Case No. S241471

SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

Michael McClain, et al.,
Plaintiffs and Appellants,

v.

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

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division 2
Appeal Nos. B265011 and B265029
Superior Court of Los Angeles County, Nos. BC327216 and BC325272,
John Shepard Wiley, Jr., Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICI CURIAE ALINA BEKKERMAN, ET AL. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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APPLICATION TO FILE AMICUS CURIAE BRIEF OF AMICI A. BEKKERMAN, B. GRIFFITH, J. LEE, AND C. LISSER IN SUPPORT OF PLAINTIFFS-APPELLANTS

Alina Bekkerman, Brandon Griffith, Jenny Lee, and Charles Lisser (collectively, "Bekkerman" or "Bekkerman Plaintiffs") are the named plaintiffs in a putative class action lawsuit entitled *Bekkerman v. California Department of Tax and Fee Administration,*[1] Sacramento Superior Court No. 34-2016-80002287, on appeal Third District Court of Appeal No. C085695, as well as a companion action, Sacramento Superior Court No. 34-2015-80002242, still pending.

The Bekkerman Plaintiffs' class action suit was brought against the Department as well as several retail sellers of mobile phones who are also carrier-service providers of mobile phone services. It alleges that the Department is illegally charging sales taxes on mobile phone sales based on non-existent phantom sales commissions. Those commissions are never actually paid on sales made in retail stores owned by mobile phone service

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[1] The Taxpayer Transparency and Fairness Act of 2017 created the California Department of Tax and Fee Administration (CDTFA) and transferred to it most of the California Board of Equalization's tax-related duties, powers, and responsibilities. (Assem. Bill No. 102 (2017-2018 Reg. Sess.) § 1.) References to the "Board of Equalization" in the sales tax laws "shall be deemed to refer to the Department of Tax and Fee Administration." (Gov. Code § 15570.24(a).) For simplicity, this brief will refer to both the CDTFA and the Board as the "Department."

providers. Nonetheless, the Department assumes the commissions are paid and taxes accordingly.

In their suit, Plaintiffs have encountered the same arguments from the Department as made in the present action, i.e., that consumer payers of sales tax reimbursements based on illegally-imposed sales taxes are not entitled to refund remedies. They have advanced constitutional due process arguments similar to those advanced in the present action.

Based on their experience litigating against the Department in their own class action, the Bekkerman Plaintiffs are uniquely positioned to offer additional legal arguments and theories regarding the issues raised in the present action. Those arguments are included in the proposed Amicus Curiae Brief attached to this Application.

AUTHORSHIP AND FUNDING

No party or attorney in this litigation authored the proposed brief or any part of it. No one other than the Law Offices of Tony J. Tanke and Hattis Law have made any monetary contribution (or, indeed, any contribution) towards the preparation or submission of this brief. The brief was written entirely by counsel for the Bekkerman Plaintiffs in order to support Plaintiffs-Appellants in this action and to protect the Bekkerman Plaintiffs' interests in their own lawsuit.

For the foregoing reasons, the Bekkerman Plaintiffs respectfully request this Court's permission to file the attached Brief of Amici Curiae.

Dated: May 14, 2018

Respectfully submitted,

LAW OFFICES OF TONY J. TANKE

By: _____
Tony J. Tanke

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BRIEF OF AMICI CURIAE ALINA BEKKERMAN, ET AL. IN SUPPORT OF PLAINTIFFS-APPELLANTS

INTRODUCTION

Taxation is vital to the efficient and effective operation of government. The law favors prompt collection of taxes to ensure the availability of public funds. But taxpayers have rights as well. They also have remedies when they are subjected to taxes that contravene the law. The system is kept in balance by a state constitutional provision prohibiting courts from enjoining tax collection pending litigation, but ensuring that, after payment of a tax claimed to be illegal, the payor can bring an action for a refund of the tax paid plus interest – according to procedures established by the Legislature. (Cal. Const., art. 13, § 32.)

The present case calls upon this Court to decide what happens when legislative procedures fall short in providing refund relief to one of the most numerous classes of California taxpayers – ordinary consumers who pay the lion's share of sales taxes imposed on hundreds of billions of dollars in sales. California sales taxation is defined by the complex character of tax statutes and regulations, the massive scale and diversity of millions of consumer transactions across our state, and persistent government efforts to increase the flow of public revenue into the state's coffers. On occasion, those efforts overreach and give rise to instances of illegal imposition and

collection of tax revenues. When this occurs, California taxpayers have constitutional due process rights to "clear and certain" judicial relief in the form of refunds of amounts illegally paid.

Our tax statutes do not provide clear and certain refund remedies to California consumers who are the economic taxpayers of illegal sales taxes. Instead, they expressly allow only retailers to claim refunds and to prosecute lawsuits to secure them. They do so even though statutes and regulations allow retailers to obtain reimbursement of all taxes paid by simply passing the amounts on to consumers as part of sales transactions. Consumers are accustomed to paying sales taxes and seeing them appear on sales slips and receipts. But they are not accustomed to illegal and unauthorized taxes on their purchases of goods and undoubtedly assume that all amounts they are charged as sales taxes are legitimately imposed.

