

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Docket No. BCD-23-56

FRANKLIN SAVINGS BANK,
Plaintiff-Appellee,

v.

MICHAEL BORDICK AND MONICA BORDICK,
Defendants-Appellants.

On Appeal from the Business and Consumer Docket
Case No. BCD-CIV-2022-00013

**Brief of Amici Curiae
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the State of Maine**

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INTEREST OF AMICI CURIAE

This case involves the proper interpretation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* The Consumer Financial Protection Bureau (CFPB or Bureau) is charged with promulgating regulations to implement TILA. *Id.* § 1604(a). The Bureau also has the authority (along with a variety of other federal agencies) to enforce TILA. *Id.* § 1607(a).

Through the Maine Consumer Credit Code – Truth-in-Lending, the State of Maine requires creditors to comply with TILA. *See* 9-A M.R.S.A. § 8-504(1) (Westlaw July 10, 2023). With respect to a creditor that is a supervised financial organization, the Maine Consumer Credit Code – Truth-in-Lending is administered and enforced by the Superintendent of Financial Institutions; with respect to any other creditor, it is administered and enforced by the Superintendent of Consumer Credit Protection; and with respect to mortgage brokers and supervised lenders other than supervised financial organizations, it may be enforced by the Attorney General. *Id.* §§ 1-301(2) (defining “Administrator”), 8-505(1) (providing for enforcement by the Administrator), 8-505(7) (providing for enforcement by the Attorney General), 8-508 (describing rulemaking authority of the Administrator).

TILA generally covers loans that are for “personal, family, or household purposes,” but not loans that are for “commercial[] ... purposes.” 15 U.S.C. §§ 1602(i), 1603(1); *see also Mauro v. Countrywide Home Loans, Inc.*, 727 F. Supp. 2d 145, 153 (E.D.N.Y. 2010) (“TILA applies only to consumer credit transactions and, therefore, does not apply to credit extended for business, commercial, or agricultural purposes.” (quotation omitted)). This case presents the question of how to determine whether a loan is for such covered purposes. The trial court held that if the loan documents unambiguously state that the loan had a commercial purpose, the loan is not eligible for TILA’s protections. Accordingly, the court declined to allow the borrowers to present extrinsic evidence showing that the loan, in fact, was primarily for a consumer purpose.

This holding is contrary to both the text of the statute and to authoritative guidance promulgated by the Bureau, both of which indicate that TILA coverage is determined by looking to the transaction as a whole and assessing the borrower’s primary purpose in entering into the transaction. That inquiry must elevate substance over form and is not limited to the language in the loan documents. If affirmed, the trial court’s holding would allow creditors to evade TILA merely by labeling the loan “commercial.” That would mean that consumers in Maine could be denied

important protections to which they are entitled under both federal and state law.

Therefore, the Bureau and the State of Maine each have a substantial interest in the outcome of this matter.¹ This amicus brief is filed with the written consent of the parties pursuant to Maine Rule of Appellate Procedure 7A(e)(1)(A).

STATEMENT OF THE CASE

A. The Federal Truth in Lending Act (TILA)

Congress passed the Truth in Lending Act, 82 Stat. 146, in 1968 to promote the “informed use of credit” by requiring “meaningful disclosure of credit terms.” 15 U.S.C. § 1601(a); *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 198 (2011). In enacting TILA, Congress observed that creditors employed inconsistent “and at times fraudulent[] practices” to inform consumers “of the terms of the credit extended to them.” *Mourning v. Fam. Publ’ns Serv., Inc.*, 411 U.S. 356, 363–64 (1973) (citing H.R. Rep. No. 90-1040, at 13 (1967) and S. Rep. No. 90-392, at 13 (1967)). As a result,

¹ The amici curiae have filed this brief to address the specific legal issue on appeal of whether the trial court erred in determining that Maine law does not allow a court to consider extrinsic evidence offered in support of a TILA defense if the loan documents identify the loan as commercial. In filing this brief, amici curiae do not take a position on the ultimate outcome of any TILA defense asserted by Appellants.

consumers “were prevented from shopping for the best terms available” and were “prompted to assume liabilities they could not meet.” *Id.* TILA was “designed to remedy” these problems. *Id.*

Congress initially granted “the [Federal Reserve] Board the authority to issue regulations to achieve TILA’s purposes.” *McCoy*, 562 U.S. at 198 (citing a pre-amendment version of 15 U.S.C. § 1604(a)). Pursuant to that authority, the Federal Reserve Board promulgated Regulation Z. 34 Fed. Reg. 2002 (Feb. 11, 1969). In 2011, Congress transferred rulemaking authority for TILA to the CFPB. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The CFPB then repromulgated Regulation Z at 12 C.F.R. part 1026. 76 Fed. Reg. 79768 (Dec. 22, 2011).

