No. 03-377

In The
Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, AND THE U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF RESPONDENT

RICHARD J. RUBIN
Counsel of Record
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

CAROLYN L. CARTER, Of Counsel
NATIONAL CONSUMER LAW CENTER
1001 Connecticut Ave., NW, Suite 510
Washington, DC 20036
(202) 452-6252

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395

THOMAS DEAN DOMONOSKE
461 Lee Street
Harrisonburg, Virginia 22802
(540) 442-8616

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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STATEMENT OF INTEREST

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation whose over 1,000 members are private and public sector attorneys, legal services attorneys, law professors, law students, and non-attorney consumer advocates. NACA members' primary interest is the protection and representation of consumers. NACA's mission is to promote justice for all consumers and to provide a forum for information sharing among consumer advocates across the country. From its inception, NACA has focused on issues concerning abusive and fraudulent practices by businesses that provide financial and credit-related services.[1]

As part of promoting justice for consumers, NACA provides training on consumer law issues throughout the country, including auto-fraud training. In addition, NACA monitors and responds to various industry practices in retail car sales. The specific bait-and-switch practice underlying this case, referred to in the industry as a yo-yo sale, is used by certain dealers in deceptive and fraudulent ways. NACA members are familiar with the practices, and with specific laws, including the Truth in Lending Act (TILA), that were enacted to deter it. NACA follows the development of the cases in this area and consults with the federal agencies that enforce the federal laws that regulate this type of sale.

[1] In blanket letters of consent filed with the Clerk, the parties have consented to the filing of *amicus* briefs in this case. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

The National Consumer Law Center (NCLC) is a non-profit corporation established in 1969. One of its primary objectives is to provide assistance to legal services attorneys, governmental agencies, and private attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law. NCLC staff attorneys write and publish sixteen legal treatises on various federal and state statutes that affect consumer law. In particular, *Truth In Lending* (5th ed. 2003) and its earlier editions have provided analysis of TILA for over two decades. For over twenty-five years, NCLC staff have testified before Congress and the Federal Reserve Board on the propriety of statutory and regulatory changes to TILA and Regulation Z. As part of its active role in promoting TILA compliance, NCLC staff have been members of the Federal Reserve Board's Consumer Advisory Council since its inception.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning, non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has repeatedly and successfully spearheaded enactment of major legislation to improve protection for consumers who buy new or used vehicles. Such legislation, including laws aimed at curbing deceptive and discriminatory auto lending practices, was adopted by the California Legislature and signed into law by Governors from both major political parties. In particular, CARS has advocated for improvements in laws regarding auto financing, the matter at issue in this case. As a result of its advocacy efforts, CARS has a substantial interest in the outcome of this appeal.

The U.S. Public Interest Research Group (U.S. PIRG) serves as the national lobbying office for the state PIRGs, which are non-profit, non-partisan public interest advocacy groups active around the country. U.S. PIRG and the state PIRGs have a longstanding interest in preserving the rights of consumers against unfair financial practices. The PIRGs have produced research reports documenting predatory and deceptive financial practices, have advocated for reform legislation, and have served as *amicus curiae* in state and federal courts.

SUMMARY OF ARGUMENT

Congress enacted the Truth In Lending Act (TILA) over thirty-five years ago to mandate truth in the market place, foster fair competition, and enable the informed use of credit in the national economy. The animating spirit of TILA is that Congress expects and intends honesty to prevail in the marketplace so that it can function properly. Despite TILA, car dealers continually come up with creative ways to avoid providing consumers with information necessary to make an informed purchase. Pretending to offer a deal, locking the consumer into the deal, putting the consumer into a car, and then changing the deal after the fact and tricking the consumer into believing that the consumer must go along with the changes, as occurred here, is something unscrupulous dealers have done to all too many consumers. This scam is aptly called a "yo-yo" deal, because the consumer is on a string that the dealer pulls.

Another fraud illustrated by this case occurs when dealers add inflated charges to a credit transaction for products that are never delivered or even requested. Without the incentive provided by TILA's statutory damage provision, a dealer who gets caught engaging in the yo-yo scam or adding false charges can look at the $1,000 damage limit favored by the petitioner Koons as an insignificant cost of continuing to engage in lucrative, but illegal, deceptive credit scams. This is particularly true since only a small proportion of consumers will ever realize that their legal rights have been violated and even be able to find an attorney to represent them or pursue a case against a dealer.

