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

SUPPLEMENTAL BRIEF OF 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

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Regulations:

Other Authorities:

SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners respectfully file this supplemental brief in response to Respondents' Supplemental Brief filed on February 2, 2018, suggesting that: "recently-discovered facts … may moot the case." Respondents' mootness concern is misguided and their invitation to avoid this *certiorari*-worthy petition should be declined. None of the Questions Presented forecloses this Court's jurisdictional power to hear this case. The current confusion regarding certain Truth in Lending Act ("TILA") provisions has limited TILA's effectiveness. Clarity is needed to restore Congressional intent and creditors' observation of TILA's strictures in the national housing market. This case is an ideal vehicle to resolve the circuit split, correct the conflicting rulings issued by lower courts, and arrest the statutorily-prohibited practices creditors inflict on consumers across the country. Federal law does not support Respondents' mootness contention.

FACTS PERTINENT TO THE ISSUE RAISED IN RESPONDENTS' SUPPLEMENTAL BRIEF

This case returns to this Court after a long and troubled history. Alan and Mary Jane Keiran filed suit on October 29, 2010, when Respondents refused to honor the Keirans' proper notice of rescission. While this case was pending on the first appeal, Bank of New York Mellon as trustee, a named Defendant below, initiated a two-pronged attack on the Keirans by filing a foreclosure action while the Keirans were defending their federal TILA claims. The bank obtained summary judgment, the Keirans appealed, and the foreclosure case was remanded. In the interim, the Keirans applied for *certiorari*

which was granted in light of *Jesinoski v. Countrywide Home Loans*, Inc., 135 S. Ct. 790 (2015). The judgment below was vacated, and the case remanded. *See Keiran, et al.*, Case # 13-705.

While the second Eighth Circuit appeal was pending, the state court on remand granted Bank of New York Mellon's renewed summary judgment. The Keirans appealed again. On August 22, 2016, the Minnesota State Court of Appeals affirmed the state court foreclosure, in an unpublished opinion. On November 23, 2016, the Minnesota Supreme Court denied the Keirans' petition for review. On June 28, 2017, a forced sale foreclosure of the Keirans' home occurred. Under Minnesota law, the Keirans are allowed a six-month redemption period to redeem the sale and payoff the subject loan. The sale was redeemed within that period at a substantially diminished price compared to the actual market value of their home. Relief here constitutes actual damages, statutory damages, costs, and attorney's fees, 15 U.S.C. § 1640(a). [1] Restitution thus would include all past payments

---

[1] "[A]ny creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title…with respect to any person is liable to such person in an amount equal to the sum of—

(1) **any actual damage sustained by such person as a result of the failure**;

…

(3) **in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635…, the costs of the action, together with a reasonable attorney's fee as determined by the court….** *Id.* (emphasis added).

and fees subtracted from the original principal of $404,000, costs and reasonable attorney's fees. Instead, the Keirans paid $508,000 to redeem the sale and still lost their home.

THE LEGAL STANDARD REGARDING MOOTNESS AND THE APPLICABLE TILA STATUTORY FRAMEWORK

The mootness doctrine bars federal courts from considering cases in which "the parties lack a legally cognizable interest in the outcome." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). The party asserting mootness has a "heavy burden of establishing that there is no effective relief remaining for a court to provide." *Seven Woods LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001). Also, mootness as to a particular issue does not impede the court's jurisdiction to consider any other justiciable issues. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). "Live" nominal damages claims suffice. This rule applies even if damages sought are nominal. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 442 (1984) (damages remained "live," though "undeniably minute").

TILA gives borrowers a federal right to rescind certain consumer-credit transactions, and the statute unambiguously describes how to *exercise* the right: "by notifying the creditor, in accordance with regulations." 15 U.S.C. § 1635(a). The sending of the notice triggers a series of steps through which the

transaction is unwound. 15 U.S.C. § 1635(b) (mandating the creditor 20 days from "receipt of a notice" to take certain acts). A creditor in receipt of a rescission notice must judicially seek a declaration that the notice was untimely, or that the section 1635(b) procedures should be altered in light of the circumstances presented. 15 U.S.C. § 1635(b); 28 U.S.C. § 2201; *New Me. Nat'l Bank v. Gendron*, 780 F. Supp. 52, 56 (D. Me. 1991). An obligor may sue for damages under section 1640(a) for a creditor's failure to follow the unwinding procedures expressed in § 1635(b); *see also* 12 C.F.R. § 226.23(d)(2)-(4). The "modification" of the creditor's obligation specified by the TILA statute to: return money or property and cancel the security instrument, or the consumers' tender, "**does not affect a consumer's substantive right to rescind** and to have the loan amount adjusted accordingly." *Official Staff Commentary* § 226.23(d)(4)-1 (emphasis added).

