Case No. S241471

IN THE SUPREME COURT OF CALIFORNIA

Michael McClain, Avi Feigenblatt
and Gregory Fisher,
Plaintiffs, Appellants and Petitioners,

vs.

Sav-On Drugs, et al.,
Defendants and Respondents.

PETITIONERS' OPENING BRIEF ON THE MERITS

After a Decision of the Court of Appeal
Second Appellate District, Division 2
Case Nos. B265011 and B265029
Affirming a Judgment Of Dismissal Following
An Order Sustaining Demurrer Without Leave to Amend
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
Honorable John Shepard Wiley

Service on the Attorney General and the Los Angeles District Attorney
Required by Bus. & Prof. Code § 17209 and
Cal. Rules of Court, Rule 8.29(a), (b), and (c)(1)

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I. ISSUES PRESENTED

1. Does the Court of Appeal's opinion *de facto* overrule this Court's opinions in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 108 ("*Loeffler*") and *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 ("*Javor*") by creating prerequisites to pursuing a *Javor* remedy which are by definition impossible to fulfill, not only for the three million California diabetics in this action, but for all California consumers regarding any sales tax issue?

2. In rewriting the presumption in California Civil Code §1656.1 from "rebuttable" to "irrebuttable," does the Court of Appeal cause California's sales tax scheme to violate this Court's direct holding in *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283 ("*National Ice*"), and by escheating money with no recourse, to violate the U.S. Constitution's Due Process and Takings Clauses?

Fairly included within the above constitutional issues is whether the issues can be resolved on statutory or other narrower grounds. (*Loeffler* at 1102-1103 ["Our jurisprudence directs that we avoid resolving constitutional questions if the issue may be resolved on narrower grounds . . . that . . .'eliminates doubts as to the statute's constitutionality.'"]. (Citations omitted.)

II. INTRODUCTION.

These two lawsuits[1] were brought on behalf of millions of California diabetics who use blood glucose test strips and skin puncture lancets to monitor their blood sugar levels to determine when they need to use insulin. While California law exempts these medically essential products from taxation, Respondent retailers have nonetheless collected "sales tax

[1] Separate lawsuits were brought for test strips and lancets, resulting in separate appeals. Briefing was consolidated in the courts below as well as here.

reimbursement" from customers on almost every sale and remitted the proceeds to Respondent California State Board of Equalization ("SBE"). The SBE has refused to even consider refunding the wrongfully collected sums, resulting in the State being unjustly enriched by tens of millions of dollars.

The trial court sustained demurrers to Petitioners' operative Fourth Amended Complaint without leave to amend and the Second District Court of Appeal affirmed. (*McClain v. Sav-On Drugs* (2017) 9 Cal. App. 5th 684.) ("*McClain*"). The *McClain* Court *correctly* held that "the chief issue in this appeal is not the merits, but where and by whom they may be litigated." (*Id.* at 702.) However, the *McClain* Court *incorrectly* held that customers who are charged sales tax reimbursement on tax-exempt sales have no standing to recover the improper charges: not against the retailers who overcharged them and not against the State which is unjustly enriched.

The *McClain* Court apparently believed that this result was preordained by this Court's decision in *Loeffler*.[2] However, *Loeffler* did not involve the two causes of action at issue in this appeal. Petitioners' First Cause of Action alleges that the retailers breached the express or implied contractual agreement with their customers for the collection of sales tax

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[2] *See McClain* at 704:

> Further, our Supreme Court in *Loeffler* —although silent on this point — noted no constitutional impediment to its ruling that left consumers with no direct remedy for a refund and instead relegated them to urging Board inquiry and to filing claims or actions under the Administrative Procedure Act. (*Loeffler, supra*, 58 Cal.4th 1081.) Were we to come to a contrary conclusion, we would effectively overrule *Loeffler*, something we are not allowed to do except in narrow circumstances not present here.

(Emphasis added.)

reimbursement (such an agreement being required by Civil Code §1656.1). Petitioner's Fifth Cause of Action alleges that Petitioners are entitled to the equitable remedy devised by this Court in *Javor*. Under that decision, each of the Respondent retailers would be compelled by the Superior Court to file refund claims with the SBE, and the SBE would be compelled to pay such amounts into court for distribution to the class members.

