No. 17-

IN THE

Supreme Court of the United States

NIKI-ALEXANDER SHETTY,

Petitioner,

v.

WELLS FARGO BANK, N.A. AS TRUSTEE *et al.*,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1: Where the language of a federal statute is plain and clear and the words of the statute are unambiguous, whether or not judicial inquiry is complete and, if so in failing to enforce it according to its terms would be an abuse of discretion and/or judicial error.

Question 2: Where the District Court and then the Court of Appeals refused to address or resolve material issues and issues raised on appeal of a party should this court issue a writ of mandamus directing the Court of Appeals to adjudicate the unresolved issues and issues on appeal, or explain why its adjudication was deemed unnecessary to the disposition of the case or in the alternative grant a writ of certiorari?

PARTIES

Petitioner (Plaintiff) is Niki-Alexander Shetty.

Respondent (Defendant) is WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee under POOLING AND SERVICING AGREEMENT dated September 1, 2006 SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2006-HE2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-HE2.

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PETITION

Niki-Alexander Shetty respectfully petitions for a writ of certiorari and in the alternative petitions for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum of opinion of the Ninth Circuit Court of Appeals Case No. 16-56207, August 24, 2017 is reprinted here as Appendix A.

Order of the District Court for the Central District of California, (*Shetty v. Wells Fargo Bank, et al.*) Case No. 16-01514-AB-MRWx , August 19, 2016 is reprinted here as Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1) AND 28 U.S. C. § 1651(a) and United States Supreme Court Rule 20.1

The Memorandum affirming district Court's order was entered by the United States Court of Appeals for the Ninth Circuit on August 24, 2017.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows: Section 1 ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1651 states in relevant part: The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

15 U.S.C. § 1635(b) states in relevant part: "...When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction..."

STATEMENT OF THE CASE

On October 3, 2008 ***long before*** any state or federal litigation was initiated related to the loan transaction and property subject of this litigation, the borrower *effectuated* a rescission by a timely Notice of Intent to Rescind and Rescission pursuant to 15 U.S.C. § 1635(f) *within three years* of the disputed transaction.

The appeal concerns the application of two distinct precedents established by United States Supreme Court decision in *Jesinoski v. Countrywide Home Loans,* Inc., 135 S. Ct. 790, 190 L.Ed. 2d 650, 574 U.S., (2015) ("*Jesinoski*") decided on January 13, 2015 **AND** California Supreme Court decision in *Yvanova v. New Century Mortg. Corp.*, 62 Cal.4th 919 (2016), ("*Yvanova*") one decided on 2/18/2016 that deals with federal Truth in Lending Act ("TILA") codified in 15 U.S.C. §§ 1601-1667(f) and its' enabling Regulation Z codified at 12 CFR § 226 et seq., that held that TILA only required written notice of intent to seek rescission, rather than filing suit, within three-year period for exercising that right, abrogating *Keiran v. Home Capital, Inc.*, 720 F.3d 721 leaving no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind and the other that decided because in a non-judicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure and that a borrower who has suffered a non-judicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment.

As in *Jesinoski* because this is all that a borrower must do in order to exercise his right to rescind under the Act, the District court erred in dismissing plaintiff's complaint without addressing the merits of Plaintiff's Rescission that automatically rendered the security instrument void and *subsequent* wrongful foreclosure by the defendants that led to litigation in state and federal courts. There was *no prior* state or federal court litigation. *Res Judicata* was inapplicable.

Instead of ruling on plaintiff rescission pursuant to 15 U.S.C. § 1601, 1640, 1635 *et. seq.*, 12 C.F.R. 226 CAL. CIV. CODE § 1689(b)(5) and supported by Supreme court precedent decision in *Jesinoski v. Countrywide Home Loans*, Inc., 135 S. Ct. 790, 190 L.Ed. 2d 650, 574 U.S., (2015) the District court ignored plaintiff's rescission and solely focused on defendant's 12(b)(6) motion to dismiss based upon erroneous ***post rescission*** application of the doctrine of *res judicata* and other issues irrelevant to the rescission that was *effectuated prior to* any state or federal litigation relied upon by the defendants and the district court to dismiss plaintiff's complaint. Appeal followed.

