For docket see 10-0121

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Supreme Court of Texas.
The Finance Commission of Texas, The Credit Union Commission of Texas and Texas Bankers Association
v.
Valerie Norwood, Elise Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper and Carlos Rivas.
No. 10-0121.

September 13, 2011.

Appearances:

Evan S. Greene, of the Office of the Attorney General, for petitioners; Craig Enoch, of Enoch Kever PLLC, for Petitioner.

Nelson Mock, of Texas Rio Grande Legal Aid, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0121, The Finance Commission of Texas and others versus Valerie Norwood and others.

MARSHAL: May it please the Court, Mr. Greene and Mr. Enoch will present argument for Petitioners. Petitioners have reserved five minutes for rebuttal. Mr. Greene will open with the first eight minutes and Mr. Greene will present the rebuttal.

ORAL ARGUMENT OF EVAN S. GREENE ON BEHALF OF THE PETITIONER

ATTORNEY EVAN S. GREENE: May it please the Court, the borrowers seek extraordinary relief in this lawsuit. They ask the Court to invalidate the Commissions' interpretations of the home equity lending provisions of the Constitution after the Commissions were given express Constitutional authority to interpret those very provisions. Even assuming ordinary deference principles apply, all of the challenged interpretations must be upheld because they are reasonable and consistent with the Constitution.

JUSTICE DAVID M. MEDINA: So when, if ever, is judicial review appropriate?

ATTORNEY EVAN S. GREENE: Your Honor, fortunately it isn't even necessary to reach the question of whether judicial review is totally excluded in this case because the Commissions' challenged interpretation satisfy the ordinary deference standard that was articulated by the Court in Railroad Commission v. Texas Citizens last term. That was the Court's Seminole opinion on agency deference interpretation. Now the interpretations here were enacted under formal notice and comment procedures. So--

JUSTICE DALE WAINWRIGHT: Counsel, we apply the deference principles when agencies are interpreting statutes. This is an agency interpretation of a Constitutional provision. Is there a difference?

ATTORNEY EVAN S. GREENE: I don't there's any difference, Your Honor, because--

JUSTICE DALE WAINWRIGHT: Is there authority from this Court for that position?

ATTORNEY EVAN S. GREENE: There isn't any authority because this is a unique provision. This is Section 50(u) that gave the Commissions' expressed Constitutional authority to interpret the Constitution.

JUSTICE DEBRA H. LEHRMANN: Excuse me, can I ask you--but are there any similar Constitutional provisions where the power to interpret the Constitution has been delegated in this way?

ATTORNEY EVAN S. GREENE: Expressly to an agency, Your Honor? No, I don't believe so.

CHIEF JUSTICE WALLACE B. JEFFERSON: How about in any other state or in the federal government, do you know of anything that's like this?

ATTORNEY EVAN S. GREENE: I'm not aware of a similar provision, but the reason that this provision was enacted was because home equity lending itself is governed by the Constitution, and for an agency to be able to issue definitive interpretations of what it meant, it had to receive its power from the Constitution itself.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the question that began argument from Justice Medina, I'm curious what your answer is. Is there judicial review or not in this instance?

ATTORNEY EVAN S. GREENE: Your Honor, I believe that you can apply the Texas Citizen standard and apply judicial review to the interpretations because it's a similar situation to when an agency is empowered to construe its enabling statute. Here, the Commissions were given power to interpret the Constitutional provisions. And so if you apply the ordinary deference standard to the interpretations, you can uphold them because they're reasonable and consistent with the Constitution.

JUSTICE EVA M. GUZMAN: Is that the only factor that is similar then, the power to interpret where the Legislature tasked the Commission with this?

ATTORNEY EVAN S. GREENE: Yes, Your Honor. I think the question is really only were the interpretations enacted under a formal rule-making type procedure and there's no dispute here that they were. There's no challenge that our interpretations didn't go through formal notice and comment properly. So I think that once you answer that question, the only question becomes can our interpretations be reconciled with the Constitution. And--

JUSTICE DAVID M. MEDINA: Well, it seems that their definition comes from one part and the argument on the other side is that the definition of interest is also in the usury part, which is intended to protect consumers. So if they're right, you lose.

ATTORNEY EVAN S. GREENE: As far as the interest interpretations, Your Honor, the interest definition that the Commissions used is the definition of interest. It's the only one contained in the Finance Code and it applies

well beyond the usury context to things that have nothing to do with consumer protection-- like judicial pre-judgment interest. And so the Commissions took this 100-year-old definition of interest that has been in the statutes in virtually the same form for all that time.

JUSTICE DAVID M. MEDINA: I'd like to be-- It's like a smoke screen though because you have fees here that are also tacked on and the argument is that the fees are also included in the broad term of interest.

ATTORNEY EVAN S. GREENE: That's not right, Your Honor. There are fees that will be capped under the Commissions' definition of interest.

