

S202037

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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JOHN W. McWILLIAMS, on behalf of himself  
and all others similarly situated,  
*Plaintiff and Appellant,*

vs.

CITY OF LONG BEACH  
*Defendant and Respondent.*

SUPREME COURT  
**FILED**

JUN 15 2012

Frederick K. Ohrich Clerk

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Deputy

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After A Decision By The Court Of Appeal  
Second Appellate District, Division Three  
Case No. B200831

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Superior Court for the County of Los Angeles  
Hon. Anthony J. Mohr, Judge  
Trial Court Case No. BC361469

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**PLAINTIFF'S OPPOSITION TO SECOND MOTION  
FOR JUDICIAL NOTICE**

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## I. INTRODUCTION

Plaintiff John McWilliams submits this opposition to the Second Motion for Judicial Notice (“Second Motion”) filed by Defendant City of Long Beach (“Defendant” or the “City) in support of the City’s Petition for Review.

The three documents for which the City seeks judicial notice are wholly irrelevant to the question of whether this Court should grant the City’s Petition for Review. Accordingly, the Second Motion should be denied.

## II. ARGUMENT

The City seeks judicial notice of materials that reflect factual circumstances fundamentally different from the instant matter, because they each involve local municipal codes that expressly purport to preclude class claims. Here, in contrast, there is no City ordinance that requires service users, such as Plaintiff, to file a claim with the City for refund of the taxes, much less one that prohibits class claims. (*McWilliams v. City of Long Beach* (March 28, 2012, No. B200831) 2012 Cal. App. Unpub. LEXIS 2402, at p. \*5 [“This refund provision does not provide a mechanism for an individual service user (i.e., taxpayer) to seek a refund of illegally collected TUT.”]; *Id.* at p. \*18-19, fn. 7, reh. den. Apr. 12, 2012.) Before this Court could even reach the preemption issue that the City seeks to raise, it would need to conclude that that the City has somehow precluded class claims sub silentio because no City ordinance precludes them by its terms.

In *Borst v. City of El Paso Robles*, San Luis Obispo Superior Court, No. CV 09-8117 – from which the City seeks judicial notice of a Memorandum of Points and Authorities in support of a demurrer (Exhibit A to the Second Motion) and portions of the Municipal Code for the City of El Paso Robles (Exhibit C to the Second Motion) – the primary argument asserted by the City of El Paso Robles is that the claims at issue are governed by *statutes* enacted by the Legislature, i.e., Health and Safety Code sections 5471 and 5472 and Revenue and Taxation Code section 5140, and not by section 910 of the Government Code or by the local

municipal code section. (See Exhibit A to the Second Motion at pp. 8-11.) Therefore, unless and until the lower court rejects the City of El Paso Robles' primary argument, the question of whether the local code is preempted will never arise in that case.<sup>1</sup>

Likewise, in *Sipple v. City of Alameda*, Los Angeles Superior Court, No. BC462270 – attached to the Second Motion as Exhibit B – the court addressed only the situation where “specific provisions in ... municipal ordinances ... prohibit class action tax refund claims ....” (Exhibit B to the Second Motion at p. 6.) The court recognized, however, that this Court’s decision in *Ardon* is controlling wherever – as here – there is no specific, applicable local ordinance. (*Ibid.*)

The fundamental inquiry on the Petition for Review before this Court is whether the City’s Municipal Code conflicts with the claims provisions of the Government Code, not whether other cities’ codes might conflict. Given the absence of such an actual conflict here, the City is asking this Court to reach out and render an advisory opinion with respect to factual circumstances not present in this action. Other municipal codes and pleadings interpreting them are irrelevant here. (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1227, fn. 3 [91 Cal.Rptr.3d 140, 203 P.3d 454] [“Although they may be affected by our ruling, the propriety of other counties’ programs is not before us, and their existence is not relevant to the resolution of any legal issue presented here [and, therefore,] [w]e decline to take judicial notice of these materials.”].)

The City’s Motions for Judicial Notice attempt to divert attention from the absence of the necessary conflict here by reference to ordinances and factual

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<sup>1</sup> For example, the El Paso Robles Municipal Code is fundamentally different from the City of Long Beach’s Municipal Code in that it provides an administrative refund claim procedure that expressly prohibits class claims. (See Exhibit C to the Second Motion.) However, as the Court of Appeal held below, the Long Beach Municipal Code has no required refund procedure for taxpayers, much less one that prohibits class claims.

circumstances purportedly present in other cases and should be rejected. To the extent that the necessary conflict exists in those cases, the preemption issue would be best decided in them.

### III. CONCLUSION

The City's Second Motion should be denied.

DATED: June 14, 2012

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DECLARATION OF SERVICE

I, Marianne Boyles, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California. 92101.

2. On June 14, 2012, declarant served the PLAINTIFF'S OPPOSITION TO SECOND MOTION FOR JUDICIAL NOTICE via Federal Express Overnight Delivery in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

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

Executed this 14th day of June 2012, at San Diego, California.

  
MARIANNE BOYLES

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