

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

BARBARA MORGAN et al.,

Plaintiffs and Appellants,

v.

YGRENE ENERGY FUND, INC. et  
al.,

Defendants and Respondents.

JANET ROBERTS et al.,

Plaintiffs and Appellants,

v.

RENEW FINANCIAL GROUP, LLC  
et al.,

Defendants and Respondents.

Supreme Court CASE No.

S277628

D079364 (4<sup>th</sup> Dist. Div. 1)

(Super. Ct. No.  
37-2019-00052045-CU-  
OR-CTL)

D079369 (4<sup>th</sup> Dist. Div. 1)

(Super. Ct. No.  
37-2019-00059601-CU-  
OR-CTL)

San Diego County Sup. Ct. Cases 37-2019-00059601-CU-OR-CTL  
& 37-2019-00052045-CU-OR-CTL

Hon. Richard S. Whitney, Department 68, (619) 450-7068

**(REPLY) PETITION FOR REVIEW**

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**1. Review of the Decision Here is Sought to Preserve the Current and Future Ability of Consumer Plaintiffs to Use the Unfair Competition Law for Its Intended Purpose of Enabling Judicial Tribunals to Deal with the Innumerable New Schemes which the Fertility of Man's invention would contrive *Loeffler v. Target Corp.*, (2014) 58 Cal. 4th 1081, 1125.**

In this Court's decision in *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1142 (Cal. May 1, 2014) dissenting members of the Court cautioned against reading the decision as negating the application of the Unfair Competition Law in all cases where the defendants' alleged unlawful, unfair, or deceptive business practices took place in a tax related context:

The court's ruling, though erroneous, ***need not be read to broadly establish that a consumer action may never go forward if it involves a tax issue.*** This case implicates a rather arcane and complicated question of taxability. *Future cases may implicate tax questions that are distinguishable from the one at issue here.*

***In light of California's strong legislative policy against deceptive business practices, courts should hesitate to [\*\*88] expand the hole that today's decision carves out of our consumer protection statutes.***

*Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1142 (Cal. May 1, 2014) (dissent)

The majority opinion in *Loeffler* did not dispute the importance of private enforcement of the Unfair Competition Law to the overall statutory scheme. Neither did it create a bar on UCL actions in *any* consumer litigation with *some connection to a tax matter*. It did ***what the Morgan Court did not do***, i.e., it conducted a *detailed evaluation of the causes of action against Target, the private party defendants, and the relevant statutory tax scheme involved* **and made a reasoned determination as to whether the civil litigation could proceed as consistent with that statutory scheme.**

Here, the Court of Appeal undertook no *Loeffler* type analysis as to **how permitting the alleged private cause of action under the UCL to proceed would affect the tax law**. Instead, it simply **proclaimed as fact** that the UCL claim against the private parties was really one against the government seeking a tax refund from the government:

The liability theories are intriguing, but we need not and do not address them here. The appeals turn

instead on a procedural issue. Generally, a taxpayer may not pursue a court action for a refund of property taxes without first applying to the local board of equalization for a reduction and then filing an administrative claim for a refund. (Rev. and Tax. Code §§ 1603, 5097;

\*\*\*

On appeal, plaintiffs primarily contend they were not required to pursue administrative remedies because they have sued only private companies and do not challenge “any aspect of the municipal tax process involved.” (Italics omitted.) But as we will explain, **the complaints seek tax refunds, an injunction against future tax assessments, and removal of tax liens. Despite their assertions to the contrary, plaintiffs do challenge their property tax assessments. And although they have not sued any government entity,** the “consumer protection statutes under which plaintiffs brought their action cannot be employed to avoid the limitations and procedures set out by the Revenue and Taxation Code.” (Loeffler v. Target Corp. (2014) 58 Cal.4<sup>th</sup> 1081, 1092 (Loeffler).)