CHIEF JUSTICE WALLACE B. JEFFERSON: What fees are those, if you can detail those?

ATTORNEY EVAN S. GREENE: It's hard to give specific names to fees because the test actually looks to the substance of the transaction.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you just said, there are fees that would be subject to the cap and I'm curious what fees those are?

ATTORNEY EVAN S. GREENE: What types of fees?

CHIEF JUSTICE WALLACE B. JEFFERSON: Sure.

ATTORNEY EVAN S. GREENE: Anything that's extended that is independent from the loan itself that would be charged irrespective of whether the loan is made and one that--

CHIEF JUSTICE WALLACE B. JEFFERSON: Example.

ATTORNEY EVAN S. GREENE: Any third party, like attorney's fees that are passed on through the lender to the borrower, those are going to be capped--

JUSTICE PHIL JOHNSON: Counsel, which of those fees are involved in this case? I know in Tarver, there was a discount to buy down the loan percentage and that was held to be interest. Now, there was a real controversy in that case because the borrower sued the lender. Now in this case, in the trial court's judgment, no one's given any relief. We don't talk about any of these plaintiffs having anything at risk in this case, no complaint. We just have a judgment declaring these rules valid and invalid and the Court of Appeals is the same way. So up here, how do we know even what we're talking about?

ATTORNEY EVAN S. GREENE: Well, that's a good question, Your Honor. The borrowers are seeking facial relief to challenge the interpretations outright going forward so they don't--

JUSTICE PHIL JOHNSON: Do they have standing to do that? Is there any real case or controversy involved in this?

ATTORNEY EVAN S. GREENE: I think the threshold is pretty low in this case because they're seeking declaratory facial relief saying that essentially the interpretations conflict with the Constitution and so anyone will be harmed by the interpretations going forward. But you're right, there are no specific loans at issue in this case.

JUSTICE DON R. WILLETT: Mr. Greene, going back to the standard, what do you make of Professor Beal's proposed alternative and how would you fare under that?

ATTORNEY EVAN S. GREENE: I think that Texas Citizens answers the question. It basically says that, as long as the interpretation is enacted under formal notice and comment, the only question becomes whether it

can reconciled with the Constitution and here, the borrowers, they failed to show that any other definition of interest was intended by the Legislature. Again, the Commissions used the statutory definition of interest, which has been applied by this Court and other courts for over 100 years, so there's a whole of precedent and context by which you can take the definition of interest that we've used and just apply it in the home equity lending context.

JUSTICE DEBRA H. LEHRMANN: Doesn't that just basically nullify the restrictions on the fees?

ATTORNEY EVAN S. GREENE: No, Your Honor. There are fees that will continue to be capped under the interest definition that the Commissions have used here. Again, any third-party fees that are passed on by the lender are not consideration for making the loan, because the third party isn't extending the loan, and things that are passed on directly by the lender that are not-- that are independent and separate from the loan itself will still constitute fees. And so it's not true that the interest interpretations that we've used here will totally negate the fee cap and if you look at the Fifth Circuit case that actually consider the question on an Erie guess case, Cerda, which we cited, in our briefs, the court held that it just simply makes sense to define interest and fees the same way that they've been applied and defined in every other lending context. It shouldn't be different for home equity lending because it's difficult to make sense out of what would become interest in that context.

JUSTICE NATHAN L. HECHT: So the Commissions' position on review is that the court should just not decide what the scope of review is.

ATTORNEY EVAN S. GREENE: I think that you can decide the case under Texas Citizens without having to answer the harder question about whether judicial review is available. It is a real legitimate question because the Commissions were given express Constitutional authority to interpret specific provisions of the Constitution here and so it creates a unique issue, but fortunately, it doesn't necessarily have to be answered because again, under the Texas Citizens standard, our interpretations plainly must be upheld because the borrowers have not proven that they cannot be reconciled with the Constitution.

JUSTICE DALE WAINWRIGHT: But staying with the issue of the standard of review, our district courts have the authority to interpret statutes, right?

ATTORNEY EVAN S. GREENE: That's correct.

JUSTICE DALE WAINWRIGHT: And we review those on appeal. Is there anything in the Constitutional pro visions that issue here that preclude appellate review?

ATTORNEY EVAN S. GREENE: That preclude it? No, just--

JUSTICE DALE WAINWRIGHT: That says, those institutions, those agencies have the authority after the organic statutes were enacted by the Legislature to interpret the provisions, but nothing precludes judicial review of those provisions, does it?

ATTORNEY EVAN S. GREENE: Nothing express, Your Honor, except Article 2, Section 1, the basic separation of powers clause says that, normally the judiciary exercises the judicial function except where explicitly authorized in the Constitution to another branch of government and that's what happened here, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

JUSTICE DEBRA H. LEHRMANN: I have one question about the oral loan application. Doesn't the language in (50)(a)(6)(M)(i) submits an application, doesn't that imply a formal application?