1. Protections for Borrowers

TILA provides borrowers certain protections when they enter into a consumer credit transaction. Two of those protections are relevant here: its disclosure requirement and its ability-to-repay requirement.

a. Disclosure Requirement

Generally, when a consumer takes out a loan, TILA requires the creditor to disclose certain information to the borrower. *See, e.g.*, 15 U.S.C. §§ 1631, 1632, 1638. The precise disclosures that are required depend on the nature of the loan and are specified by regulation. For example, for any

“closed-end consumer credit transaction secured by real property” (i.e., most residential mortgages), Regulation Z currently requires the creditor to make certain “early disclosures” that must be mailed shortly after the creditor receives the consumer’s application as well as certain “final disclosures” that must be received by the consumer before the loan is consummated. *See* 12 C.F.R. §§ 1026.19(e), 1026.19(f), 1026.37, 1026.38. Those disclosures provide consumers with a variety of information pertaining to the terms of the loan and their repayment obligations.

Similar disclosures are required for other types of consumer loans, including loans that are not secured by a real property interest. As relevant here, when a consumer enters into a credit transaction that is “[s]ecured by personal property ... that is a dwelling” but that is “not also secured by real property,” then the disclosure obligations in 12 C.F.R. § 1026.18 govern. 12 C.F.R. part 1026, Supp. I, cmt. 18-3.i.C. Under that provision of Regulation Z, the creditor must disclose, among other information, the “identity of the creditor,” the “amount financed,” the “finance charge,” the “annual percentage rate,” the “payment schedule,” and the “total of payments.” 12 C.F.R. § 1026.18. That information must be disclosed to the consumer “clearly and conspicuously in writing.” *Id.* § 1026.17(a). And the disclosure must be made “before consummation of the transaction.” *Id.* § 1026.17(b).

b. Ability-to-Repay Requirement

TILA also includes certain provisions aimed at ensuring consumers can meet their payment obligations. Specifically, the law provides that “no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination ... the consumer has a reasonable ability to repay the loan.”² 15 U.S.C. § 1639c(a)(1); *see also* 12 C.F.R. § 1026.43(c)(1). Regulation Z guides how that determination should be made. *See generally* 12 C.F.R. § 1026.43(c)(2) (setting forth factors “a creditor must consider” “in making the repayment ability determination”). Regulation Z also includes specific provisions that govern how the ability-to-repay determination should be made when a loan’s repayment schedule includes a balloon payment. *See id.* § 1026.43(c)(5)(ii); *see also* 12 C.F.R. part 1026, Supp. I, cmt. 43(c)(5)(ii)(A).

2. Coverage & Exemptions

Generally, the protections TILA provides to borrowers, including its disclosure and ability-to-repay requirements, apply only to “consumer

² A “residential mortgage loan” includes “any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling,” and, accordingly, is not limited to loans secured by a real property interest. 15 U.S.C. § 1602(dd)(5); *see also id.* § 1602(w) (defining “dwelling” as “a residential structure or mobile home”).

credit transactions.” *See, e.g.*, 15 U.S.C. § 1638(a)(1) (providing disclosures must be made “[f]or each consumer credit transaction”); *id.* § 1639c(c)(1) (providing ability-to-repay determination must be made for any “residential mortgage loan”); *id.* § 1602(dd)(5) (defining a “residential mortgage loan” as a type of “consumer credit transaction”); *see also, e.g.*, 12 C.F.R. § 1026.43(a); 12 C.F.R. part 1026, Supp. I, cmt. 18-3.i.

A covered “consumer credit transaction” is “one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” 15 U.S.C. § 1602(i); *see also* 12 C.F.R. § 1026.2(a)(12) (defining “consumer credit” as “credit offered or extended to a consumer primarily for personal, family, or household purposes”); *id.* § 1026.1(c) (explaining that a transaction is covered by Regulation Z only if the “credit is primarily for personal, family, or household purposes”). On the other hand, loans that are “primarily for business, commercial, or agricultural purposes” are exempt from TILA. 15 U.S.C. § 1603(1); *see also* 12 C.F.R. § 1026.3(a)(1). Accordingly, coverage under TILA depends on the primary purpose of the loan: consumer-purpose loans are covered whereas business-purpose loans are exempt.

The Official Commentary to Regulation Z provides guidance on how to determine the primary purpose of a loan. It provides a variety of factors that are relevant to the determination, including, for example, “the relationship of the borrower’s primary occupation” to the property the loan is being used to acquire, the “degree to which the borrower will personally manage” the property being acquired, and the “size of the transaction.” 12 C.F.R. part 1026, Supp. I, cmt. 3(a)-3.i. It also provides examples: “A loan to expand a business” is, under the Official Commentary, a business-purpose loan, “even if it is secured by the borrower’s residence.” *Id.* cmt. 43(a)-3.ii.A. On the other hand, a loan used “to pay a child’s tuition,” is a consumer-purpose loan, even if it is “secured by a mechanic’s tools.” *Id.*

The Commentary also specifies that “if some question exists as to the primary purpose” of a loan, a creditor is free to comply with Regulation Z, and the creditor’s decision to comply “is not controlling of the question of whether the transaction is exempt.” *Id.* cmt. 3(a)-1.

