No. _____

In the
Supreme Court of the United States

TIMOTHY BARNES,
Petitioner,

v.

CHASE HOME FINANCE, LLC; CHASE BANK USA, N.A., a subsidiary of JP Morgan Chase & Co.; IBM LENDER BUSINESS PROCESS SERVICES, INC.; and FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the federal Truth in Lending Act ("TILA" or "the Act") to promote the "informed use of credit." 15 U.S.C. § 1601(a). The Act provides rescission rights for a consumer whose *ownership interest* in his or her *principal dwelling* will be subject to the consumer loan's security interest. 15 U.S.C. § 1635(a) (emphasis added). Mandatory forms disclosing such rights must be provided. *Id.* There is an exception to the rescission right and provision requiring TILA disclosure forms for "residential mortgage transactions," defined by TILA and its implementing regulations to be loans in which the purpose is "to finance the *acquisition* or initial construction of the dwelling." 15 U.S.C. § 1602(x), 1635(a), 1635(e)(1); 12 C.F.R. § 1026.2(a)(24).

Federal courts are often required to apply state law to particular issues arising under federal statutes, as is the case here. TILA's implementing regulations mandate that words not defined by the regulations are to be accorded meanings given to them by state law or contract. 12 C.F.R. § 1026.2(b)(3). "Ownership interest" is not defined in the TILA regulations. Thus, whether a consumer has an *ownership interest* in their "principal dwelling" is a term defined by state law to determine if rescission rights apply. The state law definition of ownership interest, *i.e.*, property rights, establishes whether a loan falls under the section 1635(a) disclosure requirement or the residential mortgage transaction's *acquisition* exception.

The question presented is:

Does a consumer have the right to exercise federal TILA rescission protection where applicable state law

has defined his ownership interest in a way that activates that protection, or may a federal circuit court of appeal deny that protection by relying on a term atextual to the Act, such that its decision directly conflicts with the property rights decisions rendered by a state's highest court?

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):
Barnes v. Chase Home Fin., LLC, *et al.,*
No. 18-35616 (Aug. 14, 2019),
petition for reh'g denied (Oct. 28, 2019)

United States District Court (D. Or):
Barnes v. Chase Home Fin., LLC, *et. al.,*
No. 11-cv-00142-PK (June 29, 2018)

United States Court of Appeals (9th Cir.):
Barnes v. Chase Home Fin., LLC, *et al.,*
No. 18-35716 (Aug. 10, 2017)

United States District Court (D. Or):
Barnes v. Chase Home Fin., LLC, *et. al.,*
No. 11-cv-00142-PK (July 8, 2013)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy Barnes ("Mr. Barnes"), respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' order denying the petition for rehearing and petition for rehearing en banc was entered October 28, 2019 and is not reported. The opinion of the court of appeals is reported at 934 F.3d 901 (9th Cir. 2019) ("*Barnes II*"). The order of the district court granting Respondents' motion for summary judgment is reported at 2018 WL 3212018. The order of the court of appeals vacating the previous grant of summary judgment is reported at 701 Fed. Appx. 673 (9th Cir. 2017) ("*Barnes I*"). The order of the district court granting Respondents' motion for summary judgment in *Barnes I* is reported at 2013 WL 3479491. These rulings are reprinted in the accompanying Appendix.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on August 14, 2019. The court denied a timely petition for rehearing and petition for rehearing en banc on October 28, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant parts of the Federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and its implementing

regulation, 12 C.F.R. § 1026 *et seq.*,[1] *Official Interpretations* thereto, 12 C.F.R. § 1026 Supp. I, and Oregon's property partition law, Or. Rev. Stat. § 107.105 are reprinted in the accompanying Appendix.

INTRODUCTION

This case presents an ideal vehicle for resolving an important and recurring federal question under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, that directly conflicts with a state court of last resort's decisions regarding the applicable definition of property rights. The decision below also conflicts with this Court's rulings on the proper mode of analysis to interpret federal statutes, including those that borrow from state law.

