S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

CITY OF LONG BEACH'S OPENING BRIEF ON THE MERITS

Of an Unpublished Decision of the Second Appellate District of the Court of Appeal
Case No. B200831

Reversing a Judgment of the Superior Court of the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

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ISSUES PRESENTED FOR REVIEW

1. Government Code § 905 (a) excepts "claims under ... [a] statute prescribing procedures for the refund ... of any tax, assessment fee or charge" from the scope of the Government Claims Act.[1] Did the Legislature use "statute" in this section to exclude local legislation and to require claims for refunds of local taxes, assessments, fees and charges to be governed by the Government Claims Act?
2. If so, does § 905 (a) violate the home rule power to tax conferred on charter cities by Article XI, §§ 3, 5 and on all cities and counties by Article XI, § 7 of the California Constitution?[2]
3. Does the second sentence of California Constitution, Article XIII, § 32, which requires express legislative authorization for tax refunds, apply to local government?

INTRODUCTION

Until *County of Los Angeles v. Superior Court (Oronoz)* (2008) 159 Cal.App.4th 353 (hereinafter, "*Oronoz*"), no case questioned the power of local governments, acting by ordinance or city charter, to control the

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[1] Government Code § 810 *et seq.*

[2] All unspecified section references in this brief are to the California Government Code. Unspecified references to articles and sections of articles are to the California Constitution.

manner by which claims for refunds of taxes, fees and assessments[3] may be made. The strong public policy in favor of predictable funding for essential government services reflected in Article XIII, § 32 of the California Constitution explains this long-standing rule. Moreover, the Government Claims Act procedures designed for ordinary tort and contract claims are not well suited to tax refund claims, as evidenced by the Legislature's 1959 decision to exempt such claims from the Act via what is now Government Code § 905, subd. (a). This is especially true for taxes — like those in issue here — as to which a private tax collector rather than the tax payer is obligated to remit the tax to the levying government, and a risk of double recovery therefore arises.

Oronoz disparaged a long line of decisions reflecting the earlier rule. It was apparently influenced by the equities of a case in which Los Angeles County refused to seek voter approval of its utility tax for more than a decade after this Court made clear in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220 and *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809 (hereinafter, "*HJTA v. La Habra*") that it was obliged to do so. The very appellate panel that

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[3] For convenience, this brief will refer to claims for refunds of taxes, assessments and fees as "tax refund claims" as the principles in issue apply equally to all local government revenues and the revenue measure in issue here is a tax.

decided *Oronoz* promptly repudiated it,[4] leading to this Court's 2011 decision in that case.

Of course, *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 (hereinafter, "*Ardon*") expressly reserved whether local claiming ordinances may apply to tax refund claims. Thus, this case presents an opportunity to restore the law to its long-standing posture predating *Oronoz* and to eliminate ambiguity as to the power of local governments to fashion sensible rules governing claims for refund of local taxes that the Legislature has never provided, is ill-suited to provide, and which it intended to supplement the general rules of the Government Claims Act. To do otherwise is to read legislative silence that reflects delegation to local government as legislative intention to apply the usual Government Claims Act rules to tax refund claims. Such a reading works a sea change in California's local finance law and ignores the contrary legislative intent plainly demonstrated by the history of the Act.

Reexamination of the Eisenhower-era legislative history of Government Code § 905, subd. (a) will allow this Court to avoid difficult constitutional questions that otherwise arise. That history plainly shows the intent of the Legislature in 1959, when the Act was first adopted, and

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[4] *Ardon v. City of Los Angeles* (2009) 174 Cal.App.4th 369, *review granted and opinion superseded,* 216 P.3d 522 (Cal. 2009) *and rev'd,* 52 Cal. 4th 241 (2011). The City cites the Court of Appeal's decision in *Ardon,* overtaken by this Court's grant of review, pursuant to Rule 8.1115, subd. (b)(1) to provide the procedural history of this dispute.

again in 1963, when the relevant statutes took their current form, to exempt local tax claims.

Should the Court determine to reach those constitutional questions, however, this brief demonstrates that the Legislature may not subject local tax refund claims to the Government Claims Act's common procedures for tort and contract claims without offending the power reserved to charter cities by Article XI, §§ 3 and 5. Moreover, the second sentence of Article XIII, § 32, unlike the first, extends to local governments and protects the public interest in local fiscal predictability and integrity and the separation of powers between the judicial and political branches by requiring express legislative authorization for refunds of local taxes.

For all these reasons, the City of Long Beach (the "City") respectfully urges this Court to affirm the trial court's grant of demurrer in this case, disavow *Oronoz*, and in light of the legislative history, reaffirm the many cases concluding that Government Code § 905, subd. (a) preserves local government power to establish reasonable procedures for refunds of taxes, and that such procedures may bar class actions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The City's Telephone Users Tax and Appellant's Claim

Appellant John W. McWilliams ("Appellant" or "McWilliams") filed the complaint here on behalf of himself and a purported class alleging matters that have yet to be reached by any court — this appeal arises from a successful demurrer. McWilliams' allegations involve the effect of the

changing interpretation of the federal excise tax (FET) on telephony on local agencies' interpretation of their own telephone taxes. In particular, Appellant objects to the manner in which the City has calculated its telephone users tax (TUT), and claims that changes in the interpretation of the FET require a reduction in the City's TUT tax base because the City's ordinance makes reference to the FET in defining that base. However, since the TUT's inception, the City has consistently applied it to calls priced on the basis of duration alone, as well as those based on duration and the distance between the telephones served by a call. Indeed, until July 2006, the federal government construed the FET in the same manner and had done so since at least a 1979 Internal Revenue Service (IRS) ruling on which the City relied in enacting its tax. That 1979 IRS ruling remained undisturbed for nearly 30 years despite transformative changes in the telecommunications industry. (See Revenue Ruling 79-404, 1979-2 C.B. 382, MJN[5] Exh. A.) Appellant contends that, when the IRS changed its position with respect to the FET in July 2006 via Notice 2006-50 (MJN Exh. B), the City was required to change its longstanding interpretation of its TUT ordinance as well.[6]

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[5] "MJN" refers to the City's Motion for Judicial Notice In Support of its Opening Brief on the Merits, filed concurrently with this brief.

[6] Appellant maintains this position despite that the IRS issued a subsequent notice clarifying that Notice 2006-50 was not intended to affect the power of state and local governments to impose or collect telecommunication taxes under their respective laws. (See IRS Notice 2007-

After Notice 2006-50 issued, the City Council acted by ordinance to clarify that the TUT's reference to the FET meant that tax as the IRS construed it when the City first adopted that reference and indeed as the IRS construed it from at least 1979 until 2006. The Council stated that the IRS' narrowing of the federal tax did not reflect the City's intent with respect to its own tax. Appellant sued, claiming the City's clarification was a tax "increase" requiring voter approval under Proposition 218, Article XIII C, § 2, subd. (b).

The City respectfully submits that it has persuasive arguments on the merits in this dispute, which have yet to be considered by any court. Thus, any attempt by Appellant to characterize its challenge to the trial court's procedural rulings as an inevitable victory on the merits should be regarded, at a minimum, as premature.

II. Trial Court Proceedings

Appellant filed his complaint in November 2006, asserting these causes of action:

(1) declaratory and injunctive relief to prevent collection of the TUT;

(2) declaratory relief regarding the City's ordinance clarifying the intent of the local tax's reference to the FET;

(3) money had and received;

(4) unjust enrichment;[7]

11, MJN Exh. C at § 10.)

[7] Such common law claims as the third and fourth listed here, of

(5) violation of due process, and

(6) a writ claim. (CT, 18–21.)[8]

The complaint did not allege the individual members of the asserted class had filed administrative claims and relied only upon McWilliams' own claim, which purported to speak for a class. (CT 15 at ¶ 65; CT 40–42.)

This case was one of three involving nearly identical complaints and the same counsel. The others were *Ardon* and *Granados v. County of Los Angeles* (hereinafter, "*Granados*").[9] Plaintiffs filed a notice of related cases and the three suits were assigned to Judge Mohr. These three jurisdictions were sued apparently because they represent some 40% of the telecommunications market in California.

The City demurred to the *McWilliams* complaint, arguing — among other things — that Long Beach Municipal Code § 3.68.160 and § 3.48.060 disallow class claims. (CT 73; see also MJN Exhs. G and F.) Judge Mohr sustained the demurrer. (CT 113.) McWilliams declined to amend his complaint and appealed. (CT 150, 158.)

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course, do not lie against governments in California. (Cal. Gov. Code § 815, subd. (a).)

[8] CT refers to the Clerk's Transcript of the trial court action.

[9] Cal. Ct. App., Mar. 28, 2012, B200812. The City cites the Court of Appeal's decision in *Granados*, pursuant to Rule 8.1115, subd. (b)(1) to provide procedural history and context, not substantive argument.

III. Court of Appeal Proceedings

McWilliams filed his notice of appeal July 19, 2007. In August 2008, the Court of Appeal stayed the appeal pending its decision of *Ardon*. Thus, when the Court of Appeal issued its published opinion in *Ardon* in May 2009 — questioning its earlier decision in *Oronoz*[10] — it had both *Granados* and the instant case before it. This Court, of course, granted review of

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[10] Justice Joan Dempsey Klein was the swing vote as between *Oronoz* and *Ardon* and in her concurring opinion in the latter case stated:

> "In view of the confusion in this area, it would be helpful for the Supreme Court to grant review in this case in order to resolve the conflict between the *Oronoz* decision and the majority opinion herein.
>
> Review is further warranted because the question presented, i.e., whether Government Code section 910 authorizes a class claim for tax refunds, is a major statewide issue with serious implications for the public fisc.
>
> Currently, this Division alone has at least two other appeals involving the same issue."

Ardon v. City of Los Angeles, 94 Cal. Rptr. 3d 245, 257–58 (2009) *review granted and opinion superseded*, 216 P.3d 522 (Cal. 2009) *and rev'd*, 52 Cal.4th 241 (2011). Again, the City cites the Court of Appeal's decision in *Ardon* pursuant to Rule 8.1115, subd. (b)(1) to provide the procedural history of this dispute.

Ardon.[11] *McWilliams* and *Granados* remained stayed by the Court of Appeal pending decision in *Ardon*.

This Court's 2011 ruling in *Ardon* holds that § 910 permits class claims for tax refunds when that section supplies the rule of decision. This Court explained that the rule of *Woosley v. State of California* (1992) 3 Cal.4th 758, 789 — that class claims for tax refunds require express legislative authorization — "requires that a court analyze the claims statutes before it to determine whether the Legislature intended to allow class claims under those statutes." (52 Cal.4th at 251.) Like *Woosley*, *Ardon* confirms that a court must analyze applicable tax refund procedures — in this case, the City's municipal ordinances — to determine whether class claims are permitted.

