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Case No. S241471

In the Supreme Court of the State of California

MICHAEL MCCLAIN, ET AL.,
Plaintiffs and Appellants,

vs.

SAV-ON DRUGS, ET AL.
Defendants and Respondents.

THE RETAILER DEFENDANTS' CONSOLIDATED RESPONSE TO AMICI BRIEFS

After a Decision by the Court of Appeal, Second Appellate District, Division Three, Case Nos. B265011 & B265029

Appeal from a Judgment of Dismissal
Los Angeles Superior Court, Case Nos. BC325272 & BC327216
Honorable John Shepard Wiley

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I.

INTRODUCTION

The Retailers respectfully submit this consolidated response to the amicus briefs filed by: (1) Larry Littlejohn (Littlejohn Amici, LAB); (2) Public Citizen, Inc. (Public Citizen, PCAB); (3) The Howard Jarvis Taxpayers Association (Howard Jarvis, HJAB); and (4) Alina Bekkerman, Brandon Griffith, Jenny Lee, and Charles Lisser (Bekkerman Amici, BAB).[1]

Amici all agree that this case is not *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 (*Javor*). In *Javor*, taxability had been resolved by the Board[2] which found that sales tax had been overpaid and a refund was due. (*Id.* at pp. 792-793.) It thus was

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1 Retailers do not respond to the brief by The League of California Cities and California State Association of Counties (Cities and Counties, CCAB) other than to note that the Cities and Counties take no position on whether a Javor remedy should be extended, but express concern about the consequences of allowing non-taxpayers to pursue refund claims. (CCAB:10-21.) They point out that there are many circumstances where a non-taxpayer is forced to bear the economic burden of a tax, but that has never before provided non-taxpayers with legal standing to challenge the validity of the taxation scheme. (Id. at 10-13.)

2 Although responsibility for the administration of sales tax and adjudicating tax matters has been transferred to new agencies as the Retailers previously noted [RJAB:11, fn.1], for ease of reference this brief continues to refer to those functions as being performed by the Board.

clear that the State would be unjustly enriched if the overpayment was not returned to the consumers who had paid the excess tax. (*Id.* at pp. at 800-801.) Under those "unique circumstances," this Court drew on constructive trust principles to order an equitable remedy, consistent with the procedures set forth in the tax code, enabling consumers to compel retailers to file refund claims on their behalf. (*Id.* at pp. 802-803.)

This case is materially different. Here, the applicability of the relevant exemption is disputed, so there is no clear risk of unjust enrichment[3] and no discernible sum of money for a constructive trust. Further, allowing such a remedy would not be consistent with the procedures of the tax code. A decision allowing consumers to pursue a *Javor*-type remedy would conflict with the statutory safe harbor available to retailers, *and* would force retailers to litigate a disputed exemption they were statutorily permitted to waive. What is more, since *Javor*, this Court held in *Woosley v. State of California* (1992) 3 Cal.4th 758 (*Woosley*) that courts cannot expand the statutory refund methods, and in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081 (*Loeffler*) that taxability determinations in the first instance must be made by the Board.

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3 As the First District recently explained in *Littlejohn v. Costco Wholesale Corp.* (2018) __ Cal.App.5th __, 2018 WL 3407996, *6 (*Littlejohn*) "the state is not unjustly enriched when sales taxes are overpaid due to a taxpayer's good faith misinterpretation of his or her obligation to pay tax."

Waiving these profound differences aside, as several amici propose, thus raises serious separation of powers issues and creates inconsistencies with both the tax code and this Court's prior decisions.

