No. 03-377

IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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The parties agree that the issue before the Court turns on the meaning of the phrase "liability under this subparagraph" as it appears in 15 U.S.C. § 1640(a)(2)(A). (Resp. Br. at 1) That phrase defines the applicability of the $100-$1,000 limitation on recoverable statutory damages under the Truth in Lending Act (TILA). In its opening brief, petitioner offered the following reasons, among others, for concluding that the word "subparagraph" refers to the division of Section 1640(a)(2) denominated by the letter "(A)," and not just to the division within it denominated "(ii)," and that the $100-$1,000 liability limitation thus extends to both (A)(i) and (A)(ii):

* The word "subparagraph" has a well- established meaning and usage throughout the TILA and throughout federal legislation in general, as referring to "a third level subdivision introduced with a capital letter." (Br. at 20-25)

* This consistent usage and meaning of the term in federal statutes is entirely purposeful, and has been for many decades, as demonstrated by the current legislative drafting manuals of the House and Senate, and by numerous books on legislative drafting dating back many decades. (Br. at 25-28)

* The statutory evolution of the provision in question shows that the word "subparagraph" was deliberately used in a manner consistent with this common usage. When the statute was amended in 1974 to move the liability provision from Section 1640(a)(1) to Section 1640(a)(2)(A), the relevant language was changed from "under this paragraph" to "under this subparagraph," thus indicating a correct understanding of the meanings of those words. (Br. at 33)

* When the word "subparagraph" is read in the manner of the court below, as a generic reference whose application is wholly defined by its context, and is not given its usual specific meaning as a reference to the statutory division that

begins with a capital letter of the alphabet, the phrase "under this subparagraph" is rendered superfluous. If the phrase, so read, were omitted, it is entirely clear that the $100-$1,000 limitation would only apply to clause (ii). (Br. at 30)

A. Respondent Has Not Refuted The Well-Established Meaning of "Subparagraph"

Respondent does not materially dispute the correctness of any of these assertions, and thus fails to raise a serious question about the well-established meaning of the word "subparagraph."

Critically, respondent offers no usage of the term subparagraph within TILA referring to anything other than a third level subdivision introduced by a capital letter. He nonetheless claims that there is confusion about the actual meaning of the word, and notes the well-established practice, referred to in petitioner's opening brief (at 22, n.9), of using the name of the senior organizational unit in a cite referring to multiple legislative subdivisions—thus "subparagraph (A)(i)," not "clause (A)(i)." (Resp. Br. at 12)

Contrary to respondent's assertion, this convention, which, for example, causes one to refer to "Section 1640(a)(2)(A)(ii)," does not remotely suggest that the senior unit name is also a proper description of each of the hierarchical subparts included in the reference, when those subparts are each viewed in isolation. Thus the preceding citation encompasses within it references to subsection (a), paragraph (2), subparagraph (A), and clause (ii), and none of those subparts by itself is properly referred to as a "section." To conclude otherwise is to suppose that the hierarchy of terminology consistently used in federal legislation is simply meaningless.

Respondent also cites a total of eight instances from the United States Code where the word "subparagraph" is misused

to refer to a clause (Resp. Br. at 11, 13), three where the word "paragraph" is misused (*id.* at 13), and two where the word "clause" is misused (*id).* This handful of such errors among the many thousands of usages throughout the whole of the United States Code hardly contradicts the overwhelming evidence that the word "subparagraph" has a clear and unambiguous meaning. For example, Westlaw research queries for the terms "subparagraph (A)" and "subparagraph (i)" in the United States Code database confirms the term's well-settled meaning: the phrase "subparagraph (A)" appears 3,978 times in the Code, while the phrase "subparagraph (i)" appears twelve times.