Congress enacted the Truth in Lending Act more than 50 years ago to promote the informed use of credit by requiring creditors to provide borrowers with "meaningful disclosure[s] of credit terms." 15 U.S.C. § 1601(a). This important consumer protection law guarantees rescission rights to borrowers when transactions meet certain criteria: It must be a consumer credit transaction, in which a non-purchase money lien or security interest is or will be placed on the consumer's principal dwelling. There is an exception for residential mortgage transactions, defined to include a purchase money security interest to finance the "acquisition" or initial construction of a

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[1] The Ninth Circuit's citations to the TILA regulations, known as "Regulation Z," were to the numbered sections as they existed at the time of the transaction at issue. The numbers, but not the substance, of the sections cited herein, prospectively changed in 2011 from 12 C.F.R. § 226 *et seq.*, to 12 C.F.R. §1026 *et seq.* *See* 76 Fed. Reg. 79, 768-01, 79,803 (Dec. 22, 2011). Citations to the TILA regulations as currently numbered are used herein.

consumer's dwelling. If a borrower does not have an "ownership interest" prior to consummation of the loan transaction, then he is not a consumer to which TILA disclosure and rescission rights are granted.

"Ownership interest" is not defined in TILA's implementing regulations. The regulations direct that undefined terms "have the meanings given to them by state law or contract." 12 C.F.R. § 226.2(b)(3). Where state law property rights establish an **ownership interest** in a consumer's **principal dwelling,** as is the case here, then the consumer is entitled and required to receive mandatory and material Notices of Right to Cancel forms and is granted TILA's extended right of rescission. An existing ownership interest under state law also removes the transaction from the residential mortgage transaction exception because the transaction would not involve a purchase money security interest to finance the "acquisition" of the borrower's dwelling.

This Court should grant review to ensure adherence to applicable state law when directed by federal statutes to do so. The Ninth Circuit's decision below directly conflicts with decisions rendered by the relevant state's highest court. It departs from the applicable statutory text, disregards the federal agency's regulations and interpretation, and ignores this Court's decisions regarding state law determination of property rights. It thereby thwarts Congress's intent for consumer credit protection.

STATEMENT OF THE CASE

This case presents an important and recurring question of federal statutory construction that squarely conflicts with a decision of the relevant state court of last resort. Mr. Barnes purchased and has lived in his Oregon home for almost 30 years, where he lives today. In 2007, he and his former wife divorced. The divorce court ordered Mr. Barnes to "immediately refinance the mortgage on said property" to remove "wife's name from said financial obligation" and to pay a money judgment to his wife. Mr. Barnes applied to Respondent Chase Bank, USA, N.A. ("Chase Bank") and refinanced, including a cash-out of the equity in his home. Chase Bank[2] supplied him with a replacement mortgage loan that included an extra $100,000 to pay the court-ordered money judgment to his wife.

Before deciding whether and what TILA disclosures are necessary for a particular credit transaction, the creditor must make two determinations before extending credit, one factual and one legal. The creditor must make a legal determination by placing a characterization upon the facts. Here, Chase Bank did not require a down payment from Mr. Barnes to obtain the loan at issue. The loan was secured by a deed of trust, defined as a consumer credit transaction under TILA. Chase Bank supplied Mr. Barnes with a Uniform Residential Loan Application, which described the purpose of the loan as a "refinance," closing documents that identified Mr. Barnes as the

[2] The right to service the loan was transferred to IBM Lender Business Process Services, Inc. in 2010, and allegedly assigned to Federal National Mortgage Association in 2011.

"titleholder" of the property, and specifically provided as a closing condition the "right of rescission." Chase Bank also gave Mr. Barnes a TILA Disclosure Statement and Notice of Right to Cancel forms, both of which are *material* disclosures under TILA for transactions subject to rescission rights. 15 U.S.C. § 1635(a) and 12 C.F.R. § 1026.23.

Mr. Barnes exercised his right of rescission, pursuant to TILA section 1635(f), based on *material* anomalies in the disclosures he received at the loan closing. Mr. Barnes brought suit after Respondents failed to honor his rescission notice.

After the District Court ruled that Mr. Barnes's claim was untimely, the Ninth Circuit Court of Appeals found that Mr. Barnes had timely and properly exercised his right of rescission and remanded the case for further proceedings. 701 Fed. Appx. 673, 675 (2017) ("Because notice of rescission was properly given, we vacate the grant of [Respondents'] summary judgment on Barnes's claims for rescission and failure to effect rescission"). On remand, the District Court granted summary judgment to Respondents, concluding that Mr. Barnes had no right of rescission under TILA because his loan was a "residential mortgage transaction," to which the extended right of rescission under TILA does not apply, and the Ninth Circuit affirmed.

A residential mortgage transaction is defined by TILA to be "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the

acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(x) (emphasis added).

