No. 19-125

IN THE

Supreme Court of the United States

GALE ZAMORE,

Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, INDIVIDUALLY AND AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5 ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2007-CH5, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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I. The Rooker-Feldman issue merits review because the Eleventh Circuit continues to apply its own standard in derogation of *Exxon Mobil*.

A. Petitioner's Rooker-Feldman question is premised on a myriad of Eleventh Circuit Court cases which fail to apply *Exxon Mobil* correctly.

The Eleventh Circuit could not have consistently applied both *Amos v. Glynn County Board of Tax Assessors*, 347 F.3d 1249 (11th Cir. 2003) and *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). Its statement that it was relying on *Exxon Mobil* belies the fact that the rest of the opinion relies on the *Amos* factors and reaches a result that is inconsistent with *Exxon Mobil*. In so doing, the Eleventh Circuit continues to use its own standard for determining Rooker-Feldman issues and disregards the plain, clear, and explicit precedent of *Exxon Mobil*.

1. Eleventh Circuit precedent does not accord with *Exxon Mobil*.

Respondent admits the main premise of Petitioner's appeal, that "*Exxon Mobil* noted that a party may bring an 'independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party,' but only as long as such claim would not invite federal court 'review and rejection' of the state-court judgment." [Resp. P. 11.] Respondent then lists four Eleventh Circuit cases in an unconvincing attempt to show that the Court is in alliance with *Exxon Mobil* and the other Circuits. But the following cases show that the Eleventh Circuit is continuing to use its own standard.

The most cited case which is in derogation of *Exxon Mobil* is *Casale v. Tillman*, 558 F.3d 1258 (11th Cir. 2009). This post-*Exxon Mobil* case starts its Rooker-Feldman analysis by stating: "the doctrine applies both to federal claims raised in the state court ***and*** to those 'inextricably intertwined' with the state court's judgment. *Id*. at 1260 (emphasis added). The "and" in that sentence is important because it shows that the Eleventh Circuit is treating the term "inextricably intertwined" as something different from the definition of the Rooker-Feldman expressed in *Exxon Mobil*. But they are one and the same.

This Court clearly defined the doctrine as applying to "cases [1] brought by state-court losers [2] complaining of injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." *Exxon Mobil Corp.*, 544 U.S. at 284. Thus, logically, state and federal claims are "inextricably intertwined" ***only if*** they meet this definition. "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party" then the claims are ***not*** "inextricably intertwined." *Id*. at 293.

As such, the term "inextricably intertwined" is not separate from the Rooker-Feldman definition expressed in *Exxon Mobil*. Yet the Eleventh Circuit continues to treat it as such. In *Casale*, the court – relying on two pre-*Exxon Mobil* Eleventh Circuit cases – held that:

> 1) Rooker-Feldman did not apply "where a party did not have a 'reasonable opportunity to raise his federal claim in state proceedings,'" citing

> *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996); and
>
> 2) that "a claim is inextricably intertwined if it would 'effectively nullify' the state court judgment … or it 'succeeds only to the extent that the state court wrongly decided the issues,'" citing *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001)). *Casale*, 558 F.3d at 1260

Neither of these two statements are supported by *Exxon Mobil*. The opposite is true.

Exxon Mobil reversed the circuit court's application of Rooker-Feldman based on the flawed premise that if the federal defendant won in state court, the federal plaintiff "would be endeavoring in the federal action to 'invalidate' the state-court judgment…" *Exxon Mobil Corp.*, 544 U.S. at 291. In other words, this Court clarified that Rooker-Feldman is ***not*** applicable ***even if*** the federal judgment disagrees with a state court judgment, **as long as there is an independent basis for the federal claim and the federal court is not asked to overturn the state judgment.**

Likewise, the *Exxon Mobil* test cares not about whether a claim was, or should have been, raised in state court. That is *res judicata*, a principle of claim preclusion, not jurisdiction. "*Rooker–Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions. *Id*. at 284.

Casale did mention *Exxon Mobil* but its flawed reliance on the principles of *Powell* and *Goodman* continue to be cited in a plethora of Eleventh Circuit cases as the basis for denying claims, without ever applying the *Exxon Mobil* test.