The difficulty in fashioning a novel consumer remedy in this case is underscored by the differing views amici offer on how broadly a court-created remedy should apply. The Littlejohn Amici concede it would be inappropriate to completely dispense with *Javor*'s requirement to allow consumers to pursue a *Javor*-type remedy in any circumstance. (LAB:8-10.) They contend a *Javor*-type remedy should be permitted only where the consumer has made a plausible showing that a refund is available. (LAB:9-10.) Analogizing the situation to a request for provisional relief, like a preliminary injunction, the Littlejohn Amici suggest trial courts should be given "discretion" to evaluate the merits of a consumer's claimed entitlement to a refund before determining whether a *Javor*-type remedy should be allowed. (*Ibid.*)

Public Citizen, Howard Jarvis, and the Bekkerman Amici offer a more sweeping rule that would, notwithstanding *Javor*, allow consumers to force retailers to file claims for refunds under virtually any circumstance—but for different reasons. (PCAB:4-12; HJAB:11-18; BAB:14-39.) Public Citizen contends such a remedy would be consistent with the tax code and expresses concern about the perceived inequity of denying consumers who have paid reimbursements a means of seeking relief. (PCAB:4-12.)

Howard Jarvis and the Bekkerman Amici throw in constitutional arguments and contend that denying consumers a *Javor*-type remedy when they pay sales tax reimbursement would violate due process and result in unconstitutional takings. (HJAB:11-18; BAB:14-39.)

While their approaches may vary, amici's briefing establishes that the essential question for this Court remains: Should the equitable remedy this Court crafted in *Javor* be extended beyond the unique circumstances of that case? The Retailers, like the two Courts of Appeal that have considered this question, say "no." Providing a *Javor*-type remedy here is not compatible with existing statutory procedures and it is up to the Legislature, not this Court, to go beyond that statutory scheme and provide a remedy for consumers if there is a need to do so. While the unique fact pattern in *Javor* lent itself to a manageable outcome, any attempt to apply that remedy in this case would put every sales tax exemption in play. Every consumer who agrees to pay sales tax reimbursement would be enfranchised to force retailers to pursue an exemption—making a shambles of the orderly system crafted by the Legislature. That is why the Legislature, not the courts, establishes refund procedures. There are no constitutional considerations in this case to compel a different result.

This Court should affirm the Court of Appeal's decision.

II.

ARGUMENT

A. The *Javor*-Type Remedy Should Not Be Extended Beyond *Javor*

The Littlejohn and Public Citizen Amici contend a novel cause of action—one outside the confines of the statutory scheme and beyond the fact pattern in *Javor*—should be created to force the Board to ascertain whether the disputed sales are tax exempt. But the rationales supporting the expansion they advocate are unworkable when the provisions of the tax code and this Court's precedents are considered.

Looking at the Littlejohn brief first, amici contend that trial courts should have the ability to evaluate "the facts of the case" in the first instance and determine whether the consumer has "made a sufficient showing to allow the court to order the retailer to proceed with a refund application." (LAB:9-10.) They analogize the procedure to a preliminary injunction or other provisional remedy and likewise maintain that if a consumer can demonstrate "a reasonable probability that [he or she] will prevail" on the ultimate tax issue, then he or she should be permitted to pursue a refund claim. (LAB:10-11.)

This "provisional remedy" approach is not only unprecedented, it is at odds with *Loeffler*'s recognition that the

Board is responsible for determining taxability in the first instance and that courts cannot entertain non-statutory claims that infringe on the Board's function in that regard. (*Loeffler*, *supra*, 58 Cal.4th at pp. 1123-1124 ["The tax code does not permit consumers to *require* the Board to ascertain whether excess reimbursement charges have been made"].) Thus, taxability is off limits and it is evident that a court cannot make the preliminary evaluation amici advocates—even if just for the purposes of determining whether a consumer's position regarding taxability is sufficiently meritorious to warrant further review. (*Ibid.*)

For its part, Public Citizen urges this Court to expand *Javor* to enable all consumers, in all circumstances, to force retailers to pursue refund claims, insisting this would not conflict with the provisions of the tax code. (PCAB:7-10.) In particular, Public Citizen focuses on the statutory "safe harbor" retailers are afforded under Revenue & Taxation Code section 6901.5 as well as a retailer's right to waive its ability to seek an exemption under Revenue and Taxation Code section 6905.[4] (PCAB:8-10.) Public Citizen contends section 6901.5's safe harbor provides no obstacle to a *Javor*-type remedy because the Board's implementing regulation for that provision, Regulation 1700, states it does not impact the rights of consumers to pursue a *Javor*-type remedy. (PCAB:8-9.)