Congress's removal of the $1,000 cap on statutory damages for TILA violations involving vehicle finance and certain other credit transactions does not, as Koons claims, create classifications that lead to irrational results or threaten the economy. Sound reasons exist for Congress to distinguish between these credit transactions and other mortgage and lease transactions. In addition, a $1,000 award was a significant amount in 1968 when Congress adopted TILA but is equivalent to only $185.70 today. Removal of the cap restored statutory damages to the original market impact that Congress intended. Koons cannot show that Congress acted irrationally by altering the statutory damages for different classes of transactions.

ARGUMENT

I. THE TRUTH IN LENDING ACT IS INTENDED TO BENEFIT THE ECONOMY AND CONSUMERS BY PROMOTING THE INFORMED USE OF CREDIT.

The primary purpose of TILA is to enhance competition and promote the informed use of credit. 15 U.S.C.

§ 1601(a). TILA was enacted in 1968 after eight years of Congressional consideration 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." *Id.* Section 1601(a) emphasizes the importance of TILA to the economy:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

TILA compliance protects the "ethical and efficient lender or credit extender," thus "invigorat[ing] competition." 109 Cong. Rec. 2029 (1963) (remarks of Sen. Douglas). The Court recently confirmed this conclusion: "Congress enacted the Truth in Lending Act in part because it believed 'consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping.'" *Till v. SCS Credit Corp.*, __ U.S. __, __, 124 S.Ct. 1951, 1963 (May 17, 2004) (quoting S. Rep. No. 368, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S.C.C.A.N. 252) (footnote omitted). TILA also promotes consumers' efficient use of credit "by requiring all creditors to disclose credit information in a uniform manner." 1968 U.S.C.C.A.N. 1962, 1970. "The cost of credit should be disclosed fully, simply, and clearly." *Id.* at 1965 (quoting President Johnson).

The statute is remedial in nature, "designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation." *Inge v. Rock Financial Corp.,* 281 F.3d 613 (6th

Cir. 2002) (*quoting N.C. Freed Co., Inc. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973)). Its private attorney general enforcement provision is fundamental:

> The Truth in Lending Act ultimately serves the dual purpose of providing a remedy for harm to the monetary interests of individuals while serving to deter socially undesirable lending practices. Congress focused on the individual consumer of credit as the person primarily injured who should be encouraged to prosecute actions and should be allowed to recover directly and adequately for harms done.

First National Bank v. Flatau (*In re* Wood), 643 F.2d 188, 191 (5th Cir. 1980). A*ccord Murphy v. Household Finance Corp.*, 560 F.2d 206, 210 (6th Cir. 1977). In light of these purposes, the Act must be interpreted so as to provide an incentive for creditors to comply with it.

Some twenty-five years ago, Congress reaffirmed TILA's purpose by enacting the 1980 Truth in Lending Simplification and Reform Act. Pub. L. No. 96-221, 94 Stat. 132, 168 (March 31, 1980) (the Simplification Act). Its goals were to "provide the consumer with clearer credit information, make creditor compliance easier, limit creditor civil liability for statutory penalties to only significant violations, and strengthen the act's administrative restitution enforcement." S. Rep. No. 368 at 16, *reprinted in* 1980 U.S.C.C.A.N. at 251. Congress specifically noted that "the Truth-In-Lending Act is the first consumer credit law passed by Congress and remains today one of the Nation's most important consumer protection laws." *Id.*

Significantly, the Simplification Act limited the liability of assignees such as banks and other financial institutions that buy retail installment contracts from car dealers and other merchants. The Simplification Act eliminated TILA liability for virtually all contract assignees, except for a TILA "violation . . . apparent on the face of the disclosure statement. . . ." 15 U.S.C. § 1641. Furthermore, Congress narrowed the definition of a covered "creditor," which previously covered both the credit-arranging seller and the financing entity, *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 157-58 (1981) (per curiam), to cover only the dealer who initially extends the credit through the use of retail installment contracts. *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 459-61 (5th Cir. 1999). These changes substantially reduced the financial incentives that previously motivated the banking industry's oversight of its assignors and meant that compliance would rest almost exclusively in the self-policing efforts of the originating dealers. Consequently, even when an assignee's employees train and coordinate the dealer's employees who engage in deceptive practices, TILA liability remains only with the dealer. *Knapp v. Americredit Financial*, 245 F. Supp. 2d 841, 847-48 (S.D.W. Va. 2003).

