15-50199

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BLANCA TORRES,
Plaintiff-Appellee
v.
PROPEL FINANCIAL SERVICES, L.L.C.,
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. 29(c)(1) and Fifth Circuit Rules 28.2.1 and 29.2, the undersigned counsel of record certifies that Amicus Curiae National Association of Consumer Advocates (NACA) has an interest in the outcome of this case, because its members represent low-income consumers who have entered into property tax loans in Texas. NACA is a non-profit group. It has no parent corporation nor does any publicly held corporation own 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Stephen Gardner
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STATEMENT OF AMICUS CURIAE

The National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation. Its over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers and to serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. Because one of the best ways to prevent consumer deception is to ensure full disclosure of relevant facts, the disclosures under the Truth in Lending Act are an important part of preventing deception, especially where the consumers affected are taking out a new loan to cure a prior default, as is the case here. NACA has appeared as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States.

STATEMENT OF COUNSEL FOR AMICUS CURIAE

No party and no party's counsel authored the brief in whole or in part. No party or counsel for any party contributed money to fund the preparation and submission of this brief. Likewise, no person, other than the amicus curiae, its members or its counsel, contributed money to fund the preparation and submission of this brief. All parties consented to the filing of this brief. The foregoing statement is given in compliance with Fed. R. App. P. 29(c)(5).

/s/ Stephen Gardner
Stephen Gardner
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TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Amicus Curiae, National Association of Consumer Advocates, files this brief in support of Appellee Blanca Torres and affirmance.

SUMMARY OF THE ARGUMENT

The Truth in Lending Act (TILA) is a remedial act that should be construed liberally and consistent with its purpose of helping consumers to

avoid the uninformed use of credit. In line with the remedial purpose and the duty to construe the statute liberally, this Court should find that TILA applies to property tax loans in Texas.

Propel objects to having to comply with TILA, because compliance with some of TILA's provisions, which come into play only with high cost mortgages, might cause some inconvenience, even though these statutory provisions provide significant consumer protections. If Propel prevails, though, no property tax lender would be required to comply with TILA, denying Texas consumers the disclosure rights that they have traditionally been afforded in the credit marketplace since 1968.

Property tax lenders like Propel are covered by TILA because they provide third-party financing of property tax obligations. In its efforts to disguise its role as a lender, Propel employs newly created document nomenclature (e.g., instead of "Note" Propel calls the note document a "Property Tax Payment Agreement"). Because this Court looks to substance over form in its construction of TILA, this is truly a distinction without any difference. Texas state law, Propel's state regulator, and this

Court all have concluded that so-called property tax transferees are actually lenders, and thereby should be covered by TILA.

Applying TILA to the property tax loan transaction at issue would not violate the Clear Statement Rule. Under *Gregory v. Ashcroft* and its progeny, the Clear Statement Rule does not apply unless application of a federal statute would significantly impinge upon a state's traditional regulatory interest or displace a state regulatory regime. Application of TILA to property tax loans would not significantly impinge upon the interest of the State of Texas in collecting property taxes.

ARGUMENT

A. The purpose of the Truth in Lending Act is to help consumers to avoid the uninformed use of credit, and it should be construed liberally to protect consumers.

In construing TILA, the Supreme Court has repeatedly recognized the broad, remedial purpose of the statute. "Congress enacted TILA in 1968 . . . 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.'" *Koons Buick Pontiac GMC,*

Inc., 543 U.S. 50, 53-54 (2004), citing to 15 U.S.C. § 1601(a). Accord: *Jesinoski v. Countrywide Home Loans, Inc.*, ___ U.S. ___, 135 S. Ct. 790, 791-792 (2015) ("Congress passed the Truth in Lending Act . . . to help consumers 'to avoid the uninformed use of credit . . . .'"); *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998) ("The declared purpose of the Act is 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 . . ..'").

In its first ruling on the statute, the Supreme Court further recognized that "[t]he language employed [in TILA] 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[,]" and that is why an administrative agency "was thereby empowered to define such classifications and exceptions to insure that the objectives of the Act were fulfilled, no matter what adroit or unscrupulous practices were employed by those extending credit to consumers." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365-366 (1973). In other

words, the Supreme Court recognized that, in construing the statute and its implementing regulation, the courts had to be aware of the efforts of creditors to evade coverage.

Similarly, given the remedial purpose of TILA, this Court has long held that it should be construed liberally to protect borrowers. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Thomas v. Myers-Dickson Furniture Company*, 479 F.2d 740, 748 (5th Cir. 1973). As explained recently by one district court in this circuit, "[t]he Truth in Lending Act . . . has a remedial purpose and should be liberally construed to 'prevent unscrupulous and predatory creditor practices.'" *Garner v. MBNA America Bank, N.A.*, No. 3:05-cv-1029, 2007 WL 119900, at *3 (N.D. Tex. Jan. 18, 2007), citing to *Jamerson v. Miles*, 421 F. Supp. 107, 110 (D.D.C. 1976).

In determining whether TILA applies to property tax loans in Texas, this Court should recognize the broad remedial purpose of TILA and the duty to construe it liberally. In its brief, Propel wholly failed to

acknowledge the remedial purpose of TILA or the requirement of liberal construction.