3. Private Enforcement

TILA also empowers borrowers to enforce its provisions through a private right of action. *See* 15 U.S.C. § 1640(a). A creditor who fails to comply with these TILA provisions is liable to the borrower for actual damages, specified statutory damages, and costs and attorney’s fees. *Id.* §

1640(a)(1)-(3). TILA specifies different statutory damages for different types of violations. For certain violations, including violations of the ability-to-repay requirement, the creditor is liable to the borrower for “an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.” *Id.* § 1640(a)(4).

Generally, TILA’s private right of action is subject to a one-year statute of limitations. *Id.* § 1640(e). Certain TILA violations, including violations of the ability-to-repay requirement, are subject to a three-year statute of limitations. *Id.* These limitations periods, however, do not apply if the borrower asserts a TILA violation “as a matter of defense by recoupment or set-off” in “an action to collect [a] debt,” except “as otherwise provided by State law.” *Id.*

Relatedly, TILA expressly provides a borrower the right to assert violations of some of its provisions, including the ability-to-repay provision, as a defense to a foreclosure action or other action to collect on a debt. TILA provides that, “[n]otwithstanding any other provision of law,” when a creditor initiates a “foreclosure of [a] residential mortgage loan, or any other action to collect the debt in connection with such [a] loan,” a consumer may assert a violation of the ability-to-repay provision, section

1639c(a), “as a matter of defense by recoupment or set off.” *Id.* § 1640(k)(1). The “amount of recoupment or setoff” available to the borrower is equal to the amount of damages available to the consumer “for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney’s fee.” *Id.* § 1640(k)(2)(A). As in other cases in which a consumer asserts a TILA violation as a recoupment defense, *see id.* § 1640(e), the right of a consumer to assert a violation of TILA’s ability-to-repay provision as a defense to foreclosure is not subject to “the time limit on a private action for damages,” *id.* § 1640(k)(1).

4. State Exemptions

TILA allows states to apply for exemptions from many of its provisions. *See* 15 U.S.C. § 1633 (allowing states to apply for exemptions from chapter 2 of TILA, pertaining to “Credit Transactions,” including the disclosure and ability-to-repay provisions at issue here); *see also id.* § 1666j(b) (allowing exemptions from chapter 4, pertaining to “Credit Billing”); *id.* § 1667e(b) (allowing exemptions from chapter 5, pertaining to “Consumer Leases”). The Bureau “shall ... exempt ... any class of credit transactions within any State if it determines that under the law of the State that class of transactions is subject to requirements substantially similar to

those imposed [under TILA], and that there is adequate provision for enforcement.” *Id.* § 1633; *see also* 12 C.F.R. § 1026.29(a).

A TILA exemption does not “extend to the civil liability provisions” found in section 1640. *See* 12 C.F.R. § 1026.29(b)(1). Section 1640 includes the provisions allowing TILA violations to be enforced through a private right of action, 15 U.S.C. § 1640(a), and to be asserted as a recoupment defense to a foreclosure action or any other action to collect a debt, *id.* § 1640(e), (k). Accordingly, “[i]n an exempt state ... a creditor can be held liable under 15 U.S.C. § 1640 for failing to comply with any state law requirement that is equivalent to an actionable requirement under TILA.” *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 26 (1st Cir. 2005); *see also Bordetsky v. Charron*, No. BCD-RE-10-08, 2012 WL 1521493, at *1 (Me. B.C.D. Jan. 31, 2012) (following *Belini*). “Otherwise, section 1640 would be a nullity in an exempt state, since the substantive federal requirements have been superseded by the exemption.” *Belini*, 412 F.3d at 26; *see also Ives v. W. T. Grant Co.*, 522 F.2d 749, 755 (2d Cir. 1975) (“[T]he civil liability section of the federal Truth in Lending law ... is not a requirement, it is a remedy. As such, it was not intended to be eliminated by any exemption granted under section 1633.”).

B. Truth in Lending under Maine Law

Maine consumers are entitled to all the protections afforded by TILA, as implemented by Regulation Z. That is because, though the Bureau has granted Maine an exemption from certain parts of TILA, the Maine legislature has fully incorporated TILA into the Maine Consumer Credit Code.

1. Maine's TILA Exemption

In 1970, the Federal Reserve Board granted Maine an exemption from chapter 2 of TILA, which includes the credit provisions relevant here. *See* 35 Fed. Reg. 5214, 5215 (Mar. 28, 1970). The exemption was later updated and extended to other parts of the law. *See* 47 Fed. Reg. 36961 (Aug. 24, 1982). The exemption was granted based on the Board's "belief that Maine's law and regulations were substantially similar to the federal law and regulation and that the state had demonstrated adequate provision for enforcement." *Id.* at 36962.

