No. 17-672

In the Supreme Court of the United States

ALAN G. KEIRAN AND MARY JANE KEIRAN,

Petitioners,

v.

HOME CAPITAL, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

Jon D. Pels
Counsel of Record
Maria Leonard Olsen
THE PELS LAW FIRM, LLC
4845 Rugby Avenue
Third Floor
Bethesda, MD 20814
(301) 986-5570
jpels@pelslaw.com

COUNSEL FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Petition presents court conflicts on legal issues of exceptional importance to the nation's consumers. The first is whether a consumer's sworn affidavit denying receipt of mandatory Truth-in-Lending Act (TILA) disclosures is sufficient to overcome TILA's rebuttable presumption of receipt. Respondents erroneously characterize Mr. Alan Keiran's and Mrs. Mary Jane Keiran's sworn affidavits contesting receipt of the required TILA disclosures as "conclusory" and, therefore, insufficient to overcome the statutory presumption.

The second issue is whether TILA rescission is “effected” upon timely notice, as this Court unanimously held in *Jesinoski v. Countrywide Home Loans, Inc.,* 135 S. Ct. 790 (2015), triggering required lender action which, if not performed, voids the lender's security interest. Respondents assert that they had no duty to act on the Keirans' rescission notice because they did not believe the Keirans had valid reasons for rescinding. Lenders can contest TILA violation allegations, but may not ignore TILA requirements while doing so.

If Respondents' interpretation of the law is correct, plaintiffs across the country are filing hundreds of meritless lawsuits, based on an insufficient number of TILA Disclosure Statements provided to consumers. If Petitioners' interpretation is correct, lenders cannot ignore TILA's text simply through intransigence.

The last issue is whether the Keirans' alternative rescission ground—that the lender violated TILA by hiding the cost of the loan in its inaccurate Finance Charge disclosure--was waived. The rescission's validity, based in part on Finance Charge inaccuracies, is not a new issue on appeal.

Under the Eighth Circuit's view, creditors' concealment of documents pertinent to a rescission's validity would be rewarded, as would creditors' failure to follow TILA's 20-day rescission mandate. Respondents' positions negate TILA's effectiveness.

I. Petitioners Have Demonstrated Intractable Conflict Among the Circuits.

On remand, Respondents realized that TILA required them to have given Mr. and Mrs. Keiran two TILA Disclosure Statements. [1] Respondents retreated from this position, but the district court declined to address Respondents' admission of error. Instead, it accepted Respondents' argument that the Keirans' affidavits were merely "conclusory" and insufficient to overcome the presumption of receipt of disclosure statements, diverting attention from Respondents' conceded TILA violations.

A. Widespread Confusion Over What May Overcome TILA Section 1635(c)'s Presumption of Receipt of Required TILA Documentation Has Damaged TILA's Effectiveness.

Mr. and Mrs. Keiran responded to the original lender's misleading internet loan advertisement.

[1] At the post-remand hearing, Respondents stated: "Yes, in 2011 arguments were made that, in the alternative, had they only been given one copy, that should be sufficient as, you know, merely technical violation because the disclosure statement is correct and accurate, but we've abandoned the argument." Keirans' Br. at 45-46 (citing App. 564). This "technical violation" is precisely what TILA was designed to bar creditors from doing.

Keirans' Br. at 5. That lender is no longer in business, but predatory lenders take advantage of unsuspecting consumers on a regular basis. "Predatory lending is today's most pressing consumer protection issue.... [It] is particularly rampant in the subprime home equity loan market—inhabited largely by unsophisticated borrowers—where lenders have made billions upon billions of dollars of loans with abusive terms." David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 Fla. St. U. L. Rev. Issue 4 at 1 (2006). As successors-in-interest absorb the loans made by shady lenders, tactical maneuvers to protect the banks' interests increase and more consumers lose their homes. Respondents note that the Keirans "cycled through several lawyers in this litigation, and some of those counsel apparently have not been aware of documents that were produced to their predecessors." Respondents' Opp. at 7 n.2. The Keirans have been fighting the lender and its successors-in-interest for almost ten years. They finally lost their family home via a sheriff's sale in 2017.