Significantly, *Ardon* does not hold that § 910 governs all claims for tax refunds against local governments or that § 910 preempts local claiming requirements. This Court was careful to reserve that issue, which was not before it.[12] Instead, this Court concluded that class claims are allowed by § 910 "in the absence of a specific tax refund procedure set forth in an applicable governing claims statute." (*Ardon*, 52 Cal.4th 241, 251.)

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[11] *Id.*

[12] Although the City of Los Angeles asserted that certain of its ordinances constituted applicable claiming requirements, the Court of Appeal concluded otherwise and the City did not pursue the issue before this Court. (*Ardon*, 52 Cal.App.4th at 246, fn.2.)

Specifically, *Ardon* did not hold that local claiming ordinances are not "statutes" for purposes of § 905, subd. (a)'s exclusion from the Government Claims Act of "[c]laims under the Revenue and Taxation Code or other **statute**" prescribing refund procedures for taxes, fees or assessments. (Emphasis supplied.) Indeed, *Ardon* twice references local claiming ordinances. (*Ardon*, 54 Cal.4th at 250 ["[the foregoing] cases all considered statutes **or municipal ordinances** enacted to provide specific procedures for filing tax claims against governmental entities"] and 251 ["the claim here did not involve any applicable **municipal code** or statute governing claims for refunds"]) (emphases supplied.)

Ardon also reserved the question whether the second sentence of Article XIII, § 32 applies to local governments. (*Ardon, supra*, 54 Cal.4th 241, 252.) This Court concluded that § 910 permits class claims for tax refunds in the absence of local claiming requirements whether or not the second sentence of Article XIII, § 32 applies to local governments.

These reserved questions are now before this Court.

IV. This Court's Grant of Review

After this Court decided *Ardon* on July 25, 2011, the Court of Appeal asked the *McWilliams* and *Granados* parties to submit supplemental briefing on the impact of that decision on those cases. *Granados*, like *Ardon*, involved no local claiming ordinance and the parties essentially agreed to remand to the trial court. Long Beach, however, asserted its local ordinances. In an unpublished March 28, 2011 decision, the Court of Appeal reversed the trial court's dismissal of the first four causes of action

and affirmed its dismissal of the two remaining, concluding the due process and writ claims were mooted by the availability of refund claims. The Court further concluded that the City "is not authorized under the Government Claims Act to establish its own claims procedure for TUT refunds." (Opinion of the Second District Court of Appeal, Division Three, filed March 28, 2012 at p. 2) (hereinafter, "Opinion.") The Court reasoned that a city ordinance is not a "statute" within the meaning of Government Code § 811.8. On that basis, it concluded that city ordinances governing the refund of local taxes do not fall within § 905, subd. (a)'s exception to the Government Claims Act, which therefore preempts local claiming requirements in the context of claims for refunds of taxes, fees and assessments. (Opinion at pp. 7–12.) Although this decision rejected *Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65 and the long line of authority it represents, it did not designate its decision for publication as Rule 8.1105, subd. (c) of the California Rules of Court would seem to require.

In April 2012, the City petitioned for review of the questions stated above. In July 2012, this Court granted that petition.

STANDARD OF REVIEW

On appeal from an order of dismissal after an order sustaining a demurrer, review is *de novo*; a reviewing court exercises its independent judgment whether the complaint states a cause of action as a matter of law. (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) Of course, a reviewing court treats a demurrer as admitting all material facts

properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The reviewing court does not, however, assume the truth of contentions, deductions, or conclusions of law. (*Id.*) A court may also consider matters which may be judicially noticed. (*Id.*, quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

LEGAL DISCUSSION

I. Long Beach's Ordinances Do Not Permit Class Claims for Tax Refunds

The Long Beach Municipal Code ("LBMC") prescribes "procedures for the refund, rebate, exemption ... or adjustment of [a] tax, assessment, fee, or charge," and claims for money or damages against the City related to taxes controlled by those ordinances are therefore exempt from the claiming requirements of the Government Claims Act. (See Cal. Gov. Code § 905, subd. (a).)

A. LBMC Section 3.68.160 Does Not Permit Class Claims

LBMC § 3.68.160, a provision of the City Code's Utility Users Tax chapter, governs claims for refunds of telephone and other utility taxes:

> A. Whenever the amount of **any** tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the city clerk or city treasurer-city tax collector under this chapter [entitled "Utility Users Tax"], it may be refunded as provided in this section.
>
> B. A service supplier may claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally

collected or received, when it is established in a manner prescribed by the city treasurer-city tax collector that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or credited to charges subsequently payable by the service user to the person required to collect and remit.

C. No refund shall be paid under the provisions of this section unless **the claimant** established his or her right thereto by written records showing entitlement thereto.

D. **No refund shall be paid under the provisions of this section unless the claimant has submitted a claim pursuant to this section.**

(CT 73; see also MJN Exh. G) (emphases supplied.)

Thus, the City's controlling ordinance says nothing about class claims and cannot be construed to allow them. Rather, it is clear that "**the claimant**" must establish "his or her right [to a refund] by written records" (LBMC § 3.68.160(C)) and that "[n]o refund shall be paid under the provisions of this section unless **the claimant** has submitted a claim pursuant to this section." (LBMC § 3.68.160(D)) (emphasis supplied.) No reference is made to a class or representative claim. Thus, the City's controlling ordinance does not authorize class claims for refunds of utility users taxes, including telephone taxes.

Appellant attempts to avoid the City's ordinance altogether, claiming subdivision (B) limits the refund authorized by § 3.68.160 to service suppliers, creating a void as to telephone customers which the Government Claims Act (or due process) must fill. This wishful reading

completely ignores subdivisions (A), (C) and (D) of § 3.68.160. While subdivision (B) refers to the defined term "service supplier," subdivision (A) allows "**any tax**" to be refunded "**as provided in this section.**" (Emphases supplied.) Subdivisions (C) and (D) explain what "a claimant" must do to be "refunded as provided in this section." In other words, to submit a refund claim under § 3.68.160, Appellant need only submit a claim with written records establishing his right to a refund pursuant to subdivisions (C) and (D). That subdivision (B) refers only to service suppliers does not nullify the remaining subdivisions of § 3.68.160.[13]

B. Appellant Fares No Better Under the City's General Claiming Ordinances

Even were LBMC § 3.68.160 limited to service suppliers, LBMC §§ 3.48.060 and 3.48.070 — sections of the general "Claims and Refunds"

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[13] Section 1.08.010 of the LBMC provides general provisions and definitions that "shall govern the construction" of the LBMC. The LBMC's provisions "are to be construed with a view to effect its objects and to promote justice." (LBMC § 1.08.010, MJN Exh. D.) The City's interpretation of § 3.68.160 — namely, that it provides both a general refund claiming process under subdivisions (A), (C) and (D) for individual refunds and a particular procedure for service supplier refunds under subdivision (B) — effects the objects of the refund section and promotes justice by ensuring that all parties subject to the City's telephone tax have a refund remedy. Indeed, McWilliams argues the absence of a refund claim under his contorted reading of § 3.68.160 violates federal due process.

chapter of the "Revenue and Finance" title of the City Code — would apply. The former authorizes refunds:

> Any refund made pursuant to this chapter must be authorized by the department head with the approval of the city attorney or the city attorney and the city council, provided the refund is made within one (1) year after payment of the money to the city, **or if an application for a refund is filed by the person entitled to the money**, the application therefor must be filed within such one-year period."

(CT 74; see also MJN Exh. F) (emphasis supplied.)

Like § 3.68.160, this section does not authorize class claims; it plainly contemplates a refund being filed by a "person entitled to the money."[14] Moreover, it does not use the term "service supplier," much less limit refunds to service suppliers.

Section 3.48.070 confirms the availability of a refund remedy:

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[14] Section 3.48 of the LBMC does not define "person," but § 1.08.130.R does: "'Person' means any natural person, firm, association, joint venture, joint stock company, partnership, organization, club, company, corporation, business trust or the manager, lessee, agent, servant, officer or employee or any of them, except as otherwise provided in this Code, or where the context clearly requires a different meaning." (*Id.*, MJN Exh. E.) This definition plainly contemplates individuals rather than a claimant class.

> If any ordinance of the city or any law applicable thereto expressly authorizes, in certain contingencies, the making of a refund of money paid to the city or prescribes the procedure therefor, such ordinance shall control in making the refund. The council declares that its intent, in adopting this chapter, is to provide for the making of refunds of money paid to the city, under the conditions set forth in this chapter, not otherwise expressly prohibited by any ordinance or law applicable to the city or not otherwise expressly authorized by such ordinance or law.

(*Id.*, MJN Exh. F.) This makes clear that chapter 3.48 is intended as a safe-harbor to ensure that a remedy will always be available to all entitled to a remedy by due process. In light of that plainly stated intent, no court need ever resort to its equitable power to fashion a remedy to satisfy due process. McWilliams' contrary claims are wishful thinking.

C. Interpreting City Ordinances to Authorize No Tax Refund Violates Principles of Statutory Construction

Where possible, courts construe ordinances — like statutes — to avoid constitutional issues. (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928 [courts interpret ordinances as they construe statutes]; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 446 [where two interpretations of an ordinance are possible, courts will choose that which renders the ordinance constitutional]; *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 726 ["[t]he court should not espouse an interpretation which invites constitutional difficulties."].) Here, by arguing

that the City provides a refund process only for service suppliers, Appellant wants to have his cake and eat it, too. The City's ordinances would be unconstitutional if they provided Appellant no post-deprivation remedy, yet Appellant strains to read them that way. It is preferable to avoid the constitutional issue that Appellant struggles to create by accepting the City's interpretation of its own ordinances to allow individual taxpayers to claim refunds of erroneous or overpaid taxes.

As with statutes, a City's interpretation of its ordinances is given considerable deference and must be upheld absent evidence that interpretation lacks a reasonable foundation. (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 648 [construing mobile home rent control ordinance].) Where an agency's interpretation has been consistently maintained and is of long standing, a court may consider that fact in determining the degree of deference owed that interpretation. (*Van Wagner Communications, Inc. v. City of Los Angeles* (2000) 84 Cal.App.4th 499, 509-510 [construing billboard ordinance].)

Empowered by the voters who adopted its charter to implement, interpret and enforce local claiming procedures, the City has never interpreted § 3.68.160 or § 3.48.060 to authorize class claims. There is nothing in the record to the contrary. The City's consistent interpretation is both reasonable and practical. As discussed in more detail below, Article XIII, § 32 protects the City Council's legislative authority to control the manner in which tax refunds are sought. Deferring to the City's longstanding interpretation of its tax refund ordinances permits the City

sufficient notice of claims to allow for fiscal planning so it can avoid unforeseen impairment of its ability to finance police, fire, streets, parks and other essential local services to the residents and property owners it serves. The Court should therefore defer to the City's interpretation of its own ordinances, and conclude the applicable City ordinances bar class claims.

