Case No. S277628

IN THE SUPREME COURT OF CALIFORNIA

BARBARA MORGAN, *et al*,

Plaintiffs and Appellants,

v.

YGRENE ENERGY FUND, INC., *et al*,

Defendants and Respondents.

JANET ROBERTS, *et al*,

Plaintiffs and Appellants,

v.

RENEW FINANCIAL GROUP, LLC, *et al*,

Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case Nos. D079364 and D079369

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE COURT:

Pursuant to California Rules of Court, rule 8.520(f), I respectfully request permission to file the attached brief. This application is filed within 30 days after the filing of the reply brief on the merits and is therefore timely pursuant to Rule 8.520(f)(2).

INTEREST OF AMICUS CURIAE

I write this request in my capacity as a private practitioner, and not on behalf of any of my clients, and to try to remedy what I view as a misinterpretation of the property tax laws which will adversely affect my clients.

I want to address one discrete issue in the Court of Appeals holding—whether Plaintiffs and Appellants had to first present their claims they were not informed of the financial consequences of participation in the PACE program to a County Assessment Appeals Board. I believe the Court erred when it decided that Plaintiffs and Appellants had to do so.

I do not support the position of either party. I think much of the Court of Appeal's opinion is correct. I filed a request for de-publication of the Court of Appeals opinion.

I am Of Counsel to Renne Public Law Group. Most of my practice is representation of California counties in property tax disputes in the trial courts and the Courts of Appeal.

In the past eight years I have represented the County of Los Angeles in more than 40 property tax disputes in Superior Court, the Court of Appeals, the California Supreme Court, and before the Los Angeles County Assessment Appeals Boards. This work has resulted in published opinions in *Jet Suite, Inc. v. County of Los Angeles* (2017) 16 Cal.App.5th 10, *Next Century Associates v. County of Los Angeles* (2018) 29 Cal.App.5th 713, *Prang v. Los Angeles County Assessment Appeals Board No. 2.* (2020) 54 Cal.App.5th 1, *Prang v. Amen* (2020) 58 Cal. App.5th 246, review granted [together with my colleague Thomas Kelch), *Chinese Theatres LLC v. County of Los Angeles* (2021) 59 Cal.App.5th 484, *LA Live Properties LLC v. County of Los Angeles* (2021) 61 Cal.App.5th 363, *Olympic & Georgia Partners LLC v. County of Los Angeles* (2023) 90 Cal.App.5th 100, review granted, and *Paramount Pictures. Corp v. County of Los Angeles* (2023) __ Cal.App.5th __ (certified for publication 9/28/23).

I have made presentations to the County Counsels' Association Taxation Section on the taxation of intangible assets, escape and supplemental assessment, tax exemption for computer software, drafting of tax laws, tax sales, and treatment of property tax claims in bankruptcy cases. With my former colleague, Buck Delventhal, I wrote the Association's Training Module for Proposition 218. My recent publications include In *Further Defense of the "Rushmore Method to Account for*

Intangible Property in Real Property Assessments, California Real Property Law Journal/California Tax Lawyer (2019).

THE NEED FOR FURTHER BRIEFING

I have reviewed the parties' briefs. I agree with some of the arguments in each of them. I would like to offer the Court an additional alternative to what the parties propose.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, Rule 8.520(f)(4), I confirm that no party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

CONCLUSION

I respectfully request that the Court grant this application for leave to file an amicus curiae brief.

Dated: October 12, 2023

By: Michael Slattery

Michael K. Slattery

AMICUS CURIAE BRIEF OF MICHAEL K. SLATTERY TO REQUEST REVERSAL OF PART OF COURT OF APPEAL'S OPINION

I.

INTRODUCTION

Plaintiffs and Appellants ("Appellants") participated in a program to finance energy and water conservation improvements to their homes. The Opinion refers to this as the "PACE" program. Under the program, the cost of the improvements is billed on an owner's real estate tax bill. Defendants and Respondents ("Respondents") are private companies that made loans to Plaintiffs, were assigned rights to the payments or administered program loans. Appellants claimed that the loans should be subject to the rules for home improvement loans and that Respondents engaged in unfair and deceptive business practices by violating consumer protection laws. They alleged that they were confused about loan terms and "did not appreciate 'the financial burden that would result' and the risk of foreclosure." *Morgan v. Ygrene Energy Fund, Inc.* (2023) 84 Cal.App.5th 1002, 1011 (review granted).