Currently, any "[c]redit or lease transaction subject to the Maine Consumer Credit Code and its implementing regulations are exempt from chapters 2, 4, and 5" of TILA," although "[t]he exemption does not apply to transactions in which a Federally chartered institution is a creditor or lessor." 12 C.F.R. part 1026, Supp. I, cmt. 29(a)-A; *see also Deutsche Bank*

Nat'l. Tr. Co. v. Pelletier, 2011 ME 110, ¶ n. 4, 31 A.3d 1235 (discussing the exemption).

2. The Maine Consumer Credit Code

The Maine Consumer Credit Code requires full compliance with TILA and Regulation Z. It provides that “[n]otwithstanding any other law, a creditor shall comply with the Federal Truth in Lending Act ... and ... Regulation Z.” 9-A M.R.S.A. § 8-504(1) (Westlaw July 10, 2023). The Maine Consumer Credit Code also fully incorporates TILA’s civil liability provisions (including the provisions that allow a consumer to enforce TILA through a private right of action and as a defense to an action to collect a debt). *See id.* § 8-505(5) (“Except as otherwise provided ... any creditor that fails to comply with the requirements imposed under this Article with respect to any person is liable to that person as provided for in ... 15 United States Code, Section 1640.”).

These provisions in the Maine Consumer Credit Code aim “[t]o conform the regulation of consumer credit transactions to the policies of the Federal Truth in Lending Act.” *Id.* § 1-102(2)(F); *see also* Maine Bureau of Financial Institutions & Maine Bureau of Consumer Credit Protection, Regulation Z-3 (Oct. 15, 2013), <https://www.maine.gov/pfr/financialinstitutions/sites/maine.gov.pfr.financialinstitutions/files/pdf/>

regulations/Reg-38.pdf (explaining that the Maine Legislature sought “to harmonize Maine’s truth-in-lending laws with federal truth-in-lending laws in order to ensure the preservation of Maine’s exemption under Regulation Z”).

C. Factual Background

In 2008, Michael and Monica Bordick took out a loan from Franklin Savings Bank to purchase land in Rangeley, Maine. Trial Transcript (“Tr.”) 24:11-17, 27:5-17. The couple then built a second home on the land. *Id.* at 23:15-21. In 2014, the Bordicks sold that home in Rangeley, but because it had depreciated in value as a result of the 2008 financial crisis, the sale proceeds were insufficient to pay off the loan. *Id.* at 24:18-30:7. They sold the home for around \$800,000, which was not enough to cover the more than \$1 million they still owed the bank. *Id.* at 28:4-19. In order to cover the shortfall, the Bordicks took out a new loan from Franklin Savings Bank. *Id.* at 13:20-18:20; *see also* Appendix (“App”) at 59-82.

The Bordicks borrowed a total of \$378,698.55 on the new loan. Tr. at 21:9-15, 78:6-8; App. at 59. A hunting cabin owned by the Bordicks was substituted as collateral. Tr. at 95:14-19; The cabin is located on leased land in Lower Cupsuptic Township, Maine. *Id.* at 85:12-13; App. at 79. The loan required the Bordicks to make monthly payments on their outstanding

balance beginning on January 1, 2015, and then to pay a balloon payment in the amount of the entire unpaid balance on May 1, 2019. Tr. at 21:16-22:1; App. at 59.

The Bordicks made monthly payments on the new loan, but at the end of the loan's term, the balloon payment came due. Tr. at 22:2-14. The Bordicks now owed Franklin Savings Bank over \$300,000, which they were unable to pay. *Id.* at 81:7-8. Accordingly, they defaulted on the loan. *Id.* at 22:8-10.

D. Procedural History

After the Bordicks defaulted, Franklin Savings Bank filed a complaint in Rumford District Court seeking to take possession of their hunting cabin. The case was later transferred to the Business & Consumer Docket.

The trial court held a bench trial. At trial, the Bordicks sought to present evidence that the bank had not complied with TILA because it did not provide them certain mandatory disclosures and because it had failed to make a reasonable determination that they had the ability to repay the loan. Tr. at 58:13-59:12. The Bordicks argued that the bank's liability under TILA fully offset the amount they owed to the bank under the loan. *Id.* at 52:24-25.

The court did not allow the Bordicks to present evidence relevant to their TILA defenses. *Id.* at 54:13-58:9. The court opined that because the loan documents state that the loan had a commercial purpose, the loan was TILA-exempt. *Id.* The Bordicks sought to introduce extrinsic evidence showing that even though the loan was labeled “commercial,” the loan was actually issued for personal, family or household purposes and was thus a covered consumer loan. *Id.* at 58:13-59:12. The court relied on *Bordetsky v. JAK Realty Trust*, 2017 ME 42, ¶ 12, 157 A.3d 233, in which this Court held that, for purposes of determining whether Maine’s notice of default statute for residential real estate foreclosures applies, courts should not look to extrinsic evidence to determine whether the loan had a commercial or consumer purpose if the loan document states on its face that the loan has a commercial purpose.

The Bordicks filed a motion for reconsideration. App. 47-57. In that motion they argued that the court’s application of *Bordetsky* was inconsistent with TILA. *Id.* The court denied the motion for reconsideration in a brief order. App. at 58. The Bordicks then appealed. *Id.* at 5.