II. Government Code Section 905, subd. (a) Authorizes Local Tax Refund Requirements

The Government Claims Act establishes the general rule that a claim must be filed to pursue monetary relief against a California government agency; however, § 905, subd. (a) excepts from the Act's scope:

> Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption ... or adjustment of any tax, assessment, fee or charge ....

(Cal. Gov. Code § 905, subd. (a).) Appellant, however, would persuade this Court that "statute" as used in § 905, subd. (a) does not include local ordinances because § 811.8 limits the term to state and federal legislation.

To the contrary, however, the Legislature has preserved the power of both general law and charter cities to adopt local claiming requirements appropriate to their circumstances. This is reflected by the legislative history of § 905, subd. (a) and the text of the Government Claims Act itself.

A. The Legislative History of Section 905, subd. (a) Demonstrates That "Statute" Includes Local Ordinances

In 1956, the Legislature authorized the Law Revision Commission (the "Commission") to study the various provisions of law relating to the presentation of claims against public bodies and employees to determine whether they should be made uniform or otherwise revised. (2 Cal. Law Revision Com. Rep. (1959) p. A-1, attached to this Brief as an Appendix.[15]) There were then no fewer than 174 separate claims provisions scattered through state law and local charters and ordinances, differing widely as to information required, claims covered and time for filing claims. (*Id.*, p. A-7.) In 1959 the Commission proposed, and the Legislature adopted, A.B. 405 to standardize claiming requirements for claims against public entities for most, but not all claims. (Stats. 1959, Ch. 1724, § 1, at pp. 4133–4138, MJN Exh. H.) Thus came to be what is now the Government Claims Act. Tellingly, from the very first, claims for tax refunds were expressly exempted from the Act's general claiming rules. (*Id.* at pp. 4133–4134.)

In 1961 this Court decided *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, abolishing the rule of sovereign immunity and making a sea change in the law. The Commission spent all of 1962 revising the 1959 claims statute to address *Muskopf*, and in 1963 the Legislature adopted the Commission's recommendations as the current Government Claims Act. This legislation was not intended to make any change in the scope of the

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[15] 2 Cal. Law Revision Com. Rep. (1959) is appended to this brief, pursuant to Rule of Court 8.520(h), for the convenience of the Court.

power to local governments to impose claiming requirements nor to bring tax refund claims within the Act. However, the legislation also unfortunately added — 4 years after it was first adopted as an integrated statute governing claims — definitions of such terms as "statute" to the Act without the time, care and caution necessary to do so in a thorough and careful way. Thus, the seeds of the current dispute were sown.

I. The 1959 and 1963 Claiming Statutes Had Fundamentally Different Objects and Each Uses "Statute" Differently

In concluding the term "statute" excludes local enactments, the Court of Appeal in this case observed that in 1959, the Legislature specifically rejected a Commission proposal that used the term "other provisions of law," rather than "statute" in former Government Code § 703, the precursor to today's § 905, subd. (a). (Opinion, p. 10.) The court assumed that in 1959 the Legislature used the term "statute" as it would be defined four years later in Government Code § 811.8; in other words, to include only enactments of the California Legislature or of Congress, and to exclude local enactments.

This, of course, is ahistorical and error. Government Code § 811.8, with its narrow definition of the term "statute," was not adopted until 1963 — four years after the 1959 claiming statute was enacted — and with a very different object in mind. (Stats. 1963, ch. 1681, p. 3267, MJN Exh. I.) To conclude otherwise neglects the basic principle of statutory interpretation that "[t]he words of a statute are to be interpreted in the sense in which

they would have been understood at the time of the enactment." (*People v. Cruz* (1996) 13 Cal.4th 764, 775.)

2. The 1959 Legislature and Contemporaneous Courts Understood "Statute" to Include Local Ordinances and Charter Provisions

While "statute" was not defined by the government claims law enacted in 1959, the legislative history of that act shows the Legislature understood the term to embrace claim presentation requirements provided in state as well as local laws. Most notably, the 1959 Commission report, which constitutes the legislative history of that act,[16] defines "claims statutes" to include local legislation:

> There seems to be no adequate generic word for referring collectively to statutes, city charters and ordinances. Since claims are governed by legal requirements of all three types, the phrases 'claims statutes' and 'claims provisions' are used interchangeably herein to refer to all forms of legal claim presentation requirements as a class.

(2 Cal. Law Revision Com. Rep. (1959) at p. A-18, attached at Appendix.) Thus, the 1959 legislation used "statute" in what is now § 905, subd. (a) to

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[16] The appellate courts long ago identified this report as the legislative history of what is now the Government Claims Act. (*Pasadena Hotel Dev. Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415 fn. 3.)

mean "all forms of legal claim presentation requirements" **including local charters and ordinances**.

Contemporary judicial opinions also used "statute" to include local claiming provisions. (See *Parodi v. City & County of San Francisco* (1958) 160 Cal.App.2d 577, 580; *Cruise v. City & County of San Francisco* (1951) 101 Cal.App.2d 558, 562–564; *Germ v. City & County of San Francisco* (1950) 99 Cal.App.2d 404, 413–414.) This underscores the Commission's observation that there was in 1959 "no adequate generic word for referring collectively to statutes, city charters and ordinances" establishing claim requirements.

Additionally, the Office of Legislative Counsel's Report on the final version of the 1959 statute stated that tax claims were excluded from the scope of the statute. (Office of Legislative Counsel's Report, at p. 1, MJN Exh. J.) That Report explained that the new law:

> Exempts certain claims for money, **including claims related to taxes**, salaries and wages, workmen's compensation, unemployment insurance, public assistance, bonds and other such matters.

(*Id.* at p. 1) (emphasis supplied.)

3. The 1963 Legislature Had No Intent to Displace Local Claiming Requirements

The Legislature's intent with regard to former § 703, subd. (a) — the 1959 predecessor to 1963's (and the present's) § 905, subd. (a) — was to exclude **all** tax claims from this new "unified claims statute:"

> With respect to this former subdivision, the Law Revision Commission has stated that it excluded from the scope of the unified

claims statute then proposed by the Commission **all** 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.)

(*Pasadena Hotel Dev. Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415 fn. 3 [emphasis supplied].) When the Commission recommended renumbering this provision as § 905, subd. (a) in 1963, it explained "[t]his section is the same in substance as Government Code Section 703." (4 Cal. Law Revision Com. Rep. (1963), Recommendation Relating to Sovereign Immunity No. 2, p. 1027, MJN Exh. L.) Likewise, the Commission explained that, with a minor exception not pertinent here, § 935, authorizing local claiming requirements, was the same as former § 730. (*Id.* at p. 1040.) Thus, the 1963 enactment of the present version of these sections was not intended to change the meaning of the 1959 statute — which excluded **all** tax claims for which alternative claiming procedures were provided — whether those claiming procedures derived from state or local law. This intent is notwithstanding the 1963 addition of § 811.8's definition of "statute," a point to which we now turn.

When the Commission recommended, and the Legislature adopted, the current Government Claims Act in 1963, those bodies were focused on the creation of the substantive laws of public liability, not on the unified claims procedure created four years earlier. Their new and focused attention to the substantive law of public liability was prompted by *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, an earthquake in the law that abolished sovereign immunity, a doctrine of sufficient antiquity

that it had a Latin label: *Rex non potest peccare* — The King can do no wrong.[17] In the Commission's words:

> Since the decision in the *Muskopf* case, the Commission has devoted substantially all of its time during 1962 to the study of sovereign or governmental immunity.

(4 Cal. Law Revision Com. Rep. (1963), Recommendation Relating to Sovereign Immunity No. 1, at p. 803, 809, MJN Exh. K.)

In 1963, as the Commission recommended, the Legislature reenacted most of the 1959 provisions — including former section 703 — in substantially the same form, stating no intent to change the substance of the 1959 unified claims law. (See *Pasadena Hotel, supra,* 119 Cal.App.3d at 415 fn. 3.)

Rather, the Legislature and the Commission focused in 1963 on the creation of coherent law defining government immunities and liabilities post-*Muskopf*. Thus the topic of 1959 was unified claiming **procedures**; the topic of 1963 was clarifying the **substantive** law of public agency liability. The 1963 Commission's task was formidable; even before *Muskopf*, governmental immunity and liability in California had hardly been clear-cut. As the Commission noted, the pre-*Muskopf* legislation on the topic:

> expresses a variety of conflicting policies. Some statutes create broad immunities for certain entities and others create wide areas of

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[17] Black's Law Dictionary (5th ed. 1979) at 1188. Black's elaborates the point: "An ancient and fundamental principle of the English constitution." (*Id.*)

> liability. Some apply to many public entities and others apply to but one. In some cases, statutes expressing conflicting policies overlap. Even where statutes impose liability on public entities, they do so in a variety of inconsistent ways. Some entities are liable directly for the negligence of their employees .... Where statutes are not applicable, the courts have determined liability on the basis of whether the injury was caused in the course of a governmental or proprietary activity.... Even where a public entity is immune from liability for a negligent or wrongful act or omission, the public employee who acted or failed to act is often personally liable; and many public entities have assumed the cost of insurance protection for their employees against this liability.

(4 Cal. Law Revision Com. Rep. (1963), Recommendation Relating to Sovereign Immunity No. 1, pp. 807–808, MJN Exh. K.)

Given the scope and complexity of the Commission's task — to create a comprehensive, unified liabilities statute out of an incoherent legal landscape — it is hardly surprising that the resulting legislation was explicit about who was liable, who was immune and under what circumstances, but made no change to claiming requirements. This historical context explains why the 1963 Legislature distinguished among "enactment," "statute," "law" and "regulation" in amending the Government Claims Act. (See Cal. Gov. Code §§ 810.6, 811.8, 811, and 811.6 [defining these terms].) Those terms are critical to interpreting many of the liability and immunity provisions in the new statute even as they were

unnecessary to the codification of claiming rules four years earlier. It is, of course, a basic rule of the modern Act that government liability does not exist by common law, but must be premised in legislation. As Government Code § 815 states: "Except as otherwise provided by **statute** ... [a] public entity is not liable for an injury ..." Given this fundamental rule, a clear definition of "statute" was plainly required. Section 811.8's definition was adopted for that purpose, not to narrow the scope of § 905, subd. (a)'s direction that tax refund claims be governed by tax laws rather than the Government Claims Act.

Of course, the goal of the 1959 legislation was a uniform claiming process, but not as to taxes:

> Provisions governing claims for refund of taxes, assessments, fees, etc. ... are frequently integrated with special procedures governing the assessment, levy and collection of revenue. They are separate and independent from the tort and contract claims provisions and do not create problems of the same nature and significance as the claim provisions embraced by the report.

