No. ________________

IN THE SUPREME COURT OF THE UNITED STATES

Steven Bernstein, Petitioner,

vs.

Wells Fargo Bank, N.A., et., al., Respondents

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

PETITION FOR WRIT OF CERTIORARI

Steven W. Bernstein
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QUESTIONS PRESENTED

1. In light of this Court's ruling on ***Jesinoski v. Countrywide Home Loans, Inc.***, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015) was it error for the trial court to dismiss the case after the trial court stated "...I find Plaintiff has stated a plausible claim for entitlement to the benefit of the TILA three-year rescission rule"[Appendix B, p.15]?

2. Was it error for the trial Court and the 11th Circuit to dismiss/affirm, when the ***Jesinoski*** case shows that "giving notice alone affects a rescission by operation of law"; and that Mr. Bernstein "did not have to file a lawsuit to compel rescission"?

3. Mr. Bernstein showed that he had not received the Right to Cancel documents at closing, and that the Annual Percentage Rate and Finance Charges exceeded TILA tolerances, was it error for the trial court to hold that the security interest and note do not automatically became void after notice?

4. Is it error when the trial court/appellate courts make a ruling that there is a one year limitations period beginning twenty days after notice of rescission is ignored, and ignore that Mr. Bernstein had filed a civil action?

5. Is it error when numerous United States District Courts throughout the United States, are ruling in contradiction to one another, and in contradiction to Justice Scalia's ruling in ***Jesinoski***, by dismissing cases on the grounds shown in U.S.C. §1640, even though notice of rescission had been timely given?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Wells Fargo Bank, N.A.

Wells Fargo Home Mortgage

Federal Home Loan Mortgage Corporation

CORPORATE DISCLOSURE STATEMENT

Petitioner does not know whether there are parent companies, or which entities are the parent companies, or which are publicly held corporations that owns 10% or more of the party's stock. The Corporate entities involved, or are believed to have an interest in the outcome are listed below:

Federal Home Loan Mortgage Corporation, d/b/a Freddie Mac has no parent corporation, and no publicly held corporation ows more than 10% of its stock.

Wells Fargo Bank, N.A., is a wholly owned subsidiary of Wells Fargo & company. Berkshire Hathaway, Inc., is a publicly held corporation that owns 10% or more of Wells Fargo & Company stock.

Wells Fargo Home Mortgage is a division of Wells Fargo Bank, N.A,. and is a wholly owned subsidiary of Wells Fargo & Company. Berkshire Hathaway, Inc., is a publicly held corporation that owns 10% or more of Wells Fargo & Company stock.

To the best of Mr. Bernstein's knowledge, that the above, together with the list of parties, is a full and complete list of all other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this case.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Steven Bernstein ("Mr. Bernstein"), respectfully Prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit ("11th Cir"), appears at Appendix A to the Petition and is unpublished. ***Bernstein v. Wells Fargo Bank, N.A.***, 693 F. App'x 848 (11th Cir. 2017).[1]

The Opinion of the United States District Court for the Northern District of Georgia ("NDGa.") Dismissing the case appears at Appendix B to the Petition and is unpublished). ***Bernstein v. Wells Fargo Bank, N.A***, No. 1:15-CV-2520-RWS, 2016 WL 4546657 (N.D. Ga. June 28, 2016).[2]

JURISDICTION

The date on which The 11th Circuit decided my case was July 12, 2017. A timely filed Petition for Rehearing was denied by The 11th Cir on the following date: August 29, 2017, a copy of the Order Denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] 693 Fed.Appx. 848 (Mem) This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

[2] 2016 WL 4546657 Only the Westlaw citation is currently available. United States District Court, N.D. Georgia, Atlanta Division.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Truth in Lending Act: 15 U.S.C. § 1601; 15 U.S.C. § 1635(a); 15 U.S.C. §1635(b); §1635(f); § 1635(g); § 1640;

Regulation Z §§ 226.15(d)(1), 226.23(d)(1);

12 C.F.R. § 226.23(d)

STATEMENT OF THE CASE

Mr. Bernstein, has lived at 1428 Valley View Road, Dunwoody, GA 30228 ("the property") for over twenty-one (21) years. On or around November 02, 2007, Mr. Bernstein refinanced the property through Terrace Mortgage Company. The Security Instrument had been recorded in DeKalb County Georgia Records in Deed Book 20463, Page 286.

