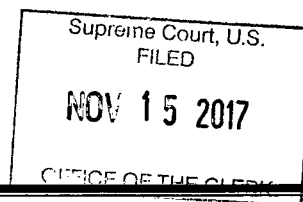


17-6852

ORIGINAL

No. 17-\_\_\_\_\_



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IN THE  
**Supreme Court of the United States**

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PETER M. PILAT AND SHEILA PILAT

*Petitioners,*

v.

MRH SUB I, LLC,  
AS SUCCESSOR-IN-INTEREST TO CITIMORTGAGE, INC,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
Arizona Court of Appeals, Division One

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

I. The Arizona Supreme Court has ruled that the Arizona non-judicial foreclosure scheme, the trustee's sale act codified at Arizona Revised Statutes ("A.R.S.") 33-801 *et seq.*, does not require to present the note, or stated another way, for the foreclosing party to prove its standing to foreclose. Non-judicial foreclosures are a creature of statute, based on contract, and the power to foreclose is contained in the "power of sale" contained in the contract, the Deed of Trust. *See Hogan v. WASHINGTON MUT. BANK, NA*, 277 P.3d 781 (Ariz. 2012).

**Conversely, in a judicial foreclosure, must a party new to the litigation establish it has standing through evidence or can it just rely on a statement of counsel?**

II. The substituted Plaintiff's predecessor-in-interest also lacked standing to *initiate* the judicial foreclosure following Peter Pilat's timely Truth-in-

Lending Act ("TILA") rescission, which voided the note and the deed of trust by operation of law.

**Must the Arizona Courts follow this Court's interpretation of federal law, here the Truth-in-Lending Act?**

### **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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---

On Petition for a Writ of Certiorari to the  
Arizona Court of Appeals, Division One

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Petitioners PETER M. PILAT and SHEILA PILAT, *Pro Se*, respectfully petition for a writ of certiorari to review the memorandum decision of the Arizona Court of Appeals, Division One.

### **OPINIONS BELOW**

The memorandum decision of the Arizona Court of Appeals, Division One, entered February 23, 2017, appears at Appendix A to the petition and is unpublished.

The orders of the Superior Court of Arizona, in and for Maricopa County, entered June 21, 2012 and November 21, 2014 appear at Appendix B1 and B2 to the petition and are unpublished.

The Letter of the Arizona Supreme Court denying discretionary review entered August 17, 2017 appears at Appendix C.

### **JURISDICTION**

The date on which the highest state court decided the case on the merits was February 23, 2017. Discretionary review was denied on August 17, 2017. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

### **STATUTORY PROVISIONS INVOLVED**

Arizona's deed of trust act was enacted in 1971 and Arizona's non-judicial foreclosure scheme, the trustee's sale act is codified at Arizona Revised Statutes ("A.R.S.") 33-801 *et seq.* Trustee's sales are commonly used as an alternative to the often-cumbersome and lengthy judicial foreclosure system. *In re Krohn*, 203 Ariz. 205, 208. P.3d 774, 777 (2002). In Arizona, deeds of trusts can be foreclosed either non-judicially or judicially, but the latter method is usually avoided by foreclosing lenders due to the longer time-frame, additional costs and the fact that the Arizona Supreme Court has ruled that the Arizona non-judicial foreclosure scheme does not require to present the note, or stated another way, for the foreclosing party to prove its standing to

foreclose. Non-judicial foreclosures are a creature of statute, based on contract, and the power to foreclose is contained in the “power of sale” contained in the contract, the Deed of Trust. *Hogan v. WASHINGTON MUT. BANK, NA*, 277 P.3d 781 (Ariz. 2012). In contrast, judicial foreclosures do offer to the foreclosed homeowner the protection of judicial oversight and follow long-standing legal theories regarding standing and the rules of evidence. Here however, the Arizona Court of Appeals, Division One has allowed the foreclosing party in a JUDICIAL foreclosure to dispense with proving its standing and to use the permissive standard used in Arizona’s non-judicial foreclosures to circumvent long-established jurisprudence and the rules of evidence.

The Arizona Court of Appeals has also departed from this Court’s guidance in *Jesinoski v.*

*Countrywide Home Loans*, 135 S. Ct. 790 (2015) with respect to the interpretation of the Truth-in-Lending Act. (“TILA”).