ATTORNEY EVAN S. GREENE: I believe that, well that provision isn't at issue anymore in this case, Your

Honor. That interpretation is no longer being challenged by the borrowers in this case.

JUSTICE DEBRA H. LEHRMANN: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel.

JUSTICE PHIL JOHNSON: Counsel, the preceding counsel said, the threshold is low for us to find a case for controversy here and it's not raised in any brief, but no one's asking for any relief here other than simply, it looks to me like an advisory opinion out of the judiciary. Can you enlighten us on that?

ATTORNEY CRAIG ENOCH: Your Honor, under the Tabb case, it has an association that could represent parties that are similarly situated. This began as an ACORN, Association of Citizens for Reform Now, organization that then became defunct and these individuals substituted in attempting to represent those same interests and I have not looked at the standing or jurisdictional issue to come before the Court at this point. We accepted it in that posture when it came. I like the blue chairs, by the way. Anyway, my name's Craig Enoch. I represent the bank, Texas Bankers Association in this case and I do think the Court really does have a question that it has to address. Does it have a role in oversight of the Commissions' interpretation of the Constitution? And we would say, yes it does. The Constitution does not exclude review. That's the first point. The second point is, in fact Section 16 or Article 16, Section 50(u) expressly recognizes that appellate courts will have a role in review and interpreting these Constitutional provisions; that's (u) subparagraph 2 that it could be an interpretation made by the state agency that's delegated or by an appellate court. So there is a role, -it seems to me.

JUSTICE NATHAN L. HECHT: So how do you read that provision? It's kind of hard to read.

ATTORNEY CRAIG ENOCH: Yes it is. It's missing something.

JUSTICE NATHAN L. HECHT: So you think that means that the Commission is like an appellate court?

ATTORNEY CRAIG ENOCH: I believe, Your Honor, we'd have to accept that under the Constitution, the Commission does perform a role like an appellate court interpreting the Constitution. But that does not exclude judicial review and I'd like to take a few minutes just to sort of explore that with you. This Court has faced this identical dilemma before twice in Pool v. Ford Motor Company, the Court faced the dilemma where it did not have jurisdiction to address factual sufficiency review, but it did have the Supreme Court's proper role to see that the appellate court was applying the factual sufficiency review properly. Although that case did have some criticism to it, even a concurring opinion, Justice Gonzales, agreed that the principle was valid, that the Supreme Court had the ultimate oversight to make sure that the reviewing court was performing its function properly. More recently in 2009, this Court ruled in In re Columbia Medical, where the trial court has complete discretion to grant a new trial, but this Court said, we can't determine whether that discretion is being handled properly if the trial court isn't required to have a complete analysis of the facts and review so we can see what the reasons are and the parties know what the reasons are. The court has recognized in both cases that it's the purview of the lower court to make these decisions, but what's the proper role of the Supreme Court and its oversight is to make sure that those courts follow the principles that are to be followed in exercising their decisions.

JUSTICE DAVID M. MEDINA: Is there a different degree of deference that's given in these type of situations as compared to, this is a Constitutional issue here. What if it's a legislative issue because I think there's some comment made in the dissent by Justice Puryear that because it's a legislative enactment, then you get more of a broad type of discretion.

ATTORNEY CRAIG ENOCH: You know, I think the courts have used giving deference as kind of a thumb on the scale, but I say the bottom line on all the deference questions is really more in the language that this Court has used in a number of different cases when it's doing a legal sufficiency review, which is to say could, in this

case, a Commission reasonably conclude that interest means compensation for use, forbearance or detention of money. Could a reasonable Commission make that determination? And it seems to me that's the standard under the Constitution. What this Court does even when the Legislature has delegated legislative authority for an agency to make some interpretations and rules and statutes, this Court has used that, I think it's a similar standard that this Court can use on the Constitutional question.

JUSTICE DON R. WILLETT: What is your take on the standard that Professor Beal proposes?

ATTORNEY CRAIG ENOCH: I read Professor Beal's. He was more concerned about whether the process was handled properly, and then he says there shouldn't be a substantive review. I disagree. I believe there is a substantive review. This Court is not excluded from making the substantive review; but it is unique in that the Constitution gives the authority of interpretation to the Commission. And as a result, this Court - in applying its duty to review the substance of what happens, to give weight to what the Commission has said, and that's not to say its de novo. De novo is, -you now look at the Constitution and you do what you do, -and you come to a conclusion of what the Constitution means. Because the Constitution gives Constitutional weight to the interpretation, I suggest this Court's review is, again, could a reasonable Commission conclude that the interest of definition means compensation--

CHIEF JUSTICE WALLACE B. JEFFERSON: Assuming that's correct, -and that there is a judicial review, there are other aspects of what the Commissions about their interpretations including power of attorney and including whether the consumer can mail in the written consent for the lien and on the latter, isn't it the case that these closings were supposed to happen at a particular place not at home and if you permit somebody to mail in the lien, doesn't that contravene the purpose of the legislation to begin with. Do you see what I mean?