B. Propel has filed this appeal to avoid the common sense strictures of the Truth in Lending Act.

Late in its Opening Brief, Propel disclosed why it was pursuing this appeal.[1] In explaining its concerns about application of the Truth in Lending Act to property tax loans, Propel argued that provisions of TILA applicable only to high-cost loans would discourage tax lien transfers in two ways—pre-closing requirements and improvident lending[2]—were inconveniences that Propel would prefer to avoid.

Propel's first complaint about pre-closing requirements is that they might delay the process of transferring the tax lien and making the property tax loan.[3] Specifically, it objected to giving the "advance peek" notice required by 15 U.S.C. § 1639(a) and providing pre-loan counseling required by 15 U.S.C. § 1639(u). The advance peek notice, required only in high-cost

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[1] Appellant's Opening Brief, pp. 34-37.

[2] Appellant's Opening Brief, pp. 35-37.

[3] Brief at 36.

loans as defined by 15 U.S.C. § 1602(bb), informs consumers before closing about the APR, the regular payment and the risk of losing the home upon default.[4]

In short, TILA gives consumers advance warning that they are about to enter into a high-cost loan that may result in the loss of their home if they find it difficult to make payments, thereby empowering consumers to skip closing if they decide to seek an alternative solution to their financial woes.

Failing to give the advance peek disclosure three business days before closing would deprive an affected consumer of "the opportunity to consider the terms of the Loan in the peace and quiet of her own home, with the counsel of trusted friends and family members, and without the confusion, time pressure, and intimidation that any homeowner . . . may experience at a closing." *Coleman v. Crossroads Lending Group, Inc.*, No. 09-cv-0221, 2010 WL 4676984, at *3 (D. Minn. Nov. 9, 2010).

[4] 15 U.S.C. § 1639(a) and 12 C.F.R. § 1026.32(c).

In addition, the requirement of pre-closing counseling required by 15 U.S.C. § 1639(u) only in high-cost loans serves a laudable consumer purpose. For example, homeowners over the age of 65 or who are disabled are entitled to defer payment of property taxes and thereby avoid foreclosure for unpaid taxes. Tex. Tax Code § 33.06(a); *Kubovy v. Cypress-Fairbanks I.S.D.*, 972 S.W.2d 130, 132-133 (Tex. App. – Houston [14th Dist.] 1998, no pet.). As such, homeowners approaching the age of 65 or who are disabled do not need a property tax loan to avoid a property tax loan foreclosure, because of these protections in state law.[5] Pre-closing counseling would give these vulnerable consumers some notice that they might not need a property tax loan at all, an important consumer protection.

The second inconvenience Propel wants to avoid are two provisions of TILA applicable only to high-cost loans, 15 U.S.C. § 1639(h) and 1639c, that prevent improvident lending, precluding such loans when the con-

[5] Despite these facts, at least one other property tax lender has been accused of making a loan to a consumer who was disabled and did not need the loan to avoid foreclosure. See *Jones v. Ovation Lending, LLC*, Case No. 4:15-CV-00779 (S.D. Tex. 2015), document no. 1, ¶s 8-15.

sumer lacks sufficient current income to make the payments. Propel thus argues that it should be able to make unsustainable loans to desperate homeowners. Given the recognized contribution of unsustainable subprime loans in the Great Recession, it is imperative to keep reasonable limitations on the making of equity-based loans to unsophisticated consumers seeking to preserve their homes.

Propel nevertheless argues that these vital forms of consumer protection should not be afforded to Texas consumers in property tax loan transactions. Ultimately, if Propel prevails in its appeals, Texas consumers will be injured even more.

Property tax lenders now typically give standard Truth in Lending disclosures.[6] If Propel prevails, consumers contemplating property tax loans would not be entitled to even these basic disclosures and could not compare the cost of credit as charged by the various property tax lenders in

[6] The Annual Percentage Rate (APR), the finance charge, the amount financed, the total of payments, and the payment schedule. 15 U.S.C. § 1638(a)(2)-(6).

the market or shop for a loan elsewhere, such as from a community credit union.

If Propel prevails, Texas consumers who seek property tax loans will be in the same position as consumers before the passage of TILA in 1968, unable to compare the cost of credit. Caveat emptor will once again reign supreme in this particular loan market. In short, this case is not only about what is convenient for Propel as a lender but what is disclosed to unsophisticated consumers.

C. Property tax lenders, such as Propel, are third-party lenders that extend credit and are, thereby, covered by TILA.

Propel argues that it is not covered by TILA and Home Ownership and Equity Protection Act (HOEPA), because it does not extend credit when it offer loans to avoid property tax foreclosures. In short, since the underlying source of the debt at issue are property tax obligations, Propel argues that its payment agreements are not extensions of credit, relying upon a provision of the Official Commentary on Regulation Z and a case from the Third Circuit Court of Appeals. Propel's analysis is incorrect.

Property tax loans, as made in Texas, fit the exception for third-party financing of property tax obligations.

The precise issue before this Court has been addressed by the Consumer Financial Protection Bureau (CFPB), and previously by the Federal Reserve Board (FRB). In the Official Commentary on Regulation Z, in effect since at least 1981, the CFPB and the FRB have stated a list of situations that are excluded from the TILA definition of "credit" including:

> Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.[7]

Thus, while tax obligations standing alone are not "credit" for purposes of TILA, a property tax loan is a form of "credit" when it is "third-party financing" of tax obligations.

