No. 20-1683

In the United States Court of Appeals
for the Second Circuit

KIM NAIMOLI,
Plaintiff-Appellant,
v.
OCWEN LOAN SERVICING, LLC,
Defendant-Appellee.

On Appeal from the
United States District Court for the Western District of New York
Hon. Elizabeth A. Wolford
Case No. 6:18-cv-06180

BRIEF OF *AMICUS CURIAE*
CONSUMER FINANCIAL PROTECTION BUREAU

Stephen Van Meter
Acting General Counsel
Steven Y. Bressler
Acting Deputy General Counsel
Laura M. Hussain
Assistant General Counsel
Christopher Deal
Senior Counsel
Domenic R. Powell
Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9582 (telephone)
(202) 435-7024 (facsimile)
christopher.deal@cfpb.gov

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INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau is an independent executive agency of the United States charged with regulating the consumer financial marketplace. The Bureau is responsible for promulgating rules under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601 *et seq*., as well as interpreting and issuing guidance for RESPA, and enforcing compliance with RESPA's requirements. *See* 12 U.S.C. §§ 2617, 5512(b), 5564(a); *see also id.* § 5481(12), (14). The Bureau's rules implementing RESPA are known as Regulation X. *See* 12 C.F.R. part 1024. The Bureau has a significant interest in the proper interpretation of RESPA and Regulation X.

On April 13, 2021, the panel of this Court considering the appeal in this case requested the views of the Bureau concerning the interpretation of a provision of RESPA, 12 U.S.C. § 2605(k)(1)(C), and a provision of Regulation X, 12 C.F.R. § 1024.35(b). In particular, the Court's letter noted that the district court held that "the failure to record instruments does not concern servicing because it does not relate to the receipt or making of payments pursuant to the terms of Plaintiff's loan with Defendant and therefore is not an error covered by these provisions" and that "errors in the

evaluation of loss mitigation options are not covered errors under § 1024.35(b)'s catch-all provision." Dkt. No. 114 (cleaned up).

Contrary to the district court's conclusion, the Bureau believes that the servicer's mismanagement of the borrower's mortgage loan documents in this case, including the servicer's failure to record those documents after telling the borrower it would do so, is a covered error under § 1024.35(b)'s catch-all provision. And although the district court rightly concluded that a servicer's failure to correctly evaluate a borrower for a loss mitigation option is not a covered error, that narrow exception does not relieve a servicer of its obligation to respond to otherwise valid error assertions that arise in the context of a request for loss mitigation.

STATEMENT

A. Regulatory Background

1. The mortgage market is the single largest market for consumer financial products and services in the United States. Mortgage servicers play a vital role in this market by managing mortgage loans on behalf of the loan's owner.[1] In connection with the rise of the secondary mortgage market in which ownership of a loan frequently changes hands, the

[1] For ease of reference, this brief uses the term owner to refer broadly to a loan's owners, assignees, or investors.

business of mortgage servicing has evolved from an in-house accounting and customer service function performed by the loan originator into a complex marketplace in its own right. Where loans are securitized (that is, pooled to serve as assets for mortgage-backed securities), the servicer operates on behalf of a trust and its investors.

"Servicers' duties typically include billing borrowers for amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and pursuing collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers." 78 Fed. Reg. 10696, 10699 (Feb. 14, 2013). A servicer exercises its duties pursuant to the borrower's agreement with the lender and a servicing agreement with the loan's owner.

The terms of a borrower's agreement with a lender are commonly contained in a promissory note and a document that may be called a mortgage, a security instrument, or a deed of trust. *See, e.g.*, CFPB, Guide to Closing Forms, https://files.consumerfinance.gov/f/documents/cfpb_buying-a-house_closing-forms_guide.pdf. Among many other things, these documents set forth the amount, timing, and manner of a borrower's payments. They specify how payments are allocated and how escrowed

funds are to be held and disbursed. They establish the fees the borrower can be charged for failing to make payments and detail the borrower's obligations when the lender's interest in the property is threatened, including by the establishment of a superior lien. Finally, they describe the parties' duties and rights in the event of a foreclosure. *See, e.g.*, Sample Mortgage, https://files.consumerfinance.gov/f/201410-deed-of-trust.pdf.

