S241471

In the Supreme Court of the State of California

MICHAEL MCCLAIN; AVI FEIGENBLATT; AND GREGORY FISHER, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND ON BEHALF OF THE GENERAL PUBLIC,

Plaintiffs and Appellants,

v.

SAV-ON DRUGS; GAVIN HERBERT COMPANY, DBA HORTON & CONVERSE; LONGS DRUG STORES CORPORATION; LONGS DRUG STORES CALIFORNIA, INC.; RITE AID CORPORATION; WALGREEN CO.; TARGET CORPORATION; ALBERTSON'S, INC.; THE VONS COMPANIES, INC., DBA VONS AND PAVILLIONS; VONS FOOD SERVICES, INC.; WAL-MART STORES, INC.; AND DOES 1 THROUGH 10,000 INCLUSIVE,

Defendants and Respondents.

Case No. S241471

Second Appellate District, Div. Eight, Case Nos. B265011 and B265029
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
John Shepard Wiley, Judge

CALIFORNIA STATE BOARD OF EQUALIZATION'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs and Appellants Michael McClain, Avi Feigenblatt, and Gregory Fisher (collectively, "Plaintiffs") ask this Court to grant review of the unanimous decision of the Court of Appeal in this case. (Petition for Review ("Pet.") at p. 14.) However, Plaintiffs fail to advance any argument that review by this Court is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

The Petition for Review asserts only that individual aspects of the decision, *McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684 ("*McClain*" or "Court of Appeal Decision"), were incorrectly decided and that this Court should grant review to remedy those alleged errors. The Court of Appeal Decision answers the narrow question of under what circumstances the courts may establish a remedy for consumers seeking a refund of excess sales tax reimbursement when the Legislature has not provided the consumers with a statutory remedy. Thus, the Court of Appeal Decision presents neither a conflict in the precedent nor an important question of law. And, in any case, as discussed below, there is nothing for this Court to correct as the Court of Appeal carefully and thoroughly considered the issues and decided them pursuant to the applicable law.

STATEMENT OF THE CASE

Plaintiffs alleged that they purchased diabetes testing supplies from Defendants and Respondents Sav-On Drugs; Gavin Herbert Company; Longs Drug Stores Corporation; Longs Drug Stores California, Inc.; Rite Aid Corporation; Walgreen Co.; Target Corporation; Albertson's, Inc.; The Vons Companies, Inc.; Vons Food Services, Inc.; Wal-Mart Stores, Inc.; and CVS Pharmacy, Inc. (collectively, "Retailers").[1] (*McClain, supra*, 9 Cal.App.5th at p. 690.) Plaintiffs further claim that they were charged (or believe they were charged) excess sales tax reimbursement on each sale of these supplies by the Retailers, who then remitted the money to Defendant and Respondent California State Board of Equalization ("Board").[2] (*Ibid.*)

In 2014, Plaintiffs filed their Fourth Amended Complaint ("Complaint"), which is the operative pleading on appeal. (*McClain, supra*, 9 Cal.App.5th at pp. 690-691.) They alleged numerous causes of action

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[1] The Court of Appeal Decision correctly relates the relevant facts of this case, as alleged in Plaintiffs' Fourth Amended Complaint.

[2] "Sales tax" is the money that retailers must pay to the Board on retail sales of tangible personal property. (Rev. & Tax. Code, § 6051.) "Sales tax reimbursement" is the money paid by consumers to the retailer to reimburse the retailer for the sales tax the retailer pays to the Board. (*Loeffler v. Target, Inc.* (2014) 58 Cal.4th 1081, 1108-1109 ("*Loeffler*").) "Excess sales tax reimbursement is charged when reimbursement is computed on a transaction which is not subject to tax, when reimbursement is computed on an amount in excess of the amount subject to tax, when reimbursement is computed using a tax rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the reimbursement on a billing." (Code Regs., tit. xviii, § 1700, subd. (b)(1).)

for, among other things, Breach of Contract, Unfair Business Competition, Negligence, California Legal Remedies Act, and Injunctive/Equitable Relief. (*Id.* at p. 691.)

The Board and the Retailers demurred to the Complaint, and the Superior Court sustained the demurrers without leave to amend. (*Ibid.*) Following entry of judgment, Plaintiffs appealed to the Court of Appeal. (*Ibid.*) On March 13, 2017, the Court of Appeal issued its opinion, which unanimously affirmed the judgment of the Superior Court. (*Id.* at p. 684.)