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4 Unless otherwise stated, all subsequent statutory citations are to the Revenue and Taxation Code.

Public Citizen asserts section 6905 is of no consequence because it existed when *Javor* was decided and thus cannot be perceived as an obstacle to a *Javor*-type remedy. (PCAB:7-8.) But Public Citizen's line of reasoning falters in its critical premises.

To begin, with regard to the statutory safe harbor retailers enjoy under section 6901.5, Public Citizen misinterprets the related regulation and its legal significance. The relevant portion of Regulation 1700 does not alleviate the tension between the statutory safe harbor afforded retailers under section 6901.5 and the expanded *Javor*-type remedy Plaintiffs now wish to pursue. Nor could it, as administrative regulations must complement, not conflict with, the statutes they interpret.

Specifically, section 6901.5 provides that when a retailer collects excess sales tax reimbursement that it pays over to the state, the excess payment will be used to offset the taxpayer's liability on the same transaction. (§ 6901.5.) Regulation 1700 was adopted by the Board to carry out section 6901.5. (Cal. Code Regs., tit. 18, § 1700.) Among other things, it explains that an "offset" on the "same transaction" means "all activities involved in the acquisition and disposition of the same property" and "may involve several persons, such as a vendor, a subcontractor, a prime contractors, and the final consumer; or a vendor, a lessor . . . ." (Cal. Code Regs., tit. 18, § 1700, subd. (b)(4).) The language in Regulation 1700 that Public Citizen extracts states that the portions of "this regulation with respect to offsets do not necessarily limit the

rights of customers to pursue refunds from persons who collected tax reimbursement from them in excess of the amount due." (Cal. Code Regs., tit. 18, § 1700, subd. (b)(6).)

Public Citizen contends this excerpted language makes clear that section 6901.5 was not intended to limit a consumer's ability to pursue a *Javor*-type remedy. (PCAB:8-9.) Read in context, however, it is clear that the regulation does not mean what Public Citizen says it does. Rather, the regulation should be understood as explaining that an "offset" can be reasonably broad and involve using excess reimbursements a retailer collects to reduce its tax liability, but the existence of that offset does not by itself limit the consumer's rights to the extent those rights otherwise exist.[5] (Cal. Code Regs., tit. 18, § 1700, subd. (b).) In particular, it explains that although excessive reimbursements may be used to "offset" other tax liabilities on the same transaction, the fact that an "offset" exists does not otherwise prevent the consumer from pursuing claims for refunds against those who collected excess reimbursements when such a remedy is otherwise authorized. (*Ibid.*)

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5 This point is driven home by the example Regulation 1700 provides in subdivision (b)(5)(B) in which the regulation explains how a transactional "offset" would operate in practice. (Cal. Code Regs., tit. 18, § 1700, subd. (b)(5)(B).)

On analysis, therefore, Regulation 1700 says nothing about giving consumers the right to *force* a refund remedy when the text of section 6901.5 says retailers enjoy a statutory safe harbor. Nor could Regulation 1700 do as Public Citizen suggests in any event. It is black letter law that regulations are subservient to the express statutory text they purport to clarify or interpret. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748 ["Administrative regulations that alter or amend the statute or enlarge or impair its scope are void"].) Here, of course, the safe harbor retailers enjoy is found within the text of section 6901.5 itself and Regulation 1700 could not rewrite section 6901.5 to destroy the safe harbor the Legislature saw fit to create.

Apart from that, Public Citizen's contention section 6905 does not complicate a consumer's right to relief overlooks the significance of *Javor*'s unique circumstances in determining whether a remedy can be provided. While it is true that section 6905 was in effect when *Javor* was decided, in *Javor* there was no taxability dispute because the Board agreed that a refund was due. (*Javor*, *supra*, 12 Cal.3d at pp. 792-793.) For that reason, this Court had no occasion to consider whether there was a potential conflict between a retailer's right to forego a refund claim under section 6905 and the equitable remedy it was crafting. (*Ibid.*) Of course, "an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn.2; see also *McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 ["The holding of a decision is limited by the facts of the case being

decided, notwithstanding the use of overly broad language by the court in stating the issue before it or in its holding or its reasoning"].) *Javor* accordingly should not be read to suggest that providing a *Javor*-type remedy in this case would be consistent with section 6905.

