No. _____

In The
# Supreme Court of the United States

CHARLES E. WOIDE and
SUSANNAH C. WOIDE,

*Petitioner,*

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

*Respondents.*

**On Petition for A Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This Court often has emphasized the importance of statutory interpretation. But a significant split has developed among the Circuits as to whether and when the right to challenge the consequences of a mailing of a notice of rescission. In this case, the United States Court of Appeals for the Eleventh Circuit held that the transaction was consummated and the rescission was untimely. This case thus raises an important issue never addressed by this Court, but that arises frequently, as to whether and when a consumer become contractually obligated and at what point creditor waives the right to all defenses to a rescission effectuated upon mailing of notice. Thus, the specific questions presented are:

Whether the rescission is effectuated upon mailing of notice where no challenge was raised within 20 days of receipt of said notice?

Whether the creditor is barred from raising any challenge to the notice of rescission and its statutory effects after the passage of 20 days?

Whether, upon filing amended schedules after conversion from Chapter 13 to a Chapter 7, and removing any reference to surrender in the chapter 7 schedules, and where no statement of intention is filed, the bankruptcy court can open the bankruptcy case to compel surrender?

## PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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## RULE 29.6 STATEMENT

None of the petitioners is a corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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**STATUTES**

Charles E. Woide and Susannah C. Woide respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is found at Appendix, App. 2. The Court of Appeals' order affirming the District Court Order affirming the bankruptcy court orders granting motion to reopen case to compel surrender was entered 5/25/2018 and is found at App. 1. The order of the United States District Court for the Middle District of Florida affirming the bankruptcy court order is found at App. 24. The District Court's order denying petitioner's motion for reconsideration is found at App. 20.

## JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on May 25, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

### 15 U.S. Code § 1635 – Right of rescission as to certain transactions

**(a) Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

**(b) Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

**(c) Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later

**12 CFR 226.1 – Authority, purpose, coverage, organization, enforcement, and liability.**

**(a)** ***Authority***. This regulation, known as Regulation Z, is issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601et seq.). This regulation also implements title XII, section 1204 of the Competitive Equality Banking Act of 1987 (Pub. L. 100-86, 101 Stat. 552). Information-collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501et seq. and have been assigned OMB No. 7100-0199.

**12 CFR 226.2 – Definitions and rules of construction.**

**(a)** ***Definitions***. For purposes of this regulation, the following definitions apply:

**(11)** ***Consumer*** means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

**(12)** ***Consumer credit*** means credit offered or extended to a consumer primarily for personal, family, or household purposes.

**(13)** ***Consummation*** means the time that a consumer becomes contractually obligated on a credit transaction.

**(14)** ***Credit*** means the right to defer payment of debt or to incur debt and defer its payment.

**(17)** ***Creditor*** means:
**(i)** A person who regularly extends consumer credit3 that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

**(25)** ***Security interest*** means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosures under §§ 226.6 and 226.18, the term does not include an interest that arises solely by operation of law. However, for purposes of the right of rescission under §§ 226.15 and 226.23, the term does include interests that arise solely by operation of law.

**(26)** ***State*** means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

**(b)*Rules of construction.*** For purposes of this regulation, the following rules of construction apply:

Obligation:

**(2)** Where the words obligation and transaction are used in the regulation, they refer to a consumer credit obligation or transaction, depending upon the context. Where the word credit is used in the regulation, it means consumer credit unless the context clearly indicates otherwise.

**12 CFR 313.3 – Definitions**

**(h)** ***Debt*** means an amount owed to the United States from loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, restitution, fines and forfeitures, and all other similar sources. For purposes of this part, a debt owed to the FDIC constitutes a debt owed to the United States.