Appellants requested this injunctive relief:

- "requiring 'property tax payments' to 'municipal taxing authorities' as 'PACE tax assessments to be 'released back' to each property owner"
- "prohibiting defendants from initiating collection procedures on collection of delinquent accounts"

84 Cal.App.5th at 1014. Appellants asked that the injunctive relief remain "until the defendants successfully 'request that the local governments remove the voluntary tax assessments of the properties.'" *Ibid.* The latter request must mean cancellation of the liens securing the assessments.

The Court said the liability theories were "intriguing," then decided the claims on a procedural issue. Respondents demurred on the ground that Appellants had failed to exhaust administrative remedies. The trial court agreed. One alleged remedy is the filing of an application for reduced assessment with the County assessment appeals board (the "Board"). 84 Cal.App.5th at 1013. The Opinion affirms the trial court; it creates a rule of law that if an obligation is collected on the tax bill, any claim that it is unlawful or invalid must be presented to a Board.

II.

PART OF THE OPINION IS LEGALLY WRONG; PACE CLAIMANTS SHOULD NOT HAVE TO FIRST PRESENT THEIR CLAIMS TO AN ASSESSMENT APPEALS BOARD

The Opinion misunderstands the role of the Boards. It turns an administrative body with narrow, specialized expertise and jurisdiction into a general civil trial court. I agree with Appellants that PACE claimants should not have to file assessment appeals to exhaust their administrative remedies.

1. Assessment Appeals Boards have a limited role.

Under Article XIII, Section 16 of the Constitution, "the county board of equalization, under such rules of notice as the county board of supervisors may prescribe, shall *equalize the values* of all property on the local assessment roll by *adjusting individual assessments* (italics added). Revenue & Taxation Code §1605.5 expands that jurisdiction to include two legal issues related to assessment—whether a property has changed ownership or undergone reassessable new construction and whether the County can impose penalties because the taxpayer failed to comply with the property tax laws.

2. Boards have a narrow expertise.

Assessment appeals board members must have certain training and experience. For counties with a population under 200,000, a member must have "a minimum of five years professional experience in this state as a certified public accountant or public accountant, a licensed real estate broker, an attorney, a property appraiser accredited by a nationally recognized professional organization, or a property appraiser certified by the Office of Real Estate Appraisers, or a property appraiser certified by the State Board of Equalization" or be "a person who the nominating member of the board of supervisors has reason to believe is possessed of competent knowledge of property appraisal and taxation." Revenue & Taxation Code §1624. For larger counties, the member can also be a property appraiser certified by the Bureau of Real Estate Appraisers, or a current member of an assessment appeals board. Section 1624.05. In Los Angeles County, a member can also have "a minimum of five years' professional experience in this state in a real estate field, including, but not limited to, business accounting and taxation, land use and urban planning, real estate development or investment analysis, and real estate banking or financing." [1]The point is the training and expertise of Board members is real estate valuation, nothing more.

The Opinion cites *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258 for the rule that the Board's jurisdiction "extends to non valuation issues as well." 84 Cal.App.5th at 1016. However, the ellipsis is non valuation issues *related to property tax assessment. Williams & Fickett*

[1] https://www.lhhcity.org/DocumentCenter/View/1315/Assessment-Appeals-BoardFactsheet#:~:text=QUALIFICATIONS%2A%20Minimum%20of%20five%20years%E2%80%99%20professional%20experience%20in,appraiser.%20Members%20may%20serve%20two%20consecutive%20three-year%20terms.

involved a disputed assessment of personal property, which the taxpayer claimed it did not own.

3. Assessment appeal procedures are much narrower than those for the trial courts.

Forcing claims like failure to disclose information through the property tax assessment appeals process is bad for both sides of the dispute. For the homeowners, they are deprived of normal civil discovery. Appellants' claims are inherently factual. They claim the PACE lenders did not inform them how much participation in the PACE program would increase their property tax bills. The homeowners' counsel need to take the depositions of those who marketed the improvements to their clients. Counsel will also want to use written discovery methods like interrogatories and request for admission. None of those discovery methods are available in an assessment appeal.