Amici are consumers who were required to pay 100% of the sales taxes due on their purchases of mobile phone devices and mobile phone services in retail stores owned by the major mobile phone service providers. They are seeking refunds arising out of an illegal attempt by the state, acting through its Department of Tax and Fee Administration, to charge them sales taxes on non-existent sales commissions charged on their purchases. Those phantom commissions are not paid to anyone. They cannot be the basis of a sales tax. This happens because the major mobile phone service providers own their retail stores and do not pay themselves

sales commissions on their own sales. Amici, like other similarly situated consumer-taxpayers, are now confronting the Department's contention that they have no rights and no remedies at all that will secure to them what there are entitled to – *a refund of taxes illegally charged and collected.*

Amici will show below that they and other consumers are legally and equitably entitled to tax refund relief. They base their entitlement on the following propositions which are more fully discussed below:

- Consumers who pay sales tax reimbursements are legal taxpayers who should be accorded the rights of legal taxpayers in their dealings with the Department – especially when the Department has acted or is acting illegally in imposing and collecting tax.
- Consumer-taxpayers in California have due process rights to clear and certain remedies in the form of refunds of illegal taxes paid by them. They are also protected from takings of their property without compensation. Both sets of rights are violated by the Department's statutes and modes of operation.
- This Court has in the past made up for these statutory deficiencies in California law by establishing *equitable* judicial remedies by which consumer-taxpayers can compel their retailers to file tax refund claims with the Department and can compel the Department to insure that refunds are

given to those who actually paid illegal taxes. The Second District Court of Appeal in this case eviscerated these remedies by employing an erroneous interpretation of this Court's precedents. If its decision is upheld, California's system of sales taxation will be unconstitutional.

DISCUSSION

I. CONSUMERS WHO PAY SALES TAX REIMBURSEMENTS ARE LEGAL TAXPAYERS WHO SHOULD BE ACCORDED THE LEGAL RIGHTS OF TAXPAYERS.

The typical California retail sale that generates a sales tax is devoid of bargaining. It is a standard transaction with seller-dictated terms and prices. The consumer enters a sales establishment, selects an item for purchase, pays a stated price, and is given a sales receipt showing a charge to the consumer of the full amount of California sales tax attributable to the transaction. This typical retail sale was made in all of the transactions involved in the present action as well as all those involved in the actions referred to in the amicus briefs filed in support of Plaintiffs and Appellants.

Under California law, the sales tax is remitted to the Department by the retailer. The retailer files tax returns, forwards tax payments to the Department, and interacts with the Department about the taxes due. Because the law allows retailers to do so, they routinely pass 100% of the tax along to consumers. Consumers thus become the actual economic

taxpayers of all amounts paid in tax. While there are occasional exceptions (e.g., promotions where the seller offers to pay the tax itself), the standard approach is typical. The Department counts on it to obtain the funds California governments require to operate.

As amici will discuss, the law regarding the incidence of sales taxation is a morass. While state statutory and case law generally provide that the incidence of sales taxes falls on retail sellers, federal due process and other federal law is to the contrary. The simple reality is that consumers pay sales taxes; therefore, they alone have an incentive to challenge illegalities in the imposition and collection of those taxes. The Department's motivation to collect potentially illegal taxes – without opposition by the only affected parties – is supported and reinforced by the statutory tax refund remedies accorded only to retailers and not to consumers and economic taxpayers. This section will discuss the legal incidence of sales taxation in California; the next will explain the due process and takings consequences from the operation of the California sales tax scheme as envisioned, designed, and enforce by the Department.

A. The Legal Incidence of Sales Tax in California Falls On Consumers Who Routinely Reimburse Sellers For 100% of the Tax Paid.

For purposes of federal constitutional rights and legal protections, federal law determines the legal incidence of a tax. In California it places that incidence on the consumers who actually pay the tax.

In *Diamond Nat'l Corp. v. State Bd. of Equalization* (1976) 425 U.S. 268, ("*Diamond I*") the Supreme Court held that federal courts were not bound by either the California legislative or state court determinations as to where the legal incidence of a tax fell. (*Id.* at 268 (specifically referring to the California sales tax).) *Diamond I* held that the Department violated federal law by improperly imposing sales tax on a national bank. (*Id.*, citing *First Agricultural Nat'l Bank v. Tax Comm'n* (1968) 392 U.S. 339, 346-348.) "Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose, we are not bound by the state court's characterization of the tax." (*First Ag., supra*, 392 U.S. at p. 374.)

While *First Agricultural Nat'l Bank* addressed an issue of federal immunity, *Kern-Limerick, Inc. v. Scurlock* (1954) 347 U.S. 110 ("*Kern-Limerick*") had previously espoused a broader standard:

> "One might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose...

Such a conclusion ... would deny the long [established] principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." [2] (*Id.* at p. 121-122 (emphasis added). *See also United States v. N.M.* (10th Cir. 1978) 581 F.2d 803, 806.

The Court conducted its own analysis and determined the legal incidence of excise tax was on the seller not the consumer), *aff'd.* (1982) 455 U.S. 720, 738; *United States v. Nevada Tax Com.* (9th Cir. 1971) 439 F.2d 435, 439-440 ("The constitutional question involved discriminatory application of [use tax] provisions" and its resolution depended on the interpretation of where the legal incidence of the tax fell, which "is a question of federal law upon which decisions of the states are not binding.")

In the 1930s, the California Legislature, this Court, and the federal district courts uniformly agreed that: California's sales tax imposed a fixed rate of tax on the retailer's gross receipts and not on the individual sale of merchandise, that the tax created a relationship between the State and the retailer and not between the State and the consumer, and that it did not matter that the retailer was required to pass the burden on to the consumer. (California Retail Sales Tax Act (Stats. 1933, ch. 1020, pp. 2599, 2600,

[2] All emphasis is added unless otherwise stated.

2602 Stats. 1935, p. 1252); *Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 Cal.2d 156, 161-163; *Meyer Const. Co. v. Corbett* (N.D.Cal. 1934) 7 F.Supp. 616, 617-618.)

From the outset, the courts have had trouble with the pass-through provisions the Legislature enacted, which stated, "**tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done.**" (California Retail Sales Tax Act (Stats. 1933, ch. 1010 § 8½), ("section 6052").) In *Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, "shall" was interpreted to mean "to merely authorize the retail merchant to reimburse himself from the consumer in so far as it may be consistently done. He is not required to do so. He may waive that right." (*Id.* at 736.)