Whether the consumer credit transaction at issue constitutes: (1) a rescindable transaction under section 1635(a); or (2) a residential mortgage transaction "acquisition" under section 1635(e)(1), is dependent on the definition of the consumer's ownership interest in the property. If Mr. Barnes had a prior interest in the property, the loan transaction is a **refinance**, to which a TILA extended right of rescission is available. Because ownership interests are not defined in the TILA regulations, the implementing regulations mandate that state law is determinative as to any undefined terms. 12 C.F.R. § 1026.2(b)(3).

The couple purchased the property in 1990. During the course of the couple's marriage, the original acquisition transaction was replaced multiple times. Each replacement transaction was granted solely on Mr. Barnes's income, while Mrs. Barnes cared for their children at home. In 1997, Mrs. Barnes quitclaimed the property to Mr. Barnes. In 2003, Mr. Barnes transferred bare legal title by quitclaim deed to Mrs. Barnes for credit reasons and to remodel or enhance their property asset. At no time, however, did the property cease to be Mr. Barnes's principal dwelling, nor did he stop paying the mortgage payments, taxes, utilities and household repairs, which bestowed upon him an equitable interest.

Under applicable state law, upon the filing of a dissolution proceeding, the property is considered co-owned marital property, regardless of in whose name the house was titled, bestowing statutory title to the

property on Mr. Barnes as well. Or. Rev. Stat. § 107.105(1)(f)(E). The dissolution proceeding was filed prior to the loan application. The divorce judgment was entered in September 2007, at which time Oregon law considers the property to be a division of jointly owned property. *Id.* The loan was obtained in November 2007.

REASONS FOR GRANTING THE WRIT

This Court has been called upon for many years to grant certiorari when courts below fail to apply state law rights within the requirements of federal statutes. This case is an ideal vehicle for resolving courts' failure to follow state law because it lacks factual impediments and concerns the proper definition of ownership interests that would allow consumers the protection of the federal Truth in Lending Act. Because the result in the case at bar directly conflicts with decisions by the relevant state court of last resort, this Court should resolve the conflict and provide clear guidance to lower courts on a matter impacting consumers across the country who seek to vindicate their substantive rights.

I. The Ninth Circuit's Decision in this Case Directly Conflicts With Decisions Rendered by the Relevant State Supreme Court, in Contravention of TILA's Mandate to Apply the State Law to Undefined TILA Terms.

The federal Truth in Lending Act, like other federal statutes, borrows from state law on certain provisions. The relationship between federal and state laws must not be ignored by federal courts. In this case, construction of TILA's protections circumvented applicable state law, conflicting with Oregon's Supreme Court decisions, in contravention

of the federal consumer protection law and the decisions of this Court.

In a prior appeal in this case, the Ninth Circuit "held that [Petitioner] gave proper, timely notice of rescission under TILA…."[3] In the subsequent appeal, however, the Ninth Circuit favorably considered the lenders' new argument[4] invoking the TILA exception for "residential mortgage transactions," defined by TILA to be "a transaction in which a mortgage…or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such a dwelling." 15 U.S.C. § 1602(x); 12 C.F.R. § 1026.2(a)(24).

The court ruled that section 1602(x)'s definition of a "residential mortgage transaction" included acquisitions and *reacquisitions*. App. 10a. The Ninth Circuit erroneously held that residential mortgage transactions include "any acquisition or reacquisition

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[3] *Barnes v. Chase Home Fin., LLC*, 934 F.3d 901, 904 (9th Cir. 2019) (citing *Barnes v. Chase Home Fin., LLC,* 701 F. App'x 673, 674–75 (9th Cir. 2017) (unpublished memorandum disposition)). App. 1a.

[4] Allowing the new argument was contrary to the Ninth Circuit's own precedent, repeatedly holding that we "need not and do[ ] not consider a new contention that could have been but was not raised on the prior appeal." *Munoz v. Imperial Cty.*, 667 F.2d 811, 817 (9th Cir. 1982). The Ninth Circuit also has previously held that even parties who were satisfied with the district court's judgment must file a cross-appeal to preserve issues for review in subsequent appeals following a remand. *Alioto v. Cowles Comm'ns, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980). As a result, Respondents waived any arguments regarding the district court's liability ruling when they failed to raise those arguments by way of a cross-appeal in *Barnes I*.

of the dwelling." App. 11a.[5] There is, however, no mention of "reacquisition" in the statute. 15 U.S.C. § 1602(x), App. 79a; *contra Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face"). The textual reading of the statute is dispositive. *U.S. v. Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989). Where the statutory language is clear, a court should not "rewrite the statute so that it covers only what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). Yet that is what the court below did in this case.