Respondent then suggests that the two official and five unofficial legislative drafting manuals and handbooks that uniformly adopt the usage of "subparagraph" as explained by petitioner should not be relied upon. (Resp. Br. at 12-14; *see* Pet. Br. at 25-28 & n.15) But the fact that these manuals and handbooks may not have been cited by this Court previously (Resp. Br. at 14), or that there are a few minor, and irrelevant, discrepancies between these manuals (*id.* at 12-13 & n.2), does not in the least undermine the central significance of these authorities in showing the virtually uniform usage and understanding of the word "subparagraph" as referring to a third-level legislative subdivision introduced by a capital letter. Indeed, in this respect, the cited authorities—which collectively span the past half century—are entirely consistent.[1]

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[1] *See* U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* § 129(d)(1), at 43 (1997); Office of the Legislative Counsel U.S. House of Representatives, *House Legislative Counsel's Manual on Drafting Style* § 341(F)(2), at 52 (1995); Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 222 (1992); Donald Hirsch, *Drafting Federal Law* § 3.8, at 27 (2d ed. 1989); Maxwell J. Mehlman & Edward G. Grossman, *Yale Legislative Services Handbook of Legislative Drafting* 100 (1977); Reed Dickerson, *Legislative Drafting* 73-74 (1977 (originally

Respondent, and the court below (Pet. App. at 12a-13a) also deny that their reading of the phrase "under this subparagraph" renders it superfluous, *i.e.*, that the meaning of the statute would be unchanged if those words were omitted. (Resp. Br. at 10) Indeed, respondent and the court below express the remarkable view that without these words, "the limitations might arguably be read to apply to both to both (i) and (ii)." (Resp. Br. at 10; Pet. App. at 12a)[2] But, in fact, had the words "under this subparagraph" been stricken in 1995—given Congress's long-established and careful usage of the term "subparagraph"—then it would have been quite clear that Congress in fact took into consideration the pre-existing liability limitation under clauses (i) and (ii), and that Congress in fact wanted the $1,000 limitation to apply only to the clause in which it was physically located—*i.e.*, clause (ii). Since Congress did not strike "under this subparagraph," and since this language had always been understood to apply to both clauses (i) and (ii), and since the legislative record is absolutely devoid of any indication whatsoever that Congress sought to eliminate the $1,000 limitation vis-a-vis clause (i), there is simply no basis to suppose that the 1995 Congress meant to make any such change.

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published in 1954)); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961). *See also* United States Congress Data Dictionary of Legislative Documents, available at http://xml.house.gov/subparagraph.html (last visited June 28, 2004).

[2] Respondent repeats the lower court's assertion that the words "under this subparagraph" simply "makes clear that the limits apply only to 'this' subparagraph"—*i.e.* (ii). Resp. Br. at 10. (*See* Pet. App. at 12a-13a ("[T]he inclusion of the 'under this subparagraph' clause not only enables, but actually compels, the reading we give the statute."))

B. Respondent Has Not Shown Any Basis To Believe That The Well-Established And Ordinary Meaning Of "Subparagraph" Does Not Control Here

Notwithstanding respondent's failure to seriously dispute that "this subparagraph" has an ordinary and well-established meaning, as reflected throughout TILA, the United States Code, and the legislative drafting manuals (referring to subparagraph (A), and thus reaching clause (i) as well as clause (ii)), respondent nonetheless insists that his contrary construction of "the plain language of Section 1640(a)(2)(A)" is the only one to which the words are susceptible. (Resp. Br. at 7) (*See* Pet. App. 13a (characterizing the court's reading of the statute as "compel[l]ed"))

Respondent offers only one argument in support of his construction. Echoing almost verbatim the principal reasoning of the court of appeals, respondent insists that the separate maximum and minimum damage amounts set out in clause (iii) of Section 1640(a)(2)(A) necessarily means that the phrase "this subparagraph" cannot refer to all of subparagraph (A), and thus that it must refer only to clause (ii). (Resp. Br. at 8 (reiterating court of appeals' argument (Pet. App. 11a))