[7] Official Interpretations of Regulation Z, 12 C.F.R. Part 1026, Supp. I, Sub A, cmt. 1026-2(a)(14)(1)(ii).

1. Substance governs over form.

Instead of third-party financing, Propel characterizes its transaction with its customers as the "transfer of an unpaid tax claim and tax lien to a non-governmental party."[8] In fact, Propel's brief refers to the transactions at issue *exclusively* as "tax lien transfers" and itself as a "tax lien transferee."[9] While other property tax lenders require their customers to sign a note and a deed of trust before paying the tax authorities, Propel labels its version of those documents as "Property Tax Payment Agreement" and "Tax Lien Contract."[10]

Propel would have this Court believe that form is more important than substance here. By avoiding the language of a loan while retaining all of the substance, Propel apparently believes that it avoids the application of laws intended to protect borrowing consumers and enable the market-

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[8] Appellant's Opening Brief, p.17.

[9] *Id*. at pp. 2-37.

[10] See Brief of Amicus Curiae Texas Family Council in *Billings v. Propel Financial Services, L.L.C.*, Appeal No. 14-51326, pp. 16-18.

place to work as it should.[11] This Court, however, has taken an opposite tack, ruling that courts should "look to the substance of the transaction . . . , rather than the form alone" in determining whether a transaction is covered by TILA. *Riviere v. Banner Chevrolet, Inc*., 184 F.3d 457, 462 (5th Cir. 1999). In other words, the transactions at issue do not become something other than loans, as if by magic, simply through the incantation of language that might be inconsistent with loans.

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[11] On its own website, though, Propel refers to itself as a "property tax financing company" and its transactions as "loans," effectively admitting that its transactions are loans. *See* http://www.propeltax.com/ (with references to "Property Tax Loan Eligibility," "Residential Property Tax Loans," "Commercial Property Tax Loans," and "Property Tax Financing").

In foreclosure litigation as well, Propel has referred to itself as a "lender" and the transaction as a "loan." See paragraph 4.B. of Petitioner's Application for an Expedited Order Under Rule 736 and paragraphs 2, 6 and 7 of the Affidavit in Support of Petitioner's Application for an Expedited Order under Rule 736 in In re: Order for Foreclosure Concerning 3516 Piedmont Dr., Plano, TX 75075, Cause No. 417-02620-2015, 417th District Court of Collin County, Texas available, upon registration, at the Collin County District Clerk website.

2. Texas state law, Propel's state regulator, and this Court have treated these transactions as loans or third-party financing and, thereby, subject to TILA and HOEPA.

The thrust of Propel's brief is that it does not lend money or provide third-party financing. Propel's brief acknowledges that there are some glitches in this conclusion, but every inconsistency is waived off as irrelevant. What Propel fails to acknowledge is that Texas law, its state regulator and this Court have treated these transactions as third-party lending transactions.

First, despite Propel's claim that state law favors its position and its propensity to refer to the transactions solely as "tax lien transfers," Texas law repeatedly treats these transactions as "loans." The statute that authorizes "tax lien transfers" is currently entitled "Property Tax Loans; Transfer of Tax Lien." Tex. Tax Code § 32.06. That same statute accords a right of rescission identical to that available under TILA, a law that only applies when there is an extension of consumer credit. Tex. Tax Code § 32.06(d-1). It permits a "tax lien transferee" to charge up to 18% interest, a rate higher than that permitted to be charged by taxing authorities but con-

sistent with the default interest rate ceiling in Texas usury law.[12] Most importantly, the so-called tax lien transferees are licensed as "lenders."[13]

Second, the Office of the Texas Consumer Credit Commissioner (OCCC), which regulates Propel as a "property tax lender," has taken the position that TILA *does apply to residential property tax loans*, using the third-party loan exception to the exemption in the Official Interpretations. The OCCC says that its "position is that property tax lenders are generally subject to TILA if they provide property tax loans for residential property."[14] The agency based its position on the fact that a "property tax loan appears to be a consumer credit transaction subject to TILA because it is a type of third-party financing of a tax lien," relying on the second sentence

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[12] Compare Tex. Tax Code § 32.06(e) with Tex. Tax Code § 33.01(c) (allowing taxing entities to charge 1% per month interest on defaulted tax obligations), Tex. Tax Code § 33.02 (prohibiting taxing entities from charging any interest or penalties during an approved installment payment plan with the entity), and Tex. Fin. Code §§ 303.001-303.009 (default interest rate ceiling of 18% in Texas usury statutes).

[13] Tex. Fin. Code § 351.001 *et seq*.

[14] *See* Letter from the General Counsel of the Consumer Credit Commission to J.J. Garza dated May 27, 2014, attached as an Appendix to this brief.

in the Official Interpretations.[15] The letter even stated that "[g]eneral TILA compliance has been an issue in some property tax lender exams, and the OCCC has instructed some licensees to correct their practices to bring them into compliance."[16]

Third, in this Court's one review of these transactions in an appeal addressing only a bankruptcy issue, the so-called tax lien transferee, Tax Ease, was constantly referred to as "a third-party lender." *In re Kizzee-Jordan*, 626 F.3d 239, 240, 244, 245-246 (5th Cir. 2010). This Court also acknowledged that the debtor in that case had borrowed money from Tax Ease, the third-party lender. *Id*. at 241.

3. *Pollice* is distinguishable.