In the lower court's view, *Bank of America v. Peterson*, 756 F.3d 357, 360 (8th Cir. 2014), "did not directly hold that, in all situations, mere affidavit testimony rebuts the statutory presumption of proper delivery." Keirans' Br. at 49 (citing Order Add. 9). The court rejected Petitioners' testimonial affidavit as "self-serving," and ignored the "sufficient probative evidence," *Davidson & Assocs. v. Jung,* 422 F.3d 630, 638 (8th Cir. 2005), from the three sources that were maintaining loan closing documentation: (1) the borrowers; (2) the lender; and (3) the title company. Each source's records contained four copies of the Notice of Right to Cancel and one copy of the TILA Disclosure Statement. Keirans' Br. at 12 (citing three Doc. Source Exs. at App. 44-48, 145, 147-150, 549, 551-554). Under oath statements denying receipt of the requisite two TILA Disclosure Statements, coupled with this corroborating evidence, should have staved off summary disposition. The Eighth Circuit's holding conflicts with the Third and Seventh Circuit's reasoning in *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180 (3rd Cir. 2011) and *Marr v. Bank of America, N.A.*, 662 F.3d 963 (7th Cir. 2011).

Respondents' primary argument is that the Keirans' affidavits are conclusory. Respondents concede that even a self-serving affidavit can create a fact question if it is not conclusory. Resp. at 1. But Respondents make an implausible distinction between "conclusory denial of receipt of the TILA disclosures" and "non-conclusory affidavits attesting to non-receipt of disclosures." Resp. at 11. The Keirans swore under oath that they did not receive the two TILA-required disclosures. Keirans' Br. at 12 (citing App. 305, 354, 448). Conclusory affidavits are those that merely paraphrase the words of a statute, giving a subjective opinion. *Morley v. C.I.A.*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). The Keirans' Affidavits stated:

> At the Closing, I signed a large stack of paperwork and documents associated with the mortgage loan.... The representative agent left only one set of unsigned documents for us and did not provide one set for me and another set for my wife.... I have maintained the mortgage loan documents securely at my home

> in a separate file where they remained in their same condition as the date of Closing…. After fully reviewing my mortgage loan documents and consulting with others, I discovered that the single unsigned TILA Disclosure Statement provided to us in connection with the mortgage transaction is the only copy ever provided to both me and my spouse.

Keirans' Br. at 12 (citing App. 306-308, ¶¶ 14, 16, 19, 20). The Keirans' affidavits are factual, not "conclusory." Summary judgment was improperly granted because the question of whether the proper TILA disclosures were given to the consumers created a triable issue of fact.

Lower courts have diverging opinions on this issue. [2] Consumers are required to sign an "acknowledgment of receipt" of complicated loan documentation to receive loans. Triable issues of fact are presented where both a borrower's "signed

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[2] "[S]omething more than the borrowers' assertions of non-receipt [are] required to rebut the section 1635(c) presumption of delivery." *Golden v. Town & Country Credit*, No. 02-3627, 2004 WL 229078, *2 (D. Minn. Feb. 3, 2004); *Sias v. Washington Mutual Bank, FA*, Case No. 3:10-cv43, 2010 WL 2103448, *4 (E.D. Tenn. May 20, 2010) (plaintiffs' written acknowledgement of receipt of the NRTC creates a "rebuttable presumption" and "plaintiffs' averments that they did not receive this disclosure are insufficient to overcome this presumption"); *cf.*, *Abubo v. Bank of New York Mellon*, 977 F. Supp. 2d 1037 (D. Haw. 2013) (citing a "majority" of cases where borrowers' testimony that, although they signed the NRTC, they did not each receive two completed, signed copies created a genuine issue of material fact); *Stanley v. Household Fin. Corp.*, 315 B.R. 602, 609 (Bankr. D. Kan. 2004) (borrower cannot win summary judgment based on affidavit of non-receipt; this creates issue for trial).

acknowledgment of receipt" and an affidavit denying receipt exist. But many courts have denied consumers the opportunity to prove their cases because they hold that TILA section 1635(c)'s presumption is not overcome by a consumer's sworn affidavit. The risk that consumers' affidavits denying receipt of TILA-required documents will be summarily discarded as "conclusory" contravenes "liberal construction in favor of the consumer." *Rand Corp. v. Moua*, 559 F.3d 842, 845 (8th Cir. 2009); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998).