**12 CFR Appendix Supplement I to Part 226, Official Staff Interpretations**

*2(a)(13) Consummation.*

1. *State law governs.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

## STATEMENT OF THE CASE

The bankruptcy court reopened our 2010 bankruptcy case in 2016 for the purpose of compelling us to surrender our home after having received a discharge on 7/12/2011 without filing a statement of intention. We, the owners and the legal and lawful title holders of record of our house, filed a chapter 13 bankruptcy petition on 12/30/2010, and on 4/7/2011 converted to a chapter 7. We did not file a statement of intention in the chapter 7 converted case. On 12/7/2011, approximately five months after the discharge and the close of the case, Federal National Mortgage Association, filed a foreclosure action. We, through counsel, defended vigorously against the action on jurisdictional grounds and prevailed on appeal in the Fifth District Court of Appeal of Florida. In 2013, we, having discovered material facts necessary to challenge the enforceability of the recorded documents in the public record, mounted an offense against the named "Lender" appearing on the non-negotiable Note and Mortgage in case # 2013-12456-CIDL. Once again, we prevailed with the state court which made findings that the transaction was not consummated, and the Note is un-enforceable. After our newly filed action, Federal National Mortgage Association, on 7/8/2014, made another attempt at serving us with a foreclosure action. We once again, defended vigorously against the action on the grounds that the note is unenforceable due to lack of consummation. On April 1st, 2015, we mailed to Appellee our Notice of Rescission. Armed with a state court

final order that contains findings that the note is unenforceable, and the transaction was not consummated, on 11/13/2015, we filed a federal action against Federal National Mortgage Association and its attorneys law firms. Having seen the writing on the wall, Federal National Mortgage Association made several attempts to undermine our wins in courts and to avoid liability for their wrongdoings relating to violations they committed under federal and state laws. To that end, Federal National Mortgage Association, using misrepresentations of material fact and concealing other material facts from the bankruptcy court, filed a motion in the 2010 bankruptcy case seeking to reopen the bankruptcy case to compel us to surrender our home. We objected to the motion. By counsel for Federal National Mortgage Association citing, legally non-binding, prior rulings of the presiding bankruptcy judge in the motion, while concealing and/or blatantly misrepresenting material facts, (no statement intention filed thus no indication of intent to surrender), the bankruptcy judge granted the motion. We timely appealed the order to the District Court in its appellate capacity. The District court affirmed. We appealed the district court order to the Eleventh circuit. The Eleventh Circuit affirmed. We filed a petition for rehearing of the order affirming the district court decision. The Eleventh Circuit denied the petition for rehearing. The Eleventh circuit then mailed a JUDGMENT with a stamp "issued as mandate". We filed a motion to recall the purported mandate. The Eleventh Circuit denied the motion to recall the mandate clearly because one was not issued pursuant to Rule 41 of the Federal Rules of Appellate Procedures.

## REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE;
IT IS INCONSISTENT WITH THE EXPRESS LANGUAGE OF THE BANKRUPTCY CODE WHICH REQUIRES DEBTOR TO FILE A STATEMENT OF INTENTION, AND NO WHERE IN THE CODE DOES IT IMPUTE INTENT TO SURRENDER IF NO STATEMENT OF INTENTION IS FILED.

IT IS ALSO INCONSISTENT WITH SUPREME COURT PRECEDENTS, AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO THE MEANING OF CONSUMMATION AND AS TO WHETHER STATE LAW OR FEDERAL LAW DETERMINES WHETHER CONSUMMATION OCCURRED, BY DETERMINING WHETHER OR NOT BORROWER BECAME CONTRACTUALLY OBLIGATED ON A TRANSACTION DESCRIBED IN THE NOTE.

A. **This Court Should Grant Certiorari to Resolve Whether or Not Surrender (one of the choices available to debtor) Can Be Imputed Without Debtor Expressly Stating Intent To Surrender And Where The Evidence Point to No Intent to Surrender.**

The Supreme Court of Florida has explained:

"The doctrine of stare decisis counsels us to follow our precedents unless there has been a significant change in circumstances after the adoption of the legal rule, or an error in legal analysis." " Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181, 1188 (Fla. 2005) (quoting Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003)). "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice." State v. Green, 944 So. 2d 208, 217 (Fla. 2006) (citations and internal quotation marks omitted). ..... We conclude that McGurn has proven to cause an injustice in practice because it rests on an impractical legal fiction. To the extent possible, procedural rules should operate so as to avoid the unintentional loss of substantive rights."