REASONS THIS COURT SHOULD DENY REVIEW

I. THE COURT OF APPEAL DID NOT "DE FACTO" OVERRULE *JAVOR V. STATE BOARD OF EQUALIZATION*; IN FACT, THE COURT OF APPEAL DECISION CLOSELY FOLLOWS *JAVOR*

Plaintiffs argue that the Court of Appeal interpreted *Javor v. State Board of Equalization* (1974) 12 Cal.3d ("*Javor*") in such a way as to "de facto" overrule *Javor*. (Pet. at pp. 17-20.) To the contrary, a review of the Court of Appeal Decision reveals that the Court of Appeal carefully considered *Javor* and closely followed this Court's directions in that case.

As the Court of Appeal recognized, any person seeking a tax refund is limited by our state Constitution to those methods specifically "provided by the Legislature." (*McClain, supra,* 9 Cal.App.5th at p. 689, quoting Cal. Const., art. XIII, § 32.) In *Javor*, this Court provided a limited exception to that rule and held that "courts retain a residual power to fill remedial gaps by fashioning tax refund remedies in 'unique circumstances.'" (*Ibid.*)

Because Plaintiffs sought to invoke *Javor*, the Court of Appeal was faced with the question of what constitutes "unique circumstances" and whether they were present in this case.

The Court of Appeal carefully reviewed *Javor* and a related case, *Decorative Carpets, Inc. v. State Board of Equalization* (1962) 58 Cal.2d 252 ("*Decorative Carpets*"), and determined that the term "unique circumstances" included, at a minimum, the following criteria:

1) The customers must have no available statutory tax refund remedy;
2) The judicially-crafted remedies sought by the plaintiffs are "consonant" with the statutory tax refund procedures provided by the Legislature; and
3) There had been a prior determination by the Board or a court that a tax refund was due and owing, such that the refusal to create the remedy will unjustly enrich either the retailer or the state.

(*McClain, supra,* 9 Cal.App.5th at pp. 697-698.)

Plaintiffs do not contend that these prerequisites are unsupported by *Javor* or *Decorative Carpets*. Nor could they do so because, in each instance, the Court of Appeal cited to the specific portions of *Javor* and *Decorative Carpets* that undergirded each prerequisite. (See *ibid.*)

Rather, Plaintiffs argue that the Court of Appeal incorrectly applied each of these requirements in this case, and interpreted the requirements in a manner that would have made it impossible for any plaintiff to obtain a judicially-created remedy under *Javor*. (Pet. at p. 4.) Thus, the Petition for Review does not seek to secure uniformity of decision nor to settle an

important question of law, as required by Rule 8.500, but rather asks this Court to correct the Court of Appeal's allegedly improper application of *Javor* to this case.

Even then, Plaintiffs are wrong in asserting that the Court of Appeal incorrectly applied the law. It is incorrect, as Plaintiffs claim, that the manner in which the Court of Appeal applied the three requirements in this case would make it impossible for any plaintiffs, including the plaintiffs in *Javor* itself, to qualify for relief under *Javor*.

Plaintiffs point to the fact that the Court of Appeal ruled that they could not meet the first prerequisite because they had several statutory remedies available to them. These remedies included requesting that the Board initiate an audit or conduct a deficiency determination of the Retailers; petitioning the Board to adopt, amend, or repeal the relevant tax regulation; or bringing suit in the courts to invalidate the regulation. (See *McClain, supra,* 9 Cal.App.5th at pp. 700-701.)

Plaintiffs reason that these statutory remedies were available at the time of *Javor* and thus, the plaintiffs in *Javor* could never have met the first requirement. However, in *Javor*, the Board had already determined that sales tax refunds were due and owing. (*Javor, supra,* 12 Cal.3d at p. 802 ["The Board has admitted that it must pay these refunds to retailers."].) In fact, the Board had promulgated a formal regulation stating that excess sales tax had been paid and allowing for refunds of excess sales tax and

sales tax reimbursement. (*Id.* at p. 794 & fn. 7.) Thus, plaintiffs in *Javor* had no statutory remedies available because initiating a Board audit or deficiency determination would not have resolved their problem. Nor would they have had any reason to seek to amend, repeal, or invalidate a regulation that squarely supported their right to refunds.

Plaintiffs also argue that the Court of Appeal erroneously applied the second requirement to them (i.e., that "[t]he judicially-crafted remedies sought by the plaintiffs are "consonant" with the statutory tax refund procedures provided by the Legislature"), by holding that the remedy Plaintiffs sought was inconsistent with Tax Code sections 6905 and 6901.5. (See *McClain, supra*, 9 Cal.App.5th at p. 701.) Those sections allow a retailer to waive its right to file a claim for a refund of sales tax and absolve the retailer of any further obligation once it remits sales tax to the Board. (*Ibid.*) Plaintiffs again reason that sections 6905 and 6901.5 existed at the time of *Javor* and, under the Court of Appeal's interpretation, would have made it impossible for the *Javor* plaintiffs to meet the second prerequisite.