The Seventh Circuit addressed the issue in *Marr v. Bank of America, N.A.*, 662 F.3d 963 (7th Cir. 2011), reasoning:

> As we consider this issue, it is helpful to recall the precise weight that the [TILA] statute gives to the written acknowledgment:
>
> Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof. 15 U.S.C. § 1635(c).

This statutory language "strongly suggests that Congress was [admonishing] courts not to overrate the importance of the acknowledgment; that is why it cautions that the statement '*does no more than*' create the rebuttable presumption." *Marr,* 662 F.3d at 967. "As we have held in other contexts, 'uncorroborated, self-serving testimony, if based on personal knowledge or first-hand experience, may prevent summary judgment against the non-moving party, as such testimony can be evidence of disputed material facts." *Id.* at 968.

Similarly, the Third Circuit held in *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180 (3rd Cir. 2011):

> In sum, because of the plain language of TILA, and the resulting conclusion that Congress did not intend something other than a Rule 301 presumption to apply, we hold that the testimony of a borrower alone is sufficient to overcome TILA's presumption of receipt.

Id. at 189-191. When considering statutory causes of action, the TILA statute prescribes the burden of production and proof. Respondents do not deny that numerous lower courts have issued conflicting decisions on this important issue.

The panel's embrace of the "remarkable factual scenario in *Peterson*," and statement that a "self-serving affidavit will not defeat an otherwise meritorious summary judgment motion," cannot be squared with their own circuit's proclamation in *Rand Corp. v. Moua*, 559 F.3d at 845, 847 (courts broadly construe TILA in favor of consumers; stating that requiring borrowers to sign false and contradictory statements is a paradigm for confusion).

B. Respondents Violated the TILA Rescission at Law Mechanics That *Jesinoski* Confirmed.

The "effect" of a rescission notice timely *exercised* is the TILA unwinding procedure. *Jesinoski,* 135 S. Ct. 790. As explained in TILA's Regulation Z:

> (d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge. (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest. (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section….

12 C.F.R. § 226.23(d) (emphasis added). Respondents failed to follow TILA's mandatory procedures.

TILA sections 1635(a) and (b) address how the borrower exercises a right of rescission, and what the creditor's obligations are upon exercise of that right. Respondents ignored their TILA required obligations following rescission notice receipt. This commonplace scenario is unfortunate because: "[T]he `remedial scheme of TILA is designed to deter generally illegalities which are only rarely uncovered and punished, and not just to compensate borrowers for their actual injuries in any particular case.'" *Fairley v. Turan-Foley Important, Inc.*, 65 F.3d 475, 480 (5th Cir. 1995); *see, e.g., McOmie–Gray v. Bank of America Home Loans,* 667 F.3d 1325, 1329–30 (9th Cir. 2012) (bank claimed it could "toll" the rescission period during negotiations, then used the statute of repose to extinguish the claim once three years had passed from loan closing); *see Merritt v. Countrywide Fin. Corp.,* 759 F.3d 1023, 1030-32 (9th Cir. 2014).

According to the Fifth Circuit:

> "[A]t this juncture, the creditor incurs several responsibilities. Within ten days after receipt of a rescission notice, the creditor is obligated, first, to return any downpayment or earnest money and, second, to take any appropriate steps to reflect the termination of the security interest.... To hold otherwise would create a gross anomaly, for no tender in the exact scheme envisioned by the statute could ever be effected by a debtor in the most egregious of circumstances, namely when a creditor steadfastly refuses to perform his express obligations upon receiving the notice of rescission. Congress scarcely could have contemplated such a disruptive commercial stand-off."

Sosa v. Fite, 498 F.2d 114, 118-119 (5th Cir. 1974); *see also Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 265 (3rd Cir. 2013). And yet, the disruptive commercial stand-off between the lender and the Keirans occurred here.

Respondents posit that the plain text of section 1635(b) or Regulation Z section 226.23(d) "would have the untoward practical consequence of flooding courts with meaningless TILA suits." Respondents' position was orally argued in *Jesinoski* and soundly rejected by this Court.

Respondents argue that the Keirans' rescission notice was invalid because their right to rescind was invalid. No district or circuit court has held that borrowers must prove their reason to rescind is legally valid, *i.e.*, based on a lender's failure to satisfy TILA's disclosure requirements, before sending a rescission notice. As the Eleventh Circuit pointed out, "[B]ecause rescission is such a painless remedy under the statute (placing all burdens on the creditor), it acts as an important enforcement tool, insuring creditor compliance with TILA's disclosure requirements." *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992). The judicial process ensures TILA compliance; the lenders are not TILA compliance dispute arbitrators.