Moreover, when this Court had occasion to consider the significance of section 6905 in *Loeffler*, it noted multiple reasons why a retailer may desire to waive its right to pursue a refund claim. (*Loeffler*, *supra*, 58 Cal.4th at p. 1129.) For example, a retailer may not have adequate records to support an exemption or the costs of pursuing an exemption may be prohibitive. (See *ibid.* ["it would not be unreasonable if the retailer's tax payment to some extent erred on the side of considering sales taxable. Indeed, the taxpayer may recognize that it has failed to retain records adequate to carry its burden of establishing it is entitled to an exemption or has overpaid"].) *Loeffler* thus suggests that, as the Retailers maintain, requiring retailers to claim an exemption that is too administratively difficult or costly conflicts with the tax code.

In sum, the Retailers have noted many incompatibilities with the tax code in attempting to extend a *Javor*-type remedy to the fact pattern in this case. (RJAB:34-38.) Those conflicts called for caution in *Woosley* and *Loeffler*, and they do so here as well.

B. Constitutional Considerations Do Not Compel That A *Javor*-Type Remedy Be Provided; They Counsel Against Extending Such A Remedy

Howard Jarvis and the Bekkerman Amici also want to expand *Javor*, but they take a different path. They focus on the alleged constitutional concerns they say would arise if consumers are denied the ability to pursue a *Javor*-type remedy because consumers purportedly are the "real taxpayers" who must bear the "legal incidence" of the tax. (HJAB 11-18; BAB 14-39.) Relying principally upon *Diamond National Corp. v. State Bd. of Equalization* (1976) 425 U.S. 268 (*Diamond National*) and *United States v. California State Bd. of Equalization* (9th Cir. 1981) 650 F.2d 1127 (*California State Bd.*), they maintain that denying consumers the opportunity to seek refunds violates due process and results in unconstitutional takings. (HJAB:11-18; BAB:14-39.) On close analysis there are several serious flaws with this argument.

This Court consistently has held that the premise of this argument—that the legal incidence of sales tax falls on consumers as opposed to on retailers as the statutory scheme provides—is wrong. Indeed, even under former section 6052, which allowed retailers to collect sales tax from consumers, this Court held the legal incidence of the tax was not on consumers. (E.g., *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283, 286; *Western Lithograph Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 162-163; *De Aryan v. Akers* (1939) 12 Cal.2d 781, 784-

785.) More importantly, this Court recognized in *Loeffler* that former section 6052 was repealed and current Civil Code section 1656.1 added "as part of a revision of the tax code that was intended to *clarify* that the incidence of the state sales tax is on retailers, not consumers." (*Loeffler, supra,* 58 Cal.4th at p. 1116, italics added.) This Court then explained that under the current system, "[t]he *retailer* is the taxpayer, *not* the consumer." (*Id.* at p. 1104, original italics.)

In an attempt to escape this Court's unequivocal pronouncement, Howard Jarvis and the Bekkerman Amici point to *Diamond National* and *California State Bd.*—federal cases they say demonstrate that the legal incidence of sales tax is actually on consumers. But those cases decided the question in a much different context. Both cases dealt with the immunity the federal government enjoys from state taxation. (*Diamond National*, *supra*, 425 U.S. at p. 268 [dealing with the immunity national banks enjoy from state taxation as an instrumentality of the federal government]; *California State Bd., supra,* 650 F.2d at p. 1127 [dealing with the federal government's immunity from state taxation].) Neither one likewise involved the extent to which a private party who has contracted to reimburse another for its tax obligation bears the "legal incidence" of a tax such that it has the type of constitutionally protected interest that would require the government afford the non-taxpayer an

opportunity to challenge the tax.[6] (*Diamond National*, *supra*, 425 U.S. at p. 26; *California State Bd.*, *supra*, 650 F.2d at p. 1127; accord *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 848 (*Occidental Life*) [noting *Diamond National* was "limited to the issue of a federally created immunity as it limits the right of a *state* to tax federal banks"]; *Xerox Corp. v. County of Orange* (1977) 66 Cal.App.3d 746, 756-757) (*Xerox Corp.*) [same].)