#### STATEMENT OF THE CASE

Petitioner Peter M. Pilat entered into a consumer finance contract subject to the Truth in Lending Act (“TILA”) for the refinance of the Pilats’ family home on January 5, 2006. The deed of trust was transferred to CitiMortgage by American Mortgage Specialist, Inc. by assignment dated July 29, 2008.

Peter Pilat *timely* rescinded that transaction under 15 U. S. C. §1635(a), (f), with a notice of rescission including an offer to tender which was signed on January 2, 2009, and mailed by certified mail to CitiMortgage, Inc (“CitiMortgage”) on January 3, 2009. It is undisputed that CitiMortgage received the timely notice of rescission, but took none of the actions required by TILA.

This Court has confirmed that the Pilats' understanding of the clear language of the almost 50-year old TILA rescission was correct, and that all that was required to effectuate a valid rescission was for Peter Pilat to notify CitiMortgage in writing of his intent to rescind. *See Jesinoski v. Countrywide Home Loans*, 135 S. Ct. 790 (2015). It is undisputed that Peter Pilat timely mailed a notice of rescission to CitiMortgage, and that CitiMortgage received it. Pursuant to TILA, once in receipt of the notice of Peter Pilat's intent to rescind, the burden then shifted to CitiMortgage to either unwind the loan or to file suit to vacate the rescission by court action if it claimed that the Pilats were not entitled to rescission. In the absence of any action by CitiMortgage, the loan and the security instrument were void by operation of law. *Jesinoski, supra*. It is also undisputed that CitiMortgage failed to file such

any action within 20 days of its receipt of Peter Pilat's notice of rescission.

Instead, more than a year later, CitiMortgage filed suit on May 27, 2010 to foreclose the rescinded deed of trust and assert claims it alleged gave it the right to *judicially foreclose* the rescinded deed of trust.

Both the Pilats separately answered CitiMortgage's complaint. The answers and amended answer raised the affirmative defense that CitiMortgage had failed to state a claim for which relief could be granted – all their claims revolved in some fashion around the void deed of trust. The Pilats also counterclaimed, *inter alia*, that CitiMortgage had received timely notice of TILA rescission and offer to tender, that CitiMortgage had failed to timely file the required action to contest Peter Pilat's ability to rescind, and that "Under the

prescribed sections of the Truth in Lending Act (TILA), Regulation Z Section 226.23 Right of Rescission, (a) and (d)(1) and (3): “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. And (3) if the creditor does not take possession of the money or property within 20 calendar days after the consumer’s tender, the consumer may keep it without further obligation.” CitiMortgage filed a motion for summary judgment and the Pilats opposed it again arguing the rescission. A hearing on CitiMortgage’s motion was held on June 07, 2012, The trial court held that to effectuate a rescission pursuant to TILA, the Pilats were required to file suit, had not done so, and were now barred by the 3 year statute of repose contained in TILA. The lower court also held that the Pilats’s

notice of rescission was not valid because the court's mistaken interpretation of TILA. The lower court judge granted CitiMortgage's motion for summary judgment. Judgment was entered on October 12, 2012 in favor of CitiMortgage.

The Pilats filed several post-judgment motions to preserve the record for their intended appeal. All the post-judgment motions were denied.

After notice, the case was dismissed on March 27, 2013 for CitiMortgage's lack of prosecution after CitiMortgage cancelled 2 Sheriff's Sales of the Pilats' home that it had scheduled. CitiMortgage's attorney verbally assured Sheila Pilat that CitiMortgage would not proceed against the house and that the case was over. Relying on that promise, and because the writ of special execution had expired and the case was dismissed, the Pilats did not go through with an appeal at that time. As

promised, CitiMortgage did not take any action to vacate the Judgment of Dismissal.

Approximately 1 year after the case was dismissed, on March 13, 2014, MRH Sub I, LLC ("MRH"), "claiming" to be CitiMortgage's successor-in-interest, stepped in from left field without evidentiary support of any kind, and filed three (3) procedurally defective motions asking 1) that the law firm of Tiffany & Bosco, PA be allowed to now represent CitiMortgage; 2) that the dismissed case be "reinstated" and 3) that MRH be substituted as the Real Party in Interest.