ATTORNEY CRAIG ENOCH: Yes, Your Honor, and I see those two points that are made and the argument is made, but I think the court does not get involved in what would be the better determination. I'd say it's really the text of the statute. Now you're looking at the mechanics of a closing. It seems to me that if the court accepts the proper role of its oversight, it then evaluates that. Could it reasonably conclude, could a Commission reasonably conclude that once it reaches that, then the fact that that may not be wise, may not be the appropriate way, hence the discussion.

CHIEF JUSTICE WALLACE B. JEFFERSON: But --signing the lien is part of the closing and the act says that, closing has to occur at the lender's office or attorney's office or title company. And so, -if it's occurring at the consumer's home or a place other than those three locations, isn't that a problem?

ATTORNEY CRAIG ENOCH: Your Honor, admittedly, that could be a problem, but in evaluating that, you will have any number of people who are physically unable to go to a closing. Are mentally aware, are alert, they know what they're doing, they are having their daughter, their husband execute powers of attorney so that those closings can occur. I think as the court analyzes all of the factors, it will say the Commission could reasonably conclude that that's appropriate and even if this Court would decide well, we think that's not a good idea, then the Constitutional review, this Court would say, the wisdom of this decision is not for the court to make. Could a reasonable Commission decide that question? The bottom line is, -could the Commissions reasonably conclude any interest is compensation for use, of forbearance, the detention of money. We think that they could. We also think they could do that as to the other two rules. We do think the Court does have the right to review under that standard and we think the court of appeals, in its reversal of the interest, should be reversed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Mock will present argument for the Respondent.

ORAL ARGUMENT OF NELSON MOCK ON BEHALF OF THE RESPONDENT

ATTORNEY NELSON MOCK: May it please the Court, the Commissions have interpreted what are some of the most important homestead protections for Texans in the Constitution. The homeowners brought this suit challenging some of those interpretations. Three of those interpretations were changed voluntarily by the Commissions; three of those interpretations challenged were mooted out by changes in the Constitution; and the remaining three are before the Court today. I would like to focus this morning primarily on one of the most significant of these interpretations, the 3% fee cap. The ultimate question before the Court relating to the fee cap is this. Are origination fees included in the 3% fee cap? Or in plain language, is a fee to originate an origination fee?

JUSTICE EVA M. GUZMAN: But before we get to that, can you spend a few moments on the standard of review question and respond to the argument that it is this Court's proper role, if you will, to simply ask could a reasonable Commission conclude, make the conclusions that it's made?

ATTORNEY NELSON MOCK: Yes, Your Honor. The review by this Court of the Commissions' interpretations of the Constitution should be de novo. Now, regardless of the standard of review, no deference should be given to the Commissions because their interpretations are not consistent with the plain language of the Constitution. However, the reason why the standard of review should be de novo is that this Court, in particular, is the final arbiter of the meaning of the Constitution. It reviews Constitutional interpretations by district and appellate courts de novo and this Court has never given any district or appellate courts any sort of deference in its interpretation of the Constitution. To the extent that the Commissions have a quasi judicial right to interpret the Constitution, like an appellate or district court, this review then, therefore, should be de novo. If nothing--

JUSTICE EVA M. GUZMAN: If it's quasi-judicial, why wouldn't we then analogize to the situation Mr. Enoch brought up when we look at whether the Court of Appeals applied correctly the factual sufficiency standard. What's wrong with that argument?

ATTORNEY NELSON MOCK: Well, and I'll say, first of all, there's nothing in 50(u) that elevates the Commissions out of the judicial scheme. If the court were to give some sort of deference like the Third Court of Appeals gave it, it would not be along the lines of the cases that have been mentioned before and the reason for that is because the many cases, Texas Citizens, Moore and all its progeny, are specifically deference to agencies that were charged with enforcing their own statutes. They were all agencies consistently that had additional rights, additional powers under those rules and that is distinct and apart from what we have here today. What the Commissions are doing simply is interpreting the Constitution. It is a power that is given to them by the Legislature through the Constitution.

JUSTICE DALE WAINWRIGHT: The Commissions have expertise in the areas they've been authorized to interpret, correct?

ATTORNEY NELSON MOCK: Yes, that is correct.

JUSTICE DALE WAINWRIGHT: One of the reasons we allow or provide for deference to those agencies when they're interpreting legislation.

ATTORNEY NELSON MOCK: Yes. And the distinction here, once again, is that the role that they have is simply to interpret; all the Commissions have the right to do is to tell us what the meanings of the, what the meaning of the words in the Constitution are. And bear in mind, of course, that when someone is violating something, they're not violating the Commissions' rules. They're violating the Constitution and for that reason, this quasi-judicial rule, this quasi-judicial power that they have is like a district or appellate court and the review should, therefore, be de novo.