This review is not about whether or not the bankruptcy court has jurisdiction to reopen bankruptcy cases, it is a given that a bankruptcy court has authority, and routinely exercises, said authority. This case however is not similar to any of the cases cited in the Court of Appeals Orders, on the issue of the surrender.

In this case, we first filed a Chapter 13 bankruptcy petition in December of 2010. We filed Chapter 13 schedules which indicated that we intended to surrender our home in Deland, Florida. In April of 2011, we converted our Chapter 13 case into a Chapter 7 case. Although § 521(a)(2) of the Bankruptcy Code requires a Chapter 7 debtor to file a statement of intention indicating whether he or she intends to redeem secured property, reaffirm the debt it secures, or surrender the property, **or exempt,** we, through counsel, did not file one after conversion. We did file amended schedules and removed the Deland property from Schedules A and D and any reference of intent to surrender so that we could pursue our remedies in state court relating to personal property and secured creditors. This is a clear indication of a change in our intentions relating to the Deland Property, our home.

After discharge, in the state court, we pursued our remedies against named lender on the non-negotiable note, and obtained a final order finding the transaction was not consummated and the note not enforceable. FANNIE MAE was aware of the proceedings but chose not to intervene nor should or could because the note is not negotiable.

The Appellate courts erroneously found the order of the state court to be non-final. A court cannot necessarily rely on how an order is labeled in determining whether an order is Final for appellate purposes. The mere fact that an order is titled a "Final" or "non-Final" order is not dispositive. As one Florida appellate court put it, "it is important to understand what a court order does and not focus only on the how the order is labeled." Boyd v.Goff, 828 So. 2d 468, 469 (Fla. 5th DCA 2002). In other words, the substance of the order is controlling—not its title.

The state court order declaring the note is not enforceable is final because it left no judicial labor to be dispensed, except to enforce the order. FANNIE MAE argued that it should have been included, but the note itself is not negotiable and therefore cannot be negotiated as matter of law because it is not a demand to repay a fixed sum of money and on its face, does not have commercial certainty. Therefore, possession of an original non-enforceable note cannot be relied upon to establish standing because the purported transfer cannot occur as matter of law.

The Eleventh Circuit reversibly erred when it determined:

"Because the Woides filed a schedule stating the intent to surrender their home in the Chapter 13 case and did not modify it in the amended schedules filed after conversion, the bankruptcy court was within its discretion to hold that the Woides had a duty to surrender the property."

And

"Second, our case law is clear that § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property. *See In re Failla*, 838 F.3d 1170, 1178 (11th Cir. 2016) ("Section 521(a)(2) requires the debtor to either redeem, reaffirm, or surrender collateral to the creditor."). Doing nothing is not an option. *See In re Taylor*, 3 F.3d 1512, 1517 (11th Cir. 1993) ("[T]he plain language of 11 U.S.C. § 521(2) does not permit a Chapter 7 debtor to retain the collateral property without either redeeming the property or reaffirming the debt[.]"). If we were to accept the Woides' argument, we would reward a debtor for failing to choose (and complete) one of these options. Both *Failla* and *Taylor* prohibit this outcome. *See Failla*, 838 F.3d at 1178; *Taylor*, 3 F.3d at 1516–17. "In bankruptcy, as in life, a person does not get to have his cake and eat it too." *Failla*, 838 F.3d at 1178. "

It was error to determine the property serves as collateral for a debt that the state court declared to be un-enforceable because the underlying transaction described in the note was not consummated. The Eleventh Circuit should not disturb the state court finding as the state court is the proper court to determine whether or not a transaction was consummated.

Case law is clear: If a party does not file a statement of intention in a chapter 7 bankruptcy case, the case can be dismissed for deficient filing by the court or upon a motion by any party in interest.

Case law is also clear that there are more than three options in Section 521(a)(2) and a non-contemplated surrender or affirmation cannot be inferred, rather must be expressly stated in the Statement of Intention.