SUMMARY OF ARGUMENT

The trial court erred in concluding that TILA does not apply whenever a contract labels a loan “commercial” for three reasons.

First, under the statutory text, a loan generally is covered by TILA so long as the borrower took out the loan primarily for a family, personal or household purpose. To determine whether a loan has a covered purpose, the statute requires a substantive and fact-intensive inquiry into the reasons *why* the borrower entered into the transaction. Authoritative administrative guidance confirms as much.

Second, the fact that the contract labels a loan “commercial” is not dispositive of whether the loan is covered by TILA. Courts are in broad agreement that determining whether a loan has a covered purpose requires looking beyond the four corners of the contract. The *Bordetsky* decision relied on by the trial court is inapposite because it involves a different Maine statute and does not address the judicial precedent or administrative guidance that govern TILA coverage.

Third, TILA was enacted to protect consumers. Allowing creditors to evade TILA merely by stamping the loan documents with the term “commercial” is at odds with the statute’s remedial purpose.

ARGUMENT

- I. **Whether a loan is covered by TILA turns on the borrower's primary purpose in entering into the transaction.**
 - A. **The statutory text focuses on the primary purpose of the transaction.**

Under TILA's statutory text, whether a loan is covered turns on the primary purpose of the transaction. The protections that TILA provides borrowers apply only to "consumer credit transactions." *E.g.*, 15 U.S.C. § 1638(a). A "consumer credit transaction" is one where "the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." *Id.* § 1602(i). On the other hand, loans that are "primarily for business, commercial, or agricultural purposes" are exempt from TILA. *Id.* § 1603(1). The text of the statute thus directs us to first identify the money (or property or service) that is the subject of the loan and then ask what its purpose is.³

A loan's purpose is the reason *why* the borrower took out the loan. *E.g.*, Cambridge Dictionary, Cambridge University Press,

³ The regulatory text is consistent with the statutory text. *See* 12 C.F.R. § 1026.1(b) (explaining that credit is covered by Regulation Z when, among other conditions, "[t]he credit is primarily for personal, family, or household purposes"); *accord id.* § 1026.2(12) ("Consumer credit means credit offered or extended to a consumer primarily for personal, family, or household purposes.").

<https://dictionary.cambridge.org/us/dictionary/english/purpose> (last visited July 10, 2023) (defining “purpose” as “why you do something or why something exists”). For example, if a borrower takes out a loan to purchase a car, whether the loan is covered by TILA depends on the borrower’s primary “purpose[]” in purchasing the car or, in other words, why the borrower purchased the car. 15 U.S.C. § 1602(i). If the borrower purchased the car primarily for “personal, family, or household” reasons, then the loan has a consumer purpose and is covered. *Id.* If, however, the borrower purchased the car primarily for “business, commercial, or agricultural” reasons, then it is exempt. *Id.* § 1603(1). The same loan may or may not be covered by TILA depending on why the borrower entered into the transaction.

Courts have long followed this approach. For example, in *Gallegos v. Stokes*, 593 F.2d 372 (10th Cir. 1979), the Tenth Circuit considered a loan that was used to finance the purchase of a pickup truck. The court focused on the truck and asked why the borrower took out the loan to purchase the truck. There was some evidence “that she intended to use the truck to sell fresh produce.” *Id.* at 375. But, on the other hand, she testified that the truck was “her sole means of transportation” and that “it would help her transport her family and possessions.” *Id.* Looking “to the transaction as a

whole,” the court concluded “the truck was primarily for personal use,” and, therefore, the loan was covered by TILA. *Id.*

Similarly, in *Tower v. Moss*, the Fifth Circuit considered a construction loan that was used to finance improvements on a home. 625 F.2d 1161, 1166 (5th Cir. 1980). In order “to determine whether [the] transaction was primarily consumer or commercial in nature,” the court “examine[d] the transaction as a whole and the purpose for which the credit was extended.” *Id.* at 1166. The court noted that, although the borrower did not reside in the home, she had previously lived there “for a long period of time,” had visited “periodically over the years,” and “fully expect[ed]” to return “upon her retirement.” *Id.* The borrower leased the home while she was away but only for a “nominal rent” to defray her expenses. *Id.* In light of “these factual circumstances, evaluated in their totality,” the court held that the loan had a consumer purpose and that TILA applied. *Id.*

Tower and *Gallegos* illustrate the principle that determining whether a loan is covered by TILA requires assessing the borrower’s primary purpose in taking out the loan in light of all of the facts and looking to the transaction as a whole. That principle emanates directly from the statutory text. And that principle ought to govern this Court’s analysis of whether the borrowers in this case are entitled to the protections afforded by TILA.

