Case No. S241471

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
On Appeal from the Los Angeles County Superior Court,
Case Nos. BC325272 and BC327216
Honorable John Shepard Wiley, Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to California Rule of Court 8.520(f), Public Citizen, Inc. respectfully seeks permission to file the accompanying amicus brief in support of plaintiffs-appellants Michael McClain, Avi Feigenblatt, and Gregory Fisher.

Public Citizen is a national, non-profit, consumer-advocacy organization that engages in research, education, lobbying, and litigation on a wide range of public-health and consumer-safety issues. Public Citizen often represents consumer interests in litigation, including as amicus curiae in this Court, the United States Supreme Court, and federal and state appellate courts.

Public Citizen has long worked to protect the right of consumers who are injured to seek redress in the courts. Public Citizen has filed amicus briefs in many cases concerning access to statutory and common-law remedies (see, e.g., *American Express Co. v. Italian Colors Rest.* (2013) 570 U.S. 228; *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298), including in many cases related to health care (see, e.g., *PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604; *Jones v. Medtronic, Inc.* (9th Cir.) No. 15-15653; *T.H. v. Novartis Pharms. Corp.* (2017) 4 Cal.5th 145.)

This case presents the question whether California consumers have a remedy when retailers overcharge them "sales tax." The Court recognized such a remedy in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790: It permitted consumers who had been charged excessive sales tax reimbursement to bring an action to require the retailers who overcharged them to seek a refund of the excess amount from the state Board of Equalization. Below, however, the Court of Appeal held that the remedy

recognized in *Javor* was unavailable to the plaintiffs in this case—diabetics who were charged sales tax reimbursement on glucose test strips and skin puncture lancets that they allege are tax exempt. The court held that the *Javor* remedy is only available in narrow circumstances and that those circumstances do not exist here.

Under the Court of Appeal's decision, however, consumers will *never* be able to demonstrate their entitlement to the *Javor* remedy. This Court's decision in *Javor* will have been rendered irrelevant, and consumers will be left without a remedy when retailers erroneously charge them sales tax reimbursement on tax-exempt items.

Public Citizen is filing this brief to address the availability of the *Javor* remedy and to explain that the Court of Appeal erred in holding that the remedy is unavailable in this case. No party or counsel for a party 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 other than Public Citizen or its counsel made a monetary contribution intended to fund the preparation or submission of Public Citizen's brief.

Dated: April 2, 2018

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BACKGROUND AND SUMMARY OF ARGUMENT

Under California law, sales tax is imposed on retailers, rather than on consumers. (See Rev. & Tax. Code § 6051.) Retailers, in turn, are permitted to "obtain reimbursement for their tax liability from the consumer at the time of sale." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, at p. 1108.) When a retailer erroneously pays too much in sales tax, the retailer can seek a refund from the state Board of Equalization ("the Board"). (See Rev. & Tax. Code § 6901 *et seq*.)[1] If the retailer has collected sales tax reimbursement from its customers for the refunded amount, it must pass the refund on to its customers. (See *Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252.)

Because they are not the taxpayers, customers who have erroneously been charged excess sales tax reimbursement cannot bring a direct cause of action against the Board to seek repayment of the excess amount. At the same time, because retailers who have collected excess sales tax reimbursement must pass sales tax refunds back to their customers, those retailers lack an incentive to seek a refund from the Board.

Recognizing that the Board should not be permitted to unjustly profit by retaining sales tax reimbursement that was erroneously collected, in

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[1] Finding that the Board's practices had "led to inconsistencies in operations, breakdowns in centralized processes, and activities contrary to state law and budgetary and legislative directives," in 2017, the legislature transferred most of the Board's tax-related duties to the newly-created California Department of Tax and Fee Administration. (Taxpayer Transparency & Fairness Act, Assembly Bill No. 102 (2017-2018 Reg. Sess.) §§ 2(e) & 5.) Effective January 1, 2018, most of the Board's duties with respect to conducting tax appeal hearings were transferred to a newly-created Office of Tax Appeals. (See *id*. § 13). For consistency, this brief will continue to refer to these duties as being performed by the Board.