It is also well-established law that doing nothing is always an option for a debtor but such a choice is not without possible negative consequences such as the dismissal of the case and losing the benefit of available remedies in the bankruptcy court such as discharge and lien status modification. In fact, the bankruptcy court is replete with orders of dismissal for this very reason. Upon dismissal, all parties return to the position they were in prior to the filing of the bankruptcy case.

The negative consequences are not unique to debtors. Creditors often do not act to protect their interests and also have to face the music as debtors do for failing to take certain required actions.

In fact, a debtor can leave a creditor out of the plan or a schedule. This act has consequences which essentially leaves the interest of said creditor intact and not subject to the automatic stay, discharge or lien status modification. Cases abound that establish a creditor is not required to participate in the bankruptcy case by filing a proof of claim. This process is entirely voluntary. The fact that a purported servicer filed a proof of claim is indicative of the filer's desire to participate in the distributions from the bankruptcy estate. It does not alter its in rem right if any.
It is clear doing nothing is an option to a debtor and the creditors alike. All parties however have to accept the consequences of the doing nothing option.

Section 521(a)(2) has to be read and interpreted in conjunction with and not in isolation of other pertinent sections of the bankruptcy code. First for Section 521(a)(2) to be applicable, the property has to be in service to secure a debt. Second, if the debtor does not comply, the bankruptcy code has set in place natural consequences to address debtor's non-compliance. One of the more harsh consequences is an outright dismissal of the case by the court on its own initiative or upon motion by a party in interest. If the debtor inadvertently does not comply, the court proceeds to issue a discharge without receiving any objections to same, then Debtor is protected by the discharge injunction from collections efforts and the creditors are left with in rem relief to pursue in state court. Nowhere in established case law, the same operative facts as in this case appeared, **and this case is a case of first impression for this court and should be treated as such.**

The operative unique facts that makes this case a case of first impression are:

(1) Debtor filed Chapter 13 scheduled indicating their intent to surrender.

(2) Debtor filed a notice of conversion.
(3) Upon conversion, Debtor filed amended schedules to remove the indication of intend to surrender and removing the property from the bankruptcy estate that are admittedly deficient.
(4) Debtor failed to file the required statement of intention which is another apparent deficiency.
(5) No objections were filed by any party in interest to the apparent deficient filing.
(6) Debtor received a discharge and a discharge injunction went into effect.
(7) No party in interest filed any objection to the discharge.
(8) A foreclosure action naming FANNIE MAE as the plaintiff was filed in 2011. The pleading did not assert "Surrender".
(9) Appellants filed an action to declare the note (personal debt covered by the discharge) unenforceable. FANNIE MAE was made aware of the action but did not intervene before the entry of the final order.
(10) It was not until we filed an action against FANNIE MAE for attempting to collect on a discharged and unenforceable debt that FANNIE MAE filed a motion to reopen and compel surrender.

The Courts are not meant to reward or punish a party on appeal. The Eleventh Circuit stated in the Orders:

"If we were to accept the Woides' argument, we would reward a debtor for failing to choose (and complete) one of these options."

Appellant cannot help but feel the negative bias appearing in the Order. In the Order, the Court failed to assign consequences for FANNIE MAE'S inaction, and instead, shifted it's focus to punish us for deficient filings, missed by those officers of the Court, upon whom we relied to insure compliance with the rules.
The courts below should put the blame where it belongs: On the parties who failed to object to the apparently deficient filings. The court appellate cannot stand as an advocate for FANNIE MAE or for FANNIE MAE'S agent or officers of the court who failed to act. Nor should this Court allow the courts below to stand in as advocates for FANNIE MAE, even though FANNIE MAE is Quasi public entity.

In other words, the deficient filings coupled with no objections amounting to waiver, does not give the courts below authority to fix the deficient filing or the inaction of the parties to the bankruptcy proceedings. Neither should this Court allow the courts below to fix deficiencies almost seven years after the discharge and close of the case. Such remedies are not available as matter of law or equity.

The compelling of surrender is an act of deprivation of property without just compensation under color of law. We are clearly prejudiced by the order compelling surrender, particularly when no surrender occurred, and the state court determined

the note un-enforceable. The mailing of our notice of rescission, also was un-objected to and became effective upon mailing and also extinguished the debt and any security lien attached thereto.