The primary issue on appeal was (1) Whether or not the district court properly granted defendant's Motion to dismiss in a TILA rescission, *effectuated* by a timely Notice of Intent to Rescind and Rescission pursuant to 15 U.S.C. § 1635(f) *within three years* of the disputed transaction and memorialized in the official Records by a recorded instrument, and *without addressing* the merits of the rescission cause of action that rendered the security instrument *void* pursuant to 15 U.S.C. 1635(d). *See Jesinoski v. Countrywide Home Loans*, Inc., 135 S. Ct. 790, 190 L.Ed. 2d 650, 574 U.S. (2015) and (2) Whether or not foreclosure by one without standing to foreclose is valid and district court erred or abused its discretion when it dismissed plaintiff's complaint without addressing the merits of wrongful foreclosure by the defendants, cancellation and expungement of void instruments, and quiet title and requiring tender. *See Yvanova v. New Century Mortg. Corp.*, 62 Cal.4th 919 (2016).

Like the district court, the United States Court of appeals totally ignored appellant's material issues on appeal as to rescission pursuant to 15 U.S.C. § 1601, 1640, 1635 *et. seq.*, 12 C.F.R. 226 CAL. CIV. CODE § 1689(b)(5) and supported by Supreme court precedent decision in *Jesinoski v. Countrywide Home Loans*, Inc., 135 S. Ct. 790, 190 L.Ed. 2d 650, 574 U.S., (2015), adopted and affirmed district court's ruling dismissing plaintiff's complaint. The word "rescission" *does not appear* anywhere in the memorandum dated August 24, 2017 *nor* does it provide any basis for ignoring appellant's issues as to rescission on appeal.

RELIEF IS UNAVAILABLE IN ANY OTHER FORUM

Petitioner has unsuccessfully sought relief from two forums, the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit. The United States Supreme Court is the only available forum remaining.

STANDARD FOR ISSUING A WRIT

Petitioner is keenly aware of the realities that face him, as this Court considers whether the issues presented by this petition are of sufficient *importance* to warrant this Court's consideration. Also Petitions for Writs of Certiorari - Petitioner acknowledge - are rarely granted. Issues herein have significant constitutional impact but are not complicated given the precedent established by the Supreme Court in *Jesinoski* that lower courts have declined to address and refused to enforce.

Further, "traditional use" of a writ of mandamus has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *See Roche v. Evaporated Milk Association,* 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). *See also Mallard v. United States District Court for Southern District of Iowa,* 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (*Mallard*); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957).

This Court has also required petitioners to demonstrate that their right to issuance of the writ is clear and indisputable. *See Mallard,* 490 U.S. at 309.

Pursuant to Supreme Court Rule 20.1, to justify the granting of a writ of mandamus, the petition "must show that the writ will be in aid of the Court's appellate jurisdiction that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Petitioner seeks a writ of certiorari and in the alternative a writ of mandamus directing the panel of the Court of Appeals for the Ninth Circuit which issued a memorandum without addressing issues raised on appeal and refusing to address issues raised on appeal as to petitioner's statutory rescission or to issue an express explanation as to why a ruling on plaintiffs' appeal was deemed unnecessary to the disposition of the case.

THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION

Petitioner is aware that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. In this case, however, petitioner is entitled to a ruling on his appeal, or an explanation for the lack of a ruling, and he has nowhere else to turn. The issues raised and unresolved on appeal was presented to the Court of Appeals, which could have clarified or supplemented its panel opinion. Instead it simply ignored petitioner's material issues that would render secondary issues considered and ruled on as moot. Petitioner recognizes that the Court of Appeals is not required to decide issues that are unnecessary to the disposition of the case. By the same token, however, the Court of Appeals is obliged to decide those issues that are necessary to the disposition of the case, or at least to provide an explanation as to why it did not address or decide an issue squarely presented to it.

It is fundamentally unfair for an appellate court to refuse to adjudicate an issue without giving some reason for its inaction. A refusal to adjudicate directly affects the jurisdiction of this Court because the litigant has been given no ruling to form the basis for a possible petition for certiorari. The supervisory and appellate powers of this Court are frustrated because there is no ruling to appeal or reasoning or analysis provided by the lower court. This case illustrates the dangers of a refusal to adjudicate.

Pursuant to 15 U.S.C. § 1635(b) effective October 2, 2008, the date of notice of rescission, rescission and recordation of the same in official records, any security interest given by the [borrower] ... became *void upon such* *a rescission.*" As a consumer protection statute, TILA "is to be liberally construed in favor of borrowers." *See Wiggins v. Avco Financial Services, supra,* 62 F.Supp.2d at p. 94; *Riggs v. Government Emp. Financial Corp.* (9th Cir.1980) 623 F.2d 68, 71.