Neither of those causes of action was alleged in *Loeffler*, and indeed, the SBE was not even named as a party in *Loeffler*. Nevertheless, this Court went out of its way in *Loeffler* to confirm the continued utility of the *Javor* remedy. (*See Loeffler* at 1133 ["The integrity of the tax system and avoidance of unjust enrichment, possibly of the retailer, but more probably of the state, in certain circumstances may support a *Javor*-type remedy for consumers."].). Moreover, Justice Liu, writing for the three dissenters in *Loeffler*, warned courts to not overread *Loeffler* as precluding all consumer cases involving a sales tax issue: (*Id.* at 1142 ["The court's ruling...need not be read to broadly establish that a consumer action may never go forward if it involves a tax issue."].)

The *McClain* opinion is the first appellate decision interpreting *Javor* since this Court's decision in *Loeffler*. Despite *Loeffler's* affirmation of the *Javor* remedy and Justice Liu's warning, the *McClain* Court read *Loeffler* so broadly as to abolish all legal recourse for consumers who are charged excess sales tax reimbursement on tax-exempt sales. (*See* n.2, *supra.*) Specifically, two holdings of the *McClain* opinion extended this Court's decision in *Loeffler* to mean:

(Holding 1) that customers — who statutorily cannot file refund claims themselves — also cannot bring an action in the Superior Court to compel a retailer to file a refund claim with the SBE, notwithstanding that this Court approved such a remedy for the State's unjust enrichment in *Javor* (*McClain* at 700-701), and

(Holding 2) that two Tax Code provisions (§6905 and §6901.5) create a "safe harbor" that insulates a retailer from liability for any breach of Civil Code §1656.1's requirement of an express or implied agreement between retailer and customer regarding "whether a retailer may add sales tax reimbursement to the sales price." (*McClain* at 701-702.)

The *McClain* Court reached its first holding by interpreting supposed "prerequisites" for the *Javor* remedy in a manner that no case, not even *Javor* itself, could possibly satisfy, making the *Javor* remedy definitionally impossible. The *McClain* Court's decision therefore amounts to a *de facto* overruling of this Court's opinions in both *Javor* and *Loeffler* (insofar as *Loeffler* affirmed the continued utility of the *Javor* remedy at 1133). Moreover, although the *Javor* remedy has rarely been employed, for 43 years it has served a vital purpose of protecting California's sales tax reimbursement scheme from unconstitutionality. By effectively abolishing the *Javor* remedy and leaving customers with no recourse, the *McClain* Court renders California's sales tax reimbursement scheme unconstitutional under the Due Process and Takings Clauses of the U.S. Constitution.

The *McClain* Court's second holding effectively re-writes Civil Code §1656.1's rebuttable presumption – of consumer consent to the addition of "sales tax reimbursement to the sales price" — into its opposite, an *ir*rebuttable presumption. That is contrary to at least three of this Court's decisions: *Javor*, *Loeffler,* and *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163 ("*Cel-Tech*"). It also destroys the consensual constitutional basis for sales tax reimbursement recognized by this Court in *National Ice*. *McClain* thereby creates a constitutional crisis for the sales tax reimbursement system that has been the foundation of California's sales tax since its inception 84 years ago.

This Court should therefore reverse *McClain* by reinstating Petitioners' First and Fifth Causes of Action and by ordering that Petitioners be granted leave to amend to state a cause of action for "just compensation" under the Takings Clause of the U.S. Constitution.

III. THE PROCEEDINGS BELOW

A. Relief Sought In The Trial Court.

Petitioners have limited their appeal to the trial court's dismissal on demurrer of two of their seven causes of action:

(1) Petitioners' Fifth Cause of Action for a *Javor* remedy against all defendants. This cause of action seeks to compel each defendant retailer to file refund claims with the SBE for all amounts that it remitted to the SBE on the sale of glucose test trips and lancets, and to compel the SBE to pay such amounts into court for distribution to the class members. (AA 083-085)

(2) Petitioners First Cause of Action against the retailer defendants for breach of the contractual agreement required by Civil Code §1656.1 in order for a retailer to collect sales tax reimbursement. This cause of action seeks equitable relief and damages from each defendant retailer for collecting sales tax reimbursement on tax-exempt sales of test strips and lancets in breach of its contractual agreement (required by Civil Code §1656.1), including the implied covenant of good faith and fair dealing. (AA 077-078.) Petitioners do not seek to enjoin the collection of any sales tax.