(2 Cal. Law Revision Com. Rep. (1959), at p. A-17, attached at Appendix.)

Thus, the 1959 and 1963 statutes had different objects and the 1963 amendments had absolutely nothing to do with the scope of claiming procedures — those were intended to be unchanged. The conclusions of the Court of Appeal below in *Oronoz* and in this case then, are error.

B. The Claims Act and Other Statutes Underscore the Diversity Among State-Regulated Local Taxes the Legislature Finds Appropriate

1. The State Has Provided Claiming Requirements for State and Local Taxes and Has Not Relied on the Government Claims Act to Do So

Section 905, subd. (a) is itself evidence that uniformity was not desired for tax refund claims. The Legislature has provided not for uniformity in local tax refund claim procedures, but for diversity. This legislative policy is evidenced by the many tax statutes prescribing different claim presentation periods, statutes of limitations, and requirements for the contents of a claim.[18] For example, Revenue and

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[18] The following, non-exhaustive list of sections from the Revenue and Taxation Code relating to local taxes demonstrates the point:

§ 255 (a) (taxpayer must file affidavit attesting to facts giving rise to most property tax exemptions);

§ 255 (b) (taxpayer must file affidavit attesting to facts giving rise to homeowner's property tax exemptions);

§ 4985 (procedures for cancellation of illegal or otherwise defective tax or charge);

§ 5096 (presentation of claim for refund of property tax);

§ 6933 (suit for refund of sales or use tax must be commenced within 90 days after board's notice of action on claim);

§ 10901 (application for refund of local vehicle license fee must be made within three years of payment);

Taxation Code §§ 5097 and 5140 outline procedures for refunds of property taxes. Similarly, Business and Professions Code § 5499.14 allows local legislative bodies to order refunds of assessments for illegal advertising displays.

Different taxes require different refund procedures, a fact demonstrated by the diversity of state tax refund procedures and the Legislature's decision that the Claims Act is not itself sufficient to address them. There is no policy rationale to impose a forced simplicity on local governments that the Legislature thought inappropriate for the State and for the local taxes the Legislature has addressed directly.

In particular, local government must tailor refund ordinances to the manner in which taxes are collected. For example, procedures for refunds of taxes collected from the taxpayer and remitted to the taxing agency by third parties (*e.g.*, hotel bed taxes, parking taxes, sales taxes, and utility user taxes) necessarily differ from those for refunds of taxes paid directly to government (*e.g.*, income taxes, business license taxes, and property taxes). This reflects the necessity to ensure that a refund is made only once and to the proper party, and that the collector with the records on which to base a refund claim is involved in determining its validity and amount. These tax refund procedures, tailored to the tax in issue, promote the policy of stability and certainty in the resolution of tax disputes. (*Cf. IBM Personal Pension Plan v. City & County of San Francisco* (2005) 131 Cal.App.4th 1291, 1305 [requirement that only taxpayer may file a

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§ 11934 (claims for refund subject to provisions for property tax refund claims under Revenue & Taxation Code § 5096).

property tax refund claim avoids disputes as to party entitled to refund].)

It would disserve these vital public policies to construe legislative silence as reflecting intent to impose on local tax refund claims the one-size-fits-all rule of the Government Claims Act, which the Legislature expressly found unsuited to claims for refund of taxes paid to the state.

2. The Legislature Has Long Relied Upon Local Governments to Regulate Local Taxes

As to taxes enacted and enforced entirely at the local level, state law is silent — not because Government Code § 910 was intended to apply, but because it was understood that local legislation controlled claiming procedures by virtue of § 905, subd. (a). This is evidenced by the fact that the Legislature has enacted enabling legislation for local taxes without enacting specific procedures for refund, as it has done for state taxes and for those local taxes it does regulate in substantive detail.

For example, § 799 was added to the Public Utilities Code ("PUC") in 1996; that statute immunizes utilities from liability to customers for collecting local utility taxes, and requires local taxing agencies to give sufficient notice to utilities before obligating them to collect new or increased taxes. (*Id.*) The statute thus enables local agencies' collection of such taxes by regulating how they may do so, but does not provide specific procedures for refunds. When PUC § 799 was enacted, existing court decisions enforced **local** refund claim procedures. (*E.g., Volkswagen Pacific v. City of Los Angeles* (1972) 7 Cal.3d 48, 60–63 [enforcing municipal ordinance regarding claims presentation requirements for tax refunds].)

Given that the Legislature is presumed to be aware of relevant appellate court decisions when enacting legislation or amending statutes (*420 Caregivers, LLC v. City of Los Angeles* (2012) 207 Cal.App.4th 703, 738, *pet'n rev. pending*), PUC § 799 assumed the existence of procedures for claims and refund suits enacted at the local level. Put differently, if the Legislature disagreed with the case law assigning the responsibility to local government to establish claiming procedures, it would have said so. If it thought that § 905, subd. (a) forbade local claiming rules, it would have provided its own, as it has done in other statutes governing state and local taxes.

Likewise, Revenue & Taxation Code § 7280 authorizes cities and counties to levy "transient occupancy" or "bed" taxes. (*Id.* at subd. (a).) Like PUC § 799, this § 7280 enables local taxes but is silent as to refund procedures. Again, the Legislature left to local governments to establish claiming procedures for such taxes tailored to their own needs.

C. The Government Claims Act Definitions Do Not Apply "Where the Provision or Context Otherwise Requires"

Moreover, the text of the Government Claims Act authorizes this Court to apply § 811.8's definition of "statute" so as to protect the Legislature's intent with respect to the scope of § 905, subd. (a). Section 810 of the Government Code limits the sweep of all the Act's definitions, including § 811.8's definition of "statute," as follows:

> **Unless the provision or context otherwise requires**, the definitions contained in this part govern the construction of this division.

(Cal. Gov. Code § 810 [emphasis supplied].) Here, "the context otherwise requires" that a local ordinance be a "statute" within the meaning of § 905, subd. (a), notwithstanding the contrary definition of § 811.8. The 1959 legislative intent that this be so is plain, as is the 1963 intent to leave the 1959 claiming rules unchanged. Moreover, the Government Claims Act uses the defined terms "statute," "regulation" and "enactment" so irregularly and inconsistently that the Court should heed the Legislature's caution that those definitions be used only when context allows.

Applying a definition to determine the scope of a statutory provision should be straightforward; but is not always so, and is not so here. Statutory language that appears unambiguous on its face may be ambiguous when read in context. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249.) Careful review of the Act — including its provisions authorizing alternative claim procedures — demonstrates that the Act's use of defined terms like "statute" (§ 811.8), "enactment" (§ 810.6) and "regulation" (§ 811.6) — each denoting the product of different legislators — are contradictory and haphazard, yielding anomalous results if those words are consistently interpreted according to the definitions added to the Act four years after its adoption. We provide two examples:

First, § 935, subd. (a) authorizes local public entities to enact claim procedures. It refers to such procedures "prescribed in any charter, ordinance or regulation adopted by the local public entity." (Gov. Code § 935, subd. (a).) But § 811.6 defines "regulation" as a rule, regulation, or

standard adopted by the United States or an agency of the State under the federal or state Administrative Procedure Act. Accordingly, local public entities cannot enact "regulations." (Gov. Code § 811.6;[19] see also Gov. Code § 11342.600 [defining "regulation" under the Administrative Procedure Act as one adopted by a "state agency"].) Therefore, § 935(a)'s authorization for local claiming requirements prescribed by "regulation" is meaningless unless one follows the directive of § 810 to construe the statute in light of § 811.6's definition only when the context and apparent intent of the Legislature permit. Plainly, "regulation" has a different meaning in § 935, subd. (a) than that supplied by § 811.6.

It would be anomalous, of course, for a statute to authorize a public entity to do something that it cannot do, and such anomalous interpretations are to be avoided. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 280.) An interpretation rendering part of a statute meaningless — here, the authority to enact "regulations" — is to be avoided. (*Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709, 715–716.) This use of "regulation" in § 935, inconsistent with that term's definition in § 811.6, suggests that the definitions at the beginning of the Government Claims Act cannot apply to § 935 and § 905 (which § 935 references), which together address local tax refund claiming provisions.

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[19] Section 811.6 previously included local government regulations within its definition, but that section was amended in 1987 to exclude them. (Stats. 1987, ch. 1201, § 14; Stats. 1987, ch. 1207, § 3).

The imprecise use of defined terms is not unique to § 935. A second example is found in the Act's provisions regarding litigation conflicts between public entities and their employees. The illogical use concerns the term "statute," the term of concern here. Section 995.2, subd. (a) authorizes a public entity to refuse to defend an employee whose position in litigation conflicts with the agency's. Such is the case, for example, when a law enforcement agency defends a civil rights claim by arguing a defendant peace officer used excessive force in violation of agency policy and was acting outside the scope of employment, immunizing the agency from liability. Section 995.2 defines the necessary conflict of interest to allow an agency to refuse to defend its employee as "a conflict of interest or an adverse or pecuniary interest, as specified by **statute or by a rule or regulation** of the public entity." (*Id.*) (emphasis supplied.) Section 811.2 defines "public entity" to include local governments. Thus, a "public entity" — including a local government — has three means to identify conflicts of interest that entitle it to refuse to defend an employee: a statute, a regulation or a rule. However, the Act's definitions of "statute" (§ 811.8) and "regulation" (§ 811.6) exclude local legislation. Again, a provision of the Government Claims Act authorizes local governments to do what the definitions of the Act, if taken literally, bar them from doing. Still further, the plain intent of the Legislature can be accomplished only by disregarding the Act's definitions of "statute" and "regulation" when construing § 995.2 — as § 810 directs — because "the provision or context otherwise requires."

If "statute" and "regulation" are read to exclude local ordinances and charter provisions (the result Appellant urges here), then local governments would be forbidden to identify conflicts of interest by ordinance or charter provision despite the apparent intent of § 995.2 to the contrary.

The goal of statutory interpretation is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) Therefore, applying § 811.8's definition of "statute" and § 811.6's definition of "regulation" to § 935, subd. (a) and § 995.2 is inappropriate.

It is equally inappropriate to apply § 811.8's definition of "statute" to § 905, subd. (a)'s exemption from the Government Claims Act for tax refund claims to which another "statute" applies. While the Government Claims Act can plainly use the tender ministrations of a Committee on Third Reading, this Court should not reach a result that contradicts the Legislature's purpose to **confirm** local government authority over tax refund claiming procedures rather than to displace it.

Given the constitutional grants of power to charter and general law cities, and in light of the compelling policy reasons for diverse tax refund procedures, the legislative intent to exempt local tax refund claims from the Government Claims Act made manifest by legislative history from 1959 and 1963 makes good public policy, too, reinforcing the conclusion that the ordinances in issue here are enforceable and that McWilliams' class claim must fail.