Prior to, and/or at closing, Terrace Mortgage Company ("TMC") failed to provide adequate disclosures for the loan. TMC had failed to provide adequate/proper Right to Cancel disclosures, and the Annual Percentage Rate and Finance Charges exceeded the tolerances allowable under TILA.

Having not been supplied with adequate/proper Right to Cancel documents prior to, and at closing, on or around February 22, 2010, Mr. Bernstein sent to Wells Fargo, a Notice to Rescind Loan Transaction ("The Notice"). That same day, Feb. 22, 2010, Mr. Bernstein caused The Notice, to be recorded at Deed Book Misc 5, Page 97, DeKalb County Georgia Records ("DCGR"). The trial Court dismissed Mr.

Bernstein's case on the grounds that he failed to file a civil action to enforce his rescission rights, within one year.

To begin with, that ruling was flawed. Mr. Bernstein had filed a civil action originally in DeKalb County Superior Court within one (1) year. Mr. Bernstein's Appellant Brief is at Appendix E, which clearly shows that Mr. Bernstein had filed a civil action which was removed to US District Court, in front of the same Judge, Judge Story. Therefore, Judge Story had actual knowledge that Mr. Bernstein had filed a civil action within one year. [Appendix E, pp.15-16, 18, 20-21, 29, 32, 42-46].

Appendix E shows that Mr. Bernstein had filed a civil action, Case No: 1:10-cv-0789-RWS, within one year. Mr. Bernstein further, had moved to Amend the Amended Complaint [Appendix E, pp. 20-21], in order to more fully address the fact that there had been the 2010 case filed within one month of the rescission [Appendix E, p.29, 30]. That one filing would have prevented the District Court from being able to claim that Mr. Bernstein had not filed suit within one year, which allegedly caused the Courts to Dismiss the action that has found its way to this Court. The earlier filed civil action went to dead docket status, when Mr. Bernstein was forced to go into Bankruptcy Court to stop the sale of his property. Mr. Bernstein was denied the right to Amend his Complaint a second time.

The Georgia trial and appellate courts, including the federal courts have in as much stated that Mr. Bernstein is "damned if he does and damned if he don't". In other words, there is no way that the courts will properly rule on this case, no matter what Mr. Bernstein says, or files.

The trial court had stated "... I find Plaintiff has stated a plausible claim for entitlement to the benefit of the TILA three-year rescission rule"[Appendix B, page 15]. Nevertheless, Mr. Bernstein had shown that TMC had failed to provide Mr. Bernstein with the required Notice to Cancel and the forms that accompany the Notice to Cancel. Mr. Bernstein contends that the trial and appellate courts did not construe the Truth and Lending Act provisions "liberally in favor of the consumer" and did not "require absolute compliance by creditors".

> "'To effectuate TILA's purpose, a court <u>**must**</u> **construe the Act's provisions liberally in favor of the consumer and require absolute compliance by creditors**.' ***Hauk v. JP Morgan Chase Bank USA***, 552 F.3d 1114, 1118 (9th Cir.2009) (quoting <u>15 U.S.C. § 1601)</u>.(quoting ***In re Ferrell***, 539 F.3d 1186, 1189 (9th Cir.2008)). TILA provides special rescission rights for loans secured by a borrower's principal dwelling. <u>15 U.S.C. § 1635(a)</u>; ***Semar v. Platte Valley Fed. Sav. & Loan Ass'n,*** 791 F.2d 699, 701 (9th Cir.1986). TILA's 'buyer's remorse' provision, <u>***Semar,***</u> 791 F.2d at 701, grants buyers the right to rescind within three days of either '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[.]" <u>15 U.S.C. § 1635(a)</u>. The right to rescind expires 'three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first.' <u>Id</u>. <u>§1635(f)</u>".