JUSTICE PAUL W. GREEN: Do you think that the people of the State through a Constitutional amendment are

able to remove judicial review from an agency's determination like this?

ATTORNEY NELSON MOCK: Could the Constitution be changed so that the agencies no longer have the right to interpret the Constitution?

JUSTICE PAUL W. GREEN: Right.

ATTORNEY NELSON MOCK: Absolutely. In fact, the only reason why the Commissions are able to interpret the Constitution is that they're given this specific right through the Legislature appointing them to interpret the Constitution. If that were to be withdrawn, they would no longer have that right.

JUSTICE PAUL W. GREEN: So in this provision where it says that, the Legislature gives the, can an [inaudible] provision, granting the Commission the right to interpret those provisions does not take it out of judicial review?

ATTORNEY NELSON MOCK: No. And I think the parties have conceded the Commissions and the Texas Bankers Association have conceded as much. It's not removing it from judicial review. The court has this right to judicial review.

JUSTICE PHIL JOHNSON: But the Legislature was not required to delegate that authority. I presume it could have passed a statute on its own?

ATTORNEY NELSON MOCK: No. In order for the Legislature to disrupt the balance of powers, the ability for any agency to interpret the Constitution and for those then to have significance, it would have to be a Constitutional amendment that would allow the Legislature to do that.

JUSTICE PHIL JOHNSON: I'm not talking about the Legislature interpreting, but the Legislature just passed a statute saying the-- setting out which fees would be fees and which fees would be interest. Like if we--

ATTORNEY NELSON MOCK: Yes. And the only way, Your Honor, and the only way the Commissions have the right to do that is because there is a Constitutional amendment allowing the Commissions to interpret the Constitution. The Commissions can always interpret the Constitution. The problem, of course, is they don't have that judicial power if it is not appointed to them by the Constitution. And it is also very clear in case law that the only power that they get through a Constitutional amendment like this is what is specifically in the Constitution and the Constitution does not disrupt the judicial scheme. It doesn't give them any sort of exclusive right to do this. It doesn't do anything more than allow them to tell us what the words mean in the Constitution. These are not rule making.

JUSTICE DALE WAINWRIGHT: Counsel --I'm not sure I understood your answer to Justice Johnson's question. Maybe I just didn't hear part of it. Could the Legislature rather than authorizing the Commissions to interpret these rules have just written a statute that said, these are fees, these are interest?

ATTORNEY NELSON MOCK: And the answer is to the extent that it was an interpretation of the Constitution, the answer is no. That what this section with the provisions of the Constitution 50(u) allows is for the Legislature to appoint an agency or agencies; -and so the Legislature itself could not do that in terms of the Legislature appointing itself to interpret the Constitution. Again, this Court is the final arbiter of what the Constitution means.

JUSTICE DAVID M. MEDINA: I agree with that. Now this here, you want to answer the question about the origination fee, Mr. Mock?

ATTORNEY NELSON MOCK: Yes. So the ultimate question with regard to the fee caps is whether or not an

origination fee falls into the 3% fee cap or in plain language, if a fee to originate is an origination fee and there is only one court that has held squarely on this issue and that is and has rested squarely and that is Judge Nowlin in the Thomison case.

JUSTICE NATHAN L. HECHT: Well, do you hear the Commissions to agree that it would fall within the cap if it were charged by somebody other than the lender?

ATTORNEY NELSON MOCK: Sure. And of course, it would fall under the cap. The question and this is the--

JUSTICE NATHAN L. HECHT: So are we down to not just an origination fee, but an origination fee charged by the lender?

ATTORNEY NELSON MOCK: That's exactly right. And Judge Nowlin had that identical issue and Judge Nowlin in the Thomison court basically said, fees to originate are origination fees and so therefore, they're included in the fee cap. Now the interesting thing about the case law on this issue is that numerous cases have also included origination fees in the fee cap. They haven't done any analysis with regard to this, but they have included them in the fee cap either automatically or by concession from the parties. So one of the questions is what is an origination fee? A loan origination fee is a one-time fee paid upfront to the lender by the borrower before the loan is made. It is often one of the largest fees that a homeowner will pay and some of the cases before that have been discussed by the parties illustrate this. In the Cerda case, the Fifth Circuit case, for example, the homeowners paid over $10,000 in origination fees. In the Maluski case--

JUSTICE PHIL JOHNSON: Stop you right there.

ATTORNEY NELSON MOCK: Yes.

JUSTICE PHIL JOHNSON: Have any of these homeowners paid any origination fees in this case?

ATTORNEY NELSON MOCK: Your Honor, I don't -- I would have to go back.

JUSTICE PHIL JOHNSON: Is it in your record at all?

ATTORNEY NELSON MOCK: I'm sorry, Your Honor.

JUSTICE PHIL JOHNSON: Is there any record that any of these homeowners have paid any origination fees in regard to their home loans, home equity loans?