However, the Court of Appeal made an important qualification in its holding on this point:

> Second, judicial recognition of a right of customers to sue retailers and the Board for a sales tax refund *when the Board has yet to determine whether any refund is due* is inconsistent with at least two provisions of the Revenue and Taxation Code.

(*McClain, supra*, 9 Cal.App.5th at p. 701, italics added; see also *ibid.* ["Judicial recognition of a right of customers to sue retailers *when the Board has yet to determine whether a refund is due* is also inconsistent with section 6901.5."], italics added.) One critical difference between this case and *Javor* is that, in *Javor*, the Board had determined that a refund was due, and in this case, the Board has made no such determination. Because the Board had already determined that a refund was due in *Javor*, allowing the consumers to seek a refund was not inconsistent with the retailers' ability to waive their right to seek a refund. In addition, section 6901.5 states that excess sales tax reimbursement collected by a person "*shall* be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained."[3] (Rev. & Tax. Code, § 6901.5, italics added.) Thus, where the Board has already determined that a refund is owed, section 6901.5 requires the retailer to make that refund, and allowing consumers to seek a refund is consistent with section 6901.5.

Finally, Plaintiffs complain that the third prerequisite (i.e., that there has been a prior determination by the Board or a court that a tax refund is

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[3] Tax Code section 6901.5 was not enacted until 1982, eight years after *Javor* was decided. However, Tax Code section 6054.5, the precursor to section 6901.5, was in effect at the time of *Javor* and included language identical to the language of section 6901.5 quoted above. (See *Javor, supra*, 12 Cal.3d at pp. 798-799 & fn.9; *Loeffler, supra*, 58 Cal.4th at p. 1110.)

due and owing), as applied by the Court of Appeal in this case, can never be met. Plaintiffs argue that consumers cannot obtain a determination that a refund is due and owing, unless they are allowed to avail themselves of the *Javor* remedy and proceed with their lawsuit in the first place. The facts of *Javor* make it clear that Plaintiffs are wrong. In *Javor*, the Board had already determined that a refund was due and owing and had issued a formal regulation to that effect *before* the plaintiffs ever brought suit in court.[4] Plaintiffs' argument that the Court of Appeal Decision makes it impossible to obtain *Javor* relief is unfounded.

II. THE COURT OF APPEAL DECISION DID NOT ADDRESS CIVIL CODE SECTION 1656.1'S REBUTTABLE PRESUMPTION

Plaintiffs next claim that the Court of Appeal Decision somehow turned the rebuttable presumption of Civil Code section 1656.1 into an irrebutable presumption and in doing so, violated the Due Process clause. (Pet. at pp. 20-28.) However, this argument boils down to nothing more than an assertion that the Court of Appeal Decision was erroneous and needs to be corrected, which is not a basis upon which this Court should grant review.

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[4] This is consistent with this Court's ruling in *Javor* that the exception in that case was a narrow one that only came into play under "unique circumstances." "Unique" means "being the only one" or "being without a like or equal." (Merriam-Webster Online Dict. <http://www.merriam-webster.com/dictionary/unique> [as of May 15, 2017].) Even the most liberal usage of "unique" is as a synonym for "unusual."

In any case, Plaintiffs' assertion of error is without merit. Plaintiffs claim that by barring them from proceeding with their breach of contract claims, the Court of Appeal disallowed them from rebutting the presumption created by Civil Code section 1656.1 and turned a rebuttable presumption into an irrebutable presumption. Section 1656.1 creates a rebuttable presumption that:

> [T]he parties *agreed* to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if:
>
> (1) The agreement of sale expressly provides for such addition of sales tax reimbursement;
>
> (2) Sales tax reimbursement is shown on the sales check or other proof of sale; or
>
> (3) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

(Civ. Code, § 1656.1, subd. (a), italics added.)