Two Courts of Appeal have addressed that issue. Both explain why, when there is no federal immunity at issue, California law controls where the legal incidence of the sales tax falls. (*Occidental Life*, *supra*, 135 Cal.App.3d at p. 850 ["As a result of the United States Supreme Court's express limitation as to federal

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6 While Howard Jarvis and the Bekkerman Amici frame the constitutional issues as turning on where the "legal incidence" of the tax lays, neither the due process nor takings clauses of the United States or California Constitutions speak in terms of legal incidence of a tax. (U.S. Const., 14th Amend., § 1 [due process clause]; Cal. Const., art. 1, § 7 [due process clause]; U.S. Const., 5th amend. [takings clause]; Cal. Const., art. 1, § 19 [takings clause].) They instead protect certain constitutionally recognized property interests. (*Ibid.*) Contractual rights are generally protected by the contract clauses of the United States and California Constitutions [U.S. Const., art. 1, § 10; Cal. Const., art. 1, § 9]—which neither Howard Jarvis or the Bekkerman Amici claim have been violated. Nevertheless, because amici have analyzed the issue in terms of where the "legal incidence" of the tax falls, that is the issue the Retailers have addressed in this response.

tax immunity, California courts are not governed by *Agricultural Bank* or *Diamond National* . . . in the instant matter. Nor are those cases persuasive authority for California courts to follow"]; *Xerox Corp., supra,* 66 Cal.App.3d at pp. 756-757 [same].) And those California courts, applying California law, held that the legal incidence of our sales tax falls on retailers, notwithstanding that the economic burden of the tax ultimately may be passed on to consumers. (*Occidental Life, supra*, 135 Cal.App.3d at p. 850; *Xerox Corp., supra,* 66 Cal.App.3d at pp. 756-757.)

In any event, the analysis in *Diamond National* and *California State Bd.* does not support Howard Jarvis's and the Bekkerman Amici's position. Instead, those cases demonstrate that when dealing with the federal government's immunity from state taxation, the legal incidence of a tax lies where the legislature intends it should fall—which, under California's sales tax system, is on retailers.

The *Diamond National* "holding" that Howard Jarvis and the Bekkerman Amici describe consists of just three sentences. (*Diamond National, supra*, 425 U.S. at p. 268.) It states that the Supreme Court "hold[s] that the incidence of the state and local sales taxes falls upon the national bank as purchaser and not upon the vendors" and cites *First Agricultural National Bank of Berkshire County v. State Tax Commission* (1968) 392 U.S. 339, 347 (*Agricultural Bank*) as support for that holding. (*Diamond National, supra*, 425 U.S. at p. 268.) As a result, one has to examine

Agricultural Bank to understand the *Diamond National* decision. *Agricultural Bank* addressed a Massachusetts sales tax statute that *required* retailers to collect sales tax from consumers. (*Agricultural Bank*, *supra*, 392 U.S. at p. 347.) There, the Court concluded that because the State of Massachusetts had required the collection of sales tax from consumers, the Massachusetts Legislature had manifested a clear legislative intent to make the consumers the taxpayers and that is where the legal incidence of the tax lay. (*Ibid.*)

For its part, *California State Bd.* begins by agreeing with *Diamond National* and *Agricultural Bank* that "[t]he legal incidence of a tax falls on the party who the legislature intends will pay the tax." (*California State Bd.*, *supra*, 650 F.2d at pp. 1130-1131.) The opinion then reviews our sales tax system and concludes that because it purportedly creates an economic incentive for retailers to charge separate sales tax reimbursements rather than simply raise the price of their products and pay the tax themselves, that means the "California sales tax scheme manifests a legislative intent that the [consumer] pay the sales tax." (*Id.* at p. 1132.)