Javor v. State Board of Equalization (1974) 12 Cal.3d 790, this Court permitted customers who had paid excess sales tax reimbursement to retailers to bring an action to require the retailers to seek a refund from the Board and to join the Board as a party to the suit. The Court explained 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" (*id*. at p. 802 [citation omitted]), and concluded that "allowing the Board to be joined as a party for these purposes in the customer's action against the retailer is an appropriate remedy entirely consonant with the statutory procedures providing for a customer's recovery of erroneously overpaid sales tax." (*Ibid*.)

This case arises out of lawsuits brought on behalf of diabetics who bought glucose test strips and skin puncture lancets used to monitor blood sugar levels. The complaint alleges that the defendant retailers charged plaintiffs sales tax reimbursement on the test strips and lancets, but that these items have been exempt from sales tax since 2000. Like the plaintiffs in *Javor*, the plaintiffs here seek to compel the defendant retailers to apply for a tax refund from the Board and for the Board to award such a refund. However, the Court of Appeal held that the remedy recognized in *Javor* is unavailable to the plaintiffs in this case. The court held that the *Javor* remedy is available only under certain narrow conditions, and that none of those conditions are present here.

In no case, however, will plaintiffs be able to meet the Court of Appeal's three conditions. The Court of Appeal's decision thus destroys the *Javor* remedy and resurrects the problem identified in *Javor*: Customers will be left without a remedy if they are overcharged sales tax reimbursement, and "the Board is very likely to become enriched at the

expense of the customer to whom the amount of the excessive tax actually belongs." (*Ibid*.)

This Court should not deprive consumers of a remedy if they are charged sales tax reimbursement on items that are tax exempt. The Court should hold that the *Javor* remedy is available to consumers whenever they have "erroneously paid an excessive sales tax reimbursement to [their] retailer who has in turn paid this money to the Board," (*ibid*.), and that the remedy is available here.

ARGUMENT

I. In *Javor*, this Court Permitted Consumers To Bring an Action To Require Retailers To Seek a Tax Refund from the Board.

In *Javor*, this Court considered whether a remedy was available to consumers who were charged excessive sales tax reimbursement by retailers who paid the excess amounts to the Board and failed to seek a refund. In that case, the U.S. Congress had retroactively repealed a tax on the sale of certain motor vehicles and accessories and required a refund of the overpaid federal tax. California consumers had paid state sales tax reimbursement on the total price of the vehicles and accessories—including on the federal tax—so refund of the federal tax made the amount of state tax collected excessive. The plaintiffs alleged that retailers from whom they purchased motor vehicles or accessories during the relevant time period had not given them refunds of the excess state sales tax reimbursement they paid. They argued that "since the monies representing the sales tax overage rightfully belong to them, since the Revenue and Taxation Code provides no procedure by which they can claim the refund themselves, and since the retailers are neither mandated by statute nor prompted by financial interest to claim any refunds, the situation is an unique one for which the courts

should fashion a remedy based on broad principles of restitution." (*Javor*, *supra*, 12 Cal.3d at p. 797.)

This Court recognized that "the retailer has no particular incentive to request the refund on his own," and that, without a refund, the Board would "become enriched at the expense of the customer to whom the amount of the excessive tax actually belongs." (*Id*. at pp. 801, 802.) It determined "that to give customers a direct cause of action against the Board for all erroneously collected sales tax reimbursements which have already been paid to the Board by the retailer" would be inconsistent with statutory procedures. (*Id*. at p. 800.) However, recognizing that "purchasers can most effectively enforce their refund right by compelling retailers to claim their own refunds from the Board," and noting that the Board had "admitted that it must pay these refunds to retailers," the Court held that the customers could "join the Board as a party to [their] suit for recovery against the retailer in order to require the Board in response to the refund application from the retailers to pay the refund owed the retailers into court or provide proof to the court that the retailer had already claimed and received a refund from the Board." (*Id*. at p. 802.)