In *National Ice v. Pacific Fruit Express Co.* (1938) 11Cal.2d 283, this Court expressed concern about the constitutionality of the taxing scheme, particularly the pass-through requirement. (11 Cal.2d 283 at 291-292 (focusing on contract rights).) In *De Aryan v. Akers* (1939) 12 Cal.2d 781, this Court stated that section 6052 "charged the seller taxpayer with the ***mandatory duty*** to add the amount of the tax to his sales price, and to collect if from the purchaser along with the sales price" except for the limited cases where following that duty would infringe on the consumer's existing contractual *or other Constitutional rights.* (*Id.* at 786.) By 1949, this Court had adopted the *Roth* view of the incidence of retail sales taxes. (*See Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 474 (comparing the

structure and requirements of California's Retail Tax to a San Francisco ordinance); see also *Pacific Coast Eng. Co. v. State of California* (1952) 111 Cal.App.2d 31 ("Since the tax is levied upon the retailer and his right of reimbursement is optional and may be waived by him, it follows, we think, that reimbursement of the amount of the tax rests upon the contractual agreement of the parties. The buyer-consumer has no obligation in reference to the tax. ... [E]ven though a contract is silent as to whether [the] price includes or excludes a sales tax, the law will not by implication add to the burden of the buyer.")

Subsequently, a series of U.S. Supreme Court cases began to scrutinize state taxing statutes as applied to banks. (See e.g., *Diamond I supra.*) The Court of Appeal in *Diamond Nat. Corp. v. State Bd. of Equalization* (1975) 49 Cal.App.3d 778 ("*Diamond II*") stated:

> "Unlike [recently invalidated schemes], this state has no mandatory requirement that its sales taxes be "passed on" to the purchaser. ... Section 6052 provides that '[the] tax hereby imposed shall be collected by the retailer from the consumer *in so far as it can be done*.' It is well settled that '[this] section *merely allows* a retailer to reimburse himself for payment of the tax. He is *limited* in doing so where the consumer's contractual or constitutional rights are infringed.' The retailer is *permitted* to pass the tax on to the consumer, but he is *not charged with a mandatory duty* to collect the

tax. Moreover, '[while] the act authorizes the retailer to collect the tax ... that does not make it a consumer's tax.'" (*Id.* at 783 (original italics, internal citations omitted).)

In *Diamond I*, the U.S. Supreme Court reversed the Court of Appeal as applied to *federal issues.* (*Diamond I, supra,* 425 U.S. 268.) This Court almost immediately seized on that distinction:

"The San Francisco tax ordinances before us contain no mandatory pass-on provisions, and it is equally clear that the mere ability to recoup the loss by raising prices will not necessarily shift the legal incidence of the tax. ... *Diamond Nat. Corp. v. State Bd. of Equalization* (1975) 49 Cal.App.3d 778 [123 Cal.Rptr. 160], revd. on issue of fed. immunity; 425 U.S. 268." (*Western States Bankcard Assn. v. San Francisco* (1977) 19 Cal.3d 208, 217.)

Despite this Court's observation just quoted in *Western States*, the California Legislature repealed the mandatory reimbursement requirement of section 6052 and replaced it with Civil Code section 1656.1, which created a presumptive contract between the retailer and the consumer for sales tax reimbursement. (Stats. 1978, Ch. 1211.) Since then, California courts are still guided by this principle:

"Under California's sales tax law, the taxpayer is the retailer, not the consumer. ... As for the interests of consumers, ... retailer/taxpayers are permitted, but not required, to contract with consumers to charge

a reimbursement amount to reimburse the retailer for its own payment of sales tax on a transaction. Alternatively, the retailer may choose simply to absorb the tax."

(*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103; See also, e.g., *GMRI, Inc. v. CDTFA* (2018) 21 Cal.App.5th 111, 118 (retailer is taxpayer).)

However, even some members of this Court appear to have trouble with this idea. "The City is correct to focus on the ... legal incidence, but its argument fails because, under the Ordinance, both the legal incidence and the economic burden ... fall on [the] consumers... The rule in California is that where the government *mandates* payment of a charge by one party and imposes a duty on some other party to collect that payment and remit it to the government, the legal incidence of the charge falls, not on the party collecting the payment—who acts merely as the governments collection agent or conduit—but on the party from whom the payment is, by law, collected." (*Jacks v. Santa Barbara* (2017) 3 Cal.5th 248, 279 (dis. opn. of Chin, J.) While we agree with Justice Chin that this should be the case, it is also worth noting that throughout most of the history of the sales tax in California, the courts have had to force the word "shall" to mean "may" in order to prevent the existence of such a mandate.

California claims that its sales tax is placed upon the retailer and that the consumer is not the taxpayer. Yet fiscal reality shows that this is a convenient fabrication. Section 6012 states, in part,

> "For the purposes of the sales tax, if the retailers establish to the satisfaction of the Board that the sales tax has been added to the total amount of the sales price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received *exclusive of the tax imposed.* Section 1656.1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax."

In 2016, taxable sales within the State of California exceeded $649 billion. (Taxable Sales in California 2016, Table 1: Statewide Taxable Sales, By Type of Business, California Board of Equalization, https://www.boe.ca.gov/news/tsalescont16.htm, last accessed Apr. 29, 2018.) If all retailers did not charge sales-tax reimbursement and the statewide tax rate of 7.25% were assumed to be charged, California *retailers* would lose over $47 billion in revenue.[3] **Access to more than an**

[3] The actual loss could be substantially higher. As an example, consider a retailer that has gross receipts of $1,000,000 in the City of Commerce, which has a 10.000% sales tax rate. (*See* California City & County Sales & Use Tax Rates, *supra.*) If the retailer charges sales tax reimbursement on the consumers, the retailer will have an additional $100,000 of receipts upon which the retailer will not owe sales tax. Thus, after paying the sales tax, the retailer would have $1,000,000 net. If, however, the retailer does not charge sales tax reimbursement on its consumers, the retailer would

additional $47 billion is an incredibly powerful incentive for California businesses to seek sales-tax reimbursements from all their customers.