The only pre-hearing information collection is the so-called "exchange of information." Rev. & Tax. Code 1606 and Property Tax Rule 305.1. The taxpayer or the Assessor may request ["I]nformation stating the basis of the other party's opinion of value" such as sales of comparable properties, a property income study, and information related to costs of a replacement building. Since a disputed PACE assessment has nothing to do with the assessed value of the homeowner's property, this procedure is no benefit to either party.

Property Tax Rule 322 allows the taxpayer and Assessor to ask the Board to issue a subpoena to compel the attendance of a hearing witness or the production of documents at the hearing. But that procedure is not akin to a civil law deposition subpoena or request for production:

> "Subpoenas will be restricted to compelling the appearance of a person or the production of things at the hearing **and will not be utilized for the prehearing discovery**." (bold added)

State Board of Equalization, Assessment Appeals Manual, pages 40-41 (May 2003).

When the parties do get to Superior Court, things work like a civil appeal. The Court reviews an administrative record of the Board proceedings. The general rule is they cannot add documents to that record:

> "A taxpayer, questioning the correctness of assessed valuation, must fairly and fully present his showing to the Board as a prerequisite to judicial attack upon the Board's determination. 'Were the rule otherwise, the taxpayer could make a perfunctory showing before the board and reserve his real showing for a subsequent appeal to the superior courts. This is not permissible.' *Eastern-Columbia, Inc. v. County of L.A.,* 61 Cal.App.2d 734, 745-746 [143 P. 2d 992].)(5b). That principle precludes the presentation before a reviewing court of evidence which with reasonable diligence could have been produced before the administrative agency but which was not there offered."

American Chemical Corp. v. County of Los Angeles (1974) 42 Cal.App.3d 45, 54-55.

I believe my concerns here affect both parties. Contract based claims like those of the Appellant will be decided by triers of fact who need not be trained as attorneys and whose training and experience may well be limited to real estate brokerage and management. Those laypersons will act as a trier of fact. The central issue in this dispute is factual—who said what to

whom when? If PACE lenders want to challenge a board factual finding, the Superior Court will review them under a deferential substantial evidence standard. "'When the assessor utilizes an approved valuation method, his factual findings and determinations of value based upon the appropriate assessment method are presumed to be correct and will be sustained if supported by substantial evidence.'" (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 606–607 ("*Elk Hills*") quoting *Service America Corp. v. County of San Diego* (1993) 15 Cal.App.4th 1232, 1235.

4. The Opinion puts a huge new administrative burden on assessment appeals boards.

The worst hit is for Boards statewide. The Opinion makes for a huge increase of workload and a task for which the Boards have not been trained. The 6th District looked to *Williams & Fickett* to justify its conclusion. That case did say appeals boards jurisdiction extends beyond valuation disputes to include questions as to who owns taxable property. But that duty has a clear nexus to the tax assessment process.

Boards are already subject to more burdens than the trial courts. Under Revenue & Taxation Code §1604, a Board must decide an application within two years of its filing unless the taxpayer waives that deadline. If the Board fails to meet that deadline, the taxpayer's opinion of value must be put on the tax roll – the taxpayer wins by default.

The volume of pending assessment appeal applications is already very large. For example, in the 2021 tax year, the Los Angeles County Assessment Appeals Boards resolved 25,436 appeals and carried over 28,866 to the following tax year. For 2020, the numbers are 12,479 and 34,691. California State Board of Equalization, Assessment Appeals Activity report, available at Assessment Appeals Activity, Grid View (ca.gov)

Respondent's Answering Brief on the Merits argues that taxpayers and the Assessor can bypass the Board if they stipulate that their dispute does not involve any dispute over property valuation. Page 49, citing Rev. & Tax. Code §5142. I agree, but that solution still requires a lot of Board and Assessor time. The Board Clerk will need to process the application, Assessor's staff will need to review and evaluate it, the parties will need to draft the stipulation, and the Board will need to process and formally approve it.

III.

PART OF THE OPINION IS CORRECT--PACE CLAIMANTS SHOULD BE REQUIRED TO FILE A REFUND CLAIM

I agree with Respondents, and the Opinion, that the property tax refund claim procedures must apply to a dispute of any item on the tax bill, even if the taxpayer does not dispute the assessed value of its real property.

The Rev. & Tax. Code §5096 claim requirement is important to the counties. When a non-property tax charge is added to the property tax bill, the County, by statute, is given a gatekeeper role. The County is the official billing and collection administrator, as well as the agent who distributes the collected payments to the governmental entities entitled to shares of that money. Most importantly, the County Auditor administers the refund process.