In addition, Petitioners appeal the trial court's denial of their request for leave to amend to allege a constitutional Takings Clause claim against the SBE for "just compensation." (AA 622; RT 643:19-644:3; AOB 59-62.)

B. The Judgment Appealed From.

At the beginning of the 2/24/2015 demurrer hearing, the trial court announced a tentative basis for sustaining the demurrers:

> It's very hotly in dispute, this taxability of the two items in question, strips and lancets.
>
> ****
>
> This case is more like *Loeffler* than *Javor*. So *Loeffler* governs across the board for all causes of action for the reasons the moving parties state.
>
> I agree with Mr. Berry's reply ... that, "The binding Supreme Court decisions in *Loeffler* and *Javor* fully [dispose] of all of Plaintiffs' claims."
>
> ... I also completely agree with this sentence [by retailer defendants]: "What made *Javor* unique is, unlike *Loeffler* or the case at Bar, the SBE has already made its taxability determination using its own statutory procedures." So the Court's forced refund order could not interfere with the exclusive powers of the SBE to rule on tax questions.

(RT 605:1-26.)

At the end of the hearing, the trial court confirmed its tentative ruling. (RT 646:6.) It also denied Petitioners' request for leave to amend to add a constitutional claim for "just compensation" under the Takings Clause. (RT 646:7-10.) The trial court did not issue a written opinion.

On 4/15/2015 the trial court entered final judgment of dismissal without leave to amend. (AA 613.) On 6/11/2015 Petitioners' filed timely Notices of Appeal. (AA 619, 621.)

IV. LEGAL AND FACTUAL BACKGROUND.

A. The Statutory Origins Of California Sales Tax And Sales Tax Reimbursement.

The basic structure of California's retail sales tax has always been dogged by constitutional concerns arising from the Legislature's initial decision[3] in 1933 to impose the sales tax on retailers rather than purchasers (as many other states have done[4]). If California had imposed the sales tax on purchasers and tasked retailers with the responsibility of collecting the tax and remitting the proceeds to the SBE, the collection and payment of sales tax would have been much the same as it is now but with one major difference—purchasers would be called "taxpayers" with standing to directly file and prosecute tax refund claims against the SBE. This would be consistent with Code of Civil Procedure ("C.C.P.") §367's public policy favoring real-parties-in-interest. ("Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute").

But there was a countervailing consideration. Prior to enactment of the Retail Sales Tax Act of 1933 ("1933 Act"), all banks located in California — both state and nationally chartered — were subject to a franchise tax based upon annual net income *that was in lieu of all other taxes* except those upon real property. (Former Cal. Const. Art. XIII, §16, adopted 11/6/1928.)[5] Likewise, insurance companies doing business in

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[3] "[I]t would have been within the power of the legislature to have imposed a tax upon either the retailer or the purchaser...." (*National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283, 290 ("*National Ice*").)

[4] *See, e.g. Washington Rev. Code.* (ARCW) § 82.08.050; *Utah Code Ann,.* § 59-12-103; *Utah Administrative Code*, R865-19S-2.

[5] "California adopted the in lieu tax on net income and made it applicable to all banks located within the state because tax-rate parity between national

California were subject to an annual tax on gross premiums that was in lieu of all other taxes. (Former Cal. Const. Art. XIII, §14, as amended 11/2/1926). Additionally, the State was precluded from directly taxing the federal government and certain of its agencies by *McCulloch v. Maryland* (1819) 17 U.S. 316 ("*McCulloch*") and its progeny. A retail sale to any of those entities would be exempt from a sales tax levied on the purchaser, but might be subject to a tax levied on the non-exempt retailer.