ATTORNEY NELSON MOCK: I believe so but I would have to go back and look at the record to confirm that with the court, Your Honor. All of the homeowners who were originally part of this case and the filing of this case have had home equity loans, and would have an interest in getting a home equity loan in the future. As the Commissions have conceded, the bar in order to challenge a case through the APA and the Declaratory Judgment Act is fairly low and they all have an interest in the case.

JUSTICE PHIL JOHNSON: So how low is it that we don't just give an advisory opinion?

ATTORNEY NELSON MOCK: And it would not be an advisory opinion, Your Honor. We're asking that the Court interpret the Constitution. And we believe that the court has the right to interpret the Constitution in this case because the Commissions are interpreting the Constitution and in as I mentioned, a quasi-judicial power. But if you look at origination fees, and if you look at those cases in particular, in the Cerda case, for example, the over $10,000 that they paid was 97% of the amount that would be the 3% fee cap.

JUSTICE DEBRA H. LEHRMANN: Can I ask you a question that has to do with that?

ATTORNEY NELSON MOCK: Yes.

JUSTICE DEBRA H. LEHRMANN: As far as bank practices with regard to these fees, do you know how uniform they are? And what I'm getting at is competition in the marketplace. Is that going to help deal with this concern?

ATTORNEY NELSON MOCK: And I'm sorry, I'm not quite sure that --

JUSTICE DEBRA H. LEHRMANN: As far as the interest, as far as the whole interest issue, basically doing away with the cap, the 3% cap and so the marketplace, the competition, is that going to help deal with that issue?

ATTORNEY NELSON MOCK: The reality is that a change in the fee, if the court was to get rid of the fee cap somehow through the Constitution, banks would be charging probably the same of what they are charging right now. The point is that the fee cap and banks can charge as much as they want to right now. The fee cap is not a cap on interest. What it is is it allows homeowners to know what they're going to be paying and so when they get a notice, which is required by the Constitution, one day before they show up at the closing, they can be assured that even though those numbers can change, that they will be charged no more than 3% in fees, 3% in fees; and that has to include the origination fees by the language of the Constitution.

JUSTICE DEBRA H. LEHRMANN: But what I'm saying is that that 3% did not apply, then are those marketplace considerations going to help deal with the issues that have been raised as far as those fees being too high. How uniform is the practice? Or you may not know that.

ATTORNEY NELSON MOCK: No. And I think the result is basically a shuffling of the fees. I mena, one of the points of the fee cap was so that Texans knew upfront what they were going to be charged. Now and so the point is that homeowners would know that one day before they're going to close, they get a listing of all the fees that they're not going to charge no more than 3% in fees, but the banks can charge higher interest rates or lower interest rates, you know, and- and it can even out. The point is to have an even ground so that homeowners can shop around for the competitive mortgages and competitive rates.

JUSTICE DAVID M. MEDINA: Mr. Mock, what's your answer in response to the Commissions' interpretation of the definition of interest has been used for over 100 years, therefore, we should not question their interpretation?

ATTORNEY NELSON MOCK: And the response to that is all of that jurisprudence has to do with looking at that definition of interest as usury. If you'll turn to page 1 of the handout and this is the Texas Constitution because this goes to the heart of this issue. This is the plain language of the Constitution. And it says, in this portion the fee cap that a home equity loan is valid on the condition that it does not require the owner or an owner spouse to pay in addition to any interest fees to any person that are necessary to originate, evaluate, maintain, record, ensure or service the extension of credit that exceed in the aggregate 3% of the original principal not of the extension of the credit. The point is to limit fees to originate. And there is nothing--

JUSTICE NATHAN L. HECHT: You sort of mention that there might be some fee shifting, but is there any way for a fee charged by the lender to benefit anybody else? It's always going to just benefit the lender, right?

ATTORNEY NELSON MOCK: No, there could be third parties. You could pay the fee to a lender that would go to someone else. But the point of the language is that if it is a fee to originate, then it should be considered in the fee cap. And there is nothing in, there's not a shred of legislative history from the 1997 law committee report statements on the floor of each chamber, descriptions of protections and from public statements about the fee cap prior to the voters actually voting on this law that supports that these fees were not to be included in the fee

cap. All of this legislative history supports is that this was the intent of the Legislature and this was the understanding of the voters and so we get back to so how is it that the Commissions consider that an origination fee is no longer in the fee cap. If you look at page 2 of the handout, you'll see that this is what the Commissions are talking about. They define interest using this portion of the Texas Finance Code, which is a definition of interest that has been defined by courts over many, many years for the purpose of usury, a cap on interest and one of the main reasons--

JUSTICE EVA M. GUZMAN: Isn't it also used though in other provisions of the subtitle not addressing usury. I mean it's also used in other context, the same definition. Or is that different--