Since Respondents failed to raise tenable defenses within 20-days' receipt of the rescission request, by default, the creditors' interest in the property is "automatically negated regardless of its status and whether or not it was recorded or perfected." *Official Staff Commentary* § 226.23(d)(1)-1. Reconciliation of the Eighth Circuit's decision granting summary judgment to the lender in this case with the other circuit courts' interpretations is necessary to bring stability to this vital area of consumer protection law.

II. Contrary to Respondents' Assertion, Granting the Petition Will Ensure Proper Construction of this Important Consumer Protection Law.

Mr. and Mrs. Keiran obtained a toxic sub-prime mortgage loan that replaced two previous loans, with a lender who went out of business after selling the loan to an entity that declared bankruptcy. Respondents assumed the Keirans' loan. The Keirans sent a rescission notice, based on an insufficient number of *material* TILA disclosures. In the notice, the Keirans asked the bank to explain how the lender allocated the amounts in the TILA Disclosure Statement. The Keirans discovered that the bank subtracted various amounts from the Amount Financed at closing, to minimize "the dollar amount this credit will cost." Reg. Z, § 226.18(d). Failure to accurately disclose the *total* amount of the Finance Charge Disclosure, subject to the applicable tolerance for accuracy, is an actionable TILA violation.

Respondents erroneously maintain that the Keirans forfeited the Finance Charge inaccuracy argument. Resp. Br. at 20. First, neither the district court nor the first circuit court panel ever decided whether the Keirans' rescission notice was *valid* when sent and what the implications were of that timely notice. Keiran En Banc Pet. at 13-14. The Finance Charge inaccuracy is one of several rescission grounds, constituting whether a *material* disclosure violation occurred. Second, the district court recognized that the Keirans consistently alleged enforcement of their TILA rescission rights, so the *validity* of the rescission notice based on a *material* disclosure violation was not a new issue and was not waived. *Id.*; *see Aquino v. Public Finance Consumer Discount Company*, 606 F. Supp. 504, 507-08 (E.D. Pa. 1985) (15 U.S.C. § 1635(a) and Regulation Z only require the customer to notify the creditor of her intention to rescind and <u>do not</u> require her to identify the disclosure violation at issue).

Moreover, the Court has "the authority to identify and apply the correct governing law… whether argued by the parties or not." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advance by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991); *Borntrager v. Cent. States Se. & Sw. Areas Pension Fund*, 577 F.3d 913, 924 (8th Cir. 2009) (whether an issue has been waived for appeal is not determined by a new argument raised on appeal, but instead whether the new argument raises a new issue on appeal). The Keirans have argued throughout that their rescission was *valid*, based on TILA *material* disclosure violations. Keirans' Br. at 4-6 (citing App. 18-51). There was no waiver.

The Finance Charge inaccuracies the court allowed fundamentally defeat TILA's statutory purpose. Petitioners briefed the lower courts in detail on each Finance Charge disclosure inaccuracy. Keirans' Br. at 32-35. The district court opined on one inaccuracy, while ignoring multiple other briefed inaccuracies. The circuit court held that the finance charge inaccuracies claim fell below the required rescission threshold or were greater than the amount required to be disclosed. Eighth Cir. Opinion at 9. If the Eighth Circuit's ruling stands, lenders required to make these material disclosures may defraud consumers by "burying the cost of credit." *Contra*, *Mourning*, 411 U.S. at 366; 15 U.S.C. § 1601(a) (purpose is "to assure a meaningful disclosure of credit terms"); Reg. Z § 226.18(d); *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 287 (7th Cir. 1997) (understating the Finance Charge is a "type of fraud that goes to the heart of the concerns that actuate [TILA]").

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

January 29, 2018

Respectfully submitted,

/s/ Jon D. Pels
Jon D. Pels
Counsel of Record
Maria Leonard Olsen
THE PELS LAW FIRM, LLC
4845 Rugby Avenue
Third Floor
Bethesda, MD 20814
(301) 986-5570
(301) 986-5571 Fax
jpels@pelslaw.com

Counsel for Petitioners,
Alan and Mary Jane Keiran