This powerful incentive for retailers challenges the *presumption* that consumers consent to pay sales tax reimbursement and are not the actual taxpayers. Amici urge this Court to recognize that $47 billion per year is a sufficient "foot on the scale" to make California's "may" obtain reimbursement into "shall" and to follow the federal courts' view that the consumers are the taxpayers. That view will now be explored.

In *United States v. California State Bd. of Equalization* (9th Cir. 1981) 650 F.2d 1127 ("*US v. BOE*"), *affd* 456 U.S. 901 (1982), the Ninth Circuit determined that, when looking at California's sales tax statutory scheme as a whole, the legal incidence fell on the consumer and not on the retailer. With respect to resolving federal constitutional issues, the Ninth Circuit stated: "In determining who the legislature intends will pay the tax, the entire state taxation scheme and the context in which it operates as well as the express wording of the taxing statute must be considered." (*Id.* at 1131.) As the Supreme Court has observed, "determining whether a tax is actually laid on the [consumer] [requires going] beyond the bare face of the

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owe $100,000 of the $1,000,000, leaving the retailer with only $900,000 net. That retailer has a $100,000 incentive to pass the tax burden on to the consumer instead of the $72,500 incentive it would have paying just the California state tax. For retailers typically working with 1-3% profit margins, this is significant.

taxing statute to consider all relevant circumstances." (*U.S. v. City of Detroit*, 355 U.S. 466, 469 (1958).)

In *US v. BOE*, the particular taxed transactions were between lessors and lessees. However, the same analysis applies when sales tax transactions100% and the relationship of retailers and consumers are at stake:

> The California sales tax scheme ... is unlike statutes struck down in previous cases because *it is facially neutral* as to who is to pay the sales tax. ... [T]he presumptions set forth in [Cal. Civ. Code § 1656.1 (a) and (b)] do not appear to be a subtle legislative attempt to require the seller to pass the tax on to the buyer. ¶ ***The seeming neutrality of section 1656.1 is rendered illusory, however, by the interaction of California Revenue and Taxation Code sections 6012 and 6051.*** ... If the lessor requires the lessee to pay the tax, the amount of the tax is deducted from the lessor's gross receipts. If the lessor pays the tax himself[,] absorbs the tax and passes the economic burden of the tax on to the lessee as an increase in the lease price, the amount of tax paid by the lessor is not deducted from his gross receipts. Since the sales tax is levied on the basis of the lessor gross receipts, the lessor must remit a *larger sum of money to the state as taxes if he absorbs the*

tax himself than if he collects the tax from the lessee.

Therefore, the lessor maximizes his profit *only if he separately states and collects the tax from the lessee...* ¶

Despite the facial neutrality of Section 1656.1, *the strong economic incentive created by Section 6012* ***all but compels the lessor to collect the tax from the lessee. In sum, the California sales tax scheme manifests a legislative intent that the lessee pay the sales tax.***"

(*US v. BOE, supra*, 650 F.2d at 1131-1132).

The Supreme Court summarily affirmed the *US v. BOE* decision without comment. (*Bd. of Equalization v. U.S.* (1982) 456 U.S. 901.) The significance of the summary affirmance is readily apparent. The only way the Supreme Court could have upheld the Ninth Circuit's ruling was by accepting the premise that the California sales tax scheme placed the legal incidence on the lessee/consumer. The High Court's decision in *U.S. v. Tax Comm'n of Miss.* (1975) 421 U.S. 599 throws additional light on the matter. Discussing why the *legal incidence* of an alcohol tax fell on the consumer and not the vendor, the Court there observed:

We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. ... Finally, even in the absence of

this clear statement of the Tax Commission's intentions, the obvious economic realities compelled the distillers to pass on the economic burden of the markup."

(*Id.* at 609 and fn.8.) Thus, if the economic realities imposed by the state *compel* the retailers to pass on the tax, the legal incidence of the tax falls to the consumers.

In *Coeur D'Alene Tribe v. Hammond* (9th Cir. 2004) 384 F.3d 674 ("*Hammond*"), the court reaffirmed and expanded this idea: The incidence of a sales tax on a sovereign Indian nation is inescapably a question of federal law that cannot be resolved by the state legislature's mere statement. (*Id.* at p. 682-683.) Specifically, permitting a state legislature hide its "*intent* about where the incidence of the tax lies ... merely be reciting *ipso facto* that the incidence of the tax falls upon another party" would undermine Supreme Court precedent and "permit states to set policy in a way that risks undermining" *federal questions of law*. (*Id* at 683 (original emphasis).) "[L]egislative declaration ... cannot be viewed as entirely 'dispositive' of the legal issue that the federal courts are charged with determining as to the incidence of the tax. And this is not merely a technical tax issue." (*Id.* at 684.) While federal courts give great deference to a state court's definitive determination of the operating incidence of a tax, it will only be deemed conclusive where it is consistent with the statutory scheme's "reasonable interpretation." (*Ibid.*)

"We believe that automatic deference [to the state court] cannot [sic] follow where the incidence was previously determined to be on [one party] ... and the state legislature's subsequent amendments to the law, though adding a statement of legislative intent on incidence, did not materially alter the operation of the statute or its probably impact." (*Id.* at 685 (emphasis added).) That is, minimal and cosmetic changes to the tax law without altering key substantive tax provisions regarding legal incidence are insufficient. (*Ibid.*)