ATTORNEY NELSON MOCK: It is also used in other contexts, but primarily it is used in the context of usury; because the point is that it's a cap on interest, but the reason why the language of the Constitution included and any interest in that description before it go to describing fees that originate, maintain, etc., was because the Legislature wanted to make sure that that fee cap provision was not a cap on interest. That was the whole point and the problem is that the Commissions have used a technical definition here that essentially defeats the purpose of the Constitutional protection and if you look at the actual definition under this provision of the Finance Code, it actually looks fairly benign. Interest means compensation for the use, forbearance or detention of money and you have to look at the case law to realize that essentially what this is it's clearly a cap on interest. It is meant to be and it's meant to be a very broad definition and the Commissions conceded that, in fact, an origination fee paid to a lender would fall outside of the fee cap as a result of their definition and so they have chosen a technical definition that defeats the purpose of the fee cap. Again, there's no shred of legislative history in 1997 that would support this, that would support that there would be exceptions to origination fees falling outside of the fee cap.

JUSTICE NATHAN L. HECHT: Let me be sure that I understand how you think this works and that is is there any way for someone other than the lender to be benefited by an origination fee charged by the lender?

ATTORNEY NELSON MOCK: Sometimes third parties who might be doing a lot of the work a broker, for example, setting up the loan might get a fee that could be called, an origination fee, but again, the interesting thing is that no court has found that origination fees fall outside of the fee cap and that is indicative of how Texans will be charged higher fees if this Court were to validate this rule.

JUSTICE NATHAN L. HECHT: Well, that's the part I'm struggling with because the cap, clearly, the Commissions agree that the cap applies to origination fees charged by people other than the lender so is there any way that now fees that would come under that cap can be moved out of that cap and into interest. That's the question.

ATTORNEY NELSON MOCK: But if you look at the definition of the Constitution, it says, fees to any person. That would include the lender, that would include a third party, that are necessary to originate.

JUSTICE NATHAN L. HECHT: I take your argument, but I'm just wondering still is there any way to shift it. Is there any way that given the Commissions' position that fees could be that would otherwise be capped would be moved over under the category of interest and avoid the cap?
ATTORNEY NELSON MOCK: And if the question is, if there's any other way if this Court were to find, well, first of all, the language doesn't allow it in the Constitution. Second of all, in order for that to happen, I think you would have -- the Legislature would have to, people would have to vote on a change to the Constitution that would state specifically that, you know, fees to a third party are to be included in the fee cap. Fees to the lender are not, but it doesn't do that and for that reason, the origination fees have to be included in the fee cap.

JUSTICE DAVID M. MEDINA: What would the impact on the industry and on consumer if you do not prevail here?

ATTORNEY NELSON MOCK: I think there would be higher fees because all indication from the cases that

are before the court and our own experience is that lenders are not yet pushing origination fees outside of the fee cap. All the cases that have considered it have simply put it inside the fee cap and what will happen is that fees for Texans will raise. Now one of the questions that the court may have is what specifically are the, what would be the definition of interest? And I provide four different examples of in the Constitution where the definition of interest that can- that would apply would relate to the rate of the note and that's the only way those sections would make sense. Now I only have one minute remaining so I want to make one point and that is there is a middle ground here and that is the Court could find per the plain meaning of the Constitution that fees to originate, evaluate, maintain, record, ensure or service a loan are not interest. It could find that that's the plain meaning of the Constitution and therefore, it be included in the fee cap and if the Court were to do that, the Commissions own definition of interest, which includes the phrase "as interpreted by the courts" would then be valid and in fact, that phrase in the rule invites this action. If the Court were to do this, it could mean that the Commissions' fee cap rules were consistent with the plain language of the Constitution. If the court were not to do that, these rules are clearly invalid and in violation of the plain language of the Constitution.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, I doubt the Commissions would agree that that's a middle ground.

ATTORNEY NELSON MOCK: I would agree, Your Honor, because they would exclude origination fees paid to a lender from the fee cap.

JUSTICE DAVID M. MEDINA: It seems to me that if the only concern is higher fees, then as Justice Lehrmann, I think, was alluding to, then the marketplace will take care of that because consumers will shop for better rates and better fees and it won't be an issue.

ATTORNEY NELSON MOCK: But the real problem, Your Honor, with regard to the fee cap is not that the, this does not keep lenders from raising their rates. It doesn't. What it does is it allows homeowners to know what they're buying and it allows so that it's not the lenders that have the best sales force or the pushiest sales force getting the customers, but Texans homeowners knowing exactly what they're getting.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Mr. Mock.

REBUTTAL ARGUMENT OF EVAN S. GREENE ON BEHALF OF PETITIONER

ATTORNEY EVAN S. GREENE: May it please the Court, I'd like to start with the fact that de novo review simply cannot be the standard here. The Commissions' authority comes from the Constitution and the Commissions were given expressed interpretative authority over these provisions. It certainly makes no sense than an enforcement agency given statutory authority to regulate has more, or should be entitled to more deference than the Commissions who have direct Constitutional authority to interpret home equity loans--

JUSTICE NATHAN L. HECHT: I understand the argument it just can't be that way, but I don't understand the argument from the text because it seemed to be that your -- counsel for the other Petitioner was correct about Part 2 of Paragraph (u) and it seems to say, although it's sort of oddly written, but it seems to say that basically the Commission is taking on the role of an appellate court and if that's the case and all it's doing is interpreting the Constitution, if it were another appellate court, we would look at it de novo.