<u>***Paatalo v. JPMorgan Chase Bank,***</u> 146 F. Supp. 3d 1239, 1243 (D. Or. 2015).

The ***Paatalo*** Court, discussing ***Jesinoski*** stated: "The Supreme Court answered this question in ***Jesinoski***. A unanimous Court declared '**rescission is effected when the borrower notifies the creditor of his intention to rescind**' ***Jesinoski***", 135 S.Ct. at 792 (emphasis added). ***Id.*** "**Thus, if—as plaintiff**

alleges—WaMu failed to provide the required disclosures and plaintiff delivered written notice of rescission in March 2008, the rescission was effected and the security interest in plaintiff's property voided at that time". ***Id, @ 1244.***

The same would have been true in the case at bar as well. Mr. Bernstein, showed that TMC failed to provide the required disclosures and Mr. Bernstein had delivered, a written notice of rescission. The trial and appellate courts in Mr. Bernstein's case, ignored the ruling by the US Supreme Court in ***Jesinoski*** as discussed by ***Paatalo***. Mr. Bernstein and most likely several thousand other Americans have been denied the ruling that this court mandated was proper. Mr. Bernstein has been denied the right to have the rescission effected, and the security interest and note on his property "**voided at that time**".

Under this Court's rulings, when Mr. Bernstein had The Notice to Rescind Loan Transaction delivered to Wells Fargo, "the rescission was effected and the security interest" in Mr. Bernstein's property "was voided at that time". N.D.Ga. and The Eleventh Circuit Court of Appeals, both refused to rule according to the opinion delivered by Justice Scalia, and this undivided court.

The ***Paatalo*** Court, still discussing ***Jesinoski*** and the US Supreme Court's ruling, held that "The Court had to determine when rescission actually occurred...":

> "The language of [the statute] leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely.

Id. Thus, the "***Jesinoski*** holding rested on the Court's determination, as a matter of statutory interpretation, that written notice actually effects the rescission". ***Paatalo v. JPMorgan Chase Bank,*** 146 F. Supp. 3d 1239, 1244 (D. Or. 2015).

The Notice was properly sent by Mr. Bernstein to Wells Fargo. At the same time, Mr. Bernstein properly had The Notice recorded into DeKalb County Georgia Records ("DCGR") as required, prior to expiration of the three (3) years right to cancel provision of 15 U.S.C. §1635(f). Pursuant to 15 U.S.C. §1635(b), Regulation Z §§ 226.15(d)(1), and 226.23(d)(1), once The Notice was given, the security interest/ lien, as well as the Note, became void by operation of law.

Clearly, numerous District Courts throughout the United States want to Dismiss. Just like in Mr. Bernstein's case, the trial Court Dismissed, claiming that since Mr. Bernstein did not bring a court action against the lender within one year, Mr. Bernstein lost his chance to rescind the loan [Appendix B, pp. 17-18].

Numerous District Courts have ruled, and there are many that agree, that after The Notice is given, the borrower must bring suit to void the Note and Security Instrument. That is not what this Court held in ***Jesinoski*** and is not what case law shows. The case law shows that it is The Notice that causes the rescission, whether a case is filed or not.