Those modifications to state tax provisions that mirror those present in, or conspicuously absent from, those found in prior schema struck down by U.S. Supreme Court rulings bear special consideration. (*Id.* at 688.) For those changes that, "[i]n light of the probable operational effects of [the tax law] in its context" do not alter the "pass through quality of the prior statute," the result is "still a collect and remit scheme which passes [on] the incidence of the tax." (*Ibid.* (internal citations removed).) Thus, for *federal constitutional consequences* of the California Sales Tax scheme, the legal incidence of the tax falls on the consumer contrary to legislative declarations that it falls on the retailer.[4]

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[4] *Bailey v. CIR* (1987) 88 T.C. 900 ("*Bailey*") recognized that "the California State courts and the Ninth Circuit have conflicting views as to whom (i.e., the retailer or consumer) the incidence of the California sales tax falls." (*Id.* at 905.) The *Bailey* court specifically rejected the assertion that *Diamond National Corp.* (1975) 425 U.S. 268 and *U.S. v. BOE* are both narrow in scope, but rather extended those findings to federal tax law

In a subsequent case, *Chemehuevi Tribe v. California State Bd. of Equalization* (9th Cir. 1985) 757 F.2d 1047, the Ninth Circuit *appeared* to change its position when it stated that California's cigarette tax statute "does not contain any [] explicit 'pass-through language," (*Id.* at 1056.) and that such "legislative intent to impose even a collection burden should be explicitly stated" (*Id.* at 1056 n.11.) before a finding of legal incidence on the purchaser is appropriate. (*Id.* at 1055.) In its petition for writ for certiorari, the Department argued that explicit pass-through language was neither required by the Supreme Court "nor rationally justifiable so long as the shift of incidence or "pass-through" is contemplated by the statutory scheme.

The Supreme Court partially reversed in *California State Bd. of Equalization v. Chemehuevi Tribe* (1985) 474 U.S. 9:

> "None of our cases has suggested that an express statement that a tax is to be passed on to the ultimate purchaser is necessary ... Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express 'pass on or collect' provision. ... We think that the fairest

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as well. (*Bailey, supra*, 88 T.C. at 905-906.) Specifically, "[f]ollowing the principle established in *Golsen v. Commissioner* (1970), affd 445 F.2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971), we shall apply herein the view of the Court of Appeals for the Ninth Circuit. We thus hold that *for federal purposes the legal incidence of the California sales tax falls on the consumer.*" (*Bailey, supra*, 88 T.C.at 906.)

reading of California's cigarette ***scheme as a whole*** is that the legal incidence of the tax falls on the consuming purchasers... *We think that, in the context of the entire California statutory scheme, interpreted without [requiring an explicit pass on or collect provision] evidences an intent to impose ... such a 'pass on and collect' requirement.*" (*Id.* at 11-12 (internal citations omitted.)

B. Any Purported Question of Consumer Consent to Sales Tax Reimbursements Raises Issues of Fact That Cannot Be Resolved on Demurrer.

In response to *Diamond I*, the Legislature enacted Civil Code section 1656.1 which provides that whether sales tax reimbursement may be added to the retail sale price of goods "depends solely upon the terms of the agreement of sale." An agreement for sales tax reimbursement is presumed if the agreement itself so states, a "sales check" or other proof of sale so provides, or the seller posts or includes in its advertising a notice that so states. (§ 1656.1 (a).) It is likewise presumed that the property is sold at a price which includes sales tax reimbursement if the retailer posts or includes on a price tag or in an advertisement one of two specified notices. The statute also declares that *"[t]he presumptions created by this section are rebuttable*."

The statute neither alters the legal incidence of the tax under *Diamond I* nor works a forfeiture of a consumer-taxpayer's right to an

effective remedy for payment of a sales tax reimbursement founded on an illegally imposed or collected sales tax. This follows for two fundamental and alternative reasons:

First, consumer contractual consent to pay a sales tax reimbursement may depend on whether the tax has been legally imposed and correctly calculated. Consumers generally believe the government operates legally and properly when it imposes taxes. They consent to pay a reimbursement because they believe the underlying tax to be correctly determined – something that their retail seller is legally required to pay to the Department. Indeed, California law includes a presumption to this effect: "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) This presumption affects the burden of proof. (Evid. Code, § 660.) It is also presumed that: "The law has been obeyed." (Civ. Code, § 3548.).

Both presumptions apply to the conduct of the government officers – including the Department. (*Irvine v. Citrus Pest Dist. No. 2* (1944) 62 Cal.App.2d 378, 383 ["It is presumed that an officer charged with a duty will perform it in accordance with the requirements of the Constitution and the law."]; *1926 North Ardmore Avenue, LLC v. County of Los Angeles* (2017) 3 Cal.5th 319, 328 ["In a tax refund action, the burden of proof is on the taxpayer, who must demonstrate that the assessment is incorrect and produce evidence to establish the proper amount of the tax."]; see also *Long*

Beach Firemen's Credit Union v. Franchise Tax Board (1982) 128 Cal.App.3d 50, 55 [same effect]; *Guy v. Washburn* (1863) 23 Cal. 111, 114-115 [presumed that State Board of Equalization duly performed its duty of equalizing assessment roll].).

Second, a presumption that the consumer consented to an illegal sales tax reimbursement, if triggered by section 1656.1, can be rebutted by evidence that no such consent and no such agreement was reached. (*Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1010-1011 [whether rebuttable presumption was rebutted is question of fact]; *Cooper v. Cooper* (1959) 168 Cal.App.2d 326, 335 [same effect]. For example, consumers could supply extrinsic evidence that the parties believed that sales tax was legally and properly imposed in the transaction – a mutual mistake that is material to an agreement to pay sales tax reimbursement. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 525; *Palma v. Leslie* (1935) 6 Cal.App.2d 702, 709.)

II. CONSUMER-TAXPAYERS HAVE CONSTITITIONAL RIGHTS TO EFFECTIVE RETROSPECTIVE REFUND REMEDIES TO SAFEGUARD BOTH THEIR DUE PROCESS RIGHTS AND THEIR RIGHTS TO BE FREE FROM UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY.