Attributes of an "acquisition" also are explained in the *Official Interpretations* of the TILA regulations to hinge on the consumer's interest in the dwelling at issue. 12 C.F.R. Supp. I to Part 1026. The *Official Interpretations* provide that an extension of credit made to a joint owner of property to buy out the other joint owner's interest is not a "residential mortgage transaction." 12 C.F.R. § 1026 Supp. I, *Official Interpretations,* 1026.2(a)(24)-5.ii. The Consumer Financial Protection Bureau, which is the "primary source for interpretation and application of truth-in-lending law," *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 238 (2004), specified in the *Official Interpretations* that a "residential mortgage transaction…does **not** include a transaction involving a consumer's principal dwelling if the consumer **had**

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[5] The court's reliance on *In re Bestrom*, 114 F.3d 741, 744–46 (8th Cir. 1997) was inapposite because that case involved reacquisition of property after a foreclosure sale. Mr. Barnes never sold his home prior to consummation of the loan transaction and never left his principal dwelling.

previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title" or, put more simply, "**new transactions involving a previously acquired dwelling**." 12 C.F.R. § 1026 Supp. I, *Official Interpretations,* 1026.2(a)(24)-5.i and ii (emphasis added). A similar scenario is present here. Mr. Barnes previously purchased and acquired some interest in the property at issue.[6]

Instead, state law is dispositive in this case. Whether a consumer has a rescission right depends on whether he or she has an ownership interest in the secured property. TILA's regulations define a consumer covered by rescission protection to "include[ ] a natural person in whose principal dwelling[7] a security interest is or will be retained or

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[6] Moreover, lenders do not provide material Notice(s) of Right to Cancel forms in "acquisition" transactions, because TILA expressly "except[s]" such transactions from this requirement under section 1635(a). That is, no statutory penalty occurs when this material disclosure form is not provided in an "acquisition" transaction because they are "exempted transactions" under section 1635(e). TILA's right of rescission section, 15 U.S.C. § 1635(a), mandates delivery of such form by the lender "except as otherwise provided in this section." Section 1635(e) delineates exceptions from the disclosure form requirement, including residential mortgage transactions. 15 U.S.C. § 1635(e). At the time of the loan, Respondent recognized that the transaction was not an acquisition and therefore provided the material Notices of Right to Cancel to Mr. Barnes. The loan at issue was never an acquisition, to which the residential mortgage transaction exception applies. This argument by Mr. Barnes was not addressed, perhaps because of the contradiction that this analysis reveals. The District Court described this material disclosure form provided at closing as nothing more than "superfluous." App. 66a-67a.

[7] There is no dispute that Mr. Barnes and his then wife purchased the home in 1990, and that Mr. Barnes has lived in

acquired, if that person's *ownership interest* in the dwelling is or will be subject to the security interest." 12 C.F.R. § 1026.2(a)(11). Any consumer "whose ownership interest is or will be subject to the security interest" has the right to rescind the transaction. 12 C.F.R. § 1026.23(a)(1).

TILA's implementing regulation provides that terms undefined by the TILA regulations "have the meanings given to them by state law or contract." 12 C.F.R. § 1026.2(b)(3). Because TILA's regulations do not define "ownership interest," Mr. Barnes's ownership interest at the time of the loan is defined by state law. *Id.* A consumer's ownership interest determines whether the loan constitutes an *acquisition* under the residential mortgage transaction exception as well. *Id.* And "[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation…to private parties, is found in the **statutes and decisions of the state**." *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-592 (1973) (quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944)) (emphasis added); *see In re Obedian*, 546 B.R. 409 (C.D. Cal. 2016) (nature of debtor's interest in real property determined by state's highest court); *see also*

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the house for almost 30 years as his principal dwelling. He continues to live in the house now. *See* Rohner and Miller, *Truth in Lending* ¶ 8.02[1][c] (The test is whether the dwelling is currently being used as the consumer's home"); *Scott v. Long Island Savings Bank*, No. CV–85–2904, 1990 WL 1656 (E.D.N.Y. Jan. 4, 1990), *aff'd in part and vacated on other grounds*, 937 F.2d. 738 (1991) (factual considerations to determine principal dwelling include whether utilities, lease or mortgage is in a person's name, mail delivery, length of residence and if belongings at that address).