The Court of Appeal Decision did not and could not have changed the section 1656.1 presumption because the presumption was never at issue in this case. As the Court of Appeal noted, "the premise of [Plaintiffs'] breach of contract claims is that the retail pharmacies wrongly collected sales tax reimbursement *that was not due. . .*" (*McClain, supra*, 9 Cal.App.5th at p. 704, italics original.) The Court of Appeal dismissed

Plaintiffs' breach of contract claims because they presented an issue (whether sales tax was due) over which the courts do not have jurisdiction in consumer class actions. In addition, Plaintiffs' Complaint did not allege any facts that would have rebutted the presumption. (*Id.* at p. p. 705.) No part of the Court of Appeal Decision improperly prevented Plaintiffs from presenting argument or evidence about the section 1656.1 presumption.[5]

III. THE COURT OF APPEAL DECISION DID NOT ABOLISH THE *JAVOR* REMEDY, NOR DID IT RENDER TAX CODE SECTION 6901.5 UNCONSTITUTIONAL

Plaintiffs next claim that Tax Code section 6901.5 is an escheat statute and that the Court of Appeal Decision rendered section 6901.5 unconstitutional because it provided no method by which a consumer could assert a claim over the allegedly escheated property. (Pet. at pp. 28-31.) As with Plaintiffs' other arguments, this claim neither points to a split in the precedent nor an important issue which must be decided by this Court. It provides no basis upon which to grant review.

In any case, Plaintiffs' argument is without merit. Plaintiffs do not provide any authority for the proposition that section 6901.5 is an escheat statute. Escheat means "the vesting in the state of title to property the

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[5] Plaintiffs raised the argument that they could "rebut Civil Code section 1656.1's presumption . . . by showing actual fraud, constructive fraud, undue influence, mistake of fact, and mistake of law," but only for the first time in their petition for rehearing. (*McClain, supra*, 9 Cal.App.5th at p. 705, fn.9.) The Court of Appeal properly declined to consider this untimely argument. (*Ibid.*)

whereabouts of whose owner is unknown or whose owner is unknown or which a known owner has refused to accept." (Code Civ. Proc., § 1300, subd. (c).) As explained by this Court, section 6901.5 is a tax statute that ensures that retailers do not wrongfully retain excess sales tax reimbursement paid by customers. (*Loeffler, supra*, 58 Cal.4th at pp. 1111-1113.)

Plaintiffs further allege that the Court of Appeal Decision interprets section 6901.5 in an unconstitutional manner because it does away with the *Javor* remedy, creating an escheat statute for which there is no avenue for customers to reclaim the supposedly escheated property. Plaintiffs are wrong on both counts.

As explained above, the Court of Appeal Decision does not "de facto" overrule *Javor* nor does it do away with the *Javor* remedy. (See *supra*, Reasons This Court Should Deny Review, § I.) Instead, the Court of Appeal correctly applied and followed *Javor*. Furthermore, the Court of Appeal Decision specifically points to other statutory remedies available to consumers, remedies which are sufficient to quell concerns about due process. (*McClain, supra*, 9 Cal.App.5th at p. 704.)

IV. THE COURT OF APPEAL CORRECTLY RULED THAT THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING PLAINTIFFS' COMPLAINT WITH PREJUDICE

Plaintiffs' final argument, that they should have been granted leave to amend to assert a Takings claim pursuant to the 5th Amendment of the United States Constitution, is similarly without merit. (Pet. at pp. 32-34.) Like Plaintiffs' other arguments, this one amounts to nothing more than an assertion that the Court of Appeal Decision was incorrect and that this Court should grant review to fix the mistakes.

The Court of Appeal, however, provided ample reasoning for its conclusion that the Superior Court had not abused its discretion in denying leave to amend. Plaintiffs do not have a Takings claim because the Retailers who collected Plaintiffs' sales tax reimbursements were not governmental entities and because the case law holds that taxes do not constitute takings. (See *McClain, supra*, 9 Cal.App.5th at pp. 703 & 705.)

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **CALIFORNIA STATE BOARD OF EQUALIZATION'S ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 2,542 words.

Dated: May 15, 2017

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Michael McClain, et al. v. Sav-On Drugs, et al.**

Case Number: Supreme Court of the State of California
Case No. S241471

Court of Appeal of California, Second Appellate District, Division Eight
Court of Appeal Case Nos.: B265011 and B265029

Superior Court of California, County of Los Angeles
Superior Court Case Nos. BC325272 and BC327216

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On May 15, 2017, I served the attached **CALIFORNIA STATE BOARD OF EQUALIZATION'S ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **GSO (Golden State Overnight)** or **FEDEX**, addressed as follows:

PLEASE SEE SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 15, 2017, at Los Angeles, California.

Norma L. Herrera-Gilbody
Declarant

Norma L. Herrera-Gilbody
Signature

LA2017603374

SERVICE LIST

Michael McClain, et al. v. Sav-On Drugs, et al.

Supreme Court of the State of California
Case No.: S241471

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