Petition for Review, *Morgan* Decision, at BATES  
PAGES 000040 - 000041

The *Morgan* Court’s conclusory pronouncement that the Plaintiffs’ UCL action against private party defendants was really seeking a tax cancellation and refund from the government (though the government was not even a party to the case) and is

subject to dismissal for failure to follow the administrative exhaustion procedures applicable to tax challenges against the government, does exactly what the dissenting justices in Loeffler cautioned against. It ignores “California's strong legislative policy against deceptive business practices” and unhesitatingly and ***without any reasoned basis*** “expand[s] the hole that [the Loeffler decision] carve[d] out of the UCL. *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1142 (Cal. May 1, 2014) (dissent). Contrary to the Answer’s assertion that Petitioners waived arguments as to the *Morgan* decisions’ misapplication of the primary jurisdiction and exhaustion doctrines, the issue was squarely addressed to the Court of Appeal in a letter brief submitted to the Court of Appeal after oral argument. (September 29, 2022, Letter Brief Submitted by Appellants with an exhaustive discussion of the primary jurisdiction and administrative exhaustion defenses, *arguing the need to decide cases under the proper analytical framework of these related, but analytically distinct defenses.*)

This is not a case where the Petition for Review is sought solely on the grounds that the Court of Appeal erred. Though ***there certainly is error here***, more than “error correction” for these individual litigants is at stake. An important issue of law, identified by the 4 dissenting members of this Court in *Loeffler*, has been ignored in a way which will forever preclude a class of senior citizens from even having a Court even ***consider*** their UCL claims against this “newest” scheme of conduit bond consumer home lending by the private party defendants here. The challenged business model purports to permit a massive campaign of defacto private lending by unlicensed private capital providers working in tandem with self-interested home improvement contractors as a defacto loan sales force, *to operate outside of any consumer protection laws*, including the UCL.

In this and other litigation against them, the defendants perceive that their business model provides them with an



additional defense to any claims against them. They claim that before *they can be sued* for their private business conduct, would be plaintiffs must first seek to have *the government tax authorities pay the damages or restitution alleged to have been caused by them*. It purports to require UCL plaintiffs to also join the government in any litigation against these private companies in a legally futile attempt to force the government *to compensate the Plaintiffs for the wrongful conduct of the private party defendants*.

As outlined in detail in the allegations of the amended complaint at issue in this appeal, the CEOs of each of the three principal defendant PACE Lenders all understood that they were creating a new form of *consumer financial product*, a new “asset class” in securities nomenclature, and relying exclusively on private capital to do so. Each was of the opinion that the only consumer standards governing their conduct were those *voluntarily agreed to* by the nascent private PACE industry.

Each acknowledged that affiliated contractors were the primary means by which homeowners were signed up to these new loans:

“The beauty of PACE and innovation of PACE is **we're using a market mechanism to do that versus expending public funds or rate payer funds.** The other piece of it that I think is important to highlight is that **contractors are key.** And the reason why they are key is because again if you put yourself in the shoes of that homeowner who is making a repair, the first person that you call when something is broken is a contractor. And so I know a number of my other panelists highlighted how the programs make sure that we train contractors and that we ensure that we have reputable contractors a part of our program that the consumer protection that homeowners otherwise would not receive through other financing options. And so I think those things are important to keep in mind as we're comparing PACE to other financing solutions.”

From an online webinar conducted by the CAETF on March 29, 2016, attended by representatives of Renovate America and Ygrene Energy Fund

Morgan App. Ex. H, Amended Class Action Complaint, **BATES PAGE 000099**

Q: Most people in CA have never heard of PACE, but all know the word “mortgage.” **What will be the channel that will educate property owners?**  
**Cisco: It's all contractors.** Look, 2 to 3 out every 100 homeowners will get an HVAC each year, less than one out of every 100 will get solar. But a

contractor doing solar/HVAC will be talking to 3 to 5 people every day. **So this works because contractors understand that PACE fundamentally changes the game**; it allows people to do bigger better projects, and homeowners to have more successful projects, save them more money. That's it. So whether they know the word PACE, or California First or Renew Financial, I don't really care. **The point is contractors are out there saying this works, here is a thing you can do.** Mortgage has a hundred year head start on us — let's see how we do in a hundred years [laugh]. In the meantime, I don't care what word they use. The key issue is are we helping them, and are they using it, and so far the answer is yes.

Interview with Cisco Devries, CEO of Renew Financial Group, LLC July 7, 2015

Morgan App. Ex. H, Amended Class Action Complaint, **BATES PAGE 000098**

At a securities investor conference with the CEOs of the two other PACE Lender defendants in 2016, then CEO and founder of Renovate America, Inc. JP McNeil, laid out the industries' understanding that **it was creating a new form of consumer financial product:**

In 2008 the State of California modified its legislation that would enable local government entities to finance infrastructure improvements on residential and commercial property for energy efficiency / renewable energy and then shortly thereafter, water efficiency measures, and that policy is in essence what created the PACE industry which now I believe over 30 states in the country have adopted similar legislation **and really what it does is it enables bonds to be issued that finance improvements that are permanently affixed to the property** and that reduce energy and water and so we ... in partnership with local and state government and even some of the policy folks at the federal level **we created a brand new consumer financing asset class, like a mortgage, like an auto loan, that enables us to access deep pockets of capital in a very cost effective manner.**

[Question from the panel moderator? DO all of the PACE companies do the same thing?]