As the initial lender, it is the originating dealer who stands to profit most from anti-competitive and anti-consumer practices when those illegal practices do not appear on the face of the credit contract as a TILA violation, and it is the dealer alone who is liable for such TILA violations. To combat such deceptions, Congress created statutory damages to provide an incentive for those originating dealers to comply with TILA.

II. TILA'S REQUIREMENTS ARE DESIGNED TO DETER THE ABUSIVE "YO-YO SALE" AND FALSE CHARGE PRACTICES IN WHICH KOONS ENGAGED IN THIS CASE.

A. Unfortunately, The Two Deceptive Sales Techniques Used By Koons Against Mr. Nigh Are Recurring Practices For Businesses Who Refuse To Compete Openly And Fairly In The Marketplace.

TILA recognizes that, for the marketplace to perform properly, consumers must be given accurate information about their purchase and an opportunity to shop for better terms. Certain dealers like Koons seek to foreclose this competition and comparison shopping. Here, Koons obscured the cost of credit by changing the deal after locking the consumer into it. Koons took Mr. Nigh's trade-in, had him sign papers, and sent him on his way in his newly purchased used car as if the deal were final. In fact, however, Koons called Mr. Nigh back twice to sign new versions of the credit contract – versions that were advantageous to Koons and harmful to Mr. Nigh. This practice is commonly known as "on-the-spot delivery," "spot delivery," or a "yo-yo sale," because the dealer first lets the consumer leave the lot "on the spot" with the car, and then pulls on the string to bring the consumer back to sign a new, more expensive credit contract. The string is usually the down payment or trade-in that the dealer holds to pull the consumer back when the dealer claims the credit contract was not approved. *See Rucker v. Sheehy Alexandria*, 228 F. Supp. 2d 711, 718 (E.D. Va. 2002).

As part of the yo-yo sale in this case, Koons wrote a second contract that included an illegal charge for a fictitious product. As found by the jury, Koons intentionally included this $965 charge on the second contract with knowledge that there was no basis for the charge. After Koons engaged in the anti-competitive and illegal tactic, it then kept Mr. Nigh from shopping elsewhere by lying to him that his trade-in had been sold. In this case, Koons was caught in the illegal practice of charging a consumer almost $1,000 extra for a fictitious product, and then lying to keep some other more honest lender from doing business with him.

As would many consumers, Mr. Nigh objected to these practices once he learned of them. At that point, Koons increased the coercive pressure on Mr. Nigh by threatening to have criminal charges brought against him unless he signed a third credit contract. Given that Koons had not yet given him title to the truck, Mr. Nigh naturally believed that Koons would and could falsely bring criminal charges against him, and he felt forced to sign a third contract. At this point, any resemblance to the competitive marketplace vanished, and any hope an honest car dealer or lender had of obtaining Mr. Nigh's business vanished with it.

Congress enacted TILA to enhance and strengthen the American economy by increasing the efficiency of the marketplace. The Court succinctly stated this guiding principle thirty-one years ago in its initial and seminal TILA case: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.,* 411 U.S. 356, 364 (1973). Deceptive businesses like Koons that are willing to lie and cheat undermine that promise and vision for consumers such as Mr. Nigh. As Judge Gregory, the dissenting judge below, stated: Koons "engaged in a variety of scurrilous business practices that support the jury's finding of liability under both TILA and the [Virginia Consumer Protection Act]." Pet. App. 22a. Although Koons's conduct is reprehensible, it is not uncommon among less scrupulous car dealers, and it deserves the penalty enacted by Congress to discourage consumer deceptions and anti-competitive practices.

The yo-yo transaction benefits the unscrupulous dealer, defeats the dealer's honest competition (undermining the market system), and causes loss of consumer time, money, and resources. In its most predatory form, as here where the dealer fraudulently concealed the option of simply canceling the transaction by misrepresenting that the trade-in had been sold, the yo-yo sale is merely an updated variation of the classic bait-and-switch scam. The yo-yo sale would rapidly disappear if the dealer risked having to pay the damages enacted by Congress.