Propel argues in its brief that the precise issue here was decided in its favor in *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3rd Cir. 2000). While the Third Circuit did rule that a purchaser of property tax debts was

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[15] *Id*.

[16] *Id*.

not subject to TILA when it offered payment plans to homeowners, that case is wholly distinguishable from the case at hand.

First, as recognized by District Judge Pitman, the circumstances in *Pollice* are totally different from those in Texas property tax transactions. He explained:

> In [*Pollice*], the defendants entered into an agreement with various municipal taxing authorities to purchase thousands of claims against homeowners delinquent in their property taxes, and then negotiated with the homeowner to collect payment. This is not the sort of third-party financing addressed in the Official Staff Commentary.

Orosco v. Ovation Lending, LLC, Case No. SA-14-CV-00897-RP, document no. 14, p. 5 fn. 1.

By contrast, the property tax loan at issue here was a form of third-party loan consummated before transfer of the tax lien and thereby TILA should apply. *Id*. at pp. 3-7.

Second, Judge Hudspeth, the trial judge in that case, recognized that the homeowners in *Pollice* were not seeking an extension of credit to repay their tax obligations, given that National Tax Funding had purchased the

tax debts without the participation of the homeowners.[17] Since the taxing authority, not the homeowner, chose the assignee and negotiated the terms of the assignment of the tax claims and liens, Judge Hudspeth reasoned that the homeowners in *Pollice* would not have benefited from Truth in Lending disclosures. *Id*. By contrast in this case, the plaintiff "was in a position to benefit from 'meaningful disclosure of credit terms so that [she would] be able to . . . avoid the uninformed use of credit." *Id*.

D. Although property tax loans are a form of hybrid transaction, combining elements of a loan and a tax lien transfer, the loan elements compel application of TILA.

Propel argues that this Court has effectively decided that no new debt is created in a tax lien transaction in the case of *In re Kizzee-Jordan* and, therefore, the third-party financing exception in the Official Interpretations does not apply.[18] In other words, if Propel receives both the underlying tax debt and tax debt, any homeowner would only being paying the tax assessment when they paid Propel. *Id*. As such, TILA could not apply under

[17] ROA 15-50199.219-220.

[18] Appellee's Opening Brief, pp. 22-29.

a plain reading of the applicable provision of the Official Interpretations. *Id*. This argument is too cute for its own good.

First and most importantly, *In re Kizzee-Jordan* dealt with an issue wholly distinct from the one before the Court in this appeal: how to interpret the meaning of a Bankruptcy Code provision, not how to construe the reach of TILA. *In re Kizzee-Jordan*, 626 F.3d 239, 242 (5th Cir. 2010) ("The sole issue in this appeal turns on the applicability of § 511 of the Bankruptcy Code."). While this case and *Kizzee* both deal with property tax loans, the factors to consider in construing Bankruptcy Code § 511 are different from those in determining the applicability of TILA. In *Kizzee*, the issue was whether the property tax lender received a "tax claim" and thereby could avoid modification of its interest rate. By contrast, the issue in this case is whether Propel is providing "third-party financing" of the unpaid tax debt when it paid the sum owed to the taxing entities and obtained a transfer of the tax lien, all in exchange for a promise to pay given before transfer. The issues are different.

Second, in considering whether to consider *Kizzee*, it should be recognized that the Congressional purpose behind the enactment of § 511 of the Bankruptcy Code was far different than that behind the enactment of TILA. Compare *Kizzee*, 626 F.3d at 242-246 with the Supreme Court cases cited on the purpose of TILA discussed *supra*.

With § 511, Congress sought to "simplify the interest rate calculation" for tax claims, 626 F.3d at 243, while, with TILA, it was seeking to impose a disclosure regime to help consumers avoid the uninformed use of credit. 15 U.S.C. § 1601. On the one hand, finding that a party like Propel is entitled to the same tax rate as governmental taxing authorities may be consistent with the goal behind the enactment of § 511. On the other hand, finding that Propel is not a third-party lender relying solely on the reasoning of *Kizzee*—even though Propel acts only after a note is signed at an interest rate and with the charging of costs not allowed in the tax context—would be clearly inconsistent with the purpose of TILA. In fact, if Propel prevails, consumers who enter into property tax loans will no longer be entitled to *any* Truth in Lending disclosures. If Propel prevails, consumers will no

longer be able to compare the cost of credit being offered by competing lenders. This outcome would be entirely inconsistent with the intent of Congress in passing TILA.

Third, *Kizzee* need not be overruled to find that Propel is a third-party lender for purposes of TILA. Even if *Kizzee* is right in concluding that a private party like Propel receives the underlying tax claim with the tax lien and is subordinated to the rights of the taxing authority, the consumer homeowner signs a note and agrees to pay sums that would be unnecessary with a governmental entity. Even assuming that Propel receives both the tax claim and the tax lien, it also obtains *additional rights not available to governmental entities.*

In other words, the transaction at issue here is more than a simple transfer of the bundle of rights belonging to the taxing authorities, as it also entails the execution of what is functionally a note by the consumer prior to the tax lien transfer and entitles the property tax lender to recover a significantly higher rate of interest and costs. By being subordinated to the rights of the taxing authority, Tex. Tax Code § 32.065(c), Propel is entitled to fore-

close on the tax lien to collect what is owed to it by the homeowner. At the same time, though, Propel is granted additional rights through the execution of a note: (a) charging for closing costs, Tex. Tax Code § 32.06(a-4)(2) and (e) and 7 T.A.C. § 89.601; and (b) charging up to 18% interest, Tex. Tax Code § 32.06(e). By contrast, property tax entities are not allowed to collect closing costs at all and are not allowed to charge any interest in an approved payment plan and no more than 12% interest outside of a payment plan. Tex. Tax Code § 33.01(c) and 33.02. In effect, Propel succeeds to rights that exceed what is available in a plain-vanilla lien transfer, all because it enters into a loan contract with homeowners before paying the taxing authority and receiving the tax lien.