III. Local Claiming Authority is of Long Standing and Reflects Fundamental Public Policies

A. This Court's Precedents Preserve Long-Established Local Legislation Governing Tax Refund Claims

1. *Volkswagen Pacific* Enforced a Local Ordinance

Appellant cites *Volkswagen Pacific v. City of Los Angeles* (1972) 7 Cal.3d 48 to support his claim that local enactments are not "statutes" within the meaning of § 905, subd. (a). *Volkswagen Pacific* addressed the limitations period applicable to a claim for refund of an allegedly invalid municipal tax. There, this Court determined that a six-month limitations period applied under Government Code § 945.6, and its conclusion did not depend upon its interpretation of § 905, subd. (a). (*Id.* at 62-63.) The Court reasoned that if the § 905, subd. (a) exception **did not** apply so as to make Los Angeles' local claiming requirement applicable, then § 945.6 would supply a six-month's limitations period under the Government Claims Act's general rule. On the other hand, if the § 905, subd. (a) exception **did** apply, then the § 945.6 limitation was still applicable, by operation of § 935, which authorizes local claiming ordinances, because § 935 provides that local claiming requirements are subject to the limitations period set forth in § 945.6. (*Id.* at 62–64.)

In dicta,[20] however, the Court applied § 811.8's definition of "statute" to the construction of § 905, subd. (a). Application of this definition rested

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[20] Both the First and Second Districts have concluded *Volkswagen*

upon the Court's conclusion that "[t]here is nothing in the legislative history to suggest that 'statute' within section 905, subdivision (a), is to have a special meaning unique to that section." (*Volkswagen Pacific*, 7 Cal.3d at 62.) With respect, however, the City submits that the legislative history outlined above, which was apparently not briefed to the *Volkswagen Pacific* court, is plainly to the contrary.

Nevertheless, the Court in *Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 83–84 (hereinafter, "*Batt*") persuasively explains why this language was dicta:

> [T]he language in *Volkswagen Pacific* on which plaintiff relies was dictum, as plaintiff herself expressly acknowledges. Perhaps more importantly, that dictum cannot support plaintiff here, because if it meant what plaintiff claims it meant, **the Supreme Court would have invalidated the Los Angeles ordinance, which it did not do.** And most importantly, plaintiff's argument is belied by the many cases that have dealt with local ordinances in tax refund cases, illustrated best by *Volkswagen Pacific* itself, **which enforced a Los Angeles municipal ordinance requiring pre-suit filing of a claim for refund of a local tax.**

(*Id.*) (emphasis supplied, footnotes and internal citations omitted.)

Pacific's discussion of Los Angeles' authority to adopt a local claiming requirement is dicta. (*Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 83-84; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249.)

Moreover, *Volkswagen Pacific* notes the relevance of the legislative history of § 905, subd. (a), yet it does not consider (and does not indicate that it was aware of) the comments of the Law Revision Commission that persuaded the Court of Appeal in *Pasadena Hotel Dev. Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412 that municipal tax refund ordinances are protected rather than preempted by § 905, subd. (a). In *Pasadena Hotel*, the Court of Appeal examined the scope and legislative history of § 905, subd. (a) and noted that subdivision (a) is:

> essentially a copy of former section 703, subdivision (a) also drafted by the Law Revision Commission....With respect to this former subdivision, the Law Revision Commission has stated that it excluded from the scope of the ... statute then proposed by the Commission **all** 'claims for tax exemption, cancellation or refund.' Since both subdivisions ... were enacted in the form proposed by the commission, the intent of the commission in regard to their meaning may be deemed to be the intent of the Legislature.

(*Pasadena Hotel*, 119 Cal.App.3d at 415, fn. 3 [internal citations omitted].) Based upon this legislative history, the Court of Appeal concluded "[t]he reference in this subdivision to 'the Revenue and Taxation Code or other statute' **is not a limitation upon the type of tax claims excepted**" from the Government Claims Act. (*Id.*, emphasis supplied.) *Pasadena Hotel* therefore held that the § 905, subd. (a) exception allows a municipal ordinance to supply tax-refund claiming requirements that displace those of the Government Claims Act.

Indeed, in at least three cases – *Volkswagen Pacific, HJTA v. City of La Habra,* and *Ardon* – this Court has been careful not to invalidate local tax refund provisions.

In *Ardon,* this Court was careful to distinguish rather than disavow *Batt.* (*Ardon, supra,* 52 Cal. 4th at 250.) In *Volkswagen Pacific,* as discussed above, the Court applied rather than rejected Los Angeles claiming requirement. In *HJTA v. City of La Habra* (2001) 25 Cal.4th 809, a taxpayer association sought a declaration invalidating the City's utility users tax, an injunction against its enforcement, and a writ compelling the city to cease collecting it. (*Id.* at 813.) This Court ruled on a statute of limitations issue, and declined to resolve the substantive merits of plaintiff's claims or the merits of similar claims against other cities. (*Id.* at 825.)

The issue whether local tax refund claim provisions are permitted has not been squarely presented by these prior cases, and this Court therefore has not ruled on that issue, much less taken the drastic step of invalidating local provisions across the state. Rather, the rule favoring local control of procedures to refund local taxes is reflected in decisions of the Courts of Appeal and in the legislative history outlined above.

2. *Oronoz* Is the Only Case To the Contrary and Has Since Been Repudiated By the Panel That Decided It

The **only** case to ever find § 905, subd. (a) to preempt local claiming ordinances is *Oronoz* (2008) 159 Cal.App.4th 353, and that case was promptly abandoned by the very panel that decided it, although its decision to do so was vitiated by this Court's grant of review and decision on other grounds in *Ardon.* (See *Ardon v. City of Los Angeles* (2009) 174

Cal.App.4th 369, *review granted and opinion superseded,* (Cal. 2009) 99 Cal.Rptr.3d 869 *and rev'd,* (2011) 52 Cal.4th 241.). Precious little supports McWilliams' claim in this Court!

While *Oronoz* concludes that local enactments are not "statutes" under § 905, subd. (a), *Batt* holds otherwise and this Court distinguished — rather than rejected — *Batt* and the line of cases on which it relies in *Ardon.* The City respectfully submits that *Oronoz* is error that this Court should correct.

B. Public Policy Compels Legislative Authorization for the Refund of Local Taxes

The City's view of the scope of § 905, subd. (a) reflects established precedent. (*E.g., Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 77-78 [hereinafter, "*Batt*"].) In *Batt,* the First District Court of Appeal relied on the City of San Francisco's ordinance — which prohibited class claims for tax refunds — to uphold a grant of the City's demurrer and to conclude that a class claim for refund of bed taxes was not permitted. (*Id.* at 78–79.)

Batt was not the only case where a court determined that a claim for refund of local taxes was subject to a local claiming requirement. In *Flying Dutchman Park, Inc. v. City & County of San Francisco* (2001) 93 Cal.App.4th 1129, a corporate taxpayer sued the City of San Francisco, challenging the imposition of a parking tax on constitutional and other grounds. The trial court dismissed the suit because the plaintiff failed to pay the disputed tax before filing its action. (*Id.* at 1132.) In affirming, the First District Court of

Appeal applied San Francisco Municipal Code provisions imposing the "pay first, litigate later" rule. (*Id.* at 1139.)

Likewise, in *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, a taxpayer association challenged an ordinance that extended Los Angeles' business tax and imposed an annual registration fee on those engaged in home-based occupations. (*Id.* at pp. 244–245). The Second District enforced Los Angeles Municipal Code provisions that precluded the association from pursuing refunds for individuals who failed to file refund claims —the issue contested here. (*Id.* at 249, fn.5.)

Each of these cases cites a wealth of prior authority imposing claiming requirements on those who seek tax refunds, barring class refund claims, and enforcing the "pay first, litigate later" rule. These rules have common public policy bases: the need for government to predict its revenues and payment obligations so that it can provide stable funding for essential public services.

Batt, supra, 155 Cal.App.4th at 71–72, concisely summarized public policies that lie at the heart of legislative control of the process by which claims for refunds of taxes are asserted:

> [M]oney is the lifeblood of modern government. Money comes primarily from taxes, and, as the importance of a predictable income stream from taxes has grown, **governments at all levels have established procedures to minimize disruptions**, primary among which is the condition precedent that a tax may be challenged only after it has been paid. Stated otherwise, preemptive, precollection, or

> prepayment lawsuits are, with a few exceptions not present here, not permitted. This principle is generally known as the 'pay first, litigate later' rule, and it **applies at all levels of government — the federal ... the state ... and the local.**"

(*Id.*) (emphasis supplied and footnote and internal citations omitted.) Stated otherwise, the "pay first, litigate later" rule allows local governments to plan their finances and to avoid disruptions in funding of their essential services. The reason for the rule is obvious: government could scarcely function, and courts would be overwhelmed, if every taxpayer could attain hold-up leverage over the municipal fisc simply by paying a filing fee in Superior Court.

C. For Similar Reasons, the Powerful and Expensive Class Action Remedy Is Not Appropriate in the Tax Refund Context

The class action remedy, with its generous enticement to successful plaintiffs' counsel via perhaps a one-third share of the recovery, is needed to incentivize correction of civil wrongs involving many plaintiffs, but small stakes. The remedy forces a civil miscreant to disgorge an ill-gotten gain and socializes the remedy for general benefit.

However, the tax system is itself a means to collectivize the benefits and burdens of civil society.[21] A refund to an individual mistakenly

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[21] As Oliver Wendell Holmes put it 85 years ago: "Taxes are what we pay for civilized society ...." *Compania Gen. de Tabacos de Filipinas v. Collector*

overtaxed restores the balance the taxing legislature intended as between the individual and society. By contrast, a class reward and the ample attorney's fees commonly associated with it can only come at taxpayers' — and thus society's — expense. Thus, applying the class remedy in this context creates an incentive to diminish the capacity of government to fund services for the collective benefit and to reward individuals **at the expense of taxpayers** for whom they claim to act. It impoverishes the collective and enriches the individual — precisely the opposite effect of the class action remedy when applied to private, profit-making defendants.

1. The Law Provides Ample Remedies to Correct Tax Errors Without Class Actions

Nor is the class action remedy needed, as federal and state law provide ample remedies for tax errors. Here, for example, post-deprivation relief is available to Appellant. He filed an administrative claim, and upon its denial, sued. If the City's telephone tax is eventually held to be invalid, the City will be compelled to satisfy timely refund claims. Moreover, other taxpayers would have the benefit of the result under the rules of issue and claim preclusion and *stare decisis* and under the force of any mandatory relief resulting from the case. That is more process than due under *McKesson v. Division of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18 on which Appellant relies.[22] Appellant cites no authority for the proposition

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of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

[22] In contrast to the case at bar, a refund in *McKesson* was denied as

that due process demands class relief, because there is no such authority. Indeed, there is no constitutional requirement that McWilliams be allowed to serve as a "general[] at the head of an army." (*Farrar v. Franchise Tax Board* (1992) 15 Cal.App.4th 10, 21.) Moreover, Appellant's position gives no sway to article XIII, § 32 as this Court construed it in *Woosley*. A class claim for a tax refund is permitted only where there has been express legislative authorization, and this rule does not violate due process.

