see also id.* at 2417 n.6 (noting that in *Auer v. Robbins*, 519 U.S. 452 (1997) the Court deferred to an agency interpretation presented in a brief where the agency "was not a party to the litigation" but instead participated as an amicus curiae).

CONCLUSION

For the foregoing reasons, the Court should hold that § 1024.36 of Regulation X requires a servicer to respond when it receives a borrower request for information "with respect" to the borrower's mortgage loan even if the requested information does not relate specifically to servicing. The Court should also hold that § 1024.35 of Regulation X requires a servicer to respond to a borrower's letter

asserting that the servicer did not respond at all to the borrower's prior request for a payoff balance in violation of Regulation Z.

Respectfully submitted,

April 4, 2022

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