A servicer's obligations to the loan's owner are generally set forth in a servicing contract or other loan servicing document. These contracts outline how the servicer should collect payments from borrowers and remit payments to the loan's owner, including when the loan is delinquent or in default. 78 Fed. Reg. at 10699-70. When borrowers fail to make their scheduled payments, a servicer's job of collecting and remitting payments becomes substantially more complicated. *See, e.g.*, 78 Fed. Reg. at 10843-44, 10851-52. Servicing contracts can deal with this complexity in a variety of ways. For instance, a servicing contract may require the servicer to balance the competing interests of different classes of investors when borrowers become delinquent on a securitized loan, or it may limit the servicer's ability to offer certain types of loan modifications to borrowers. 78 Fed. Reg. at 10699. In the absence of timely payments by the borrower, the servicing contract may require the servicer to advance payments to the

owner of the mortgage loan and then allow the servicer to recoup those payments from the amounts the servicer is able to recover after foreclosure and liquidation of a property. 78 Fed. Reg. at 10700.

Some servicing contracts provide very detailed servicing procedures in case of a delinquency or default. *See, e.g.*, Fannie Mae Single Family, Servicing Guide C-1.1-02 (June 9, 2021), https://singlefamily.fanniemae.com/media/26046/ (specifying how servicers should process payment shortages or funds received when a mortgage loan modification is pending). In other cases, the servicing agreement provides significantly less guidance. *See, e.g.*, Bureau of Consumer Financial Protection, 2013 RESPA Servicing Rule Assessment Report 43 (January 2019) ("Assessment Report"), https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-rule-assessment_report.pdf ("[I]n other cases investors may have given the servicer discretion, subject to investor guidelines, to offer loss mitigation options on their behalf."). In either case, a servicer has an obligation under the contract to act in the interest of the loan's owner to optimize the recovery of the amounts owed by the borrower. *See* Larry Cordell *et al.*, Fed. Reserve Bd., 2008-46, *The Incentives of Mortgage Servicers: Myths and Realities* 3 (October 13, 2008). Notwithstanding this obligation, historically many servicers took a passive approach to their

servicing duties when loans became delinquent. They would attempt to contact the borrower and, if that did not work, they would initiate foreclosure proceedings. *See, e.g.*, 78 Fed. Reg. at 10701 & n.23. Although this approach may have been in the servicer's interests, it was often not in the best interest of the loan's owners, who stand to benefit from loss mitigation options that could help the borrower avoid foreclosure, including loan modifications, forbearance of future payments, and extensions of the payment schedule. *Id.* at 10701, 10817; *see also* 12 C.F.R. § 1024.31 (defining "loss mitigation option" as "an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower"); Assessment Report at 42 ("Because foreclosure is a costly process, loss mitigation may in some cases be better for both the investor and the borrower.").

2. Since 1990, Section 6 of RESPA has required detailed disclosures regarding the transfer, sale, and assignment of mortgage servicing rights. *See* Pub. L. No. 101-625, 104 Stat. 4079, 4405-11 (1990) (codified at 12 U.S.C. § 2605). It has also required servicers to respond to written error resolution or information requests, known as "qualified written requests." Qualified written requests include requests "relating to the servicing" of a loan in which the borrower provided "a statement of the reasons for the

belief of the borrower … that the account is in error." *Id.* at 4408. The Department of Housing and Urban Development (HUD), which then administered RESPA, implemented Section 6 through Regulation X. *See* 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). Congress was particularly concerned with the impact of widespread foreclosures on consumers, their communities, and the broader economy. *See* S. Rep. No 111-176, at 11, 14, 16, 39 (2010). Among other things, the Dodd-Frank Act restricted servicers' use of force-placed insurance and required them to promptly refund escrow balances when consumers pay off their loans. In addition to the existing requirements that servicers respond to qualified written requests, Congress separately prohibited servicers from "fail[ing] to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." Pub. L. No. 111-203, § 1463(a) (codified at 12 U.S.C. § 2605(k)(1)(C)). The Dodd-Frank Act also

transferred authority to implement and enforce RESPA from HUD to the Bureau. *Id.* § 1061(b)(7).

3. 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 Final Rule). In issuing the 2013 Final Rule, the Bureau recognized that "[i]n general … most servicers currently correctly perform the basic duty of receiving timely and conforming payments and allocating them." *Id.* at 10851. However, "[a] substantial number of borrowers … do not make timely and conforming payments every payment period." *Id.* at 10852. And "[w]hen the financial crisis erupted, many servicers … were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process." *Id.* at 10700. As a result, servicers "fail[ed] to always ensure that loan documents were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time," "lost or mishandled borrower-provided documents supporting loan modification requests, and generally provided inadequate service to delinquent borrowers." *Id.* at 10701. This widespread failure to properly service delinquent loans imposed substantial costs on consumers, their communities, and the public as a whole. *See, e.g.*, *id.* at 10701, 10852-54.