O'Melveny & Myers v. FDIC, 512 U.S. 79, 84-86 (1994) ("(M)atters left unaddressed in such a [comprehensive federal statutory regulation] scheme are presumably left subject to the disposition provided by state law.").

Property rules for non-community property states (like Oregon) apply equitable distribution when marital property is divided at divorce.[8] The Oregon Supreme Court considers equitable factors to include who earned payment for the property. Under Oregon law, "marital assets" are "any real or personal property, or both, acquired by either of the spouses, or both, during the marriage." *In re Marriage of Stice & Stice*, 308 Or. 316, 325 (Or. 1989). Even if Mr. Barnes put the home in his ex-wife's name for a period of time, "[t]he fact that property acquired during the marriage is in one spouse's sole name does not change the fact that it is a marital asset." *Id.* Here, the house is a marital asset. It became a marital asset when Mr. Barnes and the former Ms. Barnes acquired it from third-party sellers in 1990, while married.

For marital assets, such as a home, "[s]ubsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered *a species of co-ownership*, and a transfer of marital assets under a judgment of annulment or dissolution of marriage or of separation…shall be considered a partitioning of *jointly owned property*." Or. Rev. Stat. § 107.105(1)(f)(E) (emphasis added). Indeed, the

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[8] Only nine states in the U.S. have adopted the community property system. IRS, Community Property Law, https://www.irs.gov/irm/part25/irm_25-018-001#idm140332592923296 (last visited Jan 6, 2020). The majority are, like Oregon, non-community property states. *Id.*

Oregon Supreme Court has specifically recognized that all marital assets are jointly owned regardless of the fact that "[f]or tax **or other reasons**, marital partners may choose to acquire property and take **title** in the name of either or both." *In re Marriage of Engle*, 293 Or. 207, 215 (Or. 1982) (en banc) (emphasis added); *see Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State"); *Adderly v. Florida*, 385 U.S. 39, 46 (1966) ("It is well-established that a state court's interpretation of its statutes is binding on the federal courts unless a state law is inconsistent with the federal Constitution").

The Oregon Supreme Court specifically has defined transfers of marital assets in dissolution proceedings obtained during the marriage but held in the name of a single spouse to be the division of jointly owned property. *Nay v. Dep't of Human Servs.*, 385 P.3d 1001, 1013 (Or. 2016); *see In re Marriage of Herald & Steadman*, 355 Or. 104, 120 (2014) (court has authority under Oregon statute to divide all of the marital property held by parties at the time of dissolution regardless of how the property is titled) (citing Or. Rev. Stat. § 107.105(1)(f)). The Court noted that text was added to the applicable Oregon statute to prevent adverse tax consequences to a couple. *Id.*

Thus, the Barnes's choice to transfer title in the house to Ms. Barnes in 2007 in no way diminishes the state's statutory mandate that, upon the filing of the petition for dissolution, the property was considered **co-owned**. *Engle*, 293 Or. at 218 ("whatever the nature of the spouse's interest in a separately held 'marital asset' prior to the filing of a petition for

dissolution, the statute compels this conclusion: '…Subsequent to the filing of a petition for dissolution…(1) the rights of the parties in the marital assets shall be considered a species of co-ownership, and (2) a transfer of marital assets pursuant to a decree of dissolution shall be considered a partitioning of jointly owned property.'") (citing Or. Rev. Stat. § 107.105(1)(e), currently § 107.105(1)(f)(E)). The petition for dissolution of the marriage was filed long prior to the execution of the loan documents and the divorce judgment was entered months prior to the loan transaction. Barnes could have filed for dissolution at any time which, under state law, would confer upon him co-ownership of the property. Oregon law provides that its courts has authority to divide all the property held by the parties, regardless of how titled and when it was acquired. Or. Rev. Stat 107.105(1)(f); *see Deming v. Deming*, 240 Or. App. 447, 452 (Or. Ct. App. 2011). The property thus is deemed under state law to be jointly owned.[9] *Id.*

There is no question that, when Mr. Barnes purchased the property in 1990, he acquired full legal