Even under California's old scheme which gave retailers the statutory right to pass along the tax, California courts held the Legislature intended the tax to be on the retailer. (*Diamond Nat. Corp. v. State Bd. of Equalization* (1975) 49 Cal.App.3d 778, 783 [explaining that California's sales tax system had been interpreted as not requiring the tax be passed along]; *Occidental Life*, *supra*, 135 Cal.App.3d at p. 850 [California state law controls

where the legal incidence of a tax lies where no federal immunity is at issue]; *Xerox Corp., supra,* 66 Cal.App.3d at pp. 756-757 [same].) Further, while *California State Bd.* did not closely examine the legislative history surrounding Civil Code section 1656.1's enactment, this Court did so in *Loeffler* and found that Civil Code section 1656.1 was "part of a revision of the tax code that was *intended* to clarify that the incidence of the state sales tax is on retailers, not consumers." (*Loeffler, supra,* 58 Cal.4th at p. 1116, italics added.)

Once you set aside the faux constitutional issues raised by Howard Jarvis and the Bekkerman Amici, all constitutional concerns militate against expanding *Javor*. As addressed more fully in the Retailers' Joint Answer Brief, this Court has held that California Constitution, article XIII, section 32, "expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature." (*Woosley, supra,* 3 Cal.4th at p. 789, citing Cal. Const., art. XIII, § 32.) As a result, courts are precluded "from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Id.* at p. 792.)

At the very least, the equitable remedy this Court crafted in *Javor* is in tension with this constitutional provision. This Court recognized this point in *Woosley* when it disapproved *Javor* to the extent it suggested a court has the power to expand on the methods for seeking tax refunds provided for by the Legislature. (*Woosley*, *supra*, 3 Cal.4th at p. 792.) Arguably, there is an open

question about whether *Javor* survives *Woosley*, although that is not something this Court needs to decide. The narrower question posed in this case is whether a *Javor*-type remedy should be dramatically expanded to empower consumers, who the Legislature did not designate as the taxpayer or give the right to pursue a refund, to force retailers to pursue refund claims on their behalf in effectively all circumstances. *Woosley* and article XIII, section 32 both caution against taking that extraordinary step.

Although their constitutional concerns are the centerpiece of their briefs, neither Howard Jarvis nor the Bekkerman Amici grapple with *Woosley*. Similarly, they fail to explain how an expansion of *Javor* to give consumers a remedy that is not provided by the tax code would be legally permissible in light of article XIII, section 32's clear mandate that such matters are to be left for the Legislature. Stated simply, although the Legislature could have permitted non-taxpayer consumers who have contracted to pay sales tax reimbursements to pursue refund claims, it did not to do so. It decided instead that the most appropriate taxation system was one that permitted the taxpayer and only the taxpayer to pursue refund claims. That legislatively crafted balance should be honored. (*Woosley*, *supra*, 3 Cal.4th at pp. 789-792.)

C. There Is No Reason To Unsettle California Law And Bypass The Legislature To Provide A *Javor*-Type Remedy

A number of amici address the inequity they say results from the Legislature's decision not to make consumers the taxpayers, or to give them the ability to pursue refund claims. As for the avenues available to consumers—from petitioning the Board to simply shopping around to find retailers who share their view of the issue of taxability—amici say those remedies are unsatisfactory because they do not enable consumers to recover the reimbursements they already paid and do not guarantee consumers the right to pursue legal recourse in the event retailers or the Board fail to act. (E.g., PCAB:6-7.)

The fact that a third party shoulders the costs of a tax by paying higher prices for goods or services may on some level seem inequitable but that has never before been grounds to afford those parties a legal remedy to recoup the non-taxpayer's economic burden. (CCAB:10-13.) Amici's advocacy for a different approach is just a thinly disguised lobbying effort for a different sales tax system. That effort, however, should be directed at the Legislature, not the judiciary.