Both the United States and the California Constitutions prohibit the state from taking a person's property without due process of law. (U.S. Const., art. XIV; Cal. Const. art. I, §§ 7(a); 15.) Money is a property interest. (*American Corporate Security, Inc. v. Su* (2013) 220 Cal.App.4th 38, 46-47.) An illegal exaction by a government agency or a confiscation of money by government action violates due process. (*Munns v. Kerry* (9th Cir. 2015) 782 F.3d 402, 414; *Hillsboro Properties v. City of Rohnert Park* (2006) 138 Cal.App.4th 379, 384-385.) Statutes must be construed to avoid "any doubt" as to their constitutionality under due process provisions. (*Kleffner v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346; *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 846-847.)

Due process requires reasonable notice and an opportunity to be heard before governmental deprivation of a significant property interest. (*Horn v. City of Ventura* (1979) 24 Cal.3d 605, 612.) A state court's denial of a recovery of taxes exacted in violation of constitutional law "is itself in contravention of the Fourteenth Amendment." (*Reich v. Collins* (1994)

513 U.S. 106, 109, quoting *Carpenter v. Shaw* (1930) 280 U.S. 363, 369.) A state can provide either pre-deprivation or post-deprivation remedies (or both) for illegal taxation. (Id.).

California law does not provide – and indeed prohibits – pre-deprivation remedies that disrupt the collection of taxes before a final judgment of invalidity. This allows an uninterrupted flow of tax revenues while litigation is pending – followed by payment of post-deprivation refunds in an orderly process authorized by the Legislature. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 252.). Article 13, section 32 of the California Constitution provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin 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.*"

This provision makes clear that one who pays what he or she claims to be an illegal tax (not necessarily the legal incidence taxpayer) can sue in court to obtain a refund plus interest. The Legislature is empowered to specify the "manner" in which this happens, but it has no power to refuse effective post-deprivation refund relief. To do so would contravene the plain meaning of our constitution. In California, "the sole avenue for resolving tax disputes is a postpayment refund action." (*Water*

Replenishment Dist. of So. Cal. v. City of Cerritos (2013) 220 Cal.App.4th 1450, 1465.) The United States Supreme Court has also confirmed that "refund of excess taxes paid" (or offsetting charges on previously and illegally favored taxpayers) is the "clear and certain remedy" for unconstitutional deprivation of tax monies. (*McKesson v. Division of Alcoholic Beverages and Tobacco* (1990) 496 U.S. 18, 51-52; see also *Harper v. Virginia Dept. of Taxation* (1993) 509 U.S. 86, 100-101, and cases cited in both opinions.)

With the sole exception of an equitable action to compel retailers to file refund claims and the Department to make refunds – brought under *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 and discussed in Section III below – the Department submits that consumers have no direct right to postpayment refund actions to recover illegal sales taxes paid by them. In other words, they have no right to recover the refunds of amounts illegally paid as guaranteed by both the United States and the California Constitutions. If, as the Bekkerman Plaintiffs argue in Section I above, they and other consumers are entitled to be treated as taxpayers with post-deprivation refund rights, their due process and other rights have been clearly and egregiously transgressed. This Court should recognize and vindicate those rights here and now.

The United States and California Constitutions also proscribe the "taking" of private property for public use without just compensation.

(U.S. Const., 5th Amend.; Cal. Const., art. I, § 19(a).) The Court of Appeal maintained that consumer payments of sales tax reimbursement could not result in a "taking" because "the retailer is not a government entity" and "the taking of money is different [] under the Fifth Amendment." (*McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 703.) Neither of these observations withstands scrutiny.

While retailers are not government entities per se, that distinction makes no difference here. Private entities and government institutions can act jointly or in "close nexus" with each other to perpetrate violations of federally-protected rights when government and otherwise private actors act with "interdependence" and government "insinuates itself" into complex processes that deprive individuals and businesses of their rights. (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396-400; *Jensen v. Lane County* (9th Cir. 2000) 222 F.3d 570, 575-576.)

The Department has, in interdependence with retailers, perpetrated a scheme to immunize itself from otherwise patently illegal taxation by depriving the only real taxpayers of the ability to challenge wrongful exactions. The scheme consists of the following elements: The statutory scheme provides that only retailers can file refund claims and sue. (Rev. and Tax Code, §§ 6092 & 6931-6937.) It then ensures that they will have no incentive to do so. They are permitted – indeed expressly authorized by the Department – to pass 100% of all taxes (legal or illegal) on to their

customers. (Civ. Code, § 1656.1.) Retailers are given a safe harbor that protects them from suit as long as they surrender to the State all taxes (again legal or illegal ones) they collect from consumers. (Rev. & Tax Code § 6901.5.) Of course, if they do not, they will subject to interest and a whopping 40% penalty if they cannot defeat the State in its efforts to collect taxes. (Rev. & Tax Code §§ 6591-6597, especially 6597(a).)

Needless to say, no rational retailer would be willing to challenge illegal taxes under the above rules. It is easier and cheaper simply to pay the Department whatever amounts it seeks in sales taxes, and then pass whatever the retailer pays on to the customer who, as the sole economic taxpayer, bears the full brunt of the Department's illegal conduct. After all, there is no point in suing to challenge an illegal tax if 100% of the injury from it can be inflicted on customers by the simply expedient of a cash register sales slip or posted notice.

In a mass marketplace, consumers are accustomed to standardized pricing and to reimbursing retailers for legitimate sales taxes that represent an out-of-pocket expense to retailers. But no consumer assumes the State is cheating him or her by collecting taxes it has no legal authority to collect. Unless it is proven otherwise, we all assume that the State acts within the law. As shown above, so does case law. And when it does not, no one is able to hold it accountable.