Another issue that the courts are split on is as follows:

> "In accordance with the statutory provision that courts may order an alteration of the sequence of events otherwise prescribed by the TILA rescission provision, *1031..., we have held that district courts may, if warranted by the circumstances of the particular case, require the obligor to provide evidence of ability to tender as a condition for denial

> of a summary judgment motion advanced by the creditor. See ***Yamamoto v. Bank of New York,*** 329 F.3d 1167, 1171–73 (9th Cir.2003). ***Yamamoto*** concluded that where 'it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after,' i.e., refuse to enforce rescission. Id. at 1173. In so ruling, ***Yamamoto*** relied on earlier cases which had permitted judges after a resolution of the TILA claim on the merits to condition rescission on tender. ***Palmer***, one of those earlier cases, had instructed courts considering such a condition to take into account 'the equities present in a particular case, as well as consideration of the legislative policy of full disclosure that underlies [TILA] and the remedial-penal nature of the private enforcement provisions of the Act.' Id. at 1171 (quoting Palmer, 502 F.2d at 862); see also ***LaGrone v. Johnson***, 534 F.2d 1360, 1362 (9th Cir.1976) (holding that court should condition rescission on tender where TILA violations 'were not egregious and the equities heavily favor the creditors')".

Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1030–31 (9th Cir. 2014).

"Like some other district courts in this circuit, the district court in this case extended ***Yamamoto*** to require that plaintiffs plead ability to tender in their complaint. See ***Botelho v. U.S. Bank, N.A.***, 692 F.Supp.2d 1174, 1180 (N.D.Cal.2010) (collecting cases). We reject this extension". ***Id.***

"The equities to be considered, ***Yamamoto*** noted, might include the nature of the TILA violations (such as whether they were or were not egregious); whether the obligor had gone into bankruptcy; and the borrower's ability to repay the proceeds (including, perhaps, whether that ability to repay was itself dependent upon a rescission order because without such an order, the obligor could not refinance or sell the property). 329 F.3d at 1171, 1173. 'Whether the call is correct must be determined on a case-by-case basis, in light of the record adduced.' ***Id.*** at 1173. In making the call, the court may consider evidence such as affidavits and deposition testimony or may hold an evidentiary hearing. See ***Palmer,*** 502 F.2d at 862. To prescribe the pleading of ability to tender in every TILA rescission case would be inconsistent with this evidence-grounded, case-by-case approach". ***Id.***

Without continuing to provide this Court with more case law, Mr. Bernstein believes that this Court can see that there are necessary rulings by this Court, to stop the un-uniform rulings on this same important matter, by the numerous different District Courts, that cannot and will not agree to make the proper ruling, ignoring stare decisis, law of the case, or however the Court wants to look at it. One thing is for sure, the Courts across the country, are not ruling on rescission pursuant to this Court's holding in ***Jesinoski***, but appear to be making new rules, as they go along.

The different District Courts cannot agree on whether it is one year or three years; they cannot agree on whether or not the borrowers must file suit within one year, three years, or they are not required to file suit at all, in order to exercise their right to rescission. The District Courts also apparently cannot agree on whether or not the borrower must plead that they can afford to tender all of the money they borrowed to purchase the property.

> "In addition, in many cases, it will be impossible for the parties or the court to know at the outset whether a borrower asserting her TILA rescission rights will ultimately be able to return the loan proceeds as required by the statute. That ability may depend upon the merits of her TILA rescission claim or on other claims related to the same loan transaction. See, e.g., ***Prince v. U.S. Bank Nat'l Ass'n***, 2009 WL

> 2998141, at *5 (S.D.Ala. Sept. 14, 2009) (denying creditor's motion to dismiss as based on "mere speculation" that plaintiffs would be unable to tender, and indicating that court would address the proper sequences for implementing the rescission, if necessary, only after resolving the rescission claim on the merits). For instance, if a TILA rescission claim is meritorious and the creditor relinquishes its security interest in the property upon notice of rescission as required by the default § 1635(b) sequence, the obligor may then be able to refinance or sell the property and thereby repay the original lender. Cf. ***Burrows v. Orchid Island TRS, LLC***, 2008 WL 744735, at *6 (C.D.Cal. Mar. 18, 2008) (declining to require pleading of tender where the court inferred that borrower would be able to tender by selling or refinancing the property if rescission was found to be appropriate); ***Williams v. Saxon Mortg. Co.***, 2008 WL 45739, at *6 n. 10 (S.D.Ala. Jan. 2, 2008) (declining to condition rescission on tender as was done in ***Yamamoto***, because it was not clear that borrower would not be able to refinance the loan). Or her complaint may allege damages claims arising from the same loan transaction, the proceeds of which, if successful, could then be used to satisfy her TILA tender obligation. See ***Shepard, supra,*** at 205 & n. 200, 210.

Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1032 (9th Cir. 2014).

Not all federal courts have ignored this Court's ruling in ***Jesinoski*** but as far as Mr. Bernstein can determine, all of the federal courts in Georgia have gone against this Court's ruling. The Georgia federal and state courts have twisted this Court's rulings many times, but when it comes to this Court's ruling on ***Jesinoski***, the Georgia Courts have used, every excuse, every innuendo possible, provided by the lender's attorneys to rule against the borrower.

Just like in ***Paatalo***, the Court explained that

> "Essentially, defendant argues rescission cannot be the default rule. Taken to its logical conclusion, defendant's argument would require borrowers to file suit to enforce their right to rescind, rendering no

rescission the default rule. The Supreme Court implicitly rejected defendant's argument when it declared 'rescission is effected' at the time of notice, without regard to whether a borrower files a lawsuit within the three-year period. ***Jesinoski***, 135 S.Ct. at 792; see also ***Sherzer v. Homestar Mortg. Servs.***, 707 F.3d 255, 258 (3d Cir.2013) (text of TILA and implementing regulation 'support[ ] the view that to timely rescind a loan agreement, an obligor need only send a valid notice of rescission'); ***Lippner v. Deutsche Bank Nat'l Trust Co.***, 544 F.Supp.2d 695, 703 (N.D.Ill.2008) (plaintiff's timely written notice under TILA entitled him 'as a matter of law ... to rescission'); Alexandra P. Everhart Sickler, ***And the Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan***, 12 Rutgers J.L. & Pub. Pol'y 463, 481 (Summer 2015) ('As a practical consequence of [the ***Jesinoski***] ruling, a lender now bears the burden of filing a *1245 lawsuit to contest the borrower's ability to rescind.')".

Paatalo v. JPMorgan Chase Bank, 146 F. Supp. 3d 1239, 1244–45 (D. Or. 2015).

Wells Fargo was required within twenty (20) days to return any money or property they were given in connection with the loan. Wells Fargo failed to take the steps required by 15 U.S.C. § 1635(b). Wells Fargo ignored Mr. Bernstein's Notice despite the numerous requests and demands Mr. Bernstein sent.

The Court in ***Lippner v. Deutsche Bank Nat. Tr. Co.***, 544 F. Supp. 2d 695, 702–03 (N.D. Ill. 2008) correctly held that just because there had been a state action relating to foreclosure of the mortgage, that the state court judgment and foreclosure did not preclude the lender from liability for rescission:

"Defendants argue that Lippner is not entitled to rescission since a judgment of foreclosure and sale was entered against Lippner in the state action relating to the Mortgage. *703 Defendants have not cited any law or advanced any argument that would demonstrate that the state court judgment of foreclosure should preclude Deutsche from liability for rescission. None of the TILA claims were presented in the

> state court action. Therefore, regardless of whether the state court found that the Mortgage constituted a valid lien at that time, the issue of Defendants' TILA violation and ***Deutsche's*** liability for rescission remained ripe. See ***In re Walker,*** 232 B.R. 725, 733–34 (Bkrtcy. N.D. Ill.1999) (stating that 'the evidence used by [the defendant] that it was entitled to a judgment of foreclosure is not the same evidence that [the plaintiff] would use to demonstrate that [the defendant] violated the TILA' and thus, the judgment of foreclosure could not form the basis for collateral estoppel or res judicata). Therefore, as a matter of law, Lippner is entitled to rescission and is entitled to summary judgment on that issue".

Id @703.