Accordingly, in order to maximize sales tax collections, "[w]hen the Legislature enacted the California Retail Sales Tax Act, it intended that the incidence of the tax be on the retailer, not upon the consumer." (*See* AA 410 [" One of the primary reasons for drafting the sales tax law as a tax on the retailer rather than the consumer was to provide for uniform application of tax to sales of all consumers, including those consumers who would be exempt were the tax imposed directly on the consumer. These consumers include certain agencies of the federal government and national banks, exempt under federal law, and state banks and insurance companies exempt under state law." (Emphasis added.)].

The Legislature therefore levied the sales tax on retailers "for the privilege of selling tangible personal property." (1933 Act, §3, currently Tax Code §6051.) However, the 1933 Act also provided that, "The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done..." (1933 Act, §8 ½, codified as former Tax

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and state banking institutions was a prerequisite for any tax upon national banks." *Hibernia Bank v. State Bd. of Equalization* (1985) 166 Cal. App. 3d 393, 398. The prerequisite was created by former U.S. Rev. Stat. §5219 as amended on March 25, 1926, which "required that any such tax comply with certain conditions, principally designed to prohibit discrimination against national banks." (*American Bank and Trust Company v. Dallas County* (1983) 463 U.S. 855, 861 at n.3.")

Code §6052.) This provision was the origin of California's sales tax reimbursement scheme.

B. The Differences Between Sales Tax And Sales Tax Reimbursement

Sales tax *reimbursement* is quite different than sales *tax*. Retailers must file sales tax returns and pay sales tax on their gross taxable sales, generally quarterly for the preceding quarter (Tax Code §§6451–6459), regardless of whether they were reimbursed by customers for the tax liability at the point of sale.

Sales tax reimbursement, on the other hand, is a private contractual payment by the customer that "depends solely upon the terms of the agreement of sale." (Civil Code §1656.1.) Sales tax reimbursement is typically collected by the retailer from the customer at the point of sale, but that is *not* legally required as the retailer may absorb the tax instead. (*Loeffler* at 1117.) When the retailer collects more sales tax reimbursement on a transaction than is owed by the retailer on that transaction, the difference is referred to as "excess sales tax reimbursement." If the sale is legally tax exempt, as is the case with respect to pharmacy sales of test strips and lancets, *any amount* collected as "sales tax reimbursement" is "excess sales tax reimbursement" (Cal. Code Regs., tit. 18, §1700, subd. (b)(1)) and may be returned to the customer by the retailer under Tax Code §6901.5 or by the SBE under Tax Code §6901.[6] This case involves what happens when they neglect or refuse to do so.

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[6] Tax Code §6901 was amended in 1963 to insert the words "from whom the excess amount was collected or by whom it was paid under this part." That amendment empowered the SBE to return excess sales tax reimbursement directly to customers (the persons "from whom the excess amount was collected") However, the SBE does not acknowledge that power in Reg. §1700, subd. (b)(2). Instead, as here, the SBE retains for the State's coffers all excess sales tax reimbursement remitted by retailers by

C. The Constitutional Basis For Retailers Collecting Sales Tax Reimbursement.

In 1938 this Court was faced with the following question: By what legal principle is it constitutional for the Tax Code to obligate a purchaser to reimburse a retailer for sales taxes that are legally levied upon the retailer alone? This Court answered that question by holding that there is no such legal principle, and that Section 4 of the 1933 Act was unconstitutional for lack of due process:

> [T]o baldly legislate that without, and in the absence of either due or any process of law, a legal debt that is owed by one person must be paid by another, is quite at variance with ordinary notions of that which may be termed the administration of justice. . . [A]ny . . .provision of the statute ... which purports either directly or indirectly to authorize the retailer to collect from or to charge to the purchaser ... the tax imposed upon its retailer ... is unconstitutional and consequently invalid.

(*National Ice* at 291-292, emphasis added.)

However, this Court threw the SBE a lifeline by which it could avoid unconstitutionality in future cases:

> However, such declaration of the law is not intended to indicate the illegality of authority which may be lodged in a retailer to "pass on" the tax to a purchaser with the latter's consent thereto, either expressly or impliedly given. That sort of arrangement between interested parties in such a sale is not here involved.

(*National Ice* at 292, emphasis added.)