In addition, aggrieved taxpayers are protected by *HJTA v. City of La Habra* (2001) 25 Cal.4th 809, 812 holding that as-applied challenges to taxes accrue with each payment of tax, thus avoiding the time-bar applicable to facial challenges. Thus, prospective relief as to an illegal tax is available essentially without a time bar.

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to a tax a court had invalidated. *McKesson* recognizes that "all that due process requires is that the state provide its taxpayers with a fair opportunity to challenge the accuracy and legal validity of their tax obligation and a clear and certain remedy." (*Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 965.) Here, the validity of the City's telephone tax has not been adjudicated, and the City has not denied timely refund claims with respect to any tax that has been invalidated by any court. Nor would it do so.

2. Other States Preclude Class Actions in the Tax Refund Context

These policy rationales for avoiding the class action remedy in the tax refund context have proven persuasive in our sister states. For example, New York courts hold that the "class action is not considered the superior method for the fair and efficient adjudication of a controversy against a governmental body." (*Jones v. Bd. of Educ. of Watertown City School Dist.* (N.Y. App. Div. 2006) 30 A.D.3d 967, 970; 816 N.Y.S.2d 796, 799 (citation omitted).) Under New York's "governmental operations rule," class action challenges to the operations of government are barred, including those seeking tax refunds. (*Neama v. Town of Babylon* (N.Y. App. Div. 2005) 18 A.D.3d 836, 838; 796 N.Y.S.2d 644, 646 [refusing to certify class of garbage tax refund claimants under government operations rule and because plaintiffs failed to prove absent class members filed tax protests]; see also *LaCarruba v. Legislature of the County of Suffolk* (N.Y. App. Div. 1996) 225 A.D.2d 671, 672; 640 N.Y.S.2d 130, 131 ["We note that a class action against a governmental body is not considered the superior method for the fair and efficient adjudication of a controversy because the doctrine of stare decisis would render the determination of an action binding on the governmental body and would automatically benefit all persons sought to be represented in the class."]).

Thus, as the New York courts have observed, the efficiency of the class action remedy can be achieved by the rule of stare decisis and the powerful and expensive remedy of the class action is unnecessary as to government defendants.

The Washington Supreme Court similarly emphasized that a statute providing for tax refunds must be narrowly construed to "protect the State from unanticipated losses" if the state were forced to respond to "unidentified refund appeals for unstated amounts." (*Lacey Nursing Center, Inc. v. Dep't of Revenue* (Wash. 1995) 905 P.2d 338, 343; 128 Wash.2d 40, 49-50 (citation omitted).) The Washington court resolved the issue under the terms of the tax refund statute at issue, which required that a taxpayer sue for a refund but only if the taxpayer:

> 1) identified herself,
>
> 2) stated the amount of the allegedly overpaid tax which she concedes is correct,
>
> 3) stated the reasons why the tax should be reduced or abated, and
>
> 4) proved that the tax paid was incorrect.

(*Id.* at 343, 128 Wash.2d at 50.) The court then concluded that a class action for an excise tax refund could not be maintained to protect the public fisc and governments' power to plan for financial claims and because the absent, unnamed class members could not comply with these requirements.

A number of other states reach the same conclusion that class actions against taxes are unnecessary by construing statutory waivers of sovereign immunity, such as California's Government Claims Act. These courts hold that tax refund class actions are not available unless claiming statutes expressly authorize them — the very rule of Article XIII, § 32 as explained by this Court in *Woosley*. (See, e.g., *Pourier v. South Dakota Dept. of Revenue & Regulation* (S.D. 2010) 778 N.W.2d 602, 606, 2010 SD 10, ¶14, *citing Lick v. Dahl* (S.D. 1979) 285 N.W.2d 594; *State ex rel. Lohman v. Brown*

(Mo. Ct. App. 1997) 936 S.W.2d 607, 610, citing *Charles v. Spradling* (Mo. 1975) 524 S.W.2d 820 [statutory waiver of sovereign immunity is strictly construed and no statutory authority for class tax refund claims appears]; *Wicker v. Comm'r* (Tenn. Ct. App. 2010) 342 S.W.3d 35, 42–43 [taxpayer remedies statute required each taxpayer to file refund claim and thus barred class action]; *Dunn v. Bd. of Prop. Assessment, Appeals & Rvw.* (Pa. Commw. Ct. 2005) 877 A.2d 504, 512 [class actions disallowed where the right to seek a tax refund is individual, as refund statute is strictly construed], *citing Lilian v. Commonwealth* (Pa. 1976) 354 A.2d 250, 253, 467 Pa. 15, 19 [rejecting argument taxpayers with small refund claims will be harmed by lack of class action remedy because stare decisis will protect non-party taxpayers].)

IV. McWilliams' Construction of Section 910 Raises Constitutional Issues That Are Better Avoided

Charter cities have legislative authority over "municipal affairs" that trumps inconsistent state statutes. Article XI, § 5 of the state Constitution gives charter cities autonomy in "municipal affairs," and provides that city charters "with respect to municipal affairs shall supersede all laws inconsistent therewith." (art. XI, § 5.)

This Court has held that "levying taxes to support local expenditures qualifies as a 'municipal affair' within the meaning of the home rule provision of our Constitution." (*Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal. 3d 1, 13 [hereinafter, "*Cal-Fed*"].) Charter cities derive their power to tax directly from the California Constitution, not from statutes of the Legislature. (*The Pines v. City of Santa Monica* (1981)

29 Cal.3d 656, 660 ["[t]he taxation power is vital and is granted to charter cities by the Constitution. (Cal. Const., art. XI, § 5, subd. (a))."]; art. XI, § 12.) [23]

On the other hand, this Court has also concluded that the filing of claims for money or damages against California governments is an area of statewide concern as to which the Legislature has occupied the field. (*Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48, 62 n.7.)

The boundary between the City's home rule power to tax under Article XI, §§ 3, 5 and the Legislature's ability to establish claiming procedures under Article XI, § 12 has not been lined. The cases Appellant cited below address tort and contract claims, not taxes. For example, *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 663 — similarly relied upon by this Court in *Volkswagen Pacific* — involved a pre-1959 suit against the City of Los Angeles by a plaintiff who tripped on the City's broken sidewalk. Likewise, *Taylor v. City of Los Angeles* (1960) 180 Cal.App.2d 255, 257 was a wrongful death action involving an allegedly dangerous street.

The Court can avoid drawing the boundary between these principles if, as the City maintains, the Legislature intended no preemption of local tax refund claiming ordinances. Where our Constitution permits the

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[23] Article XI, § 12 added to our Constitution in conjunction with the implementation of the Government Claims Act in 1959 states: "The Legislature may prescribe procedure for presentation, consideration, and enforcement of claims against counties, cities, their officers, agents, or employees."

Legislature to displace local legislation of a charter city, it requires it to do so expressly, with implied preemption disfavored:

> In broad outline, a court asked to resolve a putative conflict between a state statute and a charter city measure initially must satisfy itself that the case presents an actual conflict between the two. If it does not, a choice between the conclusions "municipal affair" and "statewide concern" is not required. ... And as the summary of the cases relied on by the Court of Appeal in this case ... illustrates, many opinions purportedly involving competing state and local enactments do not present a genuine conflict. To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.

(*Cal-Fed, supra,* 54 Cal. 3d at 16–17.) Thus, implied preemption of charter city legislation is disfavored, and this Court advises avoiding such a conflict by construction where possible. Because the legislative history of § 905, subd. (a) and § 810's express limitation on the scope of § 811.8's definition of "statute" allow an interpretation that avoids a need to determine the scope of the charter City of Long Beach's home rule power to tax, that interpretation is preferred.

However, should the Court find the need to reach the issue, the City's home rule power to tax necessarily includes the power to frame taxing ordinances that meet the demands of due process. As due process demands a remedy for erroneous taxation, the City has the power to provide it, and to state the means by which resort to that remedy can be had. To rule otherwise is to eviscerate the taxing power our Constitution confers on charter cities like Long Beach.

V. Article XIII, Section 32 Requires Express Legislative Authorization of Tax Refund Procedures

Section 32 reflects a broad public policy requiring that actions for tax refunds be expressly authorized by the Legislature:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, **in such manner as may be provided by the Legislature.**

(art. XIII, § 32) (emphasis supplied.) This Court has underscored the point by stating unambiguously that Article XIII, § 32 requires express legislative authorization for all tax refund claims, class or otherwise. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792 ["article XIII, section 32 of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the legislature"] ["silence did not constitute legislative authorization"].) Thus, the requirement of

express legislative authorization for tax refund claims derives directly and plainly from our Constitution.

A. The Second Sentence of Article XIII, Section 32 Applies to Local Governments

The second sentence of Article XIII, § 32, unlike the first, is not limited to the State or its taxes, but addresses tax refund procedures generally. In further contrast to the first sentence, the second contains no limitation whatsoever on the types of tax refunds subject to legislative authority. Reflecting a broad policy requiring legislative authority for **all** tax claims, the second sentence is stated in broad and unqualified terms. Indeed, what reason could there be to find that the State has greater need for stability in its finances than local governments? Is prison financing more fundamental to the peace and welfare of California than the funding of law enforcement to send people to prison? Or than funding of the county jails to which realignment is sending many formerly state prisoners? Is state funding of education by local K-12 schools more fundamental to the common wealth than local funding for those same schools?

> Thus, the two sentences of Article XIII, § 32, when:
>
> Read together ... establish that the sole legal avenue for resolving tax disputes is a postpayment refund action. A taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid.

(*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.)

Appellant's claim that Article XIII, § 32 applies only to tax refund actions against the State and not to such actions against local governments, fails. It not only overlooks the distinct language of the two sentences of Article XIII, § 32, but overlooks the case law that has long recognized the "pay first, litigate later" policy embodied by Article XIII, § 32 applies to local and state taxes alike. (*E.g., Flying Dutchman Park, Inc. v. City & County of San Francisco* (2001) 93 Cal.App.4th 1129, 1138 [no injunctive or declaratory relief against local parking tax]; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 481 [no injunctive or declaratory relief against local business tax]; *accord Macy's Dept. Stores, Inc. v. City & County of San Francisco* (2006) 143 Cal.App.4th 1444, 1457 fn. 23; *Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 72-73 [equitable relief barred re local transient occupancy tax].)