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[9] Moreover, Ms. Barnes relied entirely on Mr. Barnes's source of income for every mortgage payment. Therefore, not only did Mr. Barnes have legal title when he purchased the house in 1990, he enjoyed equitable title, even when the house was not fully legally titled to him. *E.g., In re Lindquist*, 395 B.R. 707, 709 (2008). Under the applicable state law in this case, once the dissolution proceeding was filed, Mr. Barnes also gained statutory title, because all marital assets after the dissolution filing are co-owned regardless of the fact that "[f]or tax or other reasons, marital partners may choose to acquire property and take **title** in the name of either or both." *Engle*, 293 Or. at 215. So the subsequent loan transaction was not acquisition financing, and not within the "residential mortgage transaction" exception.

title with his then-wife. The residential mortgage transaction exception applies to "acquisitions." 15 U.S.C. § 1602(x). There is no mention in the statute of the atextual "reacquisition" term relied upon the court below. *Id.; see Jesinoski v. Countrywide Home Loans*, 574 U.S. 259, 135 S. Ct. 790, 792 (2015) (TILA's unequivocal language must be followed). When the couple adjusted the bare legal title on the home for credit reasons, Mr. Barnes's continuous payment of the mortgages on the dwelling in which he and his then-wife lived allowed him to maintain equitable title to the home. *See In re Lindquist*, 395 B.R. at 709 (in federal bankruptcy case, husband whose name was removed from title to allow for a refinance, but who made mortgage payments for the property had an equitable ownership interest for which he could claim a homestead exemption under Oregon law, which is consistent with the statute's objectives); *see Harder v. City of Springfield*, 192 Or. 676, 685, 236 P.2d 432, 436 (1951) ("this court has long since held that while the word 'owner' usually implies that the estate possessed is an estate in fee simple, it may, nevertheless, include one 'who has the usufruct control or occupation of land with a claim of ownership, whether his interest be an absolute fee or a less estate"); Black's Law Dictionary 1523 (8th ed. 2004) (equitable title is not just any beneficial interest in property, but is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title"). And applicable state law also gave him statutory title to the property upon filing of the dissolution petition. *Engle*, 293 Or. at 218; Or. Rev. Stat 107.105(1)(f).

In determining Mr. Barnes's ownership interest, and the interest of any consumer, state law is

applicable to determine "ownership interest" in the home. Oregon's law establishes his interest in the dwelling in which he has lived for decades. *Harder,* 192 Or. at 686, 236 P.2d at 436 (a beneficial owner within the intention of the law is entitled to the law's benefit). TILA's *Official Interpretations* bolster the fact that his acquisition of "some interest" in the dwelling is what is required to bring his loan within the protection of the consumer protection law. In the context of a marriage dissolution proceeding, such as that here, the applicable state law considers the property to be jointly owned. *Engle*, 293 Or. at 218; Or. Rev. Stat 107.105(1)(f). A court's refusal to follow state law, as the TILA regulations directed it to do, to determine a consumer's rights, affects all homeowners in transactions governed by TILA and frustrates the purpose of the consumer protection law.

II. The Decision Below Directly Conflicts with Supreme Court Precedent.

TILA specifically directs that undefined terms, such as the consumer's property interest in this case, "have the meanings given to them by state law or contract." 12 C.F.R. § 1026(b)(3). The highest court of each state remains "the final arbiter of what is state law." *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) (quoting *West v. AT&T*, 311 U.S. 223, 236-37 (1940) ("State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule"). The courts below, however, ignored the Supreme Court's mandate. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (Justice Scalia

describing how lower courts are bound not only by the holdings of higher courts' decisions but also by their "mode of analysis").

Courts applying and interpreting federal laws may rely on outcomes dictated by state laws. *E.g.*, *North Star Steel Co. v. Thomas,* 515 U.S. 29, 33 (1995) (collecting cases in which federal courts may borrow statutes of limitation from state law where a federal statute contains no limitation of actions); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). While the scope of a federal right, such as that guaranteed by TILA, is a federal question, state law may be determinative in matters that are primarily of state concern. *De Sylva v. Ballentine,* 351 U.S. 570, 580-82 (1956) (state law controlled interpretation under copyright law of the word "children"; domestic relations are primarily a matter of state concern); *see Howlett v. Rose*, 496 U.S. 356, 367 n.14 (1990) ("we have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law.")

Federal tax law, for example, determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has property interests or rights to property subject to taxation. *Aquilino v. United States*, 363 U.S. 509 (1960); *Morgan v. Commissioner*, 309 U.S. 78 (1940). Accordingly, federal tax is assessed and collected based on a taxpayer's state-created rights and interest in property. Similarly, the Bankruptcy Code leaves the determination of property interests to state law. *Stern v. Marshall*, 564 U.S. 462, 495 (2011); *Butner v.*

U.S., 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"); *see also* 42 U.S.C. § 1988(a) (on issues not covered by federal law, courts in civil rights actions are instructed to borrow the forum state's law if not inconsistent with the federal law's purpose).