Accordingly, the 2013 Final Rule addressed, among other things, servicers' obligations to correct errors asserted by borrowers, to provide information about loss mitigation options to delinquent borrowers, and to evaluate borrowers' applications for available loss mitigation options. *Id.* at 10878-79, 10884-85. The Final Rule also generally required servicers to maintain certain important documents and data in a manner that facilitates their compilation into a servicing file and to maintain policies and procedures reasonably designed, among other things, to allow the servicer to access and provide accurate and timely information to borrowers, investors, and courts, and to properly evaluate loss mitigation applications in accordance with the eligibility rules established by owners. *See id.* at 10882-83 (codified at 12 C.F.R. § 1024.38(b)-(c)). In establishing these requirements, the Bureau recognized that "a servicer's obligation to maintain accurate and timely information regarding a mortgage loan account and to be able to provide [that] information to its own employees and to borrowers, owners, assignees, subsequent servicers, and courts, among others, is one of the most basic servicer duties." *Id.* at 10777.

As most relevant here, the 2013 Final Rule implemented the Dodd-Frank Act's addition of 12 U.S.C. § 2605(k)(1)(C), which, as noted above, requires servicers to "take timely action to respond to a borrower's requests

to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." Under the requirements imposed by the 2013 Final Rule, a servicer generally must take certain steps to respond when it receives a written notice from a borrower asserting such errors. *See* 78 Fed. Reg. at 10878-79 (codified at 12 C.F.R. § 1024.35(a)). First, the servicer must promptly acknowledge it received notice of the error. *Id.* § 1024.35(d). Then the servicer must either correct the error (or any other that it discovers) or, after conducting a reasonable investigation, provide a notice to the consumer explaining its determination that no error occurred. *Id.* § 1024.35(e)(1). Although a servicer has no obligation to respond to a notice of error that is "overbroad," a notice of error is not overbroad if the servicer can "reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account." *Id.* § 1024.35(g)(1)(ii). And a servicer has a duty to respond to a notice of error that is otherwise overbroad "[t]o the extent [the] servicer can reasonably identify a valid assertion of an error." *Id.*

The Bureau interpreted the scope of servicers' obligation to respond to errors broadly. *See* 78 Fed. Reg. at 10739-42, 10751. The Bureau explained that it understood Congress's use of the term "standard servicer's

duties" as those duties "typically undertaken by servicers in the ordinary course of business," including "duties to comply with investor agreements and servicing program guides, to advance payments to investors, … to monitor tax delinquencies, to respond to borrowers regarding mortgage loan problems, … and to work with investors and borrowers on options to mitigate losses for defaulted mortgage loans." 78 Fed. Reg. at 10739. The Final Rule enumerated ten specific categories of errors, including errors relating to payments, improper fees, payoff balance amounts, loss mitigation procedures, and the transfer of accurate information when servicing rights are transferred. *See* 12 C.F.R. § 1024.35(b)(1)-(10).

The 2013 Final Rule also included a final catch-all category of errors that covers "[a]ny other error relating to the servicing of a borrower's mortgage loan." *Id.* § 1024.35(b)(11). Under Regulation X, "[s]ervicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts … and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract." *Id.* § 1024.2(b).

Adding the catch-all resulted in a "more expansive definition of the term error." 78 Fed. Reg. at 10740. Recognizing "the fluidity of the mortgage market and the inability to anticipate in advance and delineate all types of errors related to servicing that borrowers may encounter," *id.*, the Bureau aimed "to craft error resolution procedures that are sufficiently flexible to adapt to changes in the mortgage market and to encompass the myriad and diverse types of errors that borrowers may encounter with respect to their mortgage loans," *id.* at 10744.

The Bureau, however, "decline[d] to add a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error in the final rule." *Id.* A different part of the 2013 Final Rule delineated the procedures servicers must follow when evaluating borrowers for loss mitigation options. *See id.* In § 1024.41, the Bureau imposed procedural requirements for such evaluations, including a process for appealing loss mitigation decisions, *see* 12 C.F.R. § 1024.41(h), but did not prescribe specific loss mitigation criteria. 78 Fed. Reg. 10817-28. The Bureau was concerned that mandating substantive loss mitigation criteria at that time risked inadvertently reducing borrowers' loss mitigation options and restricting access to credit more generally. *Id.* Accordingly, § 1024.41(a) cautions that "[n]othing in [that section] imposes a duty on a servicer to

provide any borrower with any specific loss mitigation option" or "should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option." Likewise, the Bureau's official interpretation of a servicer's duty to evaluate loss mitigation applications clarifies that "[t]he conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer." 12 C.F.R. pt. 1024, Suppl. I, cmt. 41(c)(1)-1; *see also id.* ("§ 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer").