The Eleventh Circuit has even admitted that it continues to apply its old standard. In *Cormier v. Horkan*, 397 Fed. Appx. 550 (11th Cir. 2010), the court stated: "our circuit has continued to apply the fourth factor of the *Amos*[1] test, evaluating whether the plaintiff's claims are 'inextricably intertwined' with the state court judgment," citing to *Casale*. *Id*. at 553. There are many similar examples of the Eleventh Circuit's expanded application of Rooker-Feldman:

***Symonette v. Aurora Loan Services, LLC*, 631 Fed. Appx. 776 (11th Cir. 2015)** – Holding that Rooker-Feldman barred the action without ever mentioning *Exxon Mobil* and without considering whether the action was brought by state court losers seeking review and rejection of a state-court judgment. Instead, citing to *Casale*, the Court held that the federal action was inextricable intertwined with the state action because appellant had a "reasonable opportunity to raise his federal claim in state proceedings." *Symonette,* 631 Fed. Appx. at 778.

***Nivia v. Nation Star Mortg., LLC*, 620 Fed. Appx. 822 (11th Cir. 2015)** – Holding that appellant's FDUTPA

1. *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249 (11th Cir. 2003) is the Eleventh Circuit's pre-*Exxon Mobil* test which the lower courts essentially applied in the current action, as fully addressed in the Petition.

claim was barred by Rooker-Feldman because it was an equitable defense to the state foreclosure action which was never raised. The Court never considered whether appellant had an independent claim, "albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party." *Exxon Mobil Corp.*, 544 U.S. at 293 (2005). In fact, the Court frankly, and incorrectly, stated that the "*Rooker–Feldman* inquiry is not whether a claim for damages is based to any degree on harm resulting from a valid state court judgment… [t]he inquiry is whether either the damages award would annul the effect of the state court judgment or the state court›s adoption of the legal theory supporting the award would have produced a different result." *Nivia*, 620 Fed. Appx. at 825 (citing *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009)).

***Scott v. Frankel*, 606 Fed. Appx. 529 (11th Cir. 2015) & *Valentine v. BAC Home Loans Servicing, L.P.*, 635 Fed. Appx. 753, 756 (11th Cir. 2015)** – Both cases give the right standard for Rooker-Feldman but then apply a separate "inextricably intertwined" test citing *Casale*.

Velardo v. Fremont Inv. & Loan*, 298 Fed. Appx. 890 (11th Cir. 2008)** – The Court found that Rooker-Feldman barred claim but did not mention *Exxon Mobil*. Instead it relied on *Goodman* to hold that a claim is "inextricably intertwined" "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Id*. at 892. The Court explicitly held that the focus of the Rooker-Feldman analysis was ***not the type of relief sought by the plaintiff, which is the opposite of *Exxon Mobil*.

***Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066 (11th Cir. 2013)** – Holding that Rooker-Feldman was not applicable pursuant to *Exxon Mobil* but actually applying the "inextricably intertwined" standard established in *Casale*, which the court treated as a separate standard from that established in *Exxon Mobil*.

***Torchia v. State of Florida Office of Fin. Institutions & Sec. Regulation*, 168 Fed. Appx. 922 (11th Cir. 2006)** – Holding that Rooker-Feldman barred the claim because it was "inextricably intertwined" with the state court action since the federal court's determination could potentially disagree with the state court judgment. While *Exxon Mobil* was mentioned in passing, the Court ultimately applied the standard set out in *Powell v. Powell*, 80 F.3d 464 (11th Cir. 1996).

***Cavero v. One W. Bank FSB*, 617 Fed. Appx. 928 (11th Cir. 2015)** – Mentioning *Exxon Mobil* but ultimately applying the definition of "inextricably intertwined" found in *Casale.*

***Velazquez v. S. Florida Fed. Credit Union*, 546 Fed. Appx. 854 (11th Cir. 2013)** – While the Court cited *Exxon Mobil* it also said that Rooker-Feldman bars claims that are inextricably intertwined as defined by *Casale*. The Court barred the claim because 1) appellant had the opportunity to raise the claim below and 2) the claim was inextricably intertwined, without doing a real *Exxon Mobil* analysis.