"All that plaintiffs seek in this action," the Court explained, "is to compel defendant retailers to make refund applications to the Board and in turn to require the Board to respond to these applications by paying into court all sums, if any, due defendant retailers." (*Ibid*.) "We think that to require this minimal action from the Board is clearly mandated by the Board's duty to protect the integrity of the sales tax by ensuring that the customers receive their refunds." (*Ibid*.)

II. The *Javor* Remedy Should Be Available to the Consumers in this Case.

The plaintiffs in this case are diabetics who were charged sales tax reimbursement on glucose test strips and skin puncture lancets that they allege are exempt from sales tax. As in *Javor*, the plaintiffs "erroneously paid an excessive sales tax reimbursement to [the] retailer who has in turn paid this money to the Board." (12 Cal.3d at p. 802.) As in *Javor*, there is "no procedure by which [the plaintiffs] can claim the refund themselves." (*Id*. at p. 797.) And as in *Javor*, "the retailers are neither mandated by statute nor prompted by financial interest to claim any refunds." (*Ibid*.)

Nonetheless, the Court of Appeal held that the *Javor* remedy is not available here. The court held that the remedy is only available if: "(1) the person seeking the new tax refund remedy has no statutory tax refund remedy available to it, (2) the tax refund remedy sought is not inconsistent with existing tax refund remedies, and (3) the Board has already determined that the person seeking the new tax refund remedy is entitled to a refund, such that the refusal to create that remedy will unjustly enrich either the taxpayer/retailer or the Board." (*McClain v. Sav-On Drugs* (2017) 9 Cal. App. 5th 684, at p. 690.) The court concluded that none of the three requirements were met.

The Court of Appeal's decision is incorrect: Plaintiffs have no other statutory tax refund remedy, the remedy they seek is not inconsistent with the tax code, and limiting the *Javor* remedy to situations in which the Board has already determined that a refund is due would undermine the "integrity of the sales tax," which "requires not only that the retailers not be unjustly enriched . . . but also that the state not be similarly unjustly enriched." (*Javor*, *supra*, 12 Cal.3d at p. 802 [citation omitted].)

A. The consumers have no statutory tax refund remedy.

As the Court of Appeal acknowledged, plaintiffs "do not have a statutory right to directly file for a refund of the sales tax from the Board or for a refund of sales tax reimbursement from the retailers." (*McClain*, *supra*, 9 Cal. App. 5th at p. 700.) Nonetheless, the court determined that the plaintiffs had sufficient statutory tax remedies available to them, noting that they can urge the Board to conduct an audit or deficiency determination of the retailers' sales tax payments, petition the Board to amend or repeal the regulation exempting glucose test strips and skin puncture lancets from taxation, or sue the Board as to the validity of that regulation. But the Board can ignore a request to conduct an audit or deficiency determination, and it has an incentive to do so if such actions might result in a refund: "[I]t holds the excessive monies collected by the retailers who paid them to the Board." (*Javor*, *supra*, 12 Cal.3d at p. 800). And plaintiffs are not looking to have the regulation at issue amended, repealed, or declared invalid; they are seeking a remedy for having been charged sales tax reimbursement on items that are tax-exempt under that regulation.

Likewise, although the California Department of Tax and Fee Administration (CDTFA) suggests that consumers can lobby the legislature for a new tax exemption (CDTFA Br. at p. 42), plaintiffs are not seeking a new exemption. And although the CDTFA states that the plaintiffs could have refrained from buying glucose test strips and skin puncture lancets from the defendant retailers, asked the retailers not to charge them sales tax reimbursement, or sought a refund before the retailers remitted the sales tax to the Board, the CDTDFA provides no reason to think that any requests to the retailers would have been successful, nor any explanation of how the ability for customers to engage in these "informal options" provides any

remedy to the plaintiffs here, who were already charged excessive sales tax reimbursement. (*Id*. at p. 40.)