ATTORNEY EVAN S. GREENE: What that provision says, is that if a loan complies with an interpretation that had already been issued in a Court of Appeals through litigation or through the Commissions, that that loan needs to be upheld, but it doesn't say that you go and undo ordinary separation of powers type principles and then under ordinary circumstances, courts provide deference to a formal interpretation of the law that's issued by an agency and again here the Commissions' power comes from the Constitution itself not just from a statute. So and I would--

JUSTICE NATHAN L. HECHT: I still don't understand what you said. It says, made by a state agency or a Commission, to which the power of interpretation is delegated as provided by this subsection, all right, or by an appellate court of this state or the United States.

ATTORNEY EVAN S. GREENE: Right.

JUSTICE NATHAN L. HECHT: So if we're going to look at an appellate court of this state or the United States and they say the Constitution means X, we're going to look at that de novo. But you say if it's the Commission, no, it's a much higher standard.

ATTORNEY EVAN S. GREENE: No. Your Honor, what -- litigation may still arise over the meaning of the home equity lending provisions and when it does, once it's reached a court of appeals and that court of appeals has issued an opinion of law about that loan, all that provision says, is that future transactions may rely upon that provision and they have safe harbor even if subsequently some court may theoretically disagree with that opinion. That provision just says that, future loans are entitled to rely upon the provision, but again assuming that reasonableness review applies here, the interpretations that exist here that were being challenged existed in advisory authority before the Commissions were given express Constitutional authority to interpret the Constitution. These are the Commissions' are interpretations that are being looked at here existed in virtually the same substantive form before the Commissions were then given expressed Constitutional authority to essentially turn those advisory opinions into law and so I think if anything speaks to the reasonableness.

JUSTICE NATHAN L. HECHT: Well, I don't understand; what do you mean by that? You mean the definition of interest predated this authority?

ATTORNEY EVAN S. GREENE: The Commissions' interpretations existed in regulatory advisory form from 1998 until 2003 when the Legislature then gave the Commissions authority to essentially transform those existing interpretations into law and so Your Honor, I'd like to just speak about the interest definition for a second. Counsel implies that it only applies in a usury context or that it mostly does. This Court has looked at the definition of interest that's used in the Finance Code and applied it to things like judgment interest that have nothing to do with consumer protection. The simple fact is that the interest definition here is the only interest definition that exists in the Finance Code and all the Commissions are doing is taking that basic definition and saying let's use the same thing in the context of home equity lending.

JUSTICE NATHAN L. HECHT: But the problem is the Constitution differentiates between interest and origination fees.

ATTORNEY EVAN S. GREENE: Right and under the Commissions' rules and origination fees can still be capped so long as they're not interest. Any time an origination fee is charged by a third party like a broker that brokers a loan, that's going to end up getting capped. If a lender charges something that they denominate an origination fee, often it is nothing more than interest. In other words, it's just a different type of charge that's made for extending the loan, but even under the Commissions' interpretations, if something is denominated an origination fee that is actually charged for something that's independent of a loan, that - because the - again, the interpretations look to substance--

JUSTICE NATHAN L. HECHT: Would that be true even if the - even if it was charged by the lender?

ATTORNEY EVAN S. GREENE: Yes, I mean in most cases, I think an origination fee is only charged in connection with actually extending a loan so it will be interest.

JUSTICE NATHAN L. HECHT: So the Commissions' position is that if the lender charges an origination fee, but pays it somehow to a third party, that would not be interest.

ATTORNEY EVAN S. GREENE: That's right. So at the end of the day, the borrowers are trying to use the courts to effectuate their desired policy here, but the bottom line is they failed to show that the Commissions' interpretations are impossible to reconcile with the Constitution and we submit that that's the standard that the court should apply so because all of the challenged interpretations they reasonably interpret the home equity lending provisions of the Constitution, the court should render judgment denying the borrowers claims and upholding interpretations.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. Before we close, the Court would like to acknowledge our senior colleague, Justice Nathan Hecht. He began his service to the Texas judiciary and to the people of this State on September 1, 1981 as judge of the 95th District Court in Dallas. That's 30 years. He then served as a justice of the Court of Appeals for the Fifth District of Texas and is the Senior Appellate Justice in active service in the State of Texas. Nathan has been the court's liaison to the rules of procedure during his 22 years on this Court and successfully led the effort to save access to justice funding in this last legislative session. The court dedicates the opening of this term of Court to our friend and colleague, Nathan Hecht. Thank you. And that concludes today's oral argument. The Marshal will adjourn the Court.

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