In *Rucker*, the court detailed how deceptive and pernicious a yo-yo sale really is:

> A dealer lures a prospective buyer with a financing deal which is unlikely to win approval. The buyer is then allowed to drive away in the car and consider herself the owner for a period of time, only to be called back in when the financing terms are rejected. Back at the dealership, the buyer is persuaded to sign a second deal, backdated to the original date of delivery, with less favorable financing terms. At this point, the buyer is quite likely to sign the deal, even if she may have balked at the terms as an original matter. Psychologically, the buyer has been given a week to become attached to the car, and is less likely to shop around. The buyer is likely unaware of her right to return the car she thinks

> she has already bought. Indeed, she may not have been told that the original financing fell through, and she may be misled into thinking that the second deal is a better deal. In these circumstances, a buyer will not wish to return the car and face the embarrassment of having to explain to family and friends that she lost the car because she was not creditworthy. Once the backdated contract is signed, there is no evidence on the face of the controlling legal documents that the terms of the deal which the consumer signed actually changed after she took possession of the car.

228 F. Supp. at 718-19 (footnotes omitted); *accord Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004).

The central truth of a normal retail installment sales contract is that the dealer is the original creditor who has extended credit to the consumer. The dealer then attempts to sell the credit contract to willing buyers, i.e., potential assignees. If the dealer is happy with the terms offered by a potential assignee, it sells the credit contract. If the dealer is unhappy with the terms or is unable to complete the sale for some reason, the dealer maintains its status as creditor and is entitled to receive monthly payments.

Walker Mobile Home Sales, Inc. v. Walker, 965 S.W.2d 271 (Mo.App. W.D. 1998), is a typical and unremarkable installment sale case that illustrates this principle. *Walker* involved a mobile home installment sale that included seller-arranged financing, with the seller listed as the initial payee. When the potential assignee refused the assignment, the seller accelerated the balance and then sued the consumer for it. The appellate court held that the seller, as the initial (and only) payee, was obligated to accept installment payments and abide by the financing terms established by its own contract. *Id.* at 275-76. Some unscrupulous dealers, like Koons, decide to call off the first contract when the dealer cannot sell it and then try to trick the consumer into signing additional contracts. Even assuming the credit contract contained a valid condition that allowed for Koons to simply cancel the credit when it was unable to sell the credit contract on the desired terms, no legitimate market reasons exist to force a consumer to sign a new contract on different terms.

A deceptive practice that is closely related to (and sometimes accompanies) the yo-yo sale is the use of charges for fictitious products or services. When a creditor is unable to make its desired profit by selling a credit contract, and when it decides to force the consumer into signing a second or third one, the creditor may try to "create" additional profit. One method employed by some dealer-creditors is to add charges for goods or services not requested or delivered. In this way, the assignee's purchase of the credit contract will give the original creditor extra dollars with no corresponding cost to the creditor. In Mr. Nigh's transaction, Koons knowingly added $975 to the second contract for a sham Silencer car alarm, in an effort to increase its overall profit after selling Mr. Nigh's credit contract. Other dealers may call these fictitious fees "filing fees," *see Abbey v. Columbus Dodge*, 607 F.2d 85 (5th Cir. 1979); *Fielder v. Credit Acceptance Corp.*, 19 F. Supp. 2d 966 (W.D. Mo. 1998), *rev'd in part on other grounds*, 188 F.3d 1031 (8th Cir. 1999); and others may call them "acquisition fees." *See Knapp*, 245 F. Supp. 2d at 845. Regardless of the label, where (as the jury found was the case here) the fee is fictitious, the creditor is simply lying to its consumer to grab money that it is otherwise not entitled to receive.