The Keirans' claim does not ask the District Court to rescind. It is grounded in the creditor's failure to "effect" rescission procedures. *See* App. at 12-14 (Claims for Relief). As the Consumer Financial Protection Bureau (CFPB) explained to multiple circuit courts, rescission *at law* under TILA is the result of an action already taken without the aid of a court. The remedy of "rescission" is an avoidance of a transaction, the extinguishment of an agreement such that in contemplation of law, it never existed. 17A Am.Jur.2d *Contracts* § 600 (1991). It is a remedial right to which an aggrieved party is entitled with or without resort to a tribunal. The advantage of *rescission at law* as an alternative to enforcement of a contract, outweigh its costs in terms of contractual instability and potential

forfeiture. TILA contemplates rescission as a private non-judicial "self-enforcing mechanism" that imposes "all burdens on the creditor" once notice is given. *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1139-1141 (11th Cir. 1992); *see Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998) (after a party "has effected the rescission" by notice, "subsequent judicial proceedings are for the purpose of confirming and enforcing that rescission")

I. TILA'S EXPRESSED EXTENDED RIGHT TO RESCIND CONFIRMS THAT THE RESCISSION RIGHT IS NOT TERMINATED IF EXERCISED BEFORE THE SALE.

The TILA statute provides that, if a creditor fails to deliver the required material disclosures, "the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 15 U.S.C. § 1635(f); 12 C.F.R. 226.23(a)(3). Petitioners *exercised* their rescission by timely sending notice. 15 U.S.C. § 1635(a). The sale or transfer of a home after exercising rescission rights does not defeat any consumer's rescission right if the rescission unwinding procedure was not completed because the creditor failed to comply with its TILA section 1635(b) obligations. Just as a rescission instituted within the three-year statutory allowance period does not become ineffective once the three-year mark passes, a rescission instituted before the home is sold does not become ineffective when the home is sold. *In re Dawson*, 437 B.R. 15, 18 (D.D.C. 2010) ("When the rights arising from rescission has been preserved in that fashion, neither the subsequent passage of three years after the consummation of the

loan transaction nor a subsequent sale of the property terminates those rescission rights.").

Respondents' contention that "it is far from clear whether 'rescinding' the loan is even possible" is particularly misguided. Courts do not render "a judgment of rescission." Resp. Br. at 3. TILA rescission *at law* mechanics is the result of an action already taken without the aid of a court. *See Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 265 (3rd Cir. 2013) (discussing differences between rescission *at law* "akin to the way [] 1635 operates," and rejecting rescission in equity); Dan B. Dobbs, *Law of Remedies* § 4.8, at 462 (2d ed. 1993) ("[T]he plaintiff *effects* the rescission, and the court gives a judgment for restitution if that is needed.").

Respondents' argument conflates TILA provisions that govern the time limit for exercising the rescission right under section 1635(f) with a separate inquiry to determine whether Respondents refusal to honor a proper rescission by unwinding the transaction under section 1635(b) was justified. Respondents also wrongly maintain a distorted view that the Eighth Circuit in 2013 affirmed the dismissal of damage claims entered in the District Court. Resp. Supp. Br. at 3, n.3. The Eighth Circuit concluded that: "the plaintiffs' claims for money damages for the bank's failure to rescind are without merit." *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 730 (8th Cir. 2013) (the circuit court also erroneously applies § 1641(b) 'conclusive proof of the delivery thereof' because that section states "Except as provided in section 1635(c)"). The circuit court misunderstood limiting language expressed in section 1635(c) (the rebuttable presumption) – Petitioners' first question on this *certiorari*

application – and that "[a]ny consumer who has a right to rescind… may rescind the transaction as against any assignee[.]" 15 U.S.C. § 1641(c). The circuit court also rejected the CFPB's amicus brief filed therein, describing TILA rescission *at law* procedures based on a notice and "the bank['s] [obligation] to file suit to essentially prevent rescission." *Id.* at 728.

In addition, the *Jesinoski* court confirms that the "effect" of rescission and the unwinding procedures are not the same. Rather, the unwinding procedures involve the second and third steps TILA requires the lender to perform upon receipt of a rescission notice. If Respondents' position were correct, lenders would continue inventing legal theories without any textual basis in law, creditors would be permitted to ignore TILA's 20-day statutory rescission mandates, and creditors could take advantage of uniformed consumers by delaying TILA rescission compliance beyond the three-year statutory rescission period. *Dawson*, 437 B.R. at 19 ("Treating a subsequent sale as terminating a timely exercised rescission right, thereby eliminating the right to recover damages for breach of the lender's rescission obligations arising from the timely exercise of rescission, only awards the lender for dragging its heels."). Lenders could continue proceeding to foreclosure sales while a TILA failure to "effect" rescission claim remained pending on appeal and to this Court. That is precisely what happened to Mr. and Mrs. Keiran, and what happens to many unfortunate consumers. In short, any resulting claim for relief would evade this Court's review, if Respondents' mootness claim were true. A case is not moot, however, if the Court

can fashion some sort of relief for the claimant, even where there is no possibility of returning the parties to the "status quo ante." *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12-13 (1992).