The existence of additional rights given to property tax lenders did not preclude this Court from concluding that those same lenders possessed "tax claims" for Bankruptcy Code purposes. *Kizzee*, 626 F.3d at 245-246 ("The fact that the Texas Legislature also chose to grant third-party lenders specific rights different from the taxing authorities does not change the fact . . . ."). In so concluding, this Court noted that adoption of the debtor's ar-

gument that a new debt was created "would effectively read the subrogation statute out of the statute." *Id*. at 246. This does not mean that these same facts could not have different consequences in the TILA context. Otherwise, this Court would be ignoring the panoply of Texas state law that treat these transactions as "loans" and not merely as "tax lien transfers." In addition, it would have the effect of ignoring the purpose of TILA and denying thousands of consumers to effective credit disclosures.

Propel has a choice here. It can entirely avoid TILA by seeking a transfer of the tax lien and the tax debt and then stand solely on its rights as a subrogee of the taxing authorities, thereby placing a lower ceiling on the amount of permissible interest and denying any possibility of charging any closing costs. Or it can ask consumers to sign a note before seeking the transfer of the tax lien and the tax debt so that it can charge closing costs and a higher rate of interest.

If Propel chooses the second option, it is a third-party lender and should be subject to TILA. Such an interpretation gives meaning *both* to the construction of § 511 of the Bankruptcy Code in *Kizzee and* to the Official

Interpretation which holds that third-party financing of tax debts is covered by TILA. Instead, Propel asks this Court to apply *Kizzee* and to ignore the underlying purpose of TILA in its ruling.

This Court should treat these transactions as what they are—a hybrid containing elements of both loans and tax debt transfers, a treatment that is consistent with Texas state law. As a hybrid, Propel may be entitled, under *Kizzee*, to assert the interest rate in its note and not be subject to interest rate modification in bankruptcy, but consumers should be entitled to the protection of TILA when Propel seeks to recover closing costs and higher interest rates through the execution of notes prior to the transfer of the tax lien.

E. Applying TILA to Texas property tax loans would not violate the Clear Statement Rule.

Propel further argues that application of TILA to Texas property tax loans would violate a rule of statutory construction known as the Clear Statement Rule, citing to *Gregory v. Ashcroft*, 501 U.S. 452 (1991). This rule provides that, absent a clear statement of Congressional intent, statutes

should be construed in such a way as to avoid upsetting the usual constitutional balance of federal and state powers. *Id*. at 260-461.

Contrary to Propel's insistence, applying TILA to property tax loans does not constitute a significant impingement of the state's interest in property tax collection.

1. The Clear Statement Rule does not apply unless application of a federal statute would significantly impinge upon a state's traditional regulatory interest or displace the state regulatory regime.

According to the Supreme Court, the clear or plain statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. That said, the Supreme Court has applied this rule when application of a federal statute would significantly impair an area traditionally reserved exclusively to the states. For the rule to come into play, a slight effect is not enough and the state interest at issue must be significant. Neither is present here.

In an early application of the clear statement rule, the Supreme Court cites favorably to Justice Frankfurter for the proposition that Congress

should be "reasonably explicit" when it seeks to "*radically readjust[] the balance of state and national authority." BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (emphasis added).[19] In that case, the Supreme Court was willing to apply the rule when the requested application of the Bankruptcy Code would have a **"***profound effect***"** on a traditional state interest, ensuring the security of real estate title. *Id*. (emphasis added). It further cited to another case for the proposition that the clear statement rule of construction should be utilized when application of a federal statute "*would displace traditional state regulation . . .*." *Id*. (citing to *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (emphasis added)).

In two other cases relating to construction of the Clean Water Act, the Supreme Court applied the Clear Statement rule, because a broad reading of the statute "would result in a *significant impingement* of the States' traditional and primary power over land and water use." *Rapanos v. United States*, 547 U.S. 715, 737-738 (2006) (citing to *Solid Waste Agency of Northern*

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[19] This quote was cited favorably in another more recent Supreme Court opinion. *Bond v. United States*, ___U.S.___, 134 S.Ct. 2077, 2089 (2014).

Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 174 (2001) (emphasis added)).

The Supreme Court refused to accept an expansive reading of the federal mail fraud statute, because it would constitute "a *sweeping expansion* of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (emphasis added). That same opinion observed that "'unless Congress conveys its purpose clearly, it will not be deemed to have *significantly changed the federal-state balance* in the prosecution of crimes.'" *Id*. (citing to *Jones v. United States*, 529 U.S. 848, 858 (2000)(emphasis added)).[20]

2. Application of TILA to property tax loans would not significantly impinge on the State's interest in collecting property taxes.