In determining that a servicer's failure to correctly evaluate a borrower for a loss mitigation option was not an error under § 1024.35, the Bureau did not conclude that errors related to loss mitigation were generally excluded from § 1024.35's reach. Just the opposite. The 2013 Final Rule emphasized, for instance, that "the Bureau's approach to loss mitigation [was] not limited to the loss mitigation procedures set forth in § 1024.41," but instead "involve[d] a coordinated use of tools set forth in different provisions of the mortgage servicing rules[,]" "including the error resolution procedures in § 1024.35." 78 Fed. Reg. at 10816.

Likewise, in 2016, the Bureau emphasized that § 1024.35's error resolution requirements applied to errors related to loss mitigation. 81 Fed. Reg. 72160 (Oct. 19, 2016). At that time, the Bureau was considering whether to extend the period during which a borrower can exercise appeal rights under § 1024.41(h) in cases where servicing of the borrower's loan has been transferred. *Id.* at 72281. The Bureau explained that it decided not to provide such an extension, but "note[d] that even absent appeal rights under § 1024.41(h), borrowers may still submit a notice of error under § 1024.35 relating to the loss mitigation or foreclosure process and to the servicing of the loan, and servicers must comply with the applicable provisions of § 1024.35 regarding such notices of error." *Id.* The Bureau has subsequently noted that, in practice, "a large fraction of error assertions relate to loss mitigation." Assessment Report at 218.

B. Facts and Procedural Background

In 2002, Kim Naimoli took out two loans to purchase her Geneva, New York home. The smaller of the two loans, a "gap mortgage" was never recorded. Special Appendix (SA) 2-3. In 2008, Naimoli consolidated these loans, secured with a single mortgage, using a New York Consolidation, Extension, and Modification Agreement (CEMA) in favor of IndyMac Bank,

FSB. This new consolidated mortgage was never recorded either. In 2013, IndyMac transferred servicing of the consolidated loan to Ocwen.

In the meantime, Naimoli had fallen behind on her payments. Naimoli requested a modification of her loan under the Home Affordable Modification Program (HAMP). Ocwen approved Naimoli for a trial period plan under HAMP in November 2014. Joint Appendix (JA) 290. Although Naimoli had "completed the trial period plan as per [its] terms," Ocwen denied the modification after appeal in September 2015. Ocwen explained that it "has been actively working on the proper recording of the consolidation; however, the approval of the permanent HAMP modification cannot be granted due to the issue with the mortgage title." JA 290. Ocwen advised Naimoli that "[o]nce the title issue has been resolved you are eligible to reapply for mortgage assistance." JA 290.

Naimoli attempted to resolve the issue, communicating with Ocwen through a representative in December 2015. In response, Ocwen emailed Naimoli unexecuted copies of the CEMA and the 2008 mortgage. JA 27-28. An Ocwen representative advised that "once I receive the signed documents back, the CEMA will need to go to OneWest Bank, to sign for the lender IndyMac Bank" and then "they will go to our recording vendor for recording." JA 27.

Naimoli re-executed the documents and returned them to Ocwen in August 2016. JA 502. That same month, Ocwen offered Naimoli a new trial period plan. Ocwen told Naimoli: "If you successfully complete the Trial Period Plan by making the required payments, you will receive a modification with an interest rate of 3.50000%" for a period of forty years. JA 57. Naimoli made each of the trial payments. SA 4. Nevertheless, in December 2016, Ocwen decided Naimoli "was no longer eligible for the loan modification offer" that Naimoli had accepted because of the issue with her mortgage title. JA 346. In connection with this denial, Ocwen led Naimoli to believe that to fix the problem, Naimoli would have to record the mortgage herself. JA 340-44, 352. Naimoli appealed and offered to record the mortgage if Ocwen would return the executed documents it had previously sought and obtained from Naimoli. JA 352.

Again, Ocwen denied the appeal because of the mortgage title problem. JA 62. In denying the appeal, Ocwen advised Naimoli that it had already "ordered the file from the custodian," and that it would have the mortgage documents "sent for recording." JA 62. Although Ocwen's "original decision [to deny the loan modification] ha[d] not been overturned," Ocwen committed to "facilitating the completion of the proper recording" of the mortgage documents. JA 62.