Moreover, even if the retailers are treated as purely private actors, they are simply collection agents of the Department who are exacting sales taxes from unwitting consumers and turning them over to the State. The State's attempt, by the creation of statutory presumptions that defy reality, to convert what customers honestly and reasonably believe to be legal and legitimate taxation into voluntary consent to illegal confiscation is a sham. At a bare minimum, customer consent in this context gives rise to factual issues that cannot be resolved on demurrers (as happened here) or by summary judgments. (See Section I(B) above.).

The Court of Appeal also cited *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671 ("*San Remo*") as standing for the proposition that "the taking of money is different, under the Fifth Amendment, from the taking of real or personal property." However, that statement is taken out of context and is misleading. Rather, *San Remo*, quoting *Ehrlich*, stated that "the imposition of various monetary extractions ... has been accorded substantial judicial deference." (*Ibid*, quoting *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 892 (conc. opn. of Mosk, J.) ("*Ehrlich*").) In *Ehrlich*, this Court specifically rejected the proposition that Fifth-Amendment takings were without application to monetary exactions, particularly those that were imposed on an individual and discretionary basis. (*Ehrlich, supra* at 876.) The issue in *Ehrlich* was whether a particular government process was a valid regulation or "an out-and-out plan of

extortion." (*Id.* at 878, quoting *Nollan v. California Costal Com'n*, (1987) 483 U.S. 825, 837 ("*Nollan*").) That is likewise the question here.

Ehrlich recognized that "one of the fundamental principles of modern takings jurisprudence is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Ehrlich, supra* at 880.) While the courts have deferred to legislative and political processes to formulate "public program[s] adjusting the benefits and burdens of economic life to promote the common good," when government imposes special, discretionary conditions (whether they be possessory dedications or monetary extractions), they must be scrutinized under a heightened takings analysis. (*Id.* at 881.)

While *Ehrlich* and *San Remo* both dealt specifically with monetary extractions relating to property development, a similar principle applies in sales tax reimbursement cases. Here, the State of California has effectively deputized retailers while granting them a level of discretion that the State would otherwise not possess. Any retailer can charge *any* sales-tax reimbursement it wants (whether based on legitimate or illegitimate sales taxes) so long as it passes those funds on to the state under the "safe harbor" provision in Revenue and Taxation Code section 6901.5.

III. WITHOUT THE AVAILABILITY OF JUDICIALLY-SUPERVISED REFUND REMEDIES AS RECOGNIZED IN THIS COURT'S DECISIONS IN *JAVOR* AND *LOEFFLER*, CALIFORNIA'S SALES TAX SCHEME WOULD BE UNCONSTITUTIONAL.

A. Consumer-Taxpayers' Rights Were Recognized in *Javor* and *Loeffler*.

This Court has recognized consumer-taxpayers' rights to obtain refunds of sums that were illegally exacted from them. Its decisions in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 and *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, properly construed, allow consumer-taxpayers to use equitable remedies of unjust enrichment and constructive trust to protect the integrity of sales taxes in California and to vindicate the rights of those who have paid illegitimate and illegal exactions. A proper construction of those decisions and the statutory schemes they address will avoid *any* of the constitutional questions posed in this case and discussed in Sections I and II above.

The Court of Appeal misconstrued *Javor* in a fundamental way that this Court can now correct. While it is true that the Department's predecessor (the California Board of Equalization) admitted that tax refunds were due to consumers in *Javor*, it is not true that the holding in that case is confined to situations in which the Department itself admits its own

wrongdoing or mistaken collection of amounts that were not due as sales taxes.

Javor was a class action brought *in equity* to achieve a remedy to address an otherwise intolerable situation. The Department was passing on refunds that did not belong in its coffers to retailers without requiring that they make claims and pass those refunds on to consumers. This Court felt duty-bound to protect the honesty and integrity of the sales tax system as well as the rights of consumers by devising an *equitable remedy*. It maintained that: "The integrity of the sales tax requires not only that the retailers not be unjustly enriched . . ., but also that the state not be similarly unjustly enriched." (*Javor*, 12 Cal.3d at 802.) Despite the fact that the statutory scheme of retailer refund claims, Board adjudication and judicial action, and refund payments to retailers did not provide *any* relief for illegal consumer tax reimbursements, the Court believed it was essential to provide such relief *in equity*. The same rationale applies here and in any case in which consumers were required to pay, as part of a sales transaction, sums that the Department illegally imposed as sales taxes.

While *Javor* did not expressly decide constitutional issues, it effectively avoided them by using *equitable powers* – outside the statutory scheme – to provide a remedy to aggrieved consumers and prevent unjust and illegal enrichment of retailers and the Department. The same is called for in this case and in the other cases involved in amicus presentations to

this Court here. Without *Javor* remedies, the statutory scheme would operate in a way that is not only inequitable, but unconstitutional as well. (See Sections I and II above.)

According to the Department and the Court of Appeal, *Javor* is confined to situations in which the Department itself admits that taxes have been mistakenly or intentionally assessed or collected in a manner that is illegal and merits recompense to someone. In other words, the Department, in its unbridled discretion, becomes judge, jury, and sole decisionmaker in determining when its own taxes are illegal. Because there is no judicial remedy, there is no effective judicial review. This is the ultimate in arbitrary government action. It is, effectively, tyranny by administrative determination. The buck stops with the Department – and stays in the Department's coffers – unless the Department itself decides otherwise.

Nothing in California law – let alone in the United States or California Constitutions – justifies what is described above or the results it produces. At some stage, courts must intervene to protect rights and to accomplish justice. That is what due process is all about. It is the responsibility and province of this Court in the present action.