The Eleventh Circuit also reversibly erred in determining no fraud on the court occurred. The record is clear that in the motion to reopen the case, FANNIE MAE through its counsels concealed material facts about the state court findings relating to the non-enforceability of the non-negotiable note. FANNIE MAE proceeded to obtain an order and attempted to enforce same in violation of the discharge injunction that arose out of the discharge order. This concealment and fraudulent misrepresentation of material facts caused the bankruptcy court to grant the motion. Officer of the court are required to disclose material facts even when the material fact does not advance the client's cause.

The rules require counsel to concede error in appropriate cases and counsel can and should adhere to these rules in practice. Lawyers recognize every day when the defense of a trial court's order is untenable. The protestations that such concessions would be "throwing in the towel" reflect an attitude that Chief Judge Schwartz has lamented:

"Too many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer's duty to his calling and to the administration of justice far outweighs—and must outweigh—even his obligation to his client, and, surely what we suspect really motivates many such inappropriate actions, his interest in his personal aggrandizement"

Rapid Credit Corp., 566 So. 2d at 812 n.1 (Schwartz, C.J., specially concurring).

B. **This Court Should Grant Certiorari to Resolve the Conflict Between the Eleventh Circuit's Decision and the Many Decisions of This Court Emphasizing That the Courts Must Grant Great Deference to The Official Staff Commentary of Regulation Z.** *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980).

There is no dispute in this case that we converted to a Chapter 7 case, our amended schedules do not contain an indication of intent to surrender, and no statement of intention was filed. It is also not disputed that the state court found the transaction was not consummated and the note not enforceable. Also not disputed is that we mailed our notice of rescission in 2015, just prior to the state court order which ruled the transaction described in the Note was not consummated.

Had the District Court and the Court of Appeals heeded this Court's holding that the courts grant great deference to the official staff commentary of Regulation Z. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980), the outcome would be to deny the motion to reopen to compel surrender. The official commentary on the definition of consummation indicates that state law, not Regulation Z, determines when a consumer becomes contractually obligated. See 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13). Florida contract law construes contract clauses, like those in this case, to create a condition precedent to contract formation. See *Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla. 3d DCA 1958).

Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, **state law should govern**. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). Emphasis added.

Even though the Court of Appeals acknowledged, "although state law is determinative of when a contractual relationship is created", the Court clearly erred in finding state law "has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes"; and "that question is governed by federal law."

The District Court and the Court of Appeals rejected our claims that state law governs, as to whether or not the transaction described in the note was consummated. Based on this rejection, the Court of Appeals affirmed the District Court's order reopening the case to compel surrender.

The Court of Appeals relied upon *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004); 12 C.F.R. § 226.1(a). to rule that state law does not govern. This case however clearly states that **state law governs**. The only way to reach the conclusion that state law does not govern is by truncating the balance of the ruling in the case. The case fully states:

> Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, **state law should govern**. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). Emphasis added.

The District Court and the Court of Appeals rejected our position regarding the effect of our mailing our notice of rescission after the state court ruled the transaction was not consummated. The District Court and the Court of Appeals misapprehended the effect of the fact that we mailed our notice of rescission and confused it with someone who was seeking to have the court rescind the transaction. We were only relying on the rescission already effectuated, since there is no need to have the court enter the order on a rescission already completed. All the Court was

required to do is review the allegations in our response to the motion to reopen case to compel surrender, which included the state court order and the mailed notice of rescission, and find that FANNIE MAE is enjoined from enforcing the unenforceable non-negotiable note and thus should have denied the motion to reopen to compel surrender.

As this Court declared in *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. ___ (2015):

> "The clear import of § 1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind."
>
> *Jesinoski* directs that the rescission, and voiding of the security interest, are effective as a matter of law as of the date of the notice.
>
> Also, in *Merritt*, 759 F.3d at 1030-31, the Ninth Circuit noted that rescission under 15 U.S.C. § 1635 occurs automatically upon the debtor's notice of intent to rescind.