Thus, the presence of customer consent "either expressly or impliedly given" became the cornerstone for retailers' right to "pass on" sales taxes to their customers as sales tax reimbursement. In 1978 that

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never "certify[ing] or"ascertain[ing] under Tax Code §§6901, 6901.5 or Reg. 1700(b)(2) that a retailer has collected excess tax reimbursement.

concept was incorporated into Civil Code §1656.1, which makes that right "depend[] solely upon the terms of the agreement of sale." (*See* p. 13, *infra.*)

Absent customer consent, retailer collection of sales tax reimbursement would be no more constitutional than if the Legislature decreed that buyers of real property must reimburse their seller for capital gains taxes that the seller incurs on the sale. Such shifting of the seller's tax liability to the buyer might be acceptable as a negotiated term of the agreement of sale, but a statute to that effect would be a deprivation of property without due process of law. *See, e.g., Oksner v. Superior Court of Los Angeles County* (1964) 229 Cal. App. 2d 672, 684 ("Due process forbids the seizure of one man's property for satisfaction of the debt of another.")

D. Background on Civil Code §1656.1.

A consensual agreement by customers to pay sales tax reimbursement becomes even more necessary as a result of *Diamond National v. State Equalization Bd.* (1976) 425 U.S. 268 ("*Diamond*"). In a brief *per curiam* opinion, the U.S. Supreme Court reversed the California Court of Appeal on the authority of *First Agricultural Nat'l Bank v. State Tax Commissioner* (1968) 392 U.S. 339, 346-48 ("*First Agricultural*").

In *First Agricultural*, the Court had held unconstitutional Massachusetts' attempt to tax a retailer on sales to a national bank that was tax-exempt under *McCulloch* (except for "in lieu" and other forms of permitted taxation enumerated in former 12 U.S.C. §548). The Court reasoned that the Massachusetts law created a "sales tax which by its terms must be passed on to the purchaser." (*First Agricultural* at 347.) Several provisions of the Massachusetts Act had analogs in California's sales tax law. It is therefore not surprising that the Supreme Court in *Diamond* held

that in California, as in Massachusetts, the incidence of the sales tax was on purchasers, not retailers, notwithstanding that Tax Code §6052 said the opposite. (*See Diamond* at 268 ["We are not bound by the California court's contrary conclusion and hold that the incidence of the state and local sales taxes falls upon the national bank as purchaser and not upon the vendors."].)

The Legislature responded to the potential loss of tax base by enacting 1978 Senate Bill 472 as Stats. 1978, ch. 1211, which attempted to eliminate any implication that California's law created a "sales tax which by its terms must be passed on to the purchaser:"

> When a federal decision found that the California sales tax fell on a bank as a purchaser *(see Diamond)*, the revision was considered necessary. The 1978 enactment clarified that the tax fell on the retailer "by *removing* from the code those provisions of law which have characteristics of laws which impose the *tax upon the consumer.*' . . . . All of these repealed provisions evidently were thought to create a danger that they might support the view that consumers bore the economic burden of the tax and therefore were the actual taxpayers.
>
> In their place, the Legislature added Civil Code section 1656.1, described above, permitting but not requiring the addition of reimbursement charges, designating the charges as a matter for a contractual agreement between seller and buyer, and permitting the retailer to absorb the tax.

(*Loeffler* at 1116-1117, original italics, underscore added.)

Thus, the Legislature's goal in 1978 was to remove the State and the SBE from any role in determining whether a retailer may add sales tax reimbursement to the sales price by making it "a matter for a contractual agreement between seller and buyer." To further disentangle the SBE from sales tax reimbursement, the Legislature put the critical replacement statute in the Civil Code rather than the Tax Code. Thus, Civil Code §1656.1 was

enacted as the only statutory authority for retailers to collect sales tax reimbursement from customers.

The reduction in California's sales tax base as a result of *Diamond* was of great concern for the State and the SBE, so §1656.1 was carefully crafted to achieve a delicate balance between the rights of retailers and the rights of consumers. It begins by stating:

> Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale.

(Emphasis added.)

However, §1656.1 then creates a presumption in favor of the existence of an agreement by the customer to pay sales tax reimbursement "if . . .sales tax reimbursement is shown on the sales check or other proof of sale." (*Id.,* Sub. (a)(3).) But in the final adjustment, the last subsection states: "The presumptions created by this section are rebuttable presumptions." (*Id.* Sub. (d).)