Oregon law is applicable in this case because the property is located there. And domestic relations is an area long regarded as virtually within the exclusive province of the states. *U.S. v. Windsor*, 570 U.S. 744, 766-78 (2013) (citations omitted); *see In re Herald and Steadman*, 322 P.3d 546, 553-58 (Or. 2014) (en banc) (state court's division of social security benefits in marital division of property case not preempted by federal law). Under Oregon law, "marital assets" include any real property acquired during the marriage in one spouse's sole name or in both spouses' names. *Stice*, 308 Or. at 325. Oregon deems property to be co-owned once a dissolution petition is filed, *Engle*, 293 Or. at 215, 218 (citing Or. Rev. Stat. § 107.105(1)(e), currently (1)(f)(E)), and jointly owned when the divorce judgment is entered. *Id.; see Farmers Ins. Co. of Oregon v. Gelfand*, 2015 WL 4506962 *5-9 (D. Or. 2015) (in bankruptcy proceedings, spouse's filing of dissolution proceeding conferred vested interest in property, but property interest then perfected upon divorce judgment). Both the dissolution petition filing and the divorce judgment predated the loan transaction here.

It is common for courts applying and interpreting federal laws to rely on outcomes dictated by state property laws. TILA regulations direct courts to do so for undefined terms, such as ownership interests in this case. 12 C.F.R. § 1026.2(b)(3). Courts below,

however, ignored multiple Supreme Court's decisions mandating that it do so.

III. The Decision Below Violates Congressional Directives Set Forth in the Truth in Lending Act Harming the Consumers That TILA Was Enacted to Protect.

Mr. Barnes will lose his home of more than 30 years if TILA's provisions are not enforced. Contrary to the stated purpose of the federal consumer protection statute, 15 U.S.C. § 1601(a), the court below narrowly construed TILA's provisions against the interests of the consumer and undermined federal policies enacted by the statute.

The panel's analysis runs afoul of this Court's decision in *Mourning v. Family Publications Serv.*, 411 U.S. 356, 365-366 (1973) by failing to adhere to TILA's remedial legislation purpose. Given the remedial nature of TILA, courts broadly construe its statutory language in favor of consumers. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1202 (9th Cir. 2010); *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 845 (8th Cir. 2009); *Saint-Jean v. Emigrant Mortg. Co.*, 50 F. Supp. 3d 300, 322-23 (E.D.N.Y. 2014); *Kurz v. Chase Manhattan Bank,* 273 F. Supp. 2d 474 (S.D.N.Y. 2003). *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)); *see also* A. Scalia & B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"). The text, structure, and legislative history of TILA indicate an overwhelming concern for consumers, which was not given due regard in this case.

As this Court pointed out in *Mourning*:

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board[10] broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes of the Act," Congress specifically provided that the regulations may define classifications and exceptions to insure compliance with the Act.

411 U.S. at 365. Yet the court below failed to follow the regulation's directive to follow state law regarding

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[10] The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred exclusive authority to interpret and promulgate rules regarding TILA from the Board of Governors of the Federal Reserve System to the Consumer Financial Protection Bureau on July 21, 2011. *See* Pub. L. No. 111-243, §§ 1061(b)(1), (d) (2010), *codified at* 12 U.S.C. §§ 5581(b)(1), (d); *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010). The Bureau, exercising this authority, republished Regulation Z in December 2011. *See* 76 Fed. Reg. 79,768-01, 79,803 (Dec. 22, 2011) (codified at 12 C.F.R. § 1026 *et seq.*).

the definition of property ownership interest and the CFPB's *Official Interpretations* that further solidify that Mr. Barnes's loan falls within TILA's protection. *See* Sections I and II, *supra.*

When consumers such as Mr. Barnes have a right to rescind under TILA, "all that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded." *Merritt v. Countrywide Financial Corp.*, 759 F.3d 1023, 1032 (9th Cir. 2014); *accord Jesinoski,* 135 S. Ct. at 792 ("The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intentions to rescind"). "By reversing the traditional sequence for common law rescission claims, TILA 'shift[s] significant leverage to consumers,' consistent with the statute's general consumer-protective goals." *Merritt,* 759 F.3d at 1032. In Barnes I, the Ninth Circuit recognized Mr. Barnes's effective rescission.