Applied to the case at bar, the second sentence of Article XIII, § 32 means that the relevant legislature — the Long Beach City Council or the City's people acting via initiative — must expressly authorize the class claim if Appellant is to pursue it. They have not and he therefore cannot

In any event, Long Beach has its own "pay first, litigate later" requirement. Long Beach Municipal Code § 3.68.160 allows service suppliers to claim refunds or credits for utility taxes overpaid, paid more than once, or erroneously or illegally collected or received by the City, but **only after** the City has first been paid (the supplier must refund or credit the claimed amount to the taxpayer before requesting a refund from the City).

B. Even If Article XIII, Section 32 Does Not Apply, the City's Ordinances Still Provide the Rule of Decision

Even if this Court were persuaded that the second sentence of Article XIII, § 32 does not apply to local governments, the Court should nevertheless apply the City's ordinances here. By enacting § 905, subd. (a), the Legislature fulfilled its mandate under Article XIII, § 32 to specify provisions covering tax refunds. Those provisions are either contained elsewhere in state statutes (as discussed in section II.B., *supra*) or, to the extent they are not, § 905, subd. (a) and § 935, subd. (a) delegate to local government the Legislature's authority to enact refund procedures where "claims ... for money or damages" are "not governed by any other statutes or regulations expressly relating thereto." (Gov. Code § 935, subd. (a).) Thus, refund procedures enacted by local governments for refunds of local taxes are the backstop for due process when, as here, the state Legislature has not provided a remedy pursuant to Article XIII, § 32. As such, local procedures — like the City of Long Beach's — are procedures authorized by the relevant legislature and provide the rule of decision to be applied in court. That rule, of course, bars class claims.

CONCLUSION

In 1959, the Law Revision Commission recommended, and the Legislature adopted, § 905, subd. (a) to exclude tax refund claims from the sweep of an ambitious effort to standardize claiming requirements. It did so for reasons of policy reflected in Article XIII, § 32 of our Constitution and in prior law — tax disputes are different from ordinary tort and

contract claims[24] – as are the consequences of the judicial branch enjoining the political branches from funding essential government services. The 1963 amendment of the Government Claims Act to address *Muskopf v. Corning Hosp. Dist.*'s repudiation of sovereign immunity was not intended to change these choices, although the speed with which that complex drafting task was undertaken produced language which can easily trap the unwary – such as the *Oronoz* panel. As demonstrated above, the legislative intent to preserve local legislative power to establish reasonable procedures to govern tax refund claims is clear. A contrary reading of § 905, subd. (a) would run afoul of our Constitution and create a legal vacuum the Legislature never intended.

Thus, Long Beach plainly had the power to adopt the ordinances in issue here and its construction of those ordinances to bar McWilliams' putative class claim is reasonable and persuasive. Accordingly, the City respectfully asserts this Court ought to affirm the trial court's grant of demurrer, reaffirming the rule reflected in *Batt* and correcting the error reflected in *Oronoz*.

DATED: September 10, 2012

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[24] See 2 Cal. Law Revision Com. Rep. (1959), at p. A-17, attached as an Appendix to this Brief.

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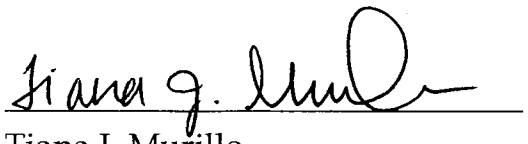

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204(c)(1)

Pursuant to California Rules of Court, Rule 8.204(c)(1), the foregoing Opening Brief on the Merits by Defendant / Respondent the City of Long Beach contains 12,975 words (including footnotes, but excluding the tables, "Issues Presented for Review" section and this Certificate) and is within the 14,000 word limit set by Rule 8.204, subd. (c)(1), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on September 10, 2012, at Los Angeles, California.

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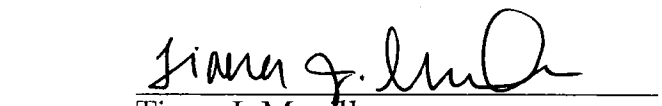

Tiana J. Murillo

APPENDIX

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Presentation of Claims Against Public Entities

January 1959

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 35 of the Statutes of 1956 to make a study of the various provisions of law relating to the presentation of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

Thomas E. Stanton, Jr., *Chairman*
John D. Babbage, *Vice Chairman*
James A. Cobey, *Member of the Senate*
Clark L. Bradley, *Member of the Assembly*
Roy A. Gustafson
Bert W. Levit
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Ralph N. Kleps, *Legislative Counsel, ex officio*

John R. McDonough, Jr.
Executive Secretary

January 1959

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Presentation of Claims Against Public Entities

The law of this State contains many statutes and county and city charters and ordinances which bar suit against a governmental entity for money or damages unless a written statement or "claim" setting forth the nature of the right asserted against the entity, the circumstances giving rise thereto and the amount involved is communicated to the entity within a relatively short time after the claimant's cause of action has accrued. Such provisions are referred to in this Recommendation and Study as "claims statutes."

Claims statutes have two principal purposes. First, they give the governmental entity an opportunity to settle just claims before suit is brought. Second, they permit the entity to make an early investigation of the facts on which a claim is based, thus enabling it to defend itself against unjust claims and to correct the conditions or practices which gave rise to the claim.

The principle justifying claims statutes has been extensively accepted in California over a long period of time. Claims statutes appeared as early as 1855. Today there are at least 174 separate claims provisions in the law of this State, scattered through statutes, charters, ordinances and regulations. As appears below and more fully in the research consultant's report, these provisions differ widely as to many material matters, including claims covered, time for filing, and information required to be furnished.

It has become increasingly clear in recent years that the implementation of the claims statute principle in this State by the enactment of numerous and conflicting claims provisions has created grave problems both for governmental entities and those who have just claims against them. The Law Revision Commission was, therefore, authorized and directed to study and analyze the various provisions of law relating to the filing of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised.[1] The Commission has made an exhaustive study of existing claims statutes and the judicial decisions interpreting and applying them.

On the basis of this study the Commission has concluded that the law of this State governing the presentation of claims against governmental entities is unduly complex, inconsistent, ambiguous and difficult to find, that it is productive of much litigation and that it often results in the barring of just claims. This conclusion is supported by the following facts among others disclosed by the Commission's study:[2]

1. There are at least 174 separate claims provisions in California. Yet a large number of cities, districts and other local entities are not protected by any claims statute.

[1] Cal. Stat. 1956, res. c. 35, p. 256.

[2] For a more complete statement of the defects in existing claims statutes see research consultant's study, *infra* at A-17.

A STUDY RELATING TO THE PRESENTATION OF CLAIMS AGAINST PUBLIC ENTITIES *

INTRODUCTION

California law contains a large variety of legal provisions found in the codes, general laws, city charters and city ordinances which require a written claim to be presented before one may sue a public entity or employee. These provisions are designed to protect against unfounded and unnecessary lawsuits. They apply to various types of claims and to different types of public entities. Some claims against some entities are not subject to a presentation requirement. All claims against certain entities are subject to a presentation requirement while no claims against some and only specified claims against still other entities are subject thereto. The time limits, formal requisites, contents and place to file vary greatly from claim statute to claim statute. All of the many diverse provisions, however, share the common general characteristic that compliance with the applicable claim presentation procedure is a prerequisite to maintenance of a court action to enforce the claim.

Most of the claims statutes and litigation concerning them relate to claims for personal injury or property damage in tort, for money owing on contract, for breach of contract and for taking or damaging private property for public use without payment of just compensation (the so-called "inverse condemnation" action). This study relates exclusively to legal provisions governing claims in the foregoing categories. Excluded from the scope of the study, therefore, are such provisions as the following:

(1) Provisions governing claims for refund of taxes, assessments, fees, etc. Such provisions are frequently integrated with special procedures governing the assessment, levy and collection of revenue. They are separate and independent from the tort and contract claims provisions and do not create problems of the same nature and significance as the claim provisions embraced by the report.

(2) Provisions governing notices and claims in connection with mechanics' and materialmen's lien procedures or their statutory counterparts applicable to public construction contracts.

(3) Provisions governing aid rendered under public assistance programs.

(4) Claims of public officers and employees arising under the Workmen's Compensation law.

(5) Provisions governing payment of benefits under pension and retirement systems.

(6) Provisions for payment of interest and principal on government bonds.

* This study was made at the direction of the Law Revision Commission by Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

There seems to be no adequate generic word for referring collectively to statutes, city charters and ordinances. Since claims are governed by legal requirements of all three types, the phrases "claims statutes" and "claims provisions" are used interchangeably herein to refer to all forms of legal claim presentation requirements as a class. For the sake of convenience, the quoted phrases are used only to refer to provisions governing presentation of claims against public agencies; the terms "employee claim statute" or "employee claim provision" are utilized to identify generically requirements governing claims which are prerequisite to suit against a public employee.

LEGAL AND HISTORICAL BACKGROUND

Requirements that certain kinds of claims against public entities be presented in writing to designated officers within a specific time limit as a prerequisite to payment and as a condition precedent to maintaining an action to enforce the claim are purely statutory in nature.[1] They are found in the law of many states [2] and are uniformly held to be valid and constitutional procedural conditions precedent to liability.

Claim statutes are not a recent innovation in California law. More than a century ago the County Government Act of 1855 provided that "no person shall sue a county in any case, or for any demand, unless he or she shall first present his or her claim or demand to the Board of Supervisors for allowance." [3] This provision later provided the basis for Section 4072 [4] of the Political Code adopted in 1872 and is also reflected in the County Government Acts of 1883,[5] 1891 [6] and 1893.[7] It may be regarded as the lineal ancestor of Sections 29700 *et seq.* of our present Government Code which governs presentation of claims against counties.