Respondent's Answering Briefs on the Merits, page 48, cites several sections of the Rev. & Tax. Code that detail these duties:

- §5099: Board of Supervisors may order refund of "county taxes and taxes collected by county officers for a city or revenue district"

- §5101: Auditor pays refunds ordered by Board of Supervisors out of carefully specified funds (more below)
- §4986: Auditor may, "on satisfactory proof," cancel taxes for a list of reasons, which include charged "erroneously or illegally," more than once, on a portion of an assessment "decreased pursuant to a correction,"[2] and an assessment "in excess of the value of the property as determined by the assessor pursuant to Section 469"[3]

Section 4101 shows why the County Auditor's involvement is critical. The Auditor manages not just the billing and collection of non-property tax charges on the tax bill—the Auditor must make sure that any refunds are paid only from designated funds and not from the County's general funds:

> Refunds ordered in respect of revenue districts, except chartered cities, may be paid by a warrant drawn by the county auditor, *upon such available funds, if any, as the revenue district may have on deposit in the county treasury, or in the event such funds are insufficient, then out of funds subsequently accruing to such revenue district and on deposit in the county treasury*. Refunds ordered in respect of chartered cities shall be paid in the manner provided for their payment in the charter or ordinances of the city. Neither any county nor its officers shall refund amounts on behalf of a revenue district from county funds.

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[2] Here, §4896 references Rev. & Tax. Code §4876 which gives assessment appeals boards a four-year period to correct errors that did not involve the exercise of value judgment.

[3] §469 requires the Assessor to periodically audit business personal property assessments. If the audit shows that the taxpayer's property was over-assessed, the Assessor must provide notice of the amount of the excess valuation and that the taxpayer may file a refund claim.

Italics added.

The Auditor needs to know about refund claims so he or she can establish appropriate reserves to pay claims that may be granted as valid or determined to be valid by court judgment. Government Code §26906.1 describes this important process:

> "The county auditor, with the approval of the board of supervisors, may impound the disputed revenues of any tax upon secured or unsecured property, levied and collected by the county for the county or any revenue district, whenever, pursuant to Chapter 5 (commencing with Section 5096), Part 9, Division 1 of the Revenue and Taxation Code, a claim or action is filed for the return of the revenues, or the auditor reasonably anticipates that the tax may be refunded in whole or in part. The county auditor shall continue to impound such revenues until the final disposition of the claim or action, or a refund of the tax is no longer anticipated. If, under the final disposition, it is determined that such taxes were properly levied against such property, the auditor shall release the revenues to the county or revenue district."

"Impounding" is necessary to make sure the Auditor does not distribute funds then later learn that he or she must return them. The only way the Auditor can learn of claims that require impounding is if the claimant files a written refund claim.

IV.

ELIMINATION OF THE REFUND CLAIM REQUIREMENT WOULD LIKELY HURT MUNICIPAL BOND FINANCING

Respondent's Answering Brief on the Merits argues that the exhaustion requirement and the Rev. & Tax. Code §4807 bar of actions to prevent the

collection of a tax serve "not only the government's immediate access to funds, but also the long-term 'effectiveness of government [citation].'" The Brief adds: "(T)hat interest is particularly acute when it implicates local government's ability to finance public projects and the creditworthiness of the bonds they issue." Page 41. I share these concerns.

PACE improvements can be funded by local government issuing bonds. The bonds are not a general obligation of government, or of the property owner either; they are purely an *in rem* debt. Investors like municipal bonds because they don't have to pay federal or California income tax on the interest payments. 26 U.S. Code §103; California Constitution Article XIII §3(c). Municipalities like them because they fund public improvements over time and a lower cost of funds:

> "State and local governments receive direct and indirect tax benefits under the IRC that lower borrowing costs on their valid debt obligations. Because interest paid to bondholders on these obligations is not includable in their gross income for federal income tax purposes, bondholders are willing to accept a lower interest rate than they would accept if the interest was taxable."

Internal Revenue Service, Publication 4079, Tax-Exempt Government Bonds. Publication 4079 (Rev. 9-2019) (irs.gov)

If, as Appellant urges, a PACE claimant can file a lawsuit to directly challenge the lien against his or her house that is collateral for the municipal bonds that funded them. I believe that those bonds become a less desirable investment:

> "The market for debt products sold by state and local governments is highly stratified and is arranged around three factors … (2) the inherent credit strength of its source of repayment …"

California Debt Financing Guide at 1.4.2.7, California Debt and Investment Advisory Commission, available at https://debtguide.treasurer.