They Do, From what I've just described the answer is yes, I do think that as the product evolves that we will see standards, so PACE Nation (successor to PACE NOW) in May of this year **adopted a set of consumer standards that we hope that the whole industry adopts**, the idea again being that we can design a financing solution that has better consumer protections than any other payment option that currently homeowners have access to.

Morgan App. Ex. H, Amended Class Action  
Complaint, **BATES PAGE 000096**

The PACE industry has consistently taken the position that its “partnership” with government shields it from the application of any consumer lending laws. This, notwithstanding that their contracts to implement PACE for local governments ***expressly disclaim any “partnership” relationship***, instead classifying the PACE Lenders as ***independent contractors*** responsible for compliance with California law and with ***having or obtaining any licenses deemed necessary to their performance of their duties under their contracts to implement PACE on behalf of municipal governments.***

#### 8.22 Independent Contractor Status

8.22.1 This Contract is by and between the County and the Contractor and is not intended, and **shall not be construed, to create the relationship of agent, servant, employee, partnership, joint venture, or association, as between the County and the Contractor.**

Morgan App. Ex. H, Amended Class Action Complaint, at **BATES PAGE 000087.**

The UCL was designed to deal with such schemes. Here, the scheme permits what would otherwise be predatory lending,

all because it is *alleged* to be “a tax by design”, and not a “consumer loan”. **To de-publish and not take review is to vindicate the scheme.**

As discussed in the Petition for Review and at length in the briefs before the Court of Appeal, Respondent’s characterization of the program as “by design” a tax, is only *partially* accurate. A more accurate phrasing would be: “by anticipation, a tax”, but “*by implementation*” a consumer loan. It is the manner in which the Respondent private party defendants chose to perform under their contracts, the way they chose to structure their business model, that made them in the business of lending money to California consumers and made them “sellers of home improvement services” subject to the Retail Installment Sales Act. Under their contracts, the defendants could have chosen to broker the loans of others, selling municipal bonds to fill county coffers, and then loaning the money out to homeowners as a form of financing. They could have chosen to forego the use of home

improvement contractors as a sales force for their loan. Instead, they chose a more profitable path, lending the money themselves, directly soliciting homeowners through affiliated home improvement contractors trained to “sell” homeowners their new “consumer financial product”, and providing home improvement related services themselves. Their choices as to how they *performed* their duties as independent contractors is the basis for their UCL liability. The essential question here is ***are the loans they made any less consumer home improvement loans because the private loans were made via the conduit of a government bond offering?***

No class was certified, but this was over the objection of Plaintiffs who argued that certification should occur before any merits determination:

WHEREAS, Plaintiffs and Defendants met and conferred on a possible demurrer to the Complaint; WHEREAS, Plaintiffs have represented that class certification issues should be decided before any merits challenge, but that in any event they intend to file an amended complaint;

WHEREAS, Defendants do not concede that class certification issues should be decided before any “merits” or other challenge to Plaintiffs’ claims, and, if appropriate, intend to file a demurrer to Plaintiffs’ amended complaint.

Morgan Appx. Stipulation by Parties Regarding Demurrer, **BATES PAGE 000062**

Whether by defendants’ waiver of a one way joinder defense, or by virtue of a published decision by this Court, a grant of review here will affect the rights of thousands of senior citizen borrowers and not just the named lead plaintiffs here.

Simply de-publishing the decision, while preventing **future** harm to consumers seeking relief from private party defendants (see December 23, 2022, Ltr. to De-publish by Consumer Law Groups Public Counsel, Bet Tzedek, Housing and Economic Rights Advocates, National Housing Law Project, and Public Law Center), **will not prevent the dismissal of the UCL claims brought by the putative class of plaintiff senior citizens most in need of the protections of that law.** These senior citizens signed up to loans that would have plainly been unlawful



as providing for a security interest on their homes to finance home improvements, had they been made by a seller of home improvement services (Civil Code section 1804.1(j)) or if made by a *licensed* Finance lender (California Civil Code section 1770(b)(1) prohibits any licensed lender from using contractors as a sales force; 10 CCR 1452 requires Finance Lenders to take account of borrowers' ability to repay the loans made). Each of them signed up long before any laws addressed the private activities of the private companies that came to dominate the implementation of PACE programs, a result not foreseen by the legislature when it enacted PACE financing:

When created, it was presumed that public agencies would run the PACE program themselves; **instead the majority of cities or counties have contracted out the services to new unregulated private entities** to administer the PACE program. Only one program runs their own PACE program internally: Placer County. Additionally, when established, the Legislature did not foresee the attention the PACE program would receive from the Federal Housing Finance Agency (FHFA) and the Federal Housing Administration (FHA) or the impact the PACE program could have on California's housing market.