The Pilats filed detailed objections to the procedurally defective motions. In their filings, the unrepresented Petitioners repeatedly point out that MRH lacks standing, and that the statements of counsel are NOT evidence.

Over the detailed objections of the Pilats and without any evidence that MRH had any interest in the Pilats' loan or any standing, other than the statements of MRH's counsel, the lower court granted the defective motions.

An appeal was taken to request a stay of the impending Sheriff's sale prematurely scheduled by MRH on the basis of an unsigned minute entry order. The Sheriff's sale of the Pilats' home did not take place and was subsequently stayed pending the outcome of appellate review.

A signed appealable order was requested and obtained on November 21, 2014. Signed appealable orders of the unsigned minute entry orders denying the Pilats' post-judgment motions, were obtained at the same time. The signed appealable orders were subsequently timely appealed on December 21, 2014.

and the appeals were consolidated in the same appeal by this Court of Appeals.

This Court's January 2015 *Jesinoski, supra* decision entirely changed the character of the Pilats' appeal. The Pilats were no longer *just* asking this Court of Appeals to review if MRH, without presenting *any* evidentiary support to the lower court, had standing to ask to be substituted as the Real Party in Interest and to "reinstate" a dismissed case. *Jesinoski, supra* confirmed what the Pilats had argued to the lower court since 2010: Peter Pilat's 2009 rescission was timely and effective by operation of law. As a result of *Jesinoski*, the first and foremost issue before the Court of Appeals had now become that the TILA rescission had been valid, and that CitiMortgage lacked standing when

it filed the lawsuit against the Pilats leading to the judgment because it was relying on a void note and deed of trust.

The Arizona Court of Appeals chose to ignore this Court's guidance in *Jesinoski, supra*. It claimed that it lacked jurisdiction to review the issue of the TILA rescission because of a defect in the Notice of Appeal, which was curable by the Court of Appeals' own admission. However, the Court of Appeals affirmed the lower court judge's ruling that MRH could insert itself into a case terminated one (1) year earlier by a Judgment of Dismissal, have it "reinstated" and be substituted as Plaintiff with no evidentiary support that MRH had any interest in the Pilats' loan or any standing, and based only on the assertion of counsel for MRH.

## REASONS FOR GRANTING THE PETITION

- A. The Arizona Court of Appeals' Decision Conflicts with Long-Standing Theories of Law And Endorses A System In Which Foreclosure is "Wantonly" Imposed in Arizona.

In *Hogan v. WASHINGTON MUT. BANK, NA*, 277 P.3d 781 (Ariz. 2012), the Arizona Supreme Court agreed that even in Hogan's case, which revolved around a non-judicial foreclosure, a deed of trust, like a mortgage "may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." Restatement (Third) of Prop.: Mortgages § 5.4(c) (1997); *see Hill v. Favour*, 52 Ariz. 561, 568-69, 84 P.2d 575, 578 (1938). We agree." In Hogan's case, however, he had not alleged that the banks were

not entitled to enforce the underlying note; rather, he alleged that they had the burden of demonstrating their rights before a non-judicial foreclosure may proceed." The court established that "[N]othing in the non-judicial foreclosure statutes, however, imposes such an obligation".

If the case at bar were a trustee's sale initiated by CitiMortgage and the Pilats' deed of trust had been assigned to MRH before the trustee's sale, the permissive non-judicial foreclosures statutes would have allowed MRH to submit a credit bid at the sale and waltz away with the property with no evidence required.

But this is a JUDICIAL foreclosure, not a trustee's sale, and the foreclosing party must prove

it is the party entitled to enforce the obligation (here the note signed by Pilat) the security instrument (here the Pilats' deed of trust) secures.

The recent housing crisis has put a spotlight on legal issues which relate to the enforcement and collection of mortgage debt. Multiple assignments of loan documents by lenders have added to the complexity and confusion amidst an epidemic of home foreclosures in Arizona. In fact, many scholars, reporters and judges have contrasted the enforcement and collection of mortgage debt in a world complicated by the uncertainties created by the bundling of mortgages into securitized trusts with the "good old days" of judicial foreclosures and few if any transfers of the loans.