The Ninth Circuit's more recent decision in *Barnes II* misinterprets one of TILA's most important features—which consumers are protected by TILA—in a manner that contradicts Supreme Court precedent and fundamentally defeats the statutory purpose. In the Ninth's Circuit's view, creditors may ignore valid rescission notices "properly given" (*Barnes I*) by claiming an exception, even after providing a defective material disclosure notice, thus keeping the consumer ignorant of his or her substantive rights. The decision contradicts statutory plain meaning canons interpreting the text. If the decision stands, it would allow lenders to circumvent state law that defines property interests and the mandatory material disclosures to conceal and defraud consumers, and that Congress implemented to protect consumers from unscrupulous lenders who

"bury[ ] the cost of credit" in a TILA disclosure. *Mourning*, 411 U.S. at 366. The ruling below invites perverse results that turn TILA's consumer protection concern on its head.

Congress enacted TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009). "To effectuate TILA's purpose, a court must construe 'the Act's provisions liberally in favor of the consumer' and **require absolute compliance** by creditors." *In re Ferrell*, 539 F.3d 1186, 1189 (9th Cir. 2008) (emphasis added). Such was not the case here. The lender gave Mr. Barnes Notices of a Right to Cancel but, when faced with a rescission recognized by the Ninth Circuit in *Barnes I*, disingenuously asserted that it did not mean to grant Mr. Barnes a right to rescind.[11] The court in *Barnes II* failed to require the lender to comply with the strict federal law designed to protect consumers from such practices.

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[11] In addition, the lender benefitted from its original characterization of the loan as a refinancing, obtaining a security interest in the property based on its conclusion that Mr. Barnes had an ownership interest in the property. Despite the fact that the lender determined that Mr. Barnes was lawfully seized of the property, and specifically provided as a closing condition that "this is a refinance transaction subject to the right of rescission," the lender reversed its position when expedient in the later stages of the litigation. Had Mr. Barnes not had an ownership interest in the property, the Deed of Trust would have been an ineffectual legal instrument.

The issue presented in the case at bar is a matter of national importance. Nearly 50 percent of marriages in the United States end in divorce.[12] Dissolution of marriages present multiple economic problems, such as cash payments for alimony, money judgments, child support and potential tax liabilities. During dissolution proceedings, properties often are refinanced or transferred to one of the spouses. And when a lender forecloses on a home, the home cannot be divided in half. Both spouses must be named in a judicial action to foreclose both of their ownership interests irrespective of whose name is on the title. The foreclosure action filed by the lender in this case was filed against Mr. Barnes *and* his ex-wife.[13]

The issue presented in this case thus is recurring and determinative of whether many consumers like Mr. Barnes will lose their homes. Property interests are defined by state laws, which cannot continue to be ignored by lenders to evade the protections TILA affords in these refinancing situations, as well as in other contexts, like federal tax and bankruptcy, in which state laws must be consulted. Evasion of state law presents practical dilemmas for citizens who must comply with a perplexing body of law designed to protect them. Few consumers can afford to bring lawsuits to this stage, but state law cannot be overridden in the way presented here and in cases throughout the country that have been summarily dismissed. A ruling in this case is likely to govern

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[12] Paul R. Amato, *The Consequences of Divorce*, 62 Journal of Marriage and the Family 1269 (2000).

[13] The state court foreclosure action has been held in abeyance pending the outcome on appeal.

large bank lenders' future behavior across the country.

The court below failed to follow TILA's regulation specifically directing that state law controls the definition of terms, like ownership interests, when not defined therein. The CFPB's *Official Interpretations*, though considered dispositive, were disregarded, so that the decision below conflicts with the view of the entity specifically charged by Congress to provide the primary interpretation of TILA. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566 (1980) (Board is the primary source for interpretation and application of truth-in-lending law). The result is a decision on an important federal question that directly conflicts with decisions of the state court of last resort, the federal statute and its implementation regulations, this Court's precedent and Congressional policy set forth in the Act. Consumer protection law codified by TILA requires that certiorari be granted here so that the law will be followed consistently by courts below.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. Consideration by the Court is necessary to secure widespread consumer protection and market certainty. The court's action below conflicts with the Truth in Lending Act's mandate. If the federal Truth in Lending Act is to provide its important intended consumer protections, certiorari must be granted.

Respectfully submitted,

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