B. Authoritative guidance confirms that TILA coverage turns on the primary purpose of the transaction.

Consistent with the statutory text, the Official Commentary to Regulation Z confirms that the determination of a borrower's purpose requires an assessment of the factual context surrounding the transaction. The Commentary provides five factors that should be used in "determining whether credit to finance an acquisition ... is primarily for business or commercial purposes (as opposed to a consumer purpose)." 12 C.F.R. part 1026, Supp. I, cmt. 3(a)-3. Those factors are: (1) "[t]he relationship of the borrower's primary occupation to the acquisition"; (2) "[t]he degree to which the borrower will personally manage the acquisition"; (3) "[t]he ratio of income from the acquisition to the total income of the borrower"; (4) "[t]he size of the transaction"; and (5) "[t]he borrower's statement of purpose for the loan." *Id.* at cmt. 3(a)-3.i.A-E; *see also* CFPB Supervision & Examinations Manual at TILA 21 (Oct. 2021) ("Supervision Manual") (explaining the five-factor test), *available at* <https://www.consumerfinance.gov/compliance/supervision-examinations/truth-in-lending-act-tila-examination-procedures/>.

The Official Commentary's five-factor test provides useful guidance as to how Regulation Z differentiates between consumer-purpose and commercial-purpose loans. Principally, the test's wide aperture (looking to

the borrower’s vocation, income, and future intentions) confirms that determining whether a loan has a covered purpose is a fact-intensive inquiry. The test requires courts to look beyond the loan documents to the broader factual context to determine whether the “transaction is primarily for an exempt purpose.” 12 C.F.R. part 1026, Supp. I, cmt. 3(a)-3. As the Ninth Circuit has explained, the Official Commentary’s approach requires “a case-by-case analysis” to assess whether a “loan *actually* was for a purpose covered by ... TILA.” *Thorns v. Sundance Properties*, 726 F.2d 1417, 1419 (9th Cir. 1984) (emphasis added).

Notably, a borrower’s “statement of purpose” (i.e., any statement from the borrower indicating how they intend to use the proceeds of the loan) is a relevant consideration under the Official Commentary’s framework, but it is not dispositive. 12 C.F.R. part 1026, Supp. I, cmt. 3(a)-3.i.E. Rather, it is only one of five factors to be considered, all of which are on equal footing. As the Bureau has explained in its manual for supervision staff, “[c]reditors must consider all five factors before determining that” TILA does not apply, and, “[n]ormally, no one factor by itself is a sufficient reason to determine the applicability of Regulation Z.” Supervision Manual at 21. That is because looking to a single factor in isolation is unlikely to provide a clear picture of the borrower’s motive. For example, a “checked

box indicating that the loan is for a business purpose” is of little use in determining why a borrower actually entered into a transaction and is, therefore, “insufficient evidence” to establish that a loan has an exempt purpose. *Id.* at 20.

Ultimately, the purpose of the Official Commentary’s five-factor approach is to determine the “borrower’s primary motive.” *Mauro*, 727 F. Supp. 2d at 153. This is illustrated by the examples provided. For instance, a “loan to expand a business” is exempt, “even if it is secured by the borrower’s residence or personal property.” 12 C.F.R. part 1026, Supp. I, cmt. 3(a)-3.ii. On the other hand, a loan used “to pay a child’s tuition” is covered, even if it is “secured by a mechanic’s tools.” *Id.* Likewise, loans issued “by a company to its employees” are covered if the “loans are used for personal purposes.” *Id.* As these examples illustrate, under the Commentary’s framework, no single characteristic of a loan (such as the identity of the creditor or the type of security interest) determines whether it is covered. In accord with the statutory text, the Commentary’s framework focuses on the borrower’s purpose and the “intended use of the proceeds” of the loan. *See* Supervision Manual at 20.

The Official Commentary, including its five-factor test for determining coverage, has long provided authoritative guidance on

Regulation Z. *See* 46 Fed. Reg. 50288, 50297 (Oct. 9, 1981) (Federal Reserve Board’s adoption of the Commentary after notice and comment); 81 Fed. Reg. 25323 (Apr. 28, 2016) (CFPB’s readoption of the Commentary after notice and comment). As the Supreme Court has recognized, this longstanding guidance is ordinarily “dispositive.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (explaining that “caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z”); *see also Segrist v. Bank of New York Mellon*, 744 F. App’x 932, 937 (6th Cir. 2018) (noting “[t]he Supreme Court has been very clear about the weight to be given” to “interpretations published by the administering agency of TILA” (citing *Ford*, 444 U.S. at 565 and *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981))).

Courts therefore routinely apply the Official Commentary’s five-factor test to guide TILA coverage determinations. *See, e.g., Thorns*, 726 F.2d 1419 (following the Commentary’s five-factor test and noting that it “constitutes a reasonable interpretation of the statute and the parallel provisions of Regulation Z”); *Mauro*, 727 F. Supp. 2d at 153 (following the five-factor test); *Daniels v. SCME Mortg. Bankers, Inc.*, 680 F. Supp. 2d

1126, 1129 (C.D. Cal. 2010) (same); *see also Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 245 (4th Cir. 2019) (following the Commentary’s guidance as to what types of loans constitute “consumer credit”).