It is not necessary to apply the Clear Statement Rule as a canon of construction in this case, because application of TILA to property tax loans would not significantly impinge on the interest of the State of Texas in collecting property taxes. This is true for a number of reasons.

[20] This quote was also cited in *Bond*, 134 S. Ct. at 2089-2090.

To start, application of TILA to Texas property tax loans has absolutely no direct effect upon the actual collection of property taxes by governmental entities. TILA has no effect upon governmental entities collecting their own property taxes, and Torres is not asserting that the statute applies to any payment plans offered by those entities. The only effect on such collection is indirect at most, because it affects the manner in which private parties make loans, pay delinquent taxes and receive tax lien transfers under Tex. Tax Code § 32.06. Given that over $45 billion in property taxes were collected by local governmental entities in Texas in 2013, Texas Comptroller of Public Accounts, *Biennial Property Tax Report – Tax Years 2012 and 2013*, at 1,[21] and only about $200 million in new property tax loans were made in 2013, Interim Report of House Committee on Business and

[21] *Available at* http://comptroller.texas.gov/taxinfo/proptax/pdf/96-1728-12-13.pdf.

Industry (January 2015),[22] property tax loans are a very small cog in the state's property tax collection machinery.

Next, even after considering the small size of the property tax loan industry in the overall scheme of property tax collection in Texas, application of TILA to property tax loans has a very limited and speculative impact on the making of such loans. Propel **only** identifies two ways in which application of TILA to its loans might impinge on the process of tax collection by purportedly "frustrating participation of state entities in tax lien transfers."[23]

Specifically, Propel complains that TILA's requirements of advance peek notices 3 days before closing, 15 U.S.C. § 1639(a)-(b), and pre-loan counseling, 15 U.S.C. § 1639(u), interfere with the quick collection of property taxes. *Id*. at 36-37. In addition, Propel complains application of TILA requires property tax lenders to evaluate the prospective borrower's ability

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[22] *Available at* http://www.house.state.tx.us/_media/pdf/commitees/rports/83interim/House-Committee-on-Business-&-Industry-Interim-Report-2014.pdf.

[23] Appellant's Opening Brief, pp. 35-37.

to make loans, citing to 15 U.S.C. §§ 1639(h) and 1639c. *Id*. at 35-36. Taken together, these statutory provisions do not constitute a significant impingement on the state's property tax loan scheme.

First of all, the duties imposed by 15 U.S.C. § 1639(a), (b), (h) and (u) may not apply to many of these property tax loans made today. These substantive provisions of HOEPA set out in 15 U.S.C. § 1639 are imposed only if the property tax loans at issue fit the definition of a "high-cost mortgage" as defined by 15 U.S.C. § 1602(bb). That provision provides two triggers for application of the HOEPA regulations found in 15 U.S.C. § 1639. 15 U.S.C. § 1602(bb)(1). It appears that many property tax loans currently being made fail to meet either trigger and are thereby not subject to 15 U.S.C. § 1639(a), (b), (h), and (u). At a minimum, property tax lenders can choose to avoid these regulations by charging a lower APR and keeping closing costs relatively low.

Under one trigger, a loan of less than $50,000, like most property tax loans,[24] would be found to be a "high-cost mortgage" if its interest rate (APR) exceeded the average prime offer rate by 8.5%. 15 U.S.C. § 1602(bb)(1)(i)(I). Since the average prime offer rate at this time is between 3.11 and 3.13% for terms of 3 and 5 years, the most common terms for property tax loans in Texas, the APR trigger right now is between 11.61 and 11.63%.[25] Between calendar years 2008 and 2013, the **average** APR on property tax loans declined from 15.92% to 12.8% in residential property tax loans.[26] If the average APR continued its decline in 2014 and 2015, that APR may well be so low as to avoid the APR trigger for HOEPA coverage in most new loans. Since Propel is the largest competitor in the industry

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[24] During calendar year 2013, the last year for which statistics are available, the average property tax loan was made for $12,770. Testimony of Consumer Credit Commissioner Leslie Pettijohn before the House Business and Industry Committee (May 27, 2014), *available at* http://www.legis.tx.us/tlodocs/83R/handouts/C0402014052710001/19901dbf-4702-4a01-9d64-080cdf174b67.PDF.

[25] *Available at* http://www.ffiec.gov/ratespread/YieldTableFixed.CSV.

[26] Testimony of Consumer Credit Commissioner Leslie Pettijohn before the House Business and Industry Committee, *supra*.

and claims to offer the best rates, it is well placed to avoid this trigger currently and in the near future.

Under the second trigger for HOEPA coverage, total points and fees in a property tax loan transaction for less than $20,000—which is typical of the average property tax loan—would have to exceed the lesser of 8% of the total transaction amount or $1,000. 15 U.S.C. § 1602(bb)(1)(ii)(II). Since the average residential property tax loan was made in 2013 for $12,770, the 8% figure would be a little above $1,000, making the minimum floor of $1,000 applicable to the points and fees trigger. Since residential closing costs per loan have declined from $1,259 to $707 from calendar years 2008 to 2013,[27] it is unlikely that this trigger for HOEPA coverage will apply to current loans. Given these facts, it appears that HOEPA, and particularly 15 U.S.C. § 1639, will not cover many property tax loans currently being made. In addition, by merely charging an APR of 11.6% or less and not

[27] Testimony of Consumer Credit Commissioner Leslie Pettijohn before the House Business and Industry Committee, *supra*.

charging more than $1,000 in closing costs, Propel can avoid these provisions.