With the recording issue still unresolved, Naimoli submitted requests for information in August 2017 and then, in December 2017, a notice of error. JA 66, 70, 82. In the notice of error, Naimoli explained, among other things, that Ocwen had advised her that it would record the mortgage agreements once she signed and returned them but that Ocwen had not done so even after she had returned the signed documents. JA 82-83. The notice of error asserted that "Ocwen's actions, in failing to honor the terms of the TPP and record the CEMA and original mortgage documents, constitute an error in the servicing of the Borrower's loan" pursuant to § 1024.35's catch-all provision. JA 84. In January 2018, Ocwen responded to the notice of error by asserting that "it would not be able to comment on concerns regarding origination of the loan" and that its denials of Naimoli's loan modification applications were valid since the "Consolidated Note was not recorded at the county." JA 449.

Naimoli filed suit in the Western District of New York on March 1, 2018, alleging violations of Regulation X along with state law claims. SA 7. The district court granted Ocwen's motion for summary judgment. As relevant here, the district court held that "errors in the evaluation of loss mitigation options are not covered errors" under the catch-all provision. SA 13. In reaching that conclusion, the district court was persuaded by the

analysis in *Sutton v. CitiMortgage, Inc.*, 228 F. Supp. 3d 254 (S.D.N.Y 2017). SA 13-15. The *Sutton* court had held that "errors in evaluation of loss mitigation options are not subsumed by th[e] catch-all provision" in light of the preamble of the 2013 Final Rule (which, as discussed above, described the Bureau's decision not to include a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error in § 1024.35). 228 F. Supp.3d at 272-73. The district court in this case also held that "[t]he failure to record instruments does not concern servicing because it does not relate to the receipt or making of payments pursuant to the terms of Plaintiff's loan with Defendant." SA 19 (citing 12 U.S.C. § 2605(i)(3)). "Instead," the district court reasoned, "the failure to record instruments concerns the modification of the terms of the loan and, thus, the error is not covered by the catch-all provision." *Id.*

SUMMARY OF ARGUMENT

Under Regulation X, a servicer must investigate and respond when a borrower provides notice of certain enumerated errors as well as "any other error relating to the servicing of a borrower's mortgage loan." 12 C.F.R. § 1024.35(b)(11). The issue in this case is whether this catch-all provision applies to a borrower's claim that the servicer mishandled critical loan

documents in connection with the borrower's efforts to obtain a loan modification. It does.

The catch-all provision is broad. By its terms, the provision covers a servicer's mishandling of loan documents. And while the regulatory design contemplates that claims that a servicer failed to correctly evaluate the merits of a borrower's loss-mitigation application are not errors covered by 12 U.S.C. § 1024.35(b), that implied exception must be construed narrowly consistent with Congress's and the Bureau's intent. To the extent that the Court believes that § 1024.35(b)(11) is ambiguous, it should defer to the Bureau's reasonable and long-standing understanding of the scope of that provision.

ARGUMENT

Regulation X's broad catch-all provision for "any other error relating to the servicing of a borrower's mortgage loan" applies to a servicer's mishandling of critical loan documents, even when those documents are relevant to a loss mitigation application.

Interpreting a regulation "requires [the Court] to examine the regulation's text in light of its purpose, as stated in the regulation's preamble, as well as the purpose of the regulation's authorizing statute." *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 52 (2d Cir. 2016); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("A

court must carefully consider the text, structure, history, and purpose of a regulation ….” (cleaned up)).

Here, the text of § 1024.35(b)(11), its purpose as described in the regulation’s preamble, and the purpose of the authorizing statute all point in the same direction: The catch-all provision broadly covers errors in managing critical loan documents, even when those documents are relevant to a borrower’s application for loss mitigation.

A. Because the catch-all provision covers any error relating to the servicing of a borrower’s mortgage loan, it applies to errors that have an impact on or a connection with a servicer’s receipt or making of payments.

Section 1024.35(b)(11) broadly covers “*any* other error *relating to* the servicing of a borrower’s mortgage loan” (emphasis added). “Any” and “relating to” are expansive terms. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (“The phrase ‘any other law enforcement officer’ suggests a broad meaning. We have previously noted that ‘[r]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (cleaned up)); *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018) (“[W]hen asked to interpret statutory language including the phrase ‘relating to,’ … this Court has typically read the relevant text expansively.”).

The "ordinary meaning" of "relating to" is "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (cleaned up). Accordingly, because the catch-all provision uses the term "relating to," it cannot be limited to errors *in* the "servicing" of a consumer's loan. *See Lamar*, 138 S. Ct. at 1761 (relying on the definition of "relating to" to reject argument that "statement respecting the debtor's financial condition" "means only a statement that captures the debtor's overall financial status" because it would "read[] 'respecting' out of the statute"); *see also Spadaro v. U.S. Customs & Border Protection*, 978 F.3d 34, 46 (2d Cir. 2020) ("Although the statutory language refers only to issuances or refusals on its face, the use of the word 'pertaining' makes clear that the reach of the statute is not so limited.").