Accordingly, the Official Commentary’s five-factor test for determining the purpose of a loan should guide this Court’s analysis of whether the loan at issue in this case is covered by TILA.

II. The fact that the contract labels a loan “commercial” is not dispositive.

The trial court did not allow the Bordicks to assert TILA defenses at trial on the basis that TILA did not apply on the sole ground that the loan documents identified the loan as having a commercial purpose. *See* Tr. at 58:1-4 (“So I find the note unambiguous ... It’s a commercial note.”). That holding is inconsistent with the relevant statutory text and authoritative agency guidance—which require a holistic assessment of the borrower’s purposes in taking out the loan—and should be vacated on that basis alone.

In giving dispositive weight to how the loan documents describe the loan, the trial court ignored the great weight of authority holding that the language in the loan documents does not control whether the loan is covered under TILA. Moreover, the trial court’s reliance on a decision of this Court as the basis for its conclusion rests on a misinterpretation of the

scope of that decision, which pertained to a different statute and is inapplicable to TILA.

A. Courts are in broad agreement that the loan documents are not controlling.

Courts across the country agree that contractual language is not determinative of whether a loan is covered by TILA. As one decision put it: “[C]ourts do not determine the purpose of a loan under TILA by looking exclusively to the terms of the loan documents. To the contrary, there is a strong, national consensus that courts must ‘look at the entire transaction and surrounding circumstances to determine a borrower’s primary motive.’” *Sundby v. Marquee Funding Grp., Inc.*, No. 3:19-cv-0390, 2020 WL 5535357, at *13 (S.D. Cal. Sept. 15, 2020) (quoting *Mauro*, 727 F. Supp. 2d at 153), *vacated on other grounds*, 2022 WL 4826445 (9th Cir. Oct. 3, 2022).

Indeed, courts assessing whether a loan has a consumer or business purpose under TILA consistently “elevate[] substance over form.” *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1075 (9th Cir. 2001); *see also Clark v. Rent-It Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (“TILA is remedial in nature, and the substance rather than the form of credit transactions should be examined in cases arising under it.”). In doing so, they “examine the transaction as a whole and the purpose for which the credit was

extended.” *Tower*, 625 F.2d at 1166; *see also, e.g., Gallegos*, 593 F.2d at 375 (“Cases considering whether a transaction is primarily consumer or commercial in nature look to the transaction as a whole and the purpose for which credit was extended.”); *Slenk*, 236 F.3d at 1075 (“We have found it necessary when classifying a loan to examine the transaction as a whole, paying particular attention to the purpose for which the credit was extended in order to determine whether the transaction was primarily consumer or commercial in nature.” (cleaned up)).

For example, in *Riviere v. Banner Chevrolet, Inc.*, the Fifth Circuit considered a loan used to purchase a pickup truck. 184 F.3d 457, 462 (5th Cir. 1999). The borrower pointed to the fact that “all documents executed in connection with the sale of the ... truck indicate that it was a consumer transaction.” *Id.* But the court explained that the law required it to “look to the substance of the transaction and the borrower’s purpose in obtaining the loan, rather than form alone.” *Id.* “That the documents relevant to this transaction label it as ‘consumer’ is not dispositive.” *Id.* Rather, “resolution of [the] issue involves a factual determination of [the borrower]’s purpose.” *Id.* The same reasoning applies here.⁴

⁴ Courts employ the same substance-over-form approach to determine whether a loan is covered by the Fair Debt Collection Practices Act

B. This Court’s holding in *Bordetsky* is inapplicable.

The trial court did not engage with TILA’s statutory text, as elucidated by the Commentary to Regulation Z, or the body of precedent described above. Instead, it relied on this Court’s holding in *Bordetsky v. JAK Realty Trust*, 2017 ME 42, ¶ 12, 157 A.3d 233. The trial court reasoned that, under *Bordetsky*, it was required to confine its analysis of the purpose of the loan to the “four corners of the note.” Tr. at 54:25-55:1. In the court’s view, only “if the note [were] ambiguous,” would it be appropriate to consider “extrinsic evidence.” Tr. at 54:23-25. But nothing in *Bordetsky* indicates that Maine law somehow displaces the ordinary application of TILA’s protections to consumer loans. That is because *Bordetsky* involved a different state statute and, accordingly, did not provide this Court the opportunity to consider the precedent and agency guidance that govern coverage under the federal TILA.

(FDCPA), which contains similar statutory language. *E.g.*, *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992) (“The [FDCPA] characterizes debts in terms of end uses, covering debts incurred ‘primarily for personal, family or household purposes.’ Neither the lender’s motives nor the fashion in which the loan is memorialized are dispositive of this inquiry.”); *Natal-Olivo v. Boss Collection Serv., Inc.*, No. 13-1232, 2014 WL 183894 (D.P.R. Jan. 14, 2014) (“We follow what appears to be a growing consensus. Because the text of the contract is not dispositive, the borrower’s intent is a factual dispute between the two parties.”).