II. PAYOFF OR REFINANCING DOES NOT TERMINATE THE EXTENDED RESCISSION RIGHT.

Creditors attempt to argue that, once an obligation is paid off or refinanced, there is nothing left to rescind. Such theories, designed to evade judicial scrutiny, are erroneous. TILA section 1635(f) enumerates the events that terminate the rescission right:

> **(f) 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.

15 U.S.C. § 1635(f). Payoff of the loan is notably absent from this statutory list of events that terminate a consumer's rescission right. *Pulphus v. Sullivan*, 2003 WL 1964333 at *14 (N.D. Ill. Apr. 23, 2003) (payment of the loan is "conspicuously absent" from the list); *Abele v. Mid-Penn Consumer Discount*, 77 B.R. 460, 467 (E.D. Pa. 1987) *aff'd memo*, 845 F.2d 1009 (3rd Cir. 1988) (though TILA enumerates circumstances upon which right to rescind expires,

repayment of the credit extended is not one of them). A Ninth Circuit case, *King v. California*, 784 F.2d 910 (9th Cir. 1986) has held that a refinancing cut-off the right to rescind the earlier mortgage because it was no longer in effect, but the analysis was virtually nonexistent. The Sixth, Seventh and D.C. Circuits, and one court within the Ninth Circuit, have rejected *King*'s holding. *See Barrett v. JP Morgan Chase Bank*, 445 F.3d 874, 878 (6th Cir. 2006) (Nothing about the word 'rescission' limits its applicability to removal of a security interest alone, and § 1635(b) requires creditor to return fees generated and 'any money or property given'); *Handy v. Anchor Mortgage Corp*., 464 F.3d 760, 765 (7th Cir. 2006) (rescission available even after the subject loan has been paid off); *Duren v. First Gov't Mortgage and Investors Corp*., 2000 U.S. App. LEXIS 15469 (D.C. Cir. June 7, 2000); *Semar v. Platte Valley Fed. S & L Ass'n,* 791 F.2d 699 (9th Cir. 1986) (permitting the borrower to continue prosecution of a TILA rescission claim notwithstanding a post-complaint sale of the property); *Pac. Shore Funding v. Lozo*, 42 Cal. Rptr. 3d 283, 291 (Cal. Ct. App. 2006); *see also McIntosh v. Irwin Union Bank & Trust*, 215 F.R.D. 26 (D. Mass. 2003) (citing borrower's right to be reimbursed for prepayment penalty as reason for allowing rescission of paid-off loan).

The Minnesota District Court also has rejected Respondents' argument:

> "[T]he parties do not cite to any on-point authority for their respective contentions, and the Court has found none. The decisions stating unequivocally that the right to rescind expires with the sale are, in the main, cases in

> which the homeowner did not exercise the right to rescind until after the sale. *See, e.g.*, *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 903 (9th Cir. 2003) ("The regulation is clear: the right to rescind ends with the sale."). [2] When the homeowner properly gives notice of the rescission **before the sale**, however, courts find that the **right to rescind does not expire with the sale**[.]"

Ofor v. Ocwen Loan Servicing, LLC, 2009 WL 10687807 *2-3 (D. Minn., Sept. 2, 2009) (dismissal denied where rescission notice sent before sale; whether borrower had right to rescind required further record development) (internal citations omitted).

The U.S. Bankruptcy Court for the District of Columbia detailed how it would defeat Congressional intent to hold that a borrower's property sale extinguished rescission rights. *In re Dawson*, 437 B.R. 15 (D.D.C. 2010).

> "[T]o strip [borrower] of the right to rescind after she duly sought to vindicate that right in this adversary proceeding, and when it was [lender] whose challenge to that asserted right necessitated a trial before this court, would be an anomalous result.... To the extent cases such as *Meyer* interpret § 1635(f) to mean that, regardless of what steps a borrower takes to invoke his right to rescission, that right

---

[2] Respondents cite *Meyer v. Ameriquest Mortgage Company*, 342 F.3d 899 (9th Cir. 2003) for the proposition that the right to rescind ends with the sale. The TILA statutory language and greater weight of authority on this issue discredit Respondents' assertion. 15 U.S.C. § 1635(f).

> always terminates once the borrower contracts to sell his home, this court respectfully disagrees. Section 1635 ought not be understood as providing for termination of the borrower's entitlements arising from rescission when a sale occurs *after* that right of rescission has been properly exercised and preserved through the timely commencement of an action to enforce the right.
>
> * * *
>
> Once, however, the borrower has timely exercised his right of rescission, the bank proceeds at its own risk in holding a foreclosure sale for which the sale proceeds may be depressed by reason of the borrower's timely exercised rescission rights. Similarly, if after timely exercising his right of rescission, the borrower voluntarily sells the property, the lender remains on notice that rescission is *not* at an end (by reason of rescission having been exercised within the time limits of § 1635(f))[.]"

Id., 437 B.R. at 17-22 (emphasis added) (internal citations omitted). Respondents' mootness argument directly conflicts with TILA's remedial purpose, the express language of the statute, and Congressional intent.

CONCLUSION

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

Dated: February 8, 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