***Parker v. Potter*, 368 Fed. Appx. 945, 948 (11th Cir. 2010)** – Acknowledging *Exxon Mobil* but ultimately applying its own four-part test from a pre- *Exxon Mobil* case, *Storck v. City of Coral Springs*, 354 F.3d 1307 (11th Cir. 2003), which used the old *Amos* test.

***Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279 (11th Cir. 2018)** – One of Respondent's four cited cases which correctly states the *Exxon Mobil* standard and then incorrectly applies *Casale*.

***Thurman v. Judicial Correction Services, Inc.*, 760 Fed. Appx. 733 (11th Cir. 2019)** – Mentioning *Exxon Mobil* but applying the *Casale* line of cases instead.

Crossdale v. Crossdale*, 598 Fed. Appx. 697, 699 (11th Cir. 2015)** – The Court initially set out the correct *Exxon Mobil* test but then stated: "Further***, the doctrine applies only to claims that were actually brought in state court or claims that are 'inextricably intertwined' with the state court's judgment," citing *Casale*. *Id*. at 699

This is a clear indication that the Eleventh Circuit continues to apply *its own* Rooker-Feldman test rather than the test set out by this Court in *Exxon Mobil*.[2]

2. A conflict exists between the Eleventh Circuit's Rooker-Feldman test and that of the other Circuits.

In the sister circuit court cases cited by Respondent, the focus of the Rooker-Feldman analysis was whether the ***injury complained of*** in federal court was ***caused by the state judgment***. Juxtapose that with the cases cited above where the Eleventh Circuit's inquiry focused on whether the federal claim was, or could have been, brought in the

2. While some of the case ultimately reached the correct result, the reasoning was flawed. If left unchecked, this flawed Rooker-Feldman test will be used to continue to deny the federal courts of their jurisdictional powers.

state court (claim preclusion) or whether adjudication of the federal claim would contradict the state court judgment (which is not part of the Rooker-Feldman test.)

B. The Eleventh Circuit's decision was incorrect because it did not apply *Exxon Mobil*.

1. The Complaint did not seek to invalidate the state foreclosure judgment.

Respondent agrees that Rooker-Feldman only applies "to 'cases [1] brought by state-court losers [2] complaining of injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments.' " [Resp. P. 20]. Respondent does not point to anything in the Complaint which invites the district court to review and reject the state court judgment. Instead, Respondent cites to the Eleventh Circuit's opinion which incorrectly relied on a state court filing (the lis pendens) instead of analyzing the relief requested in the federal Complaint.

Respondent's argument – that the Complaint "essentially" seeks review and rejection of the state judgement – is incorrect. Rather, this is the exact scenario addressed in *Exxon Mobil* where Petitioner has an "independent claim, albeit one that denies a legal conclusion that a state court has reached…" *Exxon Mobil Corp.*, 544 U.S. at 293. She is not seeking reversal of the state court judgment, she is seeking a decision as to whether rescission occurred pursuant to federal law. The fact that a federal court decision would "effectively" (but not actually) nullify a state judgment is the same as

stating that the federal action could potentially "den[y] a legal conclusion that a state court has reached," which is not a basis for applying Rooker-Feldman. *Id.*

2. Not every Circuit dismisses TILA claims based on Rooker-Feldman.

Respondent erroneously alleges that "every circuit to have addressed this particular issue, the Third, Seventh, and now the Eleventh, has squarely held that a follow-on claim for TILA rescission, or a declaration to that effect, would effectively nullify a prior state-court judgment, and is therefore barred under *Rooker-Feldman*." [Resp. P. 25]. But the Seventh Circuit has held that the application of Rooker-Feldman to a TILA recession claim is inapplicable as being too broad. *Dye v. Ameriquest Mortg. Co.*, 289 Fed. Appx. 941 (7th Cir. 2008). Likewise, the Second Circuit in *Nath v. Select Portfolio Servicing, Inc.*, 732 Fed. Appx. 85, 87 (2d Cir. 2018) held that "[t]he *Rooker-Feldman* doctrine does not prevent a district court from reviewing a claim for [TILA] damages stemming from an allegedly fraudulently obtained foreclosure judgment: the district court can determine damages liability without reviewing the propriety of the state court judgment."