Similarly, the Political Code contained provisions governing claims against the State;[8] these, in turn, were based upon earlier claim statutes adopted prior to the codes.[9] The detailed and repetitious claims procedures established for cities of various classes by the Municipal Corporations Act of 1883 [10] had their earlier counterparts in claims sections of municipal charters, such as the San Francisco Consolidation Act of 1856 [11] and the Gilroy Charter of 1870.[12] Claims procedures prescribed by ordinances over a half century ago are still in effect,[13] attesting the longevity of such requirements, and city charter claim provisions adopted before the turn of the century or soon thereafter have survived unchanged to this day.[14]

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[1] 17 MCQUILLIN, MUNICIPAL CORPORATIONS § 48.02 (3d ed. 1950).
[2] *Ibid.*
[3] Cal. Stat. 1855, c. 47, § 24, p. 56.
[4] Reenacted in 1907 as CAL. POL. CODE § 4075, Cal. Stat. 1907, c. IV, § 4075, p. 379.
[5] Cal. Stat. 1883, c. 75, § 41, p. 312.
[6] Cal. Stat. 1891, c. 216, § 41, p. 311.
[7] Cal. Stat. 1893, c. 234, § 41, p. 363.
[8] CAL. POL. CODE §§ 660, 663-64 (1872).
[9] Cal. Stat. 1858, c. 257, §§ 8-11, pp. 213-14; Cal. Stat. 1869-70, c. 390, p. 544.
[10] Cal. Stat. 1883, c. 49, §§ 91-97, 266-69, 371, 423, 526, 624, 766, 803, 864, pp. 93 *et seq.*
[11] Cal. Stat. 1856, c. 125, § 84, p. 170. See also SACRAMENTO CHARTER, Cal. Stat. 1851, c. 89, § 12, p. 391.
[12] Cal. Stat. 1869-70, c. 180, § 11, p. 266.
[13] COVINA ORD. NO. 6, adopted Sept. 10, 1901; ESCONDIDO ORD. NO. 16, adopted 1889.
[14] EUREKA CHARTER, Cal. Stat. 1895, c. 5, §§ 168-69, 173, 179, pp. 398-401; SAN BERNARDINO CHARTER, Cal. Stat. 1905, c. XV, §§ 135, 138, 236-37, pp. 962-63, 977.

Claims presentation procedure has thus been a familiar feature of the California legal scene from the very beginning of the State's history. As early as 1857 the Supreme Court held that failure to allege compliance with an applicable claim statute rendered a complaint wholly insufficient to state a cause of action against a public agency.[15] The claims statutes, however, developed along *ad hoc* lines with no attempt being made to develop any uniform claim procedure applicable to all levels of government. As more and more cities adopted freeholder charters claims provisions were often incorporated in them. Other cities enacted ordinances to regulate claims procedure. As special districts increased in number many were created by special legislation which included claims filing requirements; other districts were created under general enabling statutes which may or may not have provided for filing of claims. The proliferation of claims statutes was characterized by lack of any consistent or widespread agreement on either basic policy or detailed treatment. The result is extreme nonuniformity multiplied and scattered throughout many independent statutes, city charters and ordinances.

Until relatively recent years the piecemeal establishment of diverse and sometimes inconsistent claim requirements appears to have caused only occasional difficulties resulting in litigation. However, a great upsurge in reported cases relating to claim requirements began in the late 1920's and has continued to this day. The reasons for this development are not difficult to identify. The population boom and its attendant problems, the growing complexity of society and the increasingly pervasive role which government began to assume, particularly at the municipal level, all tended to increase the volume of claims by citizens against governing bodies.[16] But even more importantly, it was during this period of roughly the past three decades that the law of California experienced an immense expansion of the previously narrow limits of governmental liability in tort.

No attempt can be made within the scope of this report to recount in detail the various developments of public liability in tort.[17] Some of the principal statutory features should be briefly mentioned, however, in order to better understand the impact of the ever-enlarging substantive liability of governmental agencies on claims procedure. The basic rule of sovereign immunity from liability for torts committed in a "governmental" as distinguished from "proprietary" capacity[18] gave way to its first major statutory modification[19] when in 1923 the Public Liability Act[20] was adopted. This statute which is today found in the Government Code[21] declared cities, counties and school districts liable for "injuries to persons and property resulting from the danger-

[15] McCann v. Sierra County, 7 Cal. 121 (1857).
[16] See David, *Municipal Liability in Tort in California*, 6 So. CAL. L. REV. 269 (1933).
[17] An extremely detailed and careful account covering the period up to 1933 is found in a series of articles by Leon David, now Judge of the Superior Court of Los Angeles County. See David, *Municipal Liability in Tort in California*, 6 So. CAL. L. REV. 269 (1933) and 7 So. CAL. L. REV. 48, 214, 295, 372 (1933-34).
[18] See Chafor v. Long Beach, 174 Cal. 478, 163 Pac. 670 (1917).
[19] Only one previous statutory waiver had occurred which covered damages resulting from mob or riot. Cal. Stat. 1867-68, c. 344, p. 418, later codified as CAL. POL. CODE § 4452 (1944), and today found as CAL. GOVT. CODE §§ 50140-45. An attempt in 1911 to waive immunity for injuries resulting from defective public property was held to be unconstitutional for want of a sufficient title. Brunson v. Santa Monica, 27 Cal. App. 89, 148 Pac. 950 (1915).
[20] Cal. Stat. 1923, c. 328, p. 675.
[21] CAL. GOVT. CODE § 53051.

ous or defective condition of public streets, highways, buildings, grounds, works and property" when specified conditions of notice and negligence existed and authorized them to insure against such liability. Since the statute created liability where none had existed before and also created a large new body of potential claims the Legislature in 1931 saw fit to enact a special claims statute [22] governing only claims arising under the Public Liability Act of 1923.

The second major statutory development related to torts involving the operation of motor vehicles. Prior to 1929 municipal liability for motor vehicle accidents depended upon whether the vehicle was engaged in a proprietary function or not.[23] In that year Section 1714½ was added to the Civil Code [24]—today, Section 400 of the Vehicle Code—imposing liability upon the State, counties, cities, school districts and other districts and political subdivisions of the State for the negligence of their officers and employees in the operation of motor vehicles in the course of official duty. As the number of automobiles and trucks and the corresponding volume of traffic increased this waiver of liability also resulted in an ever larger volume of tort claims against all levels of government.

The foregoing statutory developments affecting governmental liability were accompanied by progressive judicial curtailment of the much-criticized immunity doctrine. The availability of the "inverse condemnation" theory as a technique to circumvent governmental immunity for taking or damaging property was established by several important decisions.[25] By liberal interpretation the Public Liability Act has been stretched to cover situations not obviously within its language.[26] There is no longer any doubt that the State is liable for negligence in the course of proprietary activities;[27] and prior judicial intimations [28] that a county's functions are exclusively governmental and hence can never give rise to tort liability in the absence of statute have been expressly disapproved by the Supreme Court.[29]

This steady expansion of the scope of governmental liability inevitably brought into operation in an increasing number of cases the existing claims statutes. The large volume of reported decisions involving claims procedure in the past 34 years, since adoption of the Public Liability Act of 1923, attests to the practical difficulties which claimants increasingly encountered in seeking to follow the appropriate

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[22] Cal. Stat. 1931, c. 1167, p. 2475, now CAL. GOVT. CODE §§ 53050-56.
[23] See David, *Municipal Liability in Tort in California*, 7 SO. CAL. L. REV. 372, 382-85 (1934).
[24] Cal. Stat. 1929, c. 260, p. 565.
[25] Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942), holding CAL. CONST. Art. I, § 14 to be a self-enforcing basis for liability for which no immunity exists at any level of government. See also Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947); House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944).
[26] See Peters v. San Francisco, 41 Cal.2d 419, 260 P.2d 55 (1953) (constructive notice of defect is sufficient); Gove v. Lakeshore Homes Ass'n, 54 Cal. App.2d 155, 128 P.2d 716 (1942) (erosion from discharging sewer outlet held actionable); Bauman v. San Francisco, 42 Cal. App.2d 144, 108 P.2d 989 (1940) (negligent supervision of playground activities treated as creating a dangerous and defective condition); Cressey v. City of Los Angeles, 10 Cal. App.2d 745, 53 P.2d 172 (1935) (imputed notice); Barrett v. City of Sacramento, 128 Cal. App. 708, 18 P.2d 356 (1933) (broken depression in sidewalk three-eighths of an inch deep, held actionable).
[27] Guidi v. State, 41 Cal.2d 623, 262 P.2d 3 (1953); People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1 (1947).
[28] Dillwood v. Riecks, 42 Cal. App. 602, 184 Pac. 35 (1919).
[29] Guidi v. State, 41 Cal.2d 623, 627, 262 P.2d 3, 5 (1953).

procedural route to realization of the newly recognized substantive rights. An exhaustive search of the reports covering the seventy-three years from 1850 to 1923 has disclosed but 38 supreme court and 11 district court of appeal decisions or a total of 49 cases which involve the interpretation, application or effect of a claims provision. Since 1923 on the other hand—a period less than one-half as long—there have been 39 supreme court decisions and 135 decisions of the district courts of appeal (not counting opinions later vacated upon grant of hearing by the supreme court) for a total of 174 cases relating to claims statutes.

This nearly four-fold increase in reported cases over the past three decades suggests that there are serious deficiencies in the present claims statutes. Such provisions, being fundamentally procedural in nature, should conform to the desiderata of simplicity and effectiveness which society has a right to expect of the means by which legally recognized rights are enforceable. Unfortunately, the existing pattern of claims provisions fails to meet these standards and in consequence claims procedures have been termed by the Supreme Court as "traps for the unwary" [30] and by a legal writer on the subject as "a bramble patch of legislation which, in many cases, completely chokes off . . . substantive rights." [31]

SURVEY OF CLAIMS PROVISIONS

Coverage of Existing Claims Provisions

Legal requirements governing the filing of claims are surprisingly numerous in California. They are to be found in five sources: (1) the California codes, (2) the uncodified general laws of the State, (3) city charters, (4) municipal ordinances and (5) rules and regulations promulgated by designated governmental agencies pursuant to statutory authorization.

In the pages immediately following the various statutory,[32] charter and ordinance claims provisions are listed in terms of the type of governmental agency to which they apply with a brief description of the nature of the claims covered. For convenience in referring to them later in this study, all claims provisions listed are numbered consecutively.

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[30] Stewart v. McCollister, 37 Cal.2d 203, 231 P.2d 48 (1951).

[31] Ward, *Requirements for Filing Claims Against Governmental Units in California*, 38 CALIF. L. REV. 259, 271 (1950).

[32] This report was prepared during the 1957 General Session of the California Legislature. It therefore collates and analyzes the statute law existing prior to changes enacted at that session. The several new enactments relating to claims do not materially alter either the analysis or the conclusions reached in the report, although in a few instances minor details are affected. Among the changes adopted in the statutes of 1957 are:

(a) Chapter 99, amending Government Code Section 29714 relating to rejection of claims against counties;

(b) Chapter 252, adding a new Section 12830 to the Public Utilities Code, to provide for filing of claims against municipal utility districts;

(c) Chapter 314, adding a new Section 29700.1 to the Government Code, relating to itemization of certain types of claims against counties;

(d) Chapter 518, creating the Contra Costa County Water Agency, and incorporating in Section 20 thereof the county claims procedure as applicable to all claims against the agency.

CERTIFICATE OF SERVICE

I, Kimberly Nielsen, 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 Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on September 10, 2012, declarant served the **CITY OF LONG BEACH'S OPENING BRIEF ON THE MERITS** via U.S. Mail in a sealed envelope 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 10th day of September, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, PC

By: _____
Kimberly Nielsen

McWilliams v. City of Long Beach, et al.
Case No. S202037
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