Loeffler did not overrule, disapprove, or limit *Javor*. Nothing in *Loeffler* is at odds with the application of *Javor* here (or in any case) in which California courts determine that the Department has taxed illegally to the detriment of California consumers. In such cases, refunds need to be

paid and equity can prevent unjust enrichment to retailers or to the Department. *Loeffler* did not grant relief for reasons that do not apply here or in many other cases where consumer-taxpayers have proceeded prudently and in deference to the Department's expertise and authority.

The *Loeffler* plaintiffs lost because they sued retailers who had done no more than what the tax statutes require and allow – collect taxes as the Department assesses them and turn any collections over to the Department. And they did so under *consumer protection statutes* not designed to resolve tax cases or determine whether illegal taxation has taken place. Here, and in other cases properly posited by amici in this Court, consumer-taxpayers went to the Department, asked it to determine the propriety and legality of its taxes, and received expressions of denial or disinterest.

In this way, the Department's statutory role and its administrative expertise in the complex world of sales taxation were fully respected and vindicated. The Department was satisfied with what it had done and did not want any further opportunities to make legal determinations. The California judicial system – and ultimately this Court – were the only remaining recourse to full and fair enforcement of the tax laws.

B. Apart from Equitable Remedies Under *Javor*, There Are No Clear and Certain Remedies To Obtain Consumer Tax Reimbursement Refunds.

As the Bekkerman Plaintiffs observed in Section II above, due process requires that, in states like California where pre-deprivation relief is not allowed, clear and certain post-deprivation remedies must be awarded. The California Constitution entitles the payers of illegal taxes to *refunds*. Case law also so provides. But the Court of Appeal insisted that due process was not implicated in this case because there were other adequate remedies. The court was wrong. The only "clear and certain" judicial remedy allowed in California is an equitable remedy under *Javor*. No other remedy posited by the court gives consumer-taxpayers the only effective post-deprivation remedy they can obtain: *a refund of illegally-paid sales taxes*.

The Court of Appeal concedes that due process requires a "clear and effective" post-deprivation remedy in the form of a "postpayment refund action." (9 Cal.App.5th at 703-704.) It also acknowledges that California law does not provide such a remedy to consumer-taxpayers: "If the customer believes it has paid a sales tax reimbursement for items on which no sales tax is due, the customer has no statutory tax refund available to her—*either administrative or judicial*—against the Board or the retailer." (9 Cal.App.5th at 694.)

The court's admission is apt. As the Bekkerman Plaintiffs will show, the so-called remedies posited by the court are neither "clear" nor "effective." None of them expressly or implicitly applies to claims of illegal taxation brought by consumer-taxpayers who paid sales tax reimbursements based on illegal taxes.

Initially, the court says that consumers may urge the Department to initiate "an audit" of the retailer's practices in collecting sales tax or to conduct a "deficiency determination" under Revenue and Taxation Code sections 6481, 6483, and 7054. (Id. at 700-701.) Section 6481 empowers the Department, if it is "not satisfied with the return . . . or the amount of tax," to "compute and determine the amount [of tax] required to be paid" based on the return or other information.

Based on its computation, the Department can issue "[o]ne or more deficiency determinations" for one or more periods. (Id.) Nothing requires the Department to determine the legality of sales taxes on the application of a consumer-taxpayer. Moreover, the only remedy referred to is an assessment of a *deficiency* against the retailer. The statute is thus an attempt to collect revenue due to the Department, not a device to hold it accountable for massive amounts of illegal taxes that were forwarded by retailers, but actually owed to consumers. Finally, and critically, the words "refund," "tax reimbursement," or "consumer" are notably absent. Nothing in its text, or any case law interpreting it, specifies that a tax refund can be

secured by audit for a consumer who never filed a "return" of any kind with the Department. It is neither "clear" nor "certain" on these vital points.

Section 6483 allows the Department to offset overpayments against underpayments for different periods and addresses interest and penalties on such amounts. Again, the provision deals entirely with retail taxpayers who report their sales to the Department. Nothing in its terms clearly or certainly gives a consumer a right to a refund.

Finally, section 7054 allows the Department to examine the books, papers, records, and equipment of persons selling tangible personal property or liable for use tax "in order to verify the accuracy of any return made, or, if no return is made by the person, to ascertain and determine the amount required to be paid." Retailers file returns; consumers do not. Nothing in the statutory scheme empowers the Department to determine the tax owed by a consumer who is not required to file any return or pay any tax to the Department. And absolutely nothing in the statute entitles consumers to refunds or authorizes the Board to grant them. Only *Javor* does this.

CONCLUSION

For the reasons stated above, the decision of the Second District Court of Appeal should be reversed and remanded with directions to reversed the trial court's dismissal order.

Dated: May 14, 2018

Respectfully submitted,

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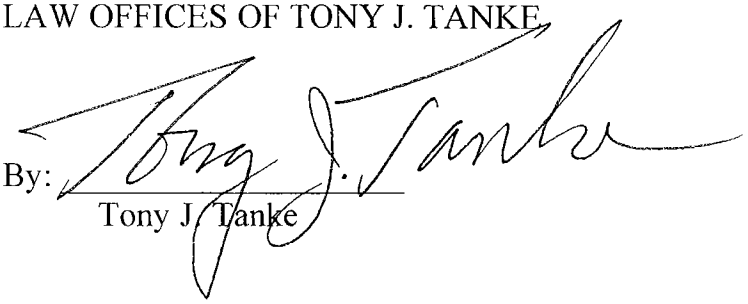
By: 
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CERTIFICATE OF WORD COUNT

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I am employed in the City of Davis, County of Yolo, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis 95616.

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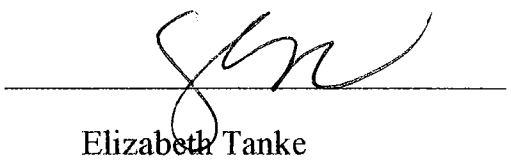

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