Respondents also address municipal bondholders' bargained-for consideration: "… public financing projects, including those financed by the PACE program, lack many of the protections afforded in the traditional credit market, such as recourse lending." Page 14. I agree again. Charges on the property tax bill are *in rem* obligations:

> "The general principles that apply to property taxes in California are that they "are imposed on the ownership of property as such; . . . no personal liability arises from their nonpayment, the sole security for the taxes being the property itself." (City of Huntington Beach v. Superior Court (1978) 78 Cal.App.3d 333, 340, 144 Cal.Rptr. 236, 240; Helvey v. Sax (1951) 38 Cal.2d 21, 24, 237 P.2d 269 (property tax operates in rem against the property); William Ede Co. v. Heywood (1908) 153 Cal. 615, 96 P. 81; Henry v. Garden City Bank etc. Co. (1904) 145 Cal. 54, 78 P. 228; McPike v. Heaton (1900) 131 Cal. 109, 111, 63 P. 179.)[4]"

Garcia v. County of Santa Clara (1978) 87 Cal.App.3d 319, 323-24. Appellants' request that the liens securing their assessments be released would completely eliminate their assessments.

V.

MY RECOMMENDATION HAS SOME PRECEDENT

What I recommend has some precedent in property tax law. Claims that property is exempt from taxation need not be presented to a Board. Property Tax Rule 302(b). The reason is the exemption process does not

[4] *Garcia* mentioned a narrow exception, not applicable here, where the Assessor determines that the assessed real estate is not worth enough to fully secure the tax assessment.

involve a valuation dispute. The exemption program is administered by the State Board of Equalization and Assessors' offices. Entitlement depends on the property owner's organizational structure, typically as a non-profit organization, and on how it uses its property.[5] Taxpayers who dispute the denial of a claim for exemption may bypass the assessment appeals board, but still must file a tax refund claim.

Rev. & Tax. Code §5142, which allows the Assessor and taxpayer to bypass the Board with a stipulation their dispute is not about valuation, reflects the same thinking. If –as with a PACE claim--there is no valuation dispute, there is no reason for a Board to be involved.

VI.

CONCLUSION

This Court should affirm the Court of Appeal's decision that PACE claimants must exhaust administrative remedies with the qualification that the only remedy is to file a tax refund claim.

Dated: October 12, 2023

By: Michael Slattery

Michael K. Slattery

[5] "The welfare exemption is co-administered by the Board of Equalization (BOE) and the 58 County Assessors. The BOE is responsible for determining whether an organization is qualified for the welfare exemption through the issuance of an Organizational Clearance Certificate (or issuance of a Supplemental Clearance Certificate for a limited partnership owning low-income rental housing), while the Assessor is responsible for determining whether the use of the property is eligible for the welfare exemption." State Board of Equalization, Welfare Exemption, available at Welfare & Veterans' Organization Exemptions - Board of Equalization (ca.gov)

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(C)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Century Schoolbook font.

According to the word count feature in my Microsoft Word software, this brief contains 3,778 words.

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

Dated: October 12, 2023

By: Michael Slattery

Michael K. Slattery

PROOF OF SERVICE

Case Name: *Olympic & Georgia Partners, LLC v. County of Los Angeles*

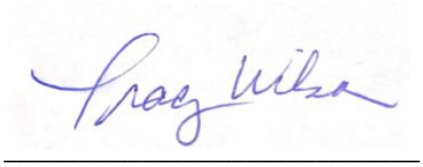
Case No.: S277628 (Court of Appeal Case No. D079364)

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On October 12, 2023, I served the following document: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF** on the parties ***via TrueFiling***.

SEE ATTACHED SERVICE LIST

I declare, under penalty of perjury that the foregoing is true and correct. Executed on October 12, 2023, at San Francisco, California.



Tracy Wilson

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MORGAN v. YGRENE ENERGY FUND**
Case Number: **S277628**
Lower Court Case Number: **D079364**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

10/12/2023

Date

/s/Tracy Wilson

Signature

Slattery, Michael (107303)

Last Name, First Name (PNum)

Renne Public Law Group

Law Firm