D. Civil Code Section 1656.1 Is Neither A Reason To Extend *Javor*, Nor A Viable Cause Of Action As Pled By Plaintiffs

This Court did not grant review to address the proper construction of Civil Code section 1656.1. Several of the amici

nevertheless discuss that provision in explaining why a *Javor*-type remedy should be permitted. But Civil Code section 1656.1 adds nothing to the *Javor* analysis. It simply permits private agreements between consumers and retailers regarding the payment of sales tax. (Civ. Code, § 1656.1, subd. (a).) It does not purport to enfranchise consumers to come to court, join retailers and the Board in an action, and force a determination of whether a product is exempt from sales tax or a retailer is owed a refund. (*Ibid.*) There is simply nothing inherent in Civil Code section 1656.1 that provides a colorable justification for allowing consumers to pursue any type of tax refund remedy—including a *Javor*-type claim—and no amicus suggests otherwise.

Civil Code section 1656.1 cannot, under any circumstances, be used to provide a means to transform the private agreement which the statute permits into a basis for compelling the Board to make a taxability determination and order a refund be paid. Nor can it be interpreted to provide a direct breach of contract claim against the Retailers. As this Court held in *Loeffler*, private causes of action cannot be used to obtain refunds in contravention of the scheme the tax code otherwise provides. (*Loeffler*, *supra*, 58 Cal.4th at p. 1133.)

For the same reason, the Bekkerman Amici's more specific discussion of the "presumption" underlying Civil Code section 1656.1 is not relevant here. They contend consumers should not be presumed to be agreeing to pay an illegal sales tax

reimbursement, but that just begs the question. It prejudges the resolution of a breach of contract claim that is precluded by *Loeffler*. Section 6901.5 also expressly contemplates that excess sales tax reimbursements may be collected on a retail transaction. Thus, as this Court observed in *Loeffler*: "[b]ased upon the statutory language, it appears that a retailer may *refuse* a consumer's request that excess reimbursement be refunded, so long as the retailer remits the amount to the Board. It follows that the taxpayer reaches a safe haven vis-à-vis the consumer if it pays the sums to the Board." (*Loeffler*, *supra*, 58 Cal.4th at 1119.) Because the potential collection of excess sales tax reimbursement is expressly contemplated by the tax code (and in fact falls under the safe harbor of Section 6901.5), seeking sales tax reimbursements on allegedly tax exempt products is not illegal.

Finally, any argument about a potential breach of contract claim under Civil Code section 1656.1 ignores the actual terms of the agreement—which simply did not encompass the unexpressed implied intent upon which Plaintiffs rely. (RJAB:47-48.) In that regard, Civil Code section 1656.1 does not purport to allow consumers to ignore the time-of-sale receipt and claim, after the fact, that they did not agree to pay reimbursements merely because they now believe the transaction to have been more properly characterized as exempt. The section instead gives effect to the receipt and disavowing that result would undermine the reliability of every sales contract and open every such contract up to litigation.

For all these reasons, section Civil Code section 1656.1 cannot be construed to provide any impetus for a *Javor*-type remedy or separate breach of contract claim and to the extent amici urge that result, their arguments are misdirected.

III.
CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeal.

DATED: July 20, 2018

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DATED: July 20, 2018

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Certification of Word Count Pursuant To California Rules Of Court, Rule 8.204(c)(1)

I, Douglas Rawles, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first-hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Retailer Defendants' Consolidated Response to Amici Briefs in this case.

3. The Retailer Defendants' Consolidated Response to Amici Briefs was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the word count feature of Microsoft Word 2010, the Retailer Defendants' Consolidated Response to Amici Briefs contains 4,843 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Retailer Defendants' Consolidated Response to Amici Briefs complies with the requirement set forth in Rule 8.204(c)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on July 20, 2018, at Los Angeles, California.

Douglas Rawles

McClain v. Sav-On Drugs, et al.
California Supreme Court Case No. S241471
CA Court of Appeal, Second District, Division 2 Case Nos. B265011 & B265029
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800 San Francisco, CA 94105. On July 20, 2018, I served the following document(s) by the method indicated below:

THE RETAILER DEFENDANTS' CONSOLIDATED RESPONSE TO AMICI BRIEFS

☒	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

PLEASE SEE SERVICE LIST

I declare under penalty of perjury under the State of California that the above is true and correct. Executed on July 20, 2018, at San Francisco, California.

Eileen Kroll

McClain v. Sav-On Drugs, et al.
California Supreme Court No. S241471
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