Why did the Legislature enact a presumption at all? Why not just say "A retailer may add sales tax reimbursement to the sales price… if… sales tax reimbursement is shown on the sales check or other proof of sale"? The answer is that would result in a "sales tax which by its terms must be passed on to the purchaser," exactly what condemned the sales taxes in *First Agricultural* and *Diamond.* So instead, the Legislature made the presumption in Civil Code §1656.1 "rebuttable" in an attempt to establish that a customers' agreement to pay reimbursement is consensual (and not State imposed as in *First Agricultural* and *Diamond*).

That same logic and rebuttable presumption did double duty by ensuring that the constitutional justification for retailers' ability to "pass on" the sales tax to their customers in the form of sales tax reimbursement

—*i.e.* purchaser agreement "either expressly or impliedly given" as per *National Ice* – would always be deemed consensual rather than State-imposed. But the *McClain* opinion would now make the carefully constructed rebuttable presumption of §1656.1 instead *ir*rebuttable.

E. The Tax Exemption For Pharmacy Sales Of Consumable Supplies Used In Treating Diabetes.

Because of its life-saving importance, insulin has never required a prescription, and therefore never fit within the general California sales tax exemption for *prescription* medicines. Nevertheless, the Legislature amended Tax Code §6369 in 1963 to specifically make insulin "furnished by a registered pharmacist without prescription" exempt from sales tax. (AA 166; Tax Code §6369 (former subsection d)/(current subsection e).)

The following year, the SBE promulgated Annotation 425.0460 to make clear that "Sales of insulin by druggists for treatment of diabetes will be presumed to be furnished upon the direction of a physician so as to fall within the exemption provided by section 6369 in the absence of evidence to the contrary." (AA 169.) That presumption is consistent with the 1963 advice of the SBE to the Governor that "patients using insulin are uniformly under the care of physicians." (AA 166). In that same communication, the SBE advised the Governor of another purpose for the legislation: to "relieve doctors and public agencies of burdensome distinctions which seem to have little basis for existence." (AA 167.)

Tax Code §6369 was amended in 1982 to extend the tax exemption to insulin syringes. (Tax Code § 6369(e).) In advance of each of the 1963 and 1982 amendments, the Legislature estimated that 100% of the sales tax revenues from the product would be lost if the proposed exemption were enacted. (AA 070-71 ¶27(a).) This establishes the Legislature's intent that all pharmacy sales of insulin and insulin syringes would be covered by the

tax exemption, not just a portion of the sales depending upon how the sale was made.

Test strips are medically necessary for diabetics to determine the timing of insulin injections. (AA 278 ["current medical opinion stresses that regardless of treatment, people who have diabetes need to monitor their disease and use of blood glucose monitors is the only method for doing that."].). The cost of test strips is the largest health maintenance expense for diabetic patients. ((*Id.*) ["The major cost to diabetics is for the test strips."].) Therefore, in 1999 the SBE considered whether the 1982 amendment to Tax Code §6369(e) – which extended the tax exemption for insulin to cover insulin syringes —also indicated a legislative intention to make other consumable supplies used in the administration of insulin, namely test strips and lancets, tax exempt.

The SBE went through the same tax loss revenue estimation process as the Legislature had gone through for insulin and insulin syringes. The estimate (dubbed "Alternative 1') showed that the tax revenue loss from the proposed exemption would be 100%. (AA 071 ¶27(b); 282; 284.)

However, the SBE's staff recommended "Alternative 2," which would not have interpreted the tax emption to cover tests strips and lancets, so the tax revenue loss would be 0.0% (AA 282 ["Alternative 2:...The staff recommendation has no revenue effect."].)

Nevertheless, the SBE's publicly elected Board overrode the staff's recommendation, and adopted Alternative 1 as SBE Regulation 1591.1(b)(5) [18 Cal. Code Regs. Tit. 18, §1591.1(b)(5)] effective March 10, 2000, as follows:

> Glucose test strips and skin puncture lancets furnished by a registered pharmacist that are used by a diabetic patient to determine his or her own blood sugar level and the necessity for and amount of insulin and/or other diabetic control medication needed to treat the disease in accordance with a