Unscrupulous dealers gain an unfair advantage from a yo-yo sale by barring the consumer from the competitive market. The dealer has the consumer's original down payment, the consumer's trade-in vehicle, and the consumer's signature on a contract – all presumably the result of a truly competitive marketplace – that the dealer can reject if the dealer is dissatisfied with the terms offered by potential assignees. Of course, the dealer will not tell the consumer that it was unhappy with the terms available in the marketplace when it tried to sell the credit contract and will instead claim that "financing was denied" or "the lender did not approve." In other words, in the yo-yo sale, the dealer lies to the consumer so that the consumer is bound to the deal, even though the dealer is not. If the consumer objects to this façade, the dealer has many strings with which to play the consumer like a yo-yo, such as: "Your trade-in has been sold," or "You will be arrested if you do not pay," or "I am keeping your down-payment." Furthermore, when the dealer then adds to the subsequent contracts that the consumer is being forced to sign charges for products or services that the consumer does not receive, the dealer improperly benefits by receiving the proverbial "money for nothing." As clearly and simply captured by the South Carolina Supreme Court, "Stokes, and other car dealerships, could easily cure the unfairness of such practices by . . . telling customers the truth about their credit." *Singleton*, 595 S.E.2d at 468.

B. The Anti-Competitive Practices Engaged In By Koons And Other Similar Bad Actors Hinder TILA's Goal Of Enhancing And Strengthening The Economy.

Several systemic problems arise when the original creditor unilaterally tries to disclaim a credit transaction or imposes hidden extra charges in the credit transaction. The primary result of the yo-yo sale is that it impedes the consumer's ability to shop around, undermining one of the primary purposes of TILA and harming both the consumer and honest merchants in a competitive marketplace. Furthermore, when phony charges are used in a credit transaction, a consumer cannot determine the true annual percentage rate (APR) and thus is unable to make the simple comparison between competing APRs that allows for accurate credit shopping.[2]

TILA compliance merely requires the creditor to provide accurate written disclosures to the consumer before the consumer agrees to accept the credit. To accomplish the yo-yo deception, the dealer may decline to give the consumer any TILA disclosures at all until the financing is approved. *See Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 863-64 (6th Cir. 2003); *Knapp,* 245 F. Supp. 2d at 844 ("We wouldn't give them copies of a contract until it was funded from Americredit because there may be an argument with [Americredit's personnel] over a fee or something, that I couldn't increase the price of the car to cover his fee enough," quoting the car salesman.) Another way the dealer may violate TILA is to disclose fictitious credit terms without identifying them as estimates as required by Federal Reserve Board Regulation Z, 12 C.F.R. § 226.17(c)(2)(i). The consumer may instead be given

[2] The APR is "the single most useful disclosure mandated by the Act," "calculated from (i) the amount of the finance charge, (ii) the amount of credit extended, and (iii) the term of the extension of credit – the time period between the date interest starts accruing and the date of the last payment." *Krenisky v. Rollins Protective Services Co.*, 728 F.2d 64, 66 (2nd Cir. 1984).

sequential sets of inaccurate TILA disclosures or, sometimes, backdated disclosures. *See Rucker*, 228 F. Supp. 2d at 714-15.

The goal of TILA is to strengthen competition among firms engaged in the extension of consumer credit by assuring "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." 15 U.S.C. § 1601(a). Yo-yo sellers seek to accomplish the opposite by obscuring the true credit terms while precluding the consumer from shopping for other terms. Those creditors who add sham charges to their credit contracts similarly seek to keep the consumer in the dark and keep other, more honest competitors from obtaining the consumer's business.

III. UNCAPPING STATUTORY DAMAGES FOR CERTAIN TRANSACTIONS IS A RATIONAL STATUTORY SCHEME.

Where, as here, the language of a statute is clear, the Court will honor Congress's words unless a party can meet the very heavy burden of proving that doing so would produce irrational and absurd results. Effectively recognizing that they must meet this arduous test, Koons and its *amici* argue that following Congress's plain language in removing the cap on TILA statutory damages for certain non-mortgage, non-lease transactions would produce irrational, absurd results.

The arguments of Koons and its *amici* lack merit. In fact, Congress's removal of the cap on statutory damages under § 1640(a)(2)(A)(i) is highly rational. Deleting the cap restores the impact of statutory damages that Congress initially intended when it enacted TILA 36 years ago. Because of inflation, a $1,000 statutory damages award in 1968 is equivalent to only $185.70 today.[3] This erosion of the statutory damages award by itself is a compelling rationale for Congress's removal of the cap.