It is ironic that here the focus is not whether the multiplicity of assignments supports a complete chain of title, or whether the assignments and endorsements were “robo-signed” or not: here we are instead back to the “good old days” where all that was required was for MRH to show that it is entitled to enforce the note to have standing to hold a sheriff’s sale of the Pilats’ home. MRH never produced any evidence to the lower court that it has any interest in the Pilats’ loan, and only produced to the Court of Appeals in its Answering Brief, a document that actually proves that MRH held no interest in the Pilats’ loan on March 13, 2014, when it first inserted itself in the dismissed case: Appendix “A” to MRH’s Answering Brief contains an uncertified

copy of an Assignment of Deed of Trust executed and notarized in Texas on March 20, 2014. There is no evidence to this day that MRH is a holder of the note, entitled to enforce it. And there certainly was no such evidence before the lower court.

*In Hill v. Favour, 52 Ariz. 561, 84 P2d 575*

*[Supreme Court of Arizona, 1938]*, the Court said:

"[T]itle to [a mortgage] passes to an assignee by assignment of the debt or obligation secured by it; for the mortgage is but an incident - a security - and, independent of the debt, has no assignable quality. Such assignment is a mere nullity..... The mortgage, being a mere incident of the debt, cannot be assigned separately from [the note], so as to give any beneficial interest. ...A mortgage, as distinct from the debt it secures, is not a thing of value nor a fit subject of transfer; hence, an assignment of the mortgage alone, without the debt, is nugatory, and confers no rights whatever upon the assignee. *[Internal citations omitted.]* The note and mortgage are

inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity."

The Court of Appeals would allow MRH to hold a Sheriff's sale of the Pilat's property without having *ever* to demonstrate that it is entitled to enforce the obligation secured by the deed of trust.

The Arizona Court of Appeals would allow MRH to trespass in case No. CV2010-016616 a year after Judgment of Dismissal was entered, move the Superior Court to "reinstate" the dismissed case, and be substituted as Plaintiff for CitiMortgage, all on the say-so of MRH's counsel.

MRH did not offer any evidence to the Superior Court that it was the successor in interest to CitiMortgage, because there was none. To this day,

there is no indication that the note has ever been transferred to MRH and the Assignment Of Deed of Trust submitted for the first time as Appendix A to MRH's Answering Brief (2 years after MRH inserted itself into the case) was actually executed and notarized after MRH asked the Superior Court to "reinstate" the dismissed case and substitute MRH as Plaintiff. The corollary to the Court of Appeals erroneous decision is that a party without standing would be allowed to foreclosure judicially.

If this is allowed to happen, it means that in Arizona, a statement of counsel in a motion trumps evidence, proof of standing in judicial foreclosures is no longer required, and a hundred years of jurisprudence is being thrown out the window.

The Arizona Court of Appeals managed to sidestep MRH's lack of standing to proceed with a **judicial** foreclosure of the Pilats' home, and held that the Pilats had only argued for the first time on appeal that MRH had failed to submit any evidence that it had any interest in the Pilats' loan, and that accordingly they had waived that argument on appeal.

In fact the Court of Appeals has ignored the numerous times that the Pilats mentioned in their briefs in the lower Court that MRH lacked standing, that there was no evidentiary support for the statements of MRH's counsel.

For almost all of the litigation, the Pilats have proceeded without assistance of counsel (and in fact

the attorney that represented them for a short time has since been suspended from the practice of law and did not provide meaningful assistance); the Pilats should have been granted the indulgence of the Arizona courts as they are not schooled in law. This is provided by the precedent set by *Haines v. Kerner*, 404 U.S. 519 which states:

“*Pro se* litigants cannot be held to the same standards as an attorney and the lower courts **must** point out any defects and allow a *pro se* litigant sufficient time to correct any defects, and, that the *pro se* litigants’ pleadings are sufficient to call for an opportunity to be heard.”  
(*Emphasis added.*)

While it is possible, although doubtful, that their objections may have been so “inartful” as to be misapprehended by the Court of Appeals, it is also possible that the reluctance of the Arizona Court of

Appeals to rule against MRH is due to the fact that MRH's counsel, on whose word the standing of MRH rests -not on evidence- is the law firm Tiffany & Bosco, P.A., a well-respected law firm until it became a foreclosure mill and which, many years ago, is credited with writing the foreclosure statutes.