Second, even when property tax loans are subject to HOEPA, the pre-closing notice required by HOEPA at 15 U.S.C. § 1639(a) is effectively required by state law as well. Under Texas law, a right of rescission described by Regulation Z, 12 C.F.R. § 226.23, is available in residential property tax loan transactions. Tex. Tax Code § 32.06(d-1). The current version of that rescission regulation provides that consumers have three days after consummation and up to three years thereafter if required material disclosures were not made. 12 C.F.R. § 1026.23(a)(1)-(3). This regulation defines material disclosures to include the disclosures referred to in section 1026.32(c), which is the Regulation Z reference to the "advance peek" notice required by 15 U.S.C. § 1639(a) and (b). Compare 12 C.F.R. § 1026.23(a)(1)-(3) with 15 U.S.C. § 1639(a)-(b). In short, state and federal law provide an extended right to cancel if the "advance peek" notice is not given in a transaction covered by HOEPA. In other words, the state provision of a right to rescission under TILA makes no sense unless the advance

peek notice is given. As this Court has noted in the context of the McCarran-Ferguson Act, duplicative regulation under federal and state law is not enough to show conflict or impairment. *Edwards v. Your Credit, Inc*., 148 F.3d 427, 433 (5th Cir. 1998) (application of TILA does not impair Louisiana's insurance regulation scheme).

Third, for the non-duplicative regulations found in TILA and Texas state law, there is no direct impairment if TILA and Texas laws on property tax loans were largely enacted for different purposes to serve different ends. *Id*. at 434. TILA almost entirely regulates disclosure in loans and imposes only a few substantive regulations on high cost loan. Texas laws on property tax loans almost entirely their substance.[28]

[28] Specifically, Texas law regulates the essential terms of such loans by (1) setting limits on interest rates, closing costs, and post-closing costs, Tex. Tax Code § 32.06(a-4)(2), (e), (e-1) and (e-2) and Tex. Fin. Code § 351.0027; (2) banning the making of such loans to persons over the age of 65, Tex. Tax Code § 32.06(a-3); (3) regulating the means of foreclosure and redemption, Tex. Tax Code § 32.06(c), (f), (f-1), (i), (j), (k) and (k-1); and (4) requiring property tax lenders to be licensed, Tex. Fin. Code § 351.001 *et seq*.

In short, the regulations in TILA and Texas law may overlap, but they mostly address different issues and there is no real substantive conflict.[29]

[29] In addition, the Texas state regulator of property tax lenders has no dog in this fight, having taken the position that TILA does apply to such loans when they involve residential properties.

CONCLUSION

For the foregoing reasons, the National Association of Consumer Advocates respectfully requests that this Court find that TILA applies to property tax loans made in Texas and affirm the order denying a motion to dismiss in this cause.

Respectfully submitted,

/s/ Stephen Gardner
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APPENDIX

Letter from Office of the Consumer Credit Commission of Texas

OCCC
Office of Consumer
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Email: info@occc.state.tx.us

May 27, 2014

Mr. J.J. Garza, Chief of Staff
Office of the Honorable Rene O. Oliveira
State Representative, District 37
P.O. Box 2910
Austin, TX 78768

Re: Applicability of federal regulations to property tax lenders

Dear Mr. Garza:

You requested information from the Office of Consumer Credit Commissioner (OCCC) regarding the applicability of certain federal regulations to Texas property tax lenders. There is some disagreement among property tax lending stakeholders about which federal regulations apply. The property tax lending industry has requested the opportunity to raise certain defenses in response to litigation under federal regulations. In addition, members of the property tax lending industry have stated that they have contacted the Consumer Financial Protection Bureau (CFPB) for additional guidance on the applicability of regulations.

The rest of this letter will discuss the applicability of certain federal statutes and regulations to property tax lenders.

I. CFPB's general enforcement authority

Property tax lenders appear to be subject to the CFPB's general enforcement authority. Property tax lenders appear to be "covered persons" under the Dodd–Frank Act. The CFPB's authority applies to any "covered person" who "offers or provides origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans." 12 U.S.C. 5514(a)(1). A "covered person" includes "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. 5481(6)(A). Providing a "consumer financial product or service" includes "extending credit and servicing loans" if the loans are "primarily for personal, family, or household purposes." 12 U.S.C. 5481(5)(A), (15)(A)(i).

Because property tax lenders appear to be subject to the CFPB's general enforcement authority, they also generally appear to be subject to the CFPB's recodified versions of the federal consumer financial protection rules (Regulation B, Regulation Z, etc.).

II. Truth in Lending Act & CFPB Regulation Z

It appears that property tax lenders are generally subject to the Truth in Lending Act (TILA) and the CFPB's recodified version of Regulation Z.

Some property tax lenders have argued that property tax lenders are not subject to TILA, except for provisions specifically cited in Texas law (e.g., the right of rescission cited in Section 32.06(d-1) of the Tax Code). The lenders argue that there is no extension of consumer credit in a property tax loan because the property owner does not incur a debt—rather, the owner authorizes a transfer of a nonconsensual lien.