Under TILA, rescission "does not mean an annulment that is definitively accomplished by unilateral pronouncement, but rather a remedy that restores the *status quo ante.* [Citation.]" *See Quenzer v. Advanta Mortg. Corp. USA* (D.Kan.2003) 288 B.R. 884, 888.) Once borrowers exercise their right to rescind under TILA, their liability for the loan ceases and any security interest given becomes void. (15 U.S.C. § 1635(b).)

Procedurally, lenders ***must return to the borrowers*** "any money or property given as earnest money, downpayment, or otherwise, and ... terminat[e the] security interest," and borrowers must tender back to the lenders property, e.g., the loan proceeds, received from the lender. (15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d) (2006).) [*Yamamoto v. Bank of New York* (9th Cir.2003) 329 F.3d 1167, 1173), each of these events constitutes a recognized part of the process of rescission under title 15 of the United States Code section 1635(b).]

Stated otherwise, after rescission, borrowers are " 'not liable for any finance or other charge' " such as interest, commissions, or extra payments in a TILA rescission. *See Semar v. Platte Valley Federal S & L Ass'n, supra,* 791 F.2d at p. 705; 15 U.S.C. § 1635(b). The lender's obligation to return the money paid to it is part of the rescission remedy under title 15 of the United States Code section 1635(b).

Neither has the lender responded to borrowers' rescission of the unconsummated April 26, 2006 loan transaction within 20 days nor has the lender returned any monies paid by the borrower or returned any property given as security.

Nothing about the word "rescission," moreover, limits its applicability to the removal of a security interest alone. While neither the Act nor the implementing regulations define the term, common definitions of "rescission" indicate that it covers more than simply removing a security interest created through a loan. According to one dictionary, the term means "[a] party's unilateral unmaking of a contract," which "restores the parties to their pre-contractual positions." *Black's Law Dictionary* 1308 (7th ed.1999). According to another, the term means "an act of cutting off" or "an act of rescinding, annulling, or vacating or of cancelling or abrogating (as by restoring to another party to a contract or transaction what one has received from him)."*Webster's Third New International Dictionary* 1930 (2002); *see also id.* (second definition of "rescind" is: "[T]o abrogate (a contract) by tendering back or restoring to the opposite party what one has received from him.").

And, most importantly, § 1635(b) not only allows a rescinding borrower to void the security interest but also requires the creditor to return other fees generated by the loan transaction, namely "any money or property given as earnest money, down payment, or otherwise." 15 U.S.C. § 1635(b); *see also id.* ("When an obligor exercises his right to rescind ... he is not liable for any finance or other charge, *and* any security interest given by the obligor ... ***becomes void upon such a rescission.***") (emphasis added); 12 C.F.R. § 226.23(d)(2) (requiring the creditor upon rescission to return "any money or property that has been given to anyone in connection with the transaction").

It was irrelevant whether or not the borrower *later filed a lawsuit* in state and federal district court and the rescission was denied. *Jesinoski* was only decided by the Supreme Court on January 13, 2015, until which time courts throughout California and Ninth Circuit Court of appeals denied almost every case of rescission under TILA on grounds that Regulation Z requires a consumer to file suit within three years to exercise TILA rescission.

Nevertheless a rescission effectuated ***prior to*** *later filed lawsuit* in state and federal district court that was denied could not be a basis for the application of the doctrine of res judicata.

The Court of Appeals should have ruled on plaintiffs' appeal from this unwarranted and unprecedented decision of the District Court, or at least made an express determination that would explain to the bench and bar why the Court deemed it unnecessary to address plaintiffs' appeal.

Where a lower court persistently and without reason refuses to adjudicate a case properly before it, the higher court may issue a writ of mandamus in order that it may exercise the jurisdiction of review given by law. *Will v. Calvert Fire Ins. Co., supra,* 437 U.S. at 661_62, 98 S.Ct. at 2557. *See also Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976); *La Buy v. Howes Leather Co., supra; Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3

L.Ed.2d 988 (1959); *McClellan v. Carland,* 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762 (1910).

In some cases, this Court and other courts have directed the lower court to act expeditiously to adjudicate a matter without actually issuing the writ of mandamus. *See, e.g., In re Blodgett,* 502 U.S. 236, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992); *Connor v.Coleman,* 440 U.S. 612, 99 S.Ct. 1523, 59 L.Ed.2d 619 (1970); *Madden v. Myers,* 102 F.3d 74 (3d Cir. 1996); *In re Scott,* 163 F.3d 282 (5th Cir. 1998).