The lessons that ***Jesinoski v. Countrywide Home Loans, Inc.***, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015) teaches, are:

> "Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower 'shall have the right to rescind ... by notifying the creditor, in accordance with regulations of the Board, of his intention to do so' (emphasis added). **The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years".**

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792, 190 L. Ed. 2d 650 (2015)

This Court's unanimous ruling, in ***Jesinoski v. Countrywide Home Loans, Inc.***, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015) shows that when Mr. Bernstein "mailed written notice" of his "intention to rescind within three years" of his loan's consummation, was "all that a borrower must do in order to exercise his right to rescind under the Act", "the Court below erred in dismissing the complaint".

> "The Jesinoskis mailed respondents written notice of their intention to rescind within three years of their loan's consummation. Because this is all that a borrower must do in order to exercise his right to rescind under the Act, the court below erred in dismissing the complaint. Accordingly, we reverse the judgment of the Eighth Circuit and remand the case for further proceedings consistent with this opinion".

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 793, 190 L. Ed. 2d 650 (2015).

In ***Jesinoski***, Respondents attempted to argue that there was a distinction between disputed and undisputed rescissions. This Court, @ 792-793 held:

> "Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter. In an effort to sidestep this problem, respondents point to a neighboring provision, § 1635(g), which they believe provides support for their interpretation *793 of the Act. Section 1635(g) states merely that, '[i]n any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.' Respondents argue that the phrase 'award relief' 'in addition to rescission' confirms that rescission is a consequence of judicial action. But the fact that it can be a consequence of judicial action when § 1635(g) is triggered in no way suggests that it can only follow from such action".

Id.

Mr. Bernstein further, showed that he had arranged with the different lenders, a reverse mortgage loan, to ensure that there would be adequate funds to tender to Wells Fargo [App. E, p.18] Neither the District Court, nor the 11th Circuit made mention of this fact.

In ***Paatalo***, the District Court held that

> "It is unclear what should happen this many years down the road, after the original lender has failed and been placed in receivership, and the property has been sold at a trustee's sale, then re-sold following the trustee's sale. **However, because plaintiff has adequately alleged (1) he had a conditional right to rescind in 2008; and (2) he exercised that right, he has stated a *1246 claim for at least some of the relief he seeks—a declaratory judgment deeming the foreclosure of the Deeds of Trust null and void".**

Paatalo v. JPMorgan Chase Bank, 146 F. Supp. 3d 1239, 1245–46 (D. Or. 2015).

Amazingly, even though ***Jesinoski*** revealed **the majority of federal courts had 'misinterpreted the will of the enacting Congress,'** ***Rivers***, 511 U.S. at 313 n. 12, 114 S.Ct. 1510, in allocating to borrowers the burden to go to court to enforce their statutory rescission rights under TILA. ***Paatalo v. JPMorgan Chase Bank***, 146 F. Supp. 3d 1239, 1247 (D. Or. 2015).

What is even more bothersome, is that this Court's rulings have done nothing to change that fact. The fact remains, that **the majority of federal courts had 'misinterpreted the will of the enacting Congress', and the same federal courts that had misinterpreted that will, continue to do so today, even though they now know Congress's will and intent. Nothing has changed, and those federal courts continue ruling against the borrowers.**

For example, a case in N.D,.Ga. ruled upon on March 8, 2016, where one judge, when she first came to the federal court in Atlanta, was heralded as a hero to those fighting foreclosures. In an apparent, if you can't beat 'em, join 'em change of heart, the ruling in ***Bazemore v. U. S. Bank, N.A.*** shocked many when she held:

> "Tender under TILA is its own beast. *1350 ***Jesinoski v. Countrywide Home Loans, Inc.***, —— U.S. ——, 135 S.Ct. 790, 793, 190 L.Ed.2d 650 (2015) (citing 15 U.S.C. § 1635(b)) ('[T]he Act disclaims the common-law condition precedent to rescission at law that the borrower tender the proceeds received under the transaction.'). In addition, the Magistrate Judge appears to assume that a borrower must allege ability and willingness to tender, but that is far from clear. The Eleventh Circuit has not decided this issue, and **district courts in this Circuit are split**. Compare ***Webb v. Suntrust Mortgage, Inc.***, No. 1:10–CV–0 307–TWT–CCH, 2010 WL 2950353, at *4 (N.D.Ga. July 1, 2010), report and recommendation adopted, No. 1:10–CV307–TWT, 2010 WL 2977950 (N.D.Ga. July 23, 2010) ("As laid out ... in 12 C.F.R. § 226.23(d), the third step in rescission [under TILA] is tender by the creditor of the money or property received in the rescinded transaction. Here, Plaintiffs have not alleged an intent or an ability to tender the money loaned to them by Defendant[ ]. Thus, they have not alleged a plausible claim that they are entitled to, or able to complete, rescission under TILA.'); with ***Berry v. Beneficial Mortgage Co. of Georgia,*** No. 1:10–CV–3259–GET–WEJ, 2011 WL 12828772, at *4 (N.D.Ga. May 4, 2011) ('This ... standard permits, but does not mandate, the Court to require plaintiffs to plead their ability to tender loan proceeds in a rescission under TILA.') report and recommendation adopted, No. 1:10–CV03259–MHS, 2011 WL 12828835 (N.D.Ga. June 27, 2011). Moreover, other circuits have decided that a plaintiff need not allege ability to tender in order to state a claim for violation of TILA's rescission provisions.
>
> See, e.g., ***Merritt v. Countrywide Fin. Corp.***, 759 F.3d 1023, 1031 (9th Cir.2014) ("Like some other district courts in this circuit, the district court in this case extended ***Yamamoto*** to require that plaintiffs plead ability to tender in their complaint. See ***Botelho v. U.S. Bank, NA.,*** 692 F.Supp.2d 1174, 1180 (N.D.Cal.2010) (collecting cases). We reject this extension.").

> Even if the Court were to apply the Ninth Circuit rule, though, the claim is still due to be dismissed for the same reason Plaintiffs' other TILA claims were recommended for dismissal. **That is, the 'one-year limitations period [for failing to properly respond to a TILA rescission request] runs from twenty days after a plaintiff gives notice of rescission**.' ***Frazile v. EMC Mortgage Corp.***, 382 Fed.Appx. 833, 839 (11th Cir.2010). The Magistrate Judge found that 'Plaintiffs clearly allege that their rescission request was made in February 2011 or February 2012, **well over a year before their complaint was filed**. (Am. Compl. ¶ 23; Sec. Am. Compl. ¶ 28).' (R & R at 17.) The Magistrate Judge also found that Plaintiffs 'have not alleged any facts in support of their conclusory petition for equitable tolling to apply.' (Id.) Thus, both claims made under Count 1 are due to be dismissed, despite the fact that the Magistrate Judge's recommendation as to tender is NOT ADOPTED".

Bazemore v. U.S. Bank, N.A., 167 F. Supp. 3d 1346, 1349–50 (N.D. Ga. 2016), aff'd, 692 F. App'x 986 (11th Cir. 2017).

REASONS FOR GRANTING THE PETITION

Mr. Bernstein has shown, that when it comes to Notice of Rescissions sent to lenders by borrowers, the District Courts themselves have commented on the fact, that rulings are in conflict with other district courts on the same issues. Not only have the District Courts, as well as the United States courts of appeals entered decisions in conflict with other United States Courts of Appeal, but the Courts of Appeals have been ruling in conflict with this Court's rulings after this Court's ruling on ***Jesinoski v. Countrywide Home Loans, Inc.***, 135 S. Ct. 790, 793, 190 L. Ed. 2d 650 (2015).

Further, there is an important federal question that must be settled by this Court; without this Court making a ruling on this important issue, the District Courts' rulings, and the United States Appeals Courts' ruling will never be consistent.

Some of the Courts have ruled that when the lender is sent Notice of Rescission, and lender ignores the Notice and does not respond within twenty days as required, that unless and until a civil action is filed within one year, the borrower does not get to exercise the rescission, the borrower loses the ability to rescind the loan.