In *Dye*, the Court reasoned that appellants "do not simply claim that they were injured by the foreclosure judgment. They claim that the defendants injured them six months earlier—at the time of the closing of their mortgage—by, as the Dyes allege, confusing them with disclosures that did not comply with TILA and using [a] low appraisal. Because the Dyes' alleged injury was complete before the state court litigation even commenced, *Rooker–Feldman* is not at play." *Id.* at 943. Similarly, in the current

action, the injury complained of by Petitioner which led to the TILA violation arose from improper disclosures during the time of closing in 2007, which was well before the foreclosure action was initiated in 2009.

II. This Court is authorized to review the remaining questions on appeal.

A. The Eleventh Circuit's failure to address the remaining issues does not preclude review.

Respondent alleges that this Court cannot review the issues of res judicata or the statute of limitations ("SOL") because the Supreme Court is a court of "final review and not first view." [Resp. P. 26]. That argument is incorrect because this would not be the "first review" of those issues.

The only case cited by Respondent to support this argument – *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) – is distinguishable. In *Zivotofsky*, petitioner asked this Court to review an issue ***not*** reviewed by the circuit court ***or*** the district court. *Id.* at 201 ("Because the District Court and the D.C. Circuit believed that review was barred by the political question doctrine, we are without the benefit of thorough lower court opinions to guide our analysis of the merits.).

Similarly, in other cases where this Court has declined to review issues, the reason has been that ***neither*** lower court addressed the issues. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 FN1 (2018) (Declining review because "[n]o court has addressed that question."); *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (Declining review because resolution of the issue "should take place in the District Court ***or*** the Ninth Circuit in the first instance.")

(emphasis added); *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) (Declining review because neither lower court had considered it.); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (Declining review because appellant "did not raise this argument before the District Court or Court of Appeals…."); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (Declining review because appellant "failed to raise this argument in the courts below….").

By contrast, here, the District Court reviewed and addressed the issues of res judicata and the SOL, in detail, thus giving this Court the benefit of a thorough lower court opinion to guide its analysis of the merits. For this reason, the Court can review and decide these issues.

B. Res judicata and the SOL are proper for review and highly relevant to the conflict at issue.

1. Res Judicata

Review of res judicata is important for the same reason that review of Rooker-Feldman is important. The Eleventh Circuit is conflating the due doctrines. This conflict can best be put to rest with an opinion which decides both issues and describes how the facts of the case are distinctly applied to each legal principle.

2. Statute of Limitations

Even more controversial than Rooker-Feldman is the application of the SOL to TILA rescissions. The conflict invoked by this issue spans across the federal and state courts. Respondent's clever attempt at taking quotations out of context cannot hide the very apparent fact that

when it comes to TILA rescission and the application of the SOL, both federal and state courts are scattered on the matter ***and*** that this Court's opinion in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015) is being misapplied. [*See Petition* P. 13-16].

Counter to Respondent's argument that Jesinoski does not provide any guidance with the statute of limitations, *Jensinoski* actually provides the key to resolving the issue. In *Jesinoski*, this Court held that rescission ***is completed*** upon the sending of the notice of rescission. Thus, applying any statute of limitation for enforcement/recognition/acknowledgement of the existence of a rescission runs afoul of the idea that rescission is a completed event by operation of law. Applying a statute of limitation implies that a borrower is required to bring an action (within a certain time) in order to effectuate rescission. But this Court has already held that effectuating a valid rescission does not require litigation. *Id*. As such, there is a conflict between the Circuits that apply a one-year SOL, the Circuit that apply their own "borrowed" SOL, and this Court's opinion in *Jesinoski* finding that no litigation is even necessary for a rescission to be legally valid.

Respectfully submitted,

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