Without the benefit of a ruling from the Court of Appeals, or a clear explanation for a non-ruling, the petitioners herein cannot properly evaluate their next step in this case. By granting this petition, this Court would encourage the Court of Appeals to write opinions that address all necessary issues, so that future petitions such as this one can be avoided and in the alternative this court may grant a writ of certiorari.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS

Statutory rescission pursuant to 15 U.S.C. § 1635(b) ***is a fact*** not a theory or a claim. 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. Pursuant to *Jesinoski*, "Nothing in our jurisprudence, and no tool of statutory interpretation, requires that a congressional Act must be construed as implementing its closest common-law analogue. Cf. *Astoria Fed. Sav. & Loan Assn.* v. *Solimino,* 501 U. S. 104, 108-109 (1991). The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind." "..Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter."

The text of Section 1635(a) is clear: a borrower exercises "the right to rescind ... by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a). The Court "begin[s] with the Act's language." *See United States v. Tinklenberg,* 131 S. Ct. 2007, 2012 (2011). "[W]here, as here, the statute's language is plain, ***'the *15 sole function of the courts is to enforce it according to its terms.'*** " *See United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989)(quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)); *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992)("***When the words of a statute are unambiguous, ... 'judicial inquiry is complete.'*** ") (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *See Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 175 (2009) (internal quotation marks omitted). The ordinary meaning of the phrase "notifying the creditor," confirmed by Congress's consistent usage across the statute, requires only that the borrower inform the creditor of the intention to rescind the transaction and entails no further requirement.

Petitioner seeks nothing more than a decision on his appeal. He should be entitled to that. This Court has recognized that a writ of mandamus may be issued where a lower court "obstinately refuses to adjudicate a matter properly before it...." *See Will v. Calvert Fire Ins. Co., supra,* 437 U.S. at 666, 98 S.Ct. at 2559.

This case is exceptional for two reasons. *Firstly* the Court of Appeals was squarely presented with this specific issue on appeal but chose not to do anything about it. *Second,* Petitioner's issue as to Rescission effectuated pursuant to 15 U.S. C. 1635(a) is an issue of national importance and public interest.

Finally, District Court's refusal to enforce rescission and Court of Appeals refusal to rule on this material issue raised on appeal issue will let stand as law an unacceptable and unconstitutional grant of power to the court *to alter* established precedent established by the United States Supreme court penned by Justice Scalia writing for a unanimous Supreme Court of the United States.

ADEQUATE RELIEF CANNOT BE OBTAINED FROM ANY OTHER COURT OR IN ANY OTHER FORM

The only form of relief potentially available to petitioners would be a petition to this Court for a writ of certiorari and in the alternative a writ of mandamus. As established by this court, *In Re Cheney,* petitioner satisfies all the three conditions set forth for a grant of a writ of mandamus. (1) the mandamus petitioner must have 'no other means to attain the relief he desires,' (2) the mandamus petitioner must show that his right to the issuance of the writ is 'clear and indisputable,' and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." 542 U.S. at 380-81 (2004).

The Court of Appeals issued no ruling on the issue of rescission plaintiffs' appeal and offered no explanation for the lack of a ruling. Petitioner should not be required to guess what the Court of Appeals intended, and neither should this Court. Petitioners cannot reasonably be expected to seek certiorari with respect to a nullity. At this point, however, without the benefit of a ruling from the Court of Appeals or an explanation for not ruling, petitioners can only speculate. While that may well be an insufficient basis on which to seek a writ of certiorari, petitioner alternatively seeks a writ of mandamus.

The District court has no authority to compel the Court of appeals to issue a ruling or explanation with respect to issues raised by the plaintiff's appeal to the Court of Appeals. Petitioner already unsuccessfully sought relief from the Court of Appeals on this specific issue. Although that Court has inherent power to recall or amend its mandate, it would be futile to ask the Court at this time. Petitioner is not aware of any potential remaining avenues of relief from the Court of Appeals.

Petitioner respectfully submit that their only option for obtaining adequate relief is the present petition to this Court for a writ of certiorari and in the alternative for a writ of mandamus directing the panel of the Court of Appeals which heard this case to adjudicate the issues presented by plaintiffs' appeal or provide a clear and complete explanation as to why a decision on those issues was thought to be unnecessary to the Court's disposition of the case.

CONCLUSION

For the reasons argued above, Petitioner respectfully requests this Court to issue a writ of certiorari or in the alternative a writ of mandamus to the United States Court of Appeals for the Ninth Circuit and adjudicate the issues presented by petitioner on appeal or to provide a clear and complete explanation as to why the court deed a decision on those issues unnecessary to its disposition of the case.

Dated: November 16, 2017

Respectfully Submitted

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