Contrary to Koons's contention, the fact that Congress merely increased rather than eliminated the (A)(iii) cap on statutory damages for closed-end mortgage loans is entirely consistent with its deletion of the (A)(i) cap. A creditor who violates certain material disclosure requirements in connection with a non-purchase money mortgage loan faces not only actual and statutory damages but also rescission of the transaction for up to three years after consummation. 15 U.S.C. § 1635; *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). If a consumer rescinds such a transaction, the creditor forfeits all right to "any finance charge or other charge." 15 U.S.C. § 1635(b); Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Pt. 226, Supp. I, § 226.23(d)(2)-1. Thus, in the case of a rescission near the three-year mark, the lender forfeits three years of interest, plus closing costs. This remedy is virtually always significantly larger than the (A)(iii) $2,000 statutory damages. Further, like an uncapped double-the-finance charge statutory damage award, the dollar amount of the rescission remedy will be larger if the loan (and thus the finance charge) is larger. As a result, by definition, it keeps pace with inflation. Congress's decision to remove the (A)(i) cap on statutory

[3] Figure obtained by use of U.S. Department of Labor Inflation Calculator at www.bls.gov on May, 12, 2004.

damages for non-mortgage transactions is therefore in balance with the remedies for mortgage transactions.

Statutory damages in consumer leasing cases under (A)(ii) are indeed still capped at $1,000, but Koons ignores the rational grounds within the statute for this distinction. Before Congress enacted the Simplification Act in 1980, statutory damages were available for violation of any disclosure requirement in both lease and non-lease transactions. 15 U.S.C. § 1640 (1968) (*amended by* Pub. L. No. 96-221, Title VI, § 615, 94 Stat. 180 (1980). The Simplification Act limited statutory damages for TILA disclosure violations in non-lease transactions, i.e., (A)(i) transactions, to a handful of disclosures that Congress deemed most significant. For consumer leasing cases, i.e., (A)(ii) transactions, however, Congress retained strict statutory damages liability for *any* disclosure violation, no matter how technical. When it revised TILA again in 1995, Congress could well have concluded that the cap on statutory damages was still justified in lease cases because of the much broader availability of statutory damages.

Nor was it irrational for Congress to allow certain kinds of statutory damages to exceed the $5,000 criminal fine for a knowing and willful TILA violation. 15 U.S.C. § 1611. First, in (A)(iii) mortgage cases, the financial effects of § 1635 rescission will already exceed that amount in many, if not most, situations. Second, TILA authorizes not only a $5,000 fine, but also imprisonment for up to a year – a penalty far more severe than any fine or statutory damages award. Even without any fine or imprisonment, a criminal conviction could prevent a motor vehicle dealer from obtaining a state-mandated bond or retaining a dealer's license. Thus, even though the fine itself is limited to $5,000, criminal sanctions remain TILA's most severe penalties, even in cases where an uncapped double-the-finance charge remedy is available.

Most importantly, a business like Koons that engages knowingly in a scurrilous deceptive practice to illegally obtain $975 for phantom charges should not be heard to claim that Congress intended to limit the remedy for such illegal behavior to a mere $1,000 fine. "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 565 (1980). Because of the complex nature of TILA, "litigation is not always the optimal process by means of which to formulate a coherent and predictable body of technical rules." *Id*. at 568 n.12. Here, Koons attempted to cheat Mr. Nigh out of almost $1,000. Unlike many victims of such consumer scams, Mr. Nigh was able to locate counsel who was willing to fight this case all the way through to a successful conclusion. If the TILA remedy were limited to only $1,000, Koons would have less incentive to stop mistreating future customers in the same way.

IV. TILA STATUTORY DAMAGES OF DOUBLE THE FINANCE CHARGE WILL NOT THREATEN THE ECONOMY.

Koons's *amici* speculate with no substantiation that giving effect to the plain meaning of TILA's statutory damage provision would have ruinous consequences for the nation's economy. Brief of American Bankers Association, *et al.* (hereinafter "Bankers Ass'n brief") at 25-29. The Bankers Association brief cites only the volume of lending in the United States, as if the cost of enforcing TILA is somehow related to those huge numbers. However, there is no reason to believe that the vast majority of lenders are regularly violating TILA, or that it would be a great burden on our economy even if consumers pursued every TILA violation to a successful conclusion.