To begin, *Bordetsky* does not apply here because that case involved a different statute. In *Bordetsky*, this Court considered 14 M.R.S.A. § 6111 (Westlaw July 10, 2023), a provision that requires certain borrowers to be provided a notice of their default and opportunity to cure before the mortgagee can foreclose on the loan. Section 6111 only applies to loans for “personal, family, or household use.” *Id.* *Bordetsky* held that, for purposes of determining whether Section 6111 applies, a “court must interpret the note to determine” the loan’s purpose, and, “[i]f the note is unambiguous,” the court should limit its analysis to the “four corners of the instrument without resort[ing] to extrinsic evidence.” 157 A.3d at 238 (quoting *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989). But *Bordetsky* did not involve TILA, nor did it involve the provisions in the Maine Consumer Credit Code that incorporate TILA. And it did not speak to how a loan’s purpose should be determined under TILA. Accordingly, *Bordetsky* is inapplicable here, and the trial court’s reliance on *Bordetsky* without engaging any TILA-specific precedent or guidance was erroneous.

Of course, Maine law may assess the purpose of a loan differently than under TILA, and any given Maine law may have coverage that differs from TILA. But how any Maine law determines its coverage is not relevant

to how TILA determines coverage.⁵ Indeed, to hold otherwise here would be inconsistent with Maine’s Consumer Credit Code, which expressly provides that “[n]otwithstanding any other law, a creditor shall comply with the Federal Truth in Lending Act ... and ... Regulation Z.” 9-A M.R.S.A. § 8-504(1) (Westlaw July 10, 2023). The scope of TILA’s protections—including its holistic test for determining coverage—apply in full measure in Maine. The trial court thus should have looked to the body of precedent and guidance that govern TILA, rather than relying on a decision from this Court that does not even examine the relevant statute.

III. Allowing contractual language to determine TILA coverage would undermine the law’s remedial purposes.

Finally, TILA is “remedial in nature,” *Clark*, 685 F.2d at 248, and allowing contractual language to control whether TILA applies would undermine the law’s remedial purposes. Congress designed TILA to protect consumers “who are inherently at a disadvantage in loan and credit transactions.” *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d 699, 705 (9th Cir. 1986). The law aims to promote the “informed use of credit”

⁵ By the same token, the principle of contract interpretation that extrinsic evidence should only be considered if the contractual language is ambiguous is also irrelevant. How Maine contract law determines the scope and terms of an agreement is a separate question from how TILA determines its coverage.

and “to assure a meaningful disclosure of credit terms.” 15 U.S.C. § 1601(a). In particular, in enacting TILA, Congress sought to ensure that the protections it afforded consumers could not be evaded through artful drafting on the part of creditors. *See Mourning*, 411 U.S. at 365 (“The 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.”).

Similarly, in adopting the Maine Consumer Credit Code—Truth-in-Lending—which as discussed above expressly requires creditors to comply with the requirements of TILA and its implementing regulations—the Maine Legislature found that “[t]he informed use of credit results from an awareness of the cost thereof by consumers.” 9-A M.R.S.A. § 8-502 (Westlaw July 10, 2023). Thus, its purpose is “to ensure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to the consumer and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” *Id.*

The trial court’s decision, however, would allow any creditor to circumvent TILA’s requirements by merely stamping loan documents with a “commercial” label. Neither Congress nor the Maine Legislature intended

to allow TILA's requirements to be so readily evaded. Accordingly, a substance-over-form approach to determining TILA coverage is necessary to effectuate TILA's consumer-oriented purposes. *See Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993) ("Because the Truth in Lending Act is liberally construed to protect consumers, ... the court [should] look[] past the form of the transactions to their economic substance in deciding whether the Act applied."); *Oas v. Rama Cap. Partners, LLC*, No. 8:20-cv-01634, 2020 WL 7786546, at *3 (C.D. Cal. Nov. 18, 2020) (assigning no weight to the fact that the "documents characterize the loan as a 'business loan,'" in order not to enable "self-serving efforts ... to circumvent consumer protections laws"); *see also Curtis*, 915 F.3d at 245 (explaining that "even if [TILA's] plain language were ambiguous, policy considerations would counsel" in favor of a broad view of TILA coverage "because TILA is a remedial consumer protection statute that is read liberally to achieve its goals" (quotation omitted)).

This Court should interpret TILA in a manner consistent with its remedial purposes and reject the proposition that a creditor can avoid TILA simply by labelling a loan "commercial."

CONCLUSION

For these reasons, the Court should hold that whether a loan is covered by TILA turns on the borrower's primary purpose in taking out the loan and is not controlled by the label given the loan in the contract. The judgment should be vacated and this matter remanded to the trial court so that it can consider evidence relevant to whether the loan here was for a consumer or commercial purpose.

July 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2023, I served two paper copies of this brief on counsel for Appellants and counsel for Appellees by United Parcel Service. On July 12, 2023, I also served an electronic copy of this brief on counsel for Appellants and counsel for Appellees by email. Counsel were served at the addresses below:

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