The catch-all, therefore, covers any kind of error that has "a connection with or reference to" the servicing of a loan. *See Morales*, 504 U.S. at 383-84 (interpreting phrase "relating to rates, routes, or services of any air carrier" as applying to actions "having a connection with or reference to" such rates, routes or services). That includes errors that impact the servicing of a loan. *See Lamar*, 138 S. Ct. at 1761 (holding "that a

statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status").

To see how broad the catch-all provision is, recall that servicing a loan involves receiving scheduled periodic payments from a borrower (under the terms of the loan) *and* making payments to the loan's owner or other third parties (under the terms of mortgage servicing loan documents or servicing contract). 12 C.F.R. § 1024.2(b). Accordingly, as a general matter, a servicer's error is covered by the catch-all if it impacts (or is connected with or refers to) either the servicer's receipt of payments from borrowers or to the servicer's making of payments to owners or other third parties.[2]

Here, Naimoli's notice described conduct by Ocwen in its role as a servicer that had a direct connection with, and impact on, both aspects of servicing under the regulatory definition. Ocwen couldn't find the executed version of the loan documents that set forth the amount, timing, and manner of the payments it was to receive from Naimoli (even after Naimoli re-executed those documents and provided them to Ocwen). And Ocwen's

[2] To be clear, errors that do not occur in the context of a servicer's role as a servicer are not covered by § 1024.35. For instance, the Bureau's Official Interpretations explain that errors relating to the origination, underwriting, or subsequent sale or securitization of a mortgage loan (among others) are not covered errors. *See, e.g.*, 12 C.F.R. pt. 1024, Suppl. I, cmt. 35(b)-1.

failure to record those documents (and thereby preserve the priority of the mortgage lien on Naimoli's home) jeopardized Ocwen's ability to make required payments to the loan's owners in the event of a foreclosure.

The fact that Naimoli identified these errors in connection with her pursuit of a loss mitigation option does not vitiate their connection to the servicing of her loan. Managing the loss mitigation process is a critical part of a servicer's role in servicing a loan. Loss mitigation aims to reduce the amount that the loan's owners might otherwise lose when the borrower does not make her scheduled principal and interest payments and the loan is foreclosed upon. And loss mitigation options commonly involve changes to the schedule of periodic payments to account for the borrower's inability to meet her existing payment obligations. *See, e.g.*, 12 C.F.R. pt. 1024, Suppl. I, cmt. 31 (describing types of loss mitigation options). Thus, where consumers have not made their scheduled payments, loss mitigation is often meant to ensure that, going forward, the servicer receives payments from the consumer and can make principal and interest payments to the loan's owners. Loss mitigation's connection to servicing is not lessened by the fact that loss mitigation can occur when scheduled payments are not received, *see, e.g.*, *Spadaro*, 978 F.3d at 46 (holding that "revocation of a visa pertains to the issuance of a visa because they are so closely related –

namely, a revocation constitutes a nullification of that issuance"), nor by the fact that loss mitigation is often focused on facilitating the receipt of future payments, *see Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) (holding that contractual provisions for subrogation and reimbursement "'relate to … payments with respect to benefits'" even though the payments yielded by the contractual rights to subrogation and reimbursement occur "long after" a carrier's provision of benefits).

The broad reach of § 1024.35(b)(11)'s catch-all provision is confirmed by the list of specific errors that precede it. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) ("Under the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" (cleaned up)). That list of errors includes, for instance, errors related to the loss mitigation process as well as errors related to the provision of accurate loan information. *See, e.g.*, 12 C.F.R. § 1024.35(b)(7), (9), and (10). The list is not limited to errors in a servicer's receiving or making of payments.

The breadth of the catch-all reflects the scope of the statutory provision that the regulation implements. As noted above, 12 U.S.C. § 2605(k)(1)(C) requires servicers to "respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." Congress added this requirement in the Dodd-Frank Act even though servicers were already required to respond to "qualified written request[s] … relating to the servicing" of a borrower's loan, which included claims by the borrower that her account "is in error." *See* 12 U.S.C. § 2605(e) (2010).

The district court was mistaken, therefore, to conclude that the catch-all provision does not cover "[t]he failure to record instruments" because that error "does not concern servicing" but instead "concerns the modification of the terms of the loan." SA 19. Ocwen's failure to record the mortgage impacted the servicing of Naimoli's loan both by jeopardizing the priority of the mortgage lien (and thereby impeding Ocwen's ability to make payments to loan's owners in the event of a foreclosure) and by leaving Naimoli permanently ineligible for a loan modification.