Another issue involved, is when the lender ignores the rescission, and the borrower does bring a civil action to enforce his rescission rights, if he does not do so within one year, again, he loses the right to rescind the loan.

And the final issue has to do with whether or not the borrower states and proves he can tender.

> "Tender under TILA is its own beast. *1350 ***Jesinoski v. Countrywide Home Loans, Inc.***, —— U.S. ——, 135 S.Ct. 790, 793, 190 L.Ed.2d 650 (2015) (citing 15 U.S.C. § 1635(b)) ('[T]he Act disclaims the common-law condition precedent to rescission at law that the borrower tender the proceeds received under the transaction.'). In addition, the Magistrate Judge appears to assume that a borrower must allege ability and willingness to tender, but that is far from clear. The Eleventh Circuit has not decided this issue, and **district courts in this Circuit are split**. Compare ***Webb v. Suntrust Mortgage, Inc.***, No. 1:10–CV–0 307–TWT–CCH, 2010 WL 2950353, at *4 (N.D.Ga. July 1, 2010), report and recommendation adopted, No. 1:10–CV307–TWT, 2010 WL 2977950 (N.D.Ga. July 23, 2010) ("As laid out ... in 12 C.F.R. § 226.23(d), the third step in rescission [under TILA] is tender by the creditor of the money or property received in the rescinded transaction.Here, Plaintiffs have

not alleged an intent or an ability to tender the money loaned to them by Defendant[ ]. Thus, they have not alleged a plausible claim that they are entitled to, or able to complete, rescission under TILA.'); with ***Berry v. Beneficial Mortgage Co. of Georgia,*** No. 1:10–CV–3259–GET–WEJ, 2011 WL 12828772, at *4 (N.D.Ga. May 4, 2011) ('This ... standard permits, but does not mandate, the Court to require plaintiffs to plead their ability to tender loan proceeds in a rescission under TILA.') report and recommendation adopted, No. 1:10–CV03259–MHS, 2011 WL 12828835 (N.D.Ga. June 27, 2011). **Moreover, other circuits have decided that a plaintiff need not allege ability to tender in order to state a claim for violation of TILA's rescission provisions.**

See, e.g., ***Merritt v. Countrywide Fin. Corp.***, 759 F.3d 1023, 1031 (9th Cir.2014) ("**Like some other district courts in this circuit, the district court in this case extended *Yamamoto* to require that plaintiffs plead ability to tender in their complaint**. See ***Botelho v. U.S. Bank, NA.,*** 692 F.Supp.2d 1174, 1180 (N.D.Cal.2010) (collecting cases). We reject this extension.").

Even if the Court were to apply the Ninth Circuit rule, though, the claim is still due to be dismissed for the same reason Plaintiffs' other TILA claims were recommended for dismissal. **That is, the 'one-year limitations period [for failing to properly respond to a TILA rescission request] runs from twenty days after a plaintiff gives notice of rescission**.' ***Frazile v. EMC Mortgage Corp.***, 382 Fed.Appx. 833, 839 (11th Cir.2010). **The Magistrate Judge found that 'Plaintiffs clearly allege that their rescission request was made in February 2011 or February 2012, well over a year before their complaint was filed.** (Am. Compl. ¶ 23; Sec. Am. Compl. ¶ 28).' (R & R at 17.) The Magistrate Judge also found that Plaintiffs 'have not alleged any facts in support of their conclusory petition for equitable tolling to apply.' (Id.) Thus, both claims made under Count 1 are due to be dismissed, despite the fact that the Magistrate Judge's recommendation as to tender is NOT ADOPTED".

There are so many unsettled issues concerning rescissions of the loans, Borrowers are at odds on what their actions need to be. Without uniformity within the Courts, Borrowers have lost confidence in the Court system to make the proper ruling, whatever that proper ruling may be.

CONCLUSION

This Petition for a Writ of Certiorari should be granted,

Respectfully submitted, this 21st day of November, 2017

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