Nevertheless, "a court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or the record fails to provide substantial evidence to support the trial court's finding." *Flying Diamond Airpark, LLC. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App.2007) (internal citation and quotation omitted).

B. The Arizona Court of Appeals' Decision  
Breaks With The Clear Precedent Of This  
Court.

The Arizona Court of Appeals sidestepped this Court's interpretation of the TILA statute, claiming it lacked jurisdiction because of a defect in the Notice of Appeal to hear the Pilats' claim in the lower court and in their briefs in the Court of Appeals that MRH's alleged predecessor-in-interest also had lacked standing to *initiate* the JUDICIAL foreclosure following Peter Pilat's timely Truth-in-Lending Act ("TILA") rescission.

The lower court ruling was in direct conflict with this Court's decision in *Jesinoski, supra*, because the Arizona lower court specifically held that a Notice of rescission was ineffective to effectuate the TILA rescission and that a lawsuit was necessary. More

specifically, the lower court judge's interpretation of TILA was that Peter Pilat's notice of rescission was ineffective, that the Pilats were required to file suit, had not done so, and were now barred by the 3 year statute of repose contained in TILA.

To avoid applying this Court's precedent and reversing an Arizona lower court judge, the Court of Appeals once again chose to ignore what the Pilats wrote. While there may have been a defect in the Pilats' Notice of Appeal, the Court of Appeals itself could have cured the defect, and stated:

" Nevertheless, the Pilats argue we do have jurisdiction to review the 2012 judgment because "the intent of [the] notice[s] of appeal was of course to appeal everything that was appealable." Our supreme court has held an appellate court may deem a defective notice of

appeal sufficient when the record “discloses” that the appellant intended to appeal the judgment and the defect in the notice of appeal neither misleads nor prejudices the appellees. *Hill v. City of Phoenix*, 193 Ariz. 570, 572-73, ¶ 10, 975 P.2d 700, 702-03 (1999) (quotations and citation omitted). Here, the record fails to show the Pilats intended to appeal the 2012 judgment”.

After years of briefing regarding the effective TILA rescission, and that the 2015 *Jesinoski*, *supra* decision by this Court corroborated what was briefed, it is difficult to see how MRH could have been misled. It was just easier for the Arizona Court of Appeals to ignore this Court’s guidance in *Jesinoski*, *supra*, and to just go on interpreting TILA the way it always has, regardless of how this Court interpreted the Truth-in-Lending statute, and despite Justice Scalia’s admonition (writing for a

unanimous Court) that no interpretation of TILA is required, nor allowed to the judiciary.

The lower court judge's interpretation of TILA cannot trump this Court: Peter Pilat's rescission was effective on January 2, 2009, and the note and deed of trust void by operation of law

The Pilats have argued since 2010 that Peter Pilat's 2009 notice of rescission had effected the rescission and *Jesinoski, supra* is the seminal case which confirms the event of Pilat's TILA rescission.

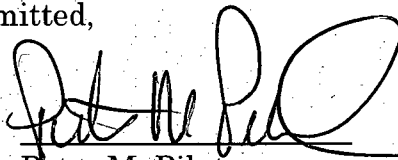
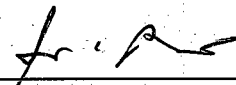
*Jesinoski, supra* is determinative here. It tells us that whether the lower court judge imposed her own interpretation of TILA in 2012 or based her interpretation on Ninth Circuit precedent at that time is irrelevant, because this Court has ruled that

it never was for the judiciary to (mis)interpret the TILA statute because it is, and was, clear on its face. And "[w]hen [the United States Supreme Court] applies a rule of federal law to the parties before it, **that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events.**" (emphasis added) See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). See also *National Consumer Law Center, Truth in Lending* (8th ed. 2012), at 901; *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995).

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

  
\_\_\_\_\_  
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\_\_\_\_\_  
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DATED this 15th day of November, 2017.