Likewise, contrary to Ocwen's suggestion, at 9, 14, the Bureau did not categorically exclude complaints related to loss mitigation from § 1024.35's

error resolution procedures, or otherwise establish a bright line between "servicing" on one hand and "loss mitigation" on the other. Instead, the Bureau made clear that § 1024.35 was an important part of its overall approach to loss mitigation, 78 Fed. Reg. at 10816, and emphasized that the broad catch-all provision was appropriate because the "mortgage market is fluid and constantly changing and that it is impossible to anticipate with certainty the precise nature of the issues that borrowers will encounter." *Id.* at 10744. And, in 2016, the Bureau relied on its understanding that § 1024.35 applies to errors associated with loss mitigation when it declined to extend the period during which a borrower can exercise appeal rights under § 1024.41(h) in connection with a transfer of mortgage servicing rights. 81 Fed. Reg. at 72281. The Bureau has also consistently made it clear that loss mitigation is an integral part of mortgage servicing. *See, e.g.*, 86 Fed. Reg. 34848, 34850 (June 30, 2021) (surveying Bureau rulemakings "intended to address deficiencies in servicers' handling of delinquent borrowers and loss mitigation applications").

Because loss mitigation options are alternatives to foreclosure, 12 C.F.R. § 1024.31 (definition of loss mitigation option), Ocwen's interpretation of the catch-all provision would categorically exclude a class of errors — those "relating to … avoiding foreclosure" — that Congress

expressly required servicers to address. *See* 12 U.S.C. § 2605(k)(1)(C). The conflict between Ocwen's interpretation of the regulation (servicers generally don't have to respond to errors related to loss mitigation) and Congress's evident purpose in enacting the underlying provision of the Dodd-Frank Act (servicers must respond to errors related to loss mitigation) weighs heavily against Ocwen's proposed approach. *See, e.g.*, *Halo*, 819 F.3d at 55 (evaluating how a proposed interpretation of a regulation "accords with the purpose of the authorizing statute"). Ocwen similarly misses the mark, *e.g.*, at 15-17, when it relies on cases involving notices of error that were received before the effective date of the Dodd-Frank Act's requirement that servicers respond to errors relating to avoiding foreclosure and the Bureau's implementing regulation.

B. Although challenges to the merits of a servicer's loss mitigation determination are implicitly excluded from the catch-all provision, that narrow exception does not exclude the notice of error here.

As the district court correctly concluded, a servicer's failure to correctly evaluate a borrower for a loss mitigation option is not a covered error under § 1024.35(b). SA 13-14. However, this is not because evaluations of loss mitigation options are not related to servicing; instead, it is because an "incorrect" evaluation of the merits of a loss mitigation application is not an error under 12 C.F.R. § 1024.35.

As explained above, when the Bureau issued the 2013 Final Rule, it determined that allowing consumers to enforce the loss mitigation standards set by the loan's owner against a servicer would perversely risk discouraging consumer-friendly loss mitigation standards.[3] *See* 78 Fed. Reg. at 10817-18. Accordingly, the Bureau provided that nothing in § 1024.41's loss mitigation procedures "should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option ...." 12 C.F.R. § 1024.41(a). The Bureau likewise made clear that under § 1024.41, "[t]he conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer." 12 C.F.R. pt. 1024, Suppl. I, cmt. 41(c)(1)-1.

The Bureau similarly declined to include a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error under § 1024.35(b). *See* 78 Fed. Reg. at 10743-44. Although Regulation X

[3] Of course, as noted above, under 12 C.F.R. § 1024.38(b)(2)(v) (which is not privately enforceable), *see* 78 Fed. Reg. at 10778-79, servicers have an obligation to maintain policies and procedures reasonably designed to ensure that the servicer can properly evaluate a borrower who submits a loss mitigation application for all loss mitigation options for which the borrower may be eligible.

does not expressly exclude "incorrect" evaluations of loss mitigation applications from being errors under § 1024.35(b), permitting borrowers to challenge the merits of a servicer's evaluation of their loss mitigation application by asserting an error under § 1024.35 would render § 1024.41(a) a practical nullity and would fatally undermine the Bureau's policy choice not to impose substantive requirements on loss mitigation programs in the 2013 Final Rule. 78 Fed. Reg. at 10818. Consistent with servicers' underlying statutory obligation to respond to errors concerning avoiding foreclosure, this implicit carve-out for the merits of loss mitigation evaluations from § 1024.35 is narrow — it applies only to purported notices of error that claim that a servicer's evaluation of a particular loss mitigation application was incorrect. Otherwise, this implicit exception would drastically limit the circumstances in which borrowers could obtain a response to their "requests to correct errors relating to … avoiding foreclosure." 12 U.S.C. § 2605(k)(1)(C).