Respondent, like the court below, here seeks to deduce the meaning of the word "subparagraph" from its usage in a single sentence. While one can imagine trying to reason in that way if one were denied access to information on the common meanings of words and their usage in contexts similar to the one at issue, there is certainly no reason to do so here. Most obviously, where a particular word has a consistent, precise and unambiguous meaning, there is simply no occasion to deduce its meaning solely from the narrow provision in which it is used. That is the case here, where "subparagraph" is a widely used term of art in the world of federal legislative drafting, whose very specific meaning is honored with uniformity throughout TILA and with virtual uniformity throughout the United States Code as a whole. No less than if

"subparagraph" were defined in a glossary to the statute, the term has a plain meaning that is conclusive of the issue in question. *K Mart Corp. V. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (if the text "is clear and unambiguous 'that is the end of the matter, for the court must give effect to the unambiguously expressed intent of Congress").

If there is no occasion here to deduce the meaning of "subparagraph" from just the narrow provision of Section 1640(a)(2)(A), since its meaning is already well-established, there is likewise no reason to flee from the established definition that exists, or to conclude, as does respondent, that if petitioner is "correct about the term's meaning, then Congress simply made a mistake."[3] (Resp. Br. at 15) As respondent acknowledges, "[s]ubpart (iii) is a 'carve-out' of (i) in the sense that it applies to a subset of the transactions otherwise covered under (i)." (*Id.* at 9) And as is apparent from both the specific language and the legislative history of clause (iii), Congress's intention was to impose a higher range of penalties—$200-to-$2,000—for claims relating to closed-end real estate transactions which otherwise would have been governed by the $100-$1,000 limitation applicable to (i). The notion of a general rule subject to specific exceptions is well-known in the law. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). The fact that a specific exception (*e.g.*, the $2,000 cap for

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[3] This invitation to simply re-write Congress's words if they do not square with respondent's beliefs about the statute's meaning, cannot be squared with respondents principal argument that "[a]s in *Lamie* [*v. United States Tr.*, 124 S.Ct. 1023 (2004)], the Court here is bound by the words of the law Congress enacted. 'If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result."' *Id.* at 1034 (quoting *United States v. Granderson,* 511 U.S. 39, 68 (1994)) (ellipsis in original)." (Resp. Br. at 17)

closed-end mortgages) to a general rule (*e.g.*, the $1,000 cap for consumer financing agreements) is expressly provided for does not support an inference that the general rule has been repealed or altered, except with regard to the express exception itself. Under all the circumstances, therefore, it is entirely clear that clause (iii) and its $2,000 limitation is just such an exception here, and that the pre-existing provision was otherwise left unchanged.

If there were any conceivable doubt about this point, it would be appropriate to look beyond the specific words of the provision at issue and consider the overall functioning of the statute, its historical evolution, and its legislative history. From its inception in 1968 until the addition of clause (iii) in 1995, TILA's statutory damages provision has been capped at $1,000, and nowhere in the legislative record is there any hint of an intention to change that. Indeed, the legislative history of the 1995 enactment indicates that Congress' *only* intention was to double the damages cap on closed-end mortgages to $2,000.

Moreover, it is not, as respondent's assert (Resp. Br. at 16) that the legislative history simply omits any reference to a purpose to lift the liability cap on clause (i). Affirmative statements in the legislative record are flatly inconsistent with any such purpose. When the amendment was explained in the House Report (and by Senator Mack and Representative McCollum on the floor) as "increas[ing] the statutory damages available" in connection with mortgage loans due to special considerations pertaining to such loans, H.R. Rep. No. 104-193, at 99, 1995 WL 432335, at *99; (*see* Br. at 10), those statements took as their premise the continued applicability of the existing $1,000 cap with regard to other consumer loan transactions, since otherwise mortgage loans would have a cap lower than all other loan transactions. Of course it would also be strange in the extreme for legislation openly aimed at modestly increasing the cap pertaining to mortgage loans to

have the effect, *sub silentio*, of entirely eliminating the cap on a much larger category of loans, with far more dramatic consequences.