The OCCC's position is that property tax lenders are generally subject to TILA if they provide property tax loans for residential property. A property tax loan appears to be a consumer credit transaction subject to TILA because it is a type of third-party financing of a tax lien. The CFPB's official commentary to Regulation Z states that third-party financing of tax liens is considered credit: "The following situations are not considered credit for purposes of the regulation: . . . . Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation." 12 C.F.R. pt. 1026 supp. I para. 2(a)(14)1.ii.

General TILA compliance has been an issue in some property tax lender exams, and the OCCC has instructed some licensees to correct their practices to bring them into compliance. However, no formal enforcement proceedings have resulted from these practices, because the licensees brought their transactions into compliance.

Certain TILA provisions are expressly cited in Texas law, and therefore clearly apply to property tax lenders. For example, Section 32.06(d-1) of the Texas Tax Code provides that the right of rescission described in Regulation Z applies to a tax lien transfer on residential property. In addition, Section 351.0023 of the Texas Finance Code provides advertising requirements that are substantially similar to Regulation Z's advertising requirements, and the OCCC's property tax loan advertising rule provides that the annual percentage rate and terms of repayment must be disclosed in accordance with Regulation Z. 7 Tex. Admin. Code § 89.208(h).

Other specific TILA provisions, however, are less clear in whether they apply to property tax lenders. For example, the industry disputes the applicability of the escrow requirement for higher-priced mortgage loans applies to property tax lenders. For certain higher-priced mortgage loans, Regulation Z requires an escrow for payment of property taxes and insurance. The requirement applies to "a loan secured by a first lien on a principal dwelling." 12. C.F.R. § 1026.35(b)(3)(i). Property tax lenders are arguably not subject to this requirement, because a tax lien is not considered to be a first lien under Texas law. *See ABN AMRO Mortgage Group v. TCB Farm & Ranch Land Investments*, 200 S.W.3d 774, 775, 781 (Tex. App.—Fort Worth 2006, no pet.) (distinguishing between first liens and tax liens, and holding that a first deed of trust is a "first lien" under the Tax Code, even when it is recorded after a tax lien).

III. SAFE Act

Property tax lenders are subject to the SAFE Act. The SAFE Act is codified at Chapter 180 of the Texas Finance Code and is based on a federal statute (also called the SAFE Act). The SAFE Act's licensing requirement for residential mortgage loan originators is specifically cited in Section 351.0515 of the Finance Code.

Compliance with the SAFE Act has been an issue in some exams, and the OCCC has instructed some licensees to correct their practices to bring them into compliance. Violations of the SAFE Act by property tax lenders have resulted in five formal enforcement actions.

IV. Equal Credit Opportunity Act & CFPB Regulation B

It appears that property tax lenders are generally subject to the Equal Credit Opportunity Act (ECOA) and the CFPB's Regulation B. The ECOA and Regulation B generally apply to creditors, and a creditor is "a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit." 12 C.F.R. § 1002.2(l). Regulation B's definition of "credit" is similar to Regulation Z's.

ECOA compliance has been an issue in some property tax lender exams, and the OCCC has instructed some licensees to correct their practices to bring them into compliance. However, no formal enforcement proceedings have resulted from these practices, because the licensees brought their transactions into compliance.

V. Gramm–Leach–Bliley Act & CFPB Regulation P

It appears that property tax lenders are generally subject to the Gramm–Leach–Bliley Act (GLBA) and the CFPB's Regulation P (also known as the Privacy Rule), which imposes requirements related to consumers' privacy and sharing of nonpublic financial information with third parties.

Regulation P applies to financial institutions subject to the CFPB's authority. A financial institution is "any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act." 12 C.F.R. § 1016.3(l)(1). Activities that are financial in nature under the Bank Holding Company Act include "[l]ending, exchanging, transferring, investing for others, or safeguarding money or securities." 12 U.S.C. § 1843(k)(4)(A).

GLBA compliance has been an issue in some property tax lender exams, and the OCCC has instructed some licensees to correct their practices to bring them into compliance. However, no formal enforcement proceedings have resulted from these practices, because the licensees brought their transactions into compliance.

VI. Real Estate Settlement Procedures Act & CFPB Regulation X

The property tax lending industry has requested the opportunity to raise defenses against litigation under the Real Estate Settlement Procedures Act (RESPA) and Regulation X, and the OCCC has not objected. The definition of "federally related mortgage loans" that are subject to RESPA describes a "first or subordinate lien on residential real property." 12 U.S.C. § 2602(1)(A). The industry argues that under Texas law, a tax lien is neither a first nor a subordinate lien, for the reasons discussed above in the last paragraph of page 2.

Also, the definition of "federally related mortgage loan" is limited to loans that are either guaranteed by a federal housing agency, or made by a creditor that "makes or invests in residential real estate loans aggregating more than $1,000,000 per year." *Id.* § 2602(1)(B). According to preliminary data from the 2013 annual reports, a majority of license property tax lenders would fall under this $1 million per year exemption, even if a tax lien were considered to be a first lien.

Please let me know if I can provide any other information.

Sincerely,

Sealy Hutchings
General Counsel
Office of Consumer Credit Commissioner

CERTIFICATE OF SERVICE

I certify that on September 2, 2015, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this case.

/s/ Stephen Gardner
Stephen Gardner
Attorney For Amicus Curiae
National Association of Consumer Advocates

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6651 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Palatino Linotype in the text and the footnotes.

/s/ Stephen Gardner
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