"Keeping Up With PACE: A Joint Oversight Hearing on Residential Property Assessed Clean Energy Programs" California Assembly Committee on Banking and Finance Thursday, June 9, 2016 10:00 a.m. -1:00 p.m. Room 437 NOL Exh. 16

Morgan App. Ex. H, Amended Class Action Complaint, at **BATES PAGE 000087.**

The dates each Plaintiff borrowed from the defendants are all well before the requirement for PACE administrators to be licensed under the Financial Code (January 1, 2019) (which law simultaneously exempted them from needing a license as a residential mortgage *broker*. Business and Professions Code section 10133.1) With the 4 year statute of limitations applicable to their Business and Professions Code section 17200 claims, they could properly represent a class of borrowers going back to the years of the heaviest ***and least regulated*** lending activity by the defendants in this case. A dismissal of their claims now will preclude any new UCL claim based on conduct occurring at a time prior to the new licensing requirements effective January 1,

2019, all such claims now being outside the four year statute of limitations applicable to UCL claims:

**Dates of Plaintiffs' PACE Loans:**

**10/13/17** Barbara Morgan (Ygrene and Affiliated Assignees)

Morgan Appx. BATES PAGE 000141

**01/01/16** Marcia Bordine (Renovate and Affiliated Assignees)

Morgan Appx. BATES PAGE 000146

**08/26/16** Janet Roberts (Renew and Affiliated Assignees)

Roberts Appx. BATES PAGE 000124

**03/07/18** Alfonso Robinson (Renew and Affiliated Assignees)

Roberts Appx. BATES PAGE 000149

**05/27/16** John Brown (Renew and Affiliated Assignees)

Roberts Appx. BATES PAGE 000152

**02/07/17** Joan Banks (Renew and Affiliated Assignees)

Roberts Appx. BATES PAGE 000170

**04/11/18** Lyn Ramskill (Renew and Affiliated Assignees)

Roberts Appx. BATES PAGE 000205

The harm *is ongoing* to this class of senior citizens. Defaults are occurring, and will continue to occur, albeit with foreclosure being pushed down the road by WRCOG to third party investors who pay off delinquent assessments to ensure the PACE ASSIGNEE defendants are paid in full. See link in Petition for Review to October 5, 2020, minutes of a WRCOG board meeting discussing PACE defaults.

At this juncture, the Court of Appeal was ***not supposed to be involved in the evaluation of the merits of the alleged causes of action***, as the demurrers were brought solely on the procedural grounds of failure to exhaust administrative remedies. But by the Court of Appeal simply stating **as fact** that the claims are “really” brought against the government for a cancellation of a tax, and a refund of tax, *it effectively ruled on the merits of the action*, assuming without discussion or analysis, that there can be no private liability of the defendants under a UCL claim

absent joinder of the government as a party and relief sought against and obtained against the government.

Separating the “merits” aspect of this determination from its “procedural aspects” is not so easily accomplished. To be sure, on this *procedural challenge* brought solely on exhaustion grounds, ***the Court of Appeal should have assumed the validity of a private claim and of a private remedy against the private defendants*** and evaluated the *procedural* claims in accordance with that assumption. By venturing beyond that and insisting that no such action or remedy could be obtained from the private parties separate and apart from the government, the Court of Appeal effectively made a merits based ruling, (on “necessary parties” grounds, and / or on a primary jurisdiction defense) notwithstanding its insistence it was merely addressing the procedural issue of exhaustion.

**2. A Grant of Review Will Serve to Bring into Uniformity the Now Conflicting Determinations of Local County Assessment Appeals Boards as to Their Jurisdiction to Decide PACE Related Disputes.**

A grant of review here will additionally serve to make uniform the now fragmented positions of local county assessment appeals boards as to their jurisdiction over PACE related claims. (December 23, 2022, Ltr. from Consumer Groups seeking de-publication noting the different positions taken by different counties on the issue of their jurisdiction over PACE related disputes). De-publication alone will leave the confusion in place and result in different results for future PACE litigants depending on their respective county appeals board's view of their jurisdiction over such claims.