Finally, the last eight pages of respondent's brief, and virtually all of the argument in the brief of *amicus curiae* National Association of Consumer Advocates, *et al.*, are devoted to various assertions that eliminating the $1,000 cap on liability under clause (i) would be both rationally defensible and constitutional.[4] Since the evidence is overwhelming that Congress has in fact not taken that action, there is no occasion to address those policy arguments at any length. Indeed, respondents and the *amicus* offer no suggestion whatsoever that Congress has ever—before, during, or even after passage of the 1995 amendments—considered the policy arguments they raise. It is worth noting, however, that respondent has offered misleading explanations for why Congress might lift the liability cap on non-mortgage loans while leaving it in place for lease transactions.[5]

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[4] *Amici* National Association of Consumer Advocates, *et al.*, argue that elimination of the liability cap on clause (i) could have been justified by a need to deter certain fraudulent lending practices, including "spot delivery" or "yo-yo sales," where "the dealer first lets the consumer leave the lot 'on the spot' with the car, and then pulls on the string to bring the consumer back to sign a new, more expensive credit contract." (Brief of NACA, *et al.* as Amicus Curiae in Support of Respondent at 8) *Amici* further allege that the transaction at issue was just such a "yo-yo sale," in which respondent was twice called back to the dealer to sign amended credit contracts, with the implication that the later contracts were increasingly unfavorable to respondent. While this is not the place to re-litigate the facts underlying this case, it is worth noting that both the interest rate and the total sales prices in the transaction were lower in the third RISC than in the first. (*Compare* J.A. at 47 (RISC I), *with id.* at 59(RISC III).)

[5] Respondent suggests two misleading distinctions between liability under clauses (i) and (ii), in an effort to explain why Congress "may" have thought it appropriate to eliminate the cap on (i) but not on (ii).

First, respondent justifies eliminating the $1,000 cap on liability under

More generally, apart from the question of constitutionality, any claim that a statute has been silently amended to increase by many multiples the potential recoveries for unintentional violations that cause no actual injury must be viewed with a healthy dose of skepticism. Given the radical nature of the legislative change asserted by respondent and the court of appeals, the notion that such a change would have been unanimously adopted by both the House and Senate in 1995 without so much as a single legislator anywhere making reference to it in the legislative record is implausible in the extreme. *See generally Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342-43 (1999) ("[I]t tests the

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clause (i) because lending transactions under clause (i) are only covered under TILA up to $25,000. (Resp. Br. at 18) But this offers no basis for treating loan transactions under clause (i) differently from consumer leasing agreements under clause (ii) since such agreements are covered only if the total leasing arrangement is valued at $25,000 or less. See 15 U.S.C. § 1667.

Second, respondent's assertion that statutory damages are only recoverable for "material violations" of TILA, but are recoverable "for any" violation of the Consumer Leasing Act, is equally misleading. Resp. Br. at 21. Absent proof of actual damages, statutory damages are only recoverable under clause (ii) for violations enumerated in 15 U.S.C. §§ 1667a and 1667b, which, upon review, are obviously not of a hyper-technical nature like those in TILA that Congress removed from statutory damages liability under clause (i) in 1980. Indeed, Sections 1667a and 1667b set out only 14 violations of the Consumer Leasing Act that allow a statutory damage recovery under clause (ii). By contrast, even after the 1980 changes, there are over two dozen TILA violations for which statutory damages are available under clause (i).

Moreover, a simple comparison of the Consumer Leasing Act provisions covered by clause (ii) and the TILA provisions covered by clause (i) reveals a striking similarity in the material nature of the violations. For example, the TILA violations covered under clause (i) generally control disclosure of the finance charge, related fees, and payment periods; by comparison, Section 1667a and 1667b of the Consumer Leasing Act require similar disclosures for the lease payments, related fees, and payment periods.

limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception."); *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) ("All in all, we think that this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

CONCLUSION

For these reasons, and for the reasons stated in petitioner's opening brief, the decision below should be vacated and remanded.

Respectfully submitted,

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