It was legal error to base the decision on a finding that we did not timely rescind or cancel the note, when our rescission occurred just prior to the state court ruling that the transaction described in the note was not consummated and the note is un-enforceable. What the law actually supports is that it is Fannie Mae who is time-barred from setting aside our TILA rescission. We served Fannie Mae directly with the TILA rescission notice, and Fannie Mae decided to simply sit on its hands and let our rescission go unchallenged. The statute is clear as to the time frame to dispute and bring any challenges to the rescission, which is effective by law when dropped in the mail. A TILA rescission is not "conditionally" effective, it does not require court approval or review (Unless timely challenged, which was not). It is a creature of statute meant to aid debtors who enter into transactions that, in many cases, may have violated the statute of frauds, ***and we can only assume Fannie Mae failed to challenge the rescission because it knew that, without the aid of forged documents, it did not have proper documentation to raise any challenges or represent the current creditor, if any***.

Arguments as to the consummation of our transaction, timing, true nature of the transaction, etc., are allowed to be raised in the 20-day period subsequent to receipt, but again, Fannie Mae chose to let the clock run out. This Court's unanimous decision supports the plain reading of the statute in *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. ___ (2015.

Order of events is now dictated by TILA, and as the 9th circuit court noted in the case of *Causey v. U.S. Bank Nat 7 Ass 'n*, 464 F. App'x 634 (9th Cir. 2011),

referencing Yamamoto, a case from the 9th circuit court of appeals, "**Although the district court is authorized to modify the default sequence, that authority ends once rescission is accomplished.**" 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(4). In a case where the creditor disputes the consumer's asserted ground for rescission, rescission is not accomplished until a court determines that the consumer had the right to rescind. **See *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003). But in a case where the creditor acquiesces in the consumer's notice of rescission or fails to respond within the 20-day response period, rescission is accomplished automatically. See *Id.*** (Emphasis in bold).

Here, the facts alleged, show that we mailed our rescission notice, and Fannie Mae failed to dispute it within 20 days — thus, accomplishing rescission automatically, and triggering the default sequence under the regulations. This is especially true post-*Jesinoski*.

Rescission is effective the moment it is mailed. The blowback from the servicer or bank is not a legal response. It can only be a lawsuit that vacates that which legally exists --- a cancellation of the note and mortgage, leaving the debt unsecured and the bargaining table leveled almost in favor of the borrower. While this throws those bogus mortgage bonds into turmoil that is not the subject matter for concern in any foreclosure case or case in which rescission duties are sought to be enforced.

The creditor – if there is one – has several options. First, it can acquiesce. That means it delivers the canceled note back to the borrower (hard to do when you have destroyed it), files a release of the encumbrance, and pays back all the money the borrower ever paid in connection with the loan. THEN, it can make a claim for repayment, but not before. Thus, the note and mortgage are canceled forever, and the debt is off the table until all of the three statutory duties are met. OR, the creditor can contest by filing a lawsuit stating what is wrong with the rescission and why it should be vacated. Notice that such a lawsuit has never been brought, even when the rescission notice has been recorded. And that brings us to the third problem – no party has standing to bring such an action to vacate the rescission except the actual creditor. Nobody can rely upon instruments that are "void" (as per Regs) and claim standing or anything else. It is only the owner of the debt that can make a claim to vacate the rescission. And it is only the creditor who is responsible for paying the disgorgement of all money paid by the borrower. It appears that nobody wants to claim that honor. So, the creditors either don't know what is going on at ground level, or don't care, or have other reasons for not producing themselves as the creditors.

Simple logic dictates that the creditor could accept the rescission no matter when it was filed, or the reasons for serving the notice of rescission. But, in order to

have that option, the rescission must be effective. Otherwise, there would be nothing to greet with acquiescence. Should the creditor wish to vacate the rescission, they must do so within 20 days or lose their right to demand revocation of the rescission. Hence, in all cases, and at all times, the notice of rescission is effective, subject to the creditor's right to seek revocation. Otherwise, rescission doesn't work at all, and the banks could forever stonewall, which is precisely what the committee notes show was intended to be impossible when the Truth in Lending Act was passed. To treat the situation any other way would mean that the rescission is effective but it isn't.