Respectfully Submitted,

James Swiderski. Date: December 29, 2022

James Swiderski, Counsel for Appellants

### **CERTIFICATE OF WORD COUNT**

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the Petition for Review filed by Appellants is proportionally spaced, has a font size of 13 points or more, including footnotes, and contains 3,314 words (excluding the cover, the tables, this certificate, the signature blocks, and exhibits), which is less than the number of words permitted by the Rules of Court. In making this certification, I have relied on the word count of the word processing program, Microsoft Word for Microsoft used to prepare this brief.

*James Swiderski*<sup>type text here</sup>.

James Swiderski,

Counsel for Appellants

Date: December 29, 2022

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 b. My electronic service address is (specify): Law@WhatsTheLaw.com
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 Petition for Review REPLY
4. I electronically served the documents listed in 3. as follows:
  - a. Name of person served: See attachments (2 pages)  
 On behalf of (name or names of parties represented, if person served is an attorney):  
 See attachments
  - b. Electronic service address of person served: See attachment
  - c. On (date): December 29, 2022
- ☒ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment (write "APP-009E, Item 4" at the top of the page).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 29, 2022

James Swiderski  
 (TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

  
 (SIGNATURE OF PERSON COMPLETING THIS FORM)



**APP 009E, Item 4**

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**APP 009E, Item 4**

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1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My ☐ residence ☒ business address is (specify):  
325 West Washington Street #2125 San Diego CA 92103
3. I mailed or personally delivered a copy of the following document as indicated below (fill in the name of the document you mailed or delivered and complete either a or b):  
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    - (1) I enclosed a copy of the document identified above in an envelope or envelopes and
      - (a) ☒ **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.
      - (b) ☐ **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.
    - (2) Date mailed: ~~December 29, 2022~~ December 29, 2022
    - (3) The envelope was or envelopes were addressed as follows:
      - (a) Person served:
        - (i) Name: Judge Whitney, Superior Court Judge
        - (ii) Address: Superior Court of San Diego County, Dept. 68 330 West Broadway, San Diego CA 92101
      - (b) Person served:
        - (i) Name: Summer Stephan, San Diego County District Attorney
        - (ii) Address: San Diego County District Attorney, 330 West Broadway, San Diego CA 92101
      - (c) Person served:
        - (i) Name: Clerk of the Supreme Court of California
        - (ii) Address: 350 McAllister Street  
San Francisco, CA 94102-4797
  - ☐ Additional persons served are listed on the attached page (write "APP-009, Item 3a" at the top of the page).
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Case Name: Morgan v. Ygrene	Court of Appeal Case Number: D079364
	Superior Court Case Number: 37-2019-00052045

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:

(a) Name:

(b) Address where delivered:

(c) Date delivered:

(d) Time delivered:

(2) Person served:

(a) Name:

(b) Address where delivered:

(c) Date delivered:

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(a) Name:

(b) Address where delivered:

(c) Date delivered:

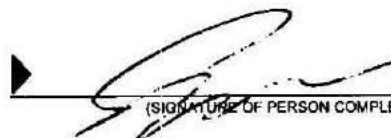
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☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page (*write "APP-009, Item 3b" at the top of the page*).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ~~December 7, 2022~~ December 29, 2022

James Swiderski  
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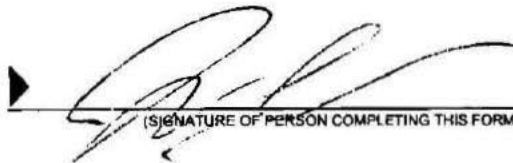
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  3. I electronically served the following documents (exact titles):  
 Petition for Review REPLY
  4. I electronically served the documents listed in 3. as follows:
    - a. Name of person served: Rob Bonta, Attorney General  
 On behalf of (name or names of parties represented, if person served is an attorney):  
 Attorney General, State of California
    - b. Electronic service address of person served: Dept. of Justice Website Upload for 17200 brief
    - c. On (date): ~~December 29, 2022~~ December 29, 2022
- ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment (write "APP-009E, Item 4" at the top of the page).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ~~December 29, 2022~~ December 29, 2022

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**STATE OF CALIFORNIA**  
Supreme Court of California

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**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **MORGAN v. YGRENE ENERGY FUND**

Case Number: **S277628**

Lower Court Case Number: **D079364**

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Date

/s/James Swiderski

Signature

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