To determine whether a purported error is a challenge to the merits of a particular loss mitigation application (and therefore not an error under the catch-all provision), it is instructive to consider whether the error can only be corrected (as § 1024.35(e)(1)(i)(A) would otherwise require) by changing a servicer's past evaluation of a loss mitigation application. If the

only way a servicer can correct a purported error is by revisiting its evaluation of a prior loss mitigation application, there is no covered error.

Here, Naimoli's notice of error identifies an error that can be corrected without disturbing Ocwen's evaluation of her loss mitigation application: Ocwen's failure to maintain and record her loan documents after repeatedly telling Naimoli that it would do so. Ocwen could have corrected the error by simply locating and recording the documents, but it never did so (at least as of February 2019). *See* JA 790. Concluding that this error is outside the reach of § 1024.35(b)'s catch-all provision would leave Naimoli and similarly situated borrowers with no recourse for errors that persist beyond any individual loss mitigation application. Indeed, Ocwen's statements accompanying its denials of Naimoli's loss mitigation applications demonstrate its recognition that the recording problem was an ongoing issue. *See* JA 290 (affirming denial of loan modification and advising that "[o]nce the title issue has been resolved you are eligible to reapply for mortgage assistance"); JA 62 (affirming denial of loan modification and committing to "facilitating the completion of the proper recording" of the mortgage documents).

To be sure, Naimoli's notice of error can be reasonably understood as also asking Ocwen to revisit its evaluation of her loss mitigation

applications. *See, e.g.*, SA 16 (noting that the subject line of Naimoli's notice of error was "Notice of error pursuant to 12 C.F.R. 1024.35(b)(11) *for improperly denying loan modification*"). However, under Regulation X, a servicer has an obligation to respond to a notice of error that is otherwise overbroad "to the extent a servicer can reasonably identify a valid assertion of an error." *Id.* § 1024.35(g)(1)(ii). Here, Naimoli's notice provided more than enough information to allow Ocwen to identify the errors that plagued its handling of Naimoli's mortgage documents. *See* JA 82-84.

C. To the extent the Court finds Regulation X ambiguous, the Bureau's interpretation of the catch-all provision is entitled to deference.

To the extent the Court finds the regulation ambiguous, the Bureau's interpretation of the scope of the catch-all provision contained in this brief and in the preamble to the Bureau's rules is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See also* Naimoli's Opening Br. at 13-14; Ocwen's Br. at 13-15.

First, the Bureau's interpretation is reasonable. For all the reasons discussed above, the Bureau's construction of the catch-all provision falls 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 *Auer* deference is appropriate. *Id.*

The Bureau's interpretation of the catch-all provision squarely "implicate[s] [the Bureau's] substantive expertise." *Id.* at 2417. Interpreting the scope of § 1024.35's catch-all provision and its interaction with § 1024.41's loss mitigation procedures implicates a number of significant policy questions concerning the regulation of the mortgage servicing market. Likewise, the Bureau's interpretations — in Federal Register notices signed by the Bureau's Director and in this brief filed for the agency at this Court's request — "authoritative[ly]" reflect the Bureau's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2416-17; *see also id.* at 2417 n.6 (noting that the *Auer* Court deferred to an agency interpretation contained in an amicus curiae brief filed in response to the Court's request). Accordingly, if the Court finds that the catch-all provision is ambiguous, it should defer to the Bureau's interpretation.

CONCLUSION

For the reasons set forth above, the error resolution requirements imposed by § 12 U.S.C. § 2605(k)(1)(C) and 12 C.F.R. § 1024.35(b) should be interpreted to apply to the notice of error in this case.

Respectfully submitted,

/s/ Christopher Deal
Stephen Van Meter
Acting General Counsel
Steven Y. Bressler
Acting Deputy General Counsel
Laura M. Hussain
Assistant General Counsel
Christopher Deal
Senior Counsel
Domenic R. Powell
Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9582 (telephone)
(202) 435-7024 (facsimile)
christopher.deal@cfpb.gov

Counsel for Amicus Curiae
Consumer Financial Protection Bureau

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and L.R. 29.1(c) because it contains 6,924 words, excluding the portions exempted by Rule 32(f).

July 26, 2021 /s/ *Christopher Deal*