In any case, the enforcement of TILA does not approach such a level. TILA cases make up only a minuscule portion of litigation in the United States. Of approximately 157,000 state and federal judicial decisions added to the Westlaw database in 2003, only 300 even mentioned the term "Truth in Lending."[4] In fiscal year 2002-03, only 606 of the 254,499 civil cases filed in federal district courts were listed as TILA cases.[5] Even if consumers won every one of those cases, even if every one of those cases fell under (A)(i), and even if every plaintiff had finance charges at the high end like Mr. Nigh, total damage awards would be less than $15 million – less than one one-thousandth of a percent of the $2 *trillion* in outstanding consumer credit cited by Koons's *amici*. *See* Bankers Ass'n brief at 25.

Koons's *amici* also complain that TILA imposes on creditors hypertechnical requirements for which they can be liable despite good faith compliance efforts. Bankers Ass'n brief at 27-28. But in characterizing TILA as

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[4] The Westlaw search was conducted on May 12, 2004, using the search terms "Truth +2 Lending & da(bef 1/1/2004) & da(aft 1/1/2003)." The number of judicial decisions per year was approximated with the assistance of a Westlaw research attorney by finding the total number for a 15-day period and multiplying by 24.

[5] Administrative Office of the United States Courts, table titled "Civil Cases, Commenced by Nature of Suit During the 12 Months Periods Ended June 20, 2002 and 2003." The FY 2001-02 figure was 597 TILA cases out of 268,071 civil cases.

hypertechnical, Koons's *amici* cite mostly decisions and Congressional testimony from the 1970's, before the Simplification Act limited statutory damages to "significant" violations. *See* S. Rep. No. 368 at 16, 17, *reprinted in* 1980 U.S.C.C.A.N. at 251, 252.

Basic TILA compliance is not hypertechnical. Any lender can always comply merely by putting into a computer the true amount financed, the true payment terms, and the true payment dates; a standard program will then create written disclosures to be given to the consumer in a form the consumer can keep before the consumer signs. *See* Federal Reserve Board Regulation Z, 12 C.F.R. § 226.22(a)(1) and accompanying footnote (immunizing APR and finance charge disclosure errors resulting from an "error in a calculation tool used in good faith . . . "); *see also* 15 U.S.C. § 1640(c) (establishing a bona fide error defense to all civil liability). It is TILA's simplicity and its requirement of honesty that makes it such a powerful tool for keeping the credit marketplace functioning.

Koons's *amici* also assert that the costs of compliance with TILA are high. *See* Bankers Ass'n brief at 27-8. However, neither the costs of private attorneys general enforcement by consumers nor the (A)(i) statutory damage remedy that is the sole issue before the Court is the culprit in the Federal Reserve Board staff study cited in support of their assertion. *Id.* Even if TILA had no private remedies, it is still enforceable by public officials, as is well documented in that staff study. Indeed, federal regulators have enforcement authority under 15 U.S.C. § 1607 for all TILA violations, even the non-"significant" ones for which statutory damages are unavailable.

It is unclear whether Koons's *amici* are claiming that noncompliance with TILA is rare or widespread since their brief contains contradictory assertions. The Bankers Association brief states on page 27 that 2,700 of the 3,500 institutions examined by the FDIC in 1994 had at least one TILA violation. Yet on the very next page the brief asserts that the *amici's* member institutions "already are largely successful at meeting their TILA obligations." In either case it is sensible to have a strong statutory damages remedy. If noncompliance is rare, then the increase in the statutory damage amount should be of little consequence to creditors. If noncompliance is widespread, then the increase enacted by Congress is reasonable to provide an incentive to creditors to take greater care than they currently do in making their disclosures. Indeed, widespread noncompliance would cry out for an even stronger remedy than that enacted by Congress in 1995.

In sum, the damage remedies enacted by Congress will enforce honest marketplace standards, without which our marketplace economy cannot properly function. If enforced, they will remedy and deter the kinds of serious marketplace abuse emphatically rejected by the jury below.

CONCLUSION

The judgment below accordingly should be affirmed.

Respectfully submitted,

RICHARD J. RUBIN
Counsel of Record
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

CAROLYN L. CARTER, Of Counsel
NATIONAL CONSUMER LAW CENTER
1001 Connecticut Ave., NW, Suite 510
Washington, DC 20036
(202) 452-6252

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395

THOMAS DEAN DOMONOSKE
461 Lee Street
Harrisonburg, Virginia 22802
(540) 442-8616