To exercise that right, a borrower must "notify[] the creditor, in accordance with regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a); see also *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) ("[R]escission is effected when the borrower notifies the creditor of his intention to rescind."). TILA's core implementing regulation, known as Regulation Z, outlines further details on how the borrower is to exercise the right to rescind. See 12 C.F.R. § 226(a).

This Court should grant review to resolve the tension between the Eleventh Circuit's ruling, holding that Federal Court governs in determining whether or not a transaction described in the note is consummated and accordingly, ruling counter to the state court ruling that consummation did not occur and the note was not enforceable.

### C. This Court Should Grant Certiorari to Resolve a Split Among the Circuits as to Whether There is a Time Limit to Bringing an Action for Declaratory Relief When the As-a-Matter-of-Law Completed Rescission Is Being Challenged Outside of the Twenty Day Window Mandated by the Statute.

Although this Court has held that rescission is effective upon mailing, the circuit courts of appeals continue to reject the power and simplicity of the rescission process afforded to consumers. This rejection has manifested in rulings such as the orders in this case, where the circuit court unwinds the effectuated rescission after the mandated 20-day period had passed.

> **"Although the district court is authorized to modify the default sequence, that authority ends once rescission is accomplished."** 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(4).

An example of this uncertainty in the law is the conflicting decisions as to whether the court has authority to unwind the completed rescission after the twenty-day window has passed. The finding of the circuit court, that we did not

timely rescind, thus the note and mortgage remained enforceable is contrary to law. Even though, the we did not solely rely on our completed rescission but also relied on the state court judgment, the rescission should have sufficed. This is because, like a judicial degree, the validity of which may be subject to a timely challenge or acquiescence, a rescission is deemed valid unless timely challenged within the twenty-day window mandated by congress. Failing to successfully challenge the rescission, rendered the rescission complete and effective.

What is happening, time and again, is that the Courts of Appeal are sticking to their own precedents, which are contrary to this Court's holdings in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015). The Eleventh Circuit continues to decide that rescission did not occur, even when the notice of rescission is mailed, and remained uncontested for over twenty days from mailing.

The apparent split in authority, as to whether there is a twenty-day time limit for a creditor to act – failing which – the creditor is barred from mounting any defense or challenge to the rescission requires this Court's intervention.

*The 9th circuit court noted in the case of Causey v. U.S. Bank Nat 7 Ass 'n, 464 F. App'x 634 (9th Cir. 2011), referencing Yamamoto, a case from the 9th circuit court of appeals, "**Although the district court is authorized to modify the default sequence, that authority ends once rescission is accomplished.**" 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(4). In a case where the creditor disputes the consumer's asserted ground for rescission, rescission is not accomplished until a court determines that the consumer had the right to rescind. See **Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003). But in a case where the creditor acquiesces in the consumer's notice of rescission or fails to respond within the 20-day response period, rescission is accomplished automatically. See Id.***
*(Emphasis in bold).*

In none of these cases do the Federal Circuits decide that rescission can be challenged outside of the twenty-day response period proscribed by Congress. The Eleventh Circuit's decision in this case is thus inconsistent with these many other Circuit Court rulings, allowing challenge to a completed rescission outside of the twenty-day response period proscribed by congress.

The differences among the Circuits cannot be explained by the specific statutes involved. None of these laws mention extending the twenty-day response period prescribed by Congress. The split among the Circuits is entirely a result of a lack of clarification from this Court as to whether the twenty-day response period can be extended under some circumstances

This case provides a vital occasion for the Court to address several crucial issues and in the context of an important federal statute and the bankruptcy code, where the questions often will arise: (1) Is challenge to the completed rescission available to a purported creditor outside the twenty-day response period prescribed by Congress? (2) Does state law govern in determining whether consummation occurred? And (3) Can surrender be arbitrarily imputed by the bankruptcy court when no statement of intention is filed and no other indication of intent to surrender appear on the chapter 7 amended schedules?

## CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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