Similarly, although the retailer defendants suggest that, if plaintiffs engaged in transactions subject to use tax, they "could raise their taxability challenge in the context of litigation with the Board over [those] transactions" (Retailer Def. Br. at pp. 44-45), the ability of people who engaged in transactions subject to use tax to challenge the imposition of that tax provides no remedy for the injury suffered by the plaintiffs here—the collection of excessive *sales tax* reimbursement.

In sum, the "remedies" discussed by the Court of Appeal and defendants do not "effect the customers' right to their refund" (*Javor*, *supra*, 12 Cal.3d at p. 800), and do not replace the need for the *Javor* remedy, which should be available here.

B. The *Javor* remedy is consistent with the tax code.

The Court of Appeal stated that allowing the plaintiffs to sue the retailers and the Board for a tax refund would be inconsistent with the Revenue and Taxation Code. In *Javor*, however, this Court permitted the consumers to pursue their claim seeking to compel the retailers to apply for refunds from the Board precisely because that remedy was the one that was "consonant with existing statutory procedures." (*Javor*, *supra*, 12 Cal.3d at p. 800.) More recently, this Court stated in *Loeffler* that "it is clear that a remedy that is directed at requiring the taxpayer to make a claim for refund from the Board . . . is the remedy that is consistent with the current governing statutory scheme." (*Loeffler*, *supra*, 58 Cal.4th at p. 1133). "[A] judicial proceeding to compel the retailer/taxpayer to seek a refund from the Board," it noted, "invokes, rather than avoids, tax code procedures." (*Id*. at p. 1101.)

The Court of Appeal identified two provisions of the Revenue and Taxation Code that it thought would be inconsistent with the remedy requested by the plaintiffs. Neither conflicts with the *Javor* remedy. First, the court stated that the remedy would be inconsistent with Section 6905, which provides that failure to file a timely claim for a refund constitutes waiver of a demand for a refund. The waiver language in Section 6905, however, was enacted prior to *Javor*. Thus, if that language precluded a remedy compelling retailers to seek a refund from the Board, the *Javor* remedy would have been unavailable in *Javor* itself. Rather than viewing its actions as contrary to the tax code, however, this Court determined in *Javor* that the remedy it was permitting was "entirely consonant with the statutory procedures providing for a customer's recovery of erroneously overpaid sales tax." (*Javor*, *supra*, 12 Cal.3d at p. 802.)

Second, the Court of Appeal stated that the remedy requested by the plaintiffs would be inconsistent with Section 6901.5, which requires retailers to return excess tax reimbursement to their customers, and provides that, if they fail or refuse to do so, they must remit the excess amounts to the state. The Court of Appeal noted that Section 6901.5 has been interpreted to provide a "'safe harbor'" for any "retailer/taxpayer 'vis-à-vis the consumer' if the retailer/taxpayer 'remits reimbursement charges [it collects] to the Board,'" and stated that the provision would not operate as a safe harbor if consumers could "sue retailers to compel them to seek a refund from the Board." (*McClain*, *supra*, 9 Cal.App.5th at p. 701 [quoting *Loeffler*, *supra*, 58 Cal.4th at pp. 1100, 1119].) But unlike, for example, the unfair competition law and Consumer Legal Remedies Act claims at issue in *Loeffler*, the *Javor* remedy would not require retailers to refund to consumers excess tax reimbursement that had already been remitted to and

kept by the Board. The remedy only requires retailers to seek a refund, which, if determined to be due, is then paid by the Board into the court.

Moreover, as the Court of Appeal noted, "the regulation implementing section 6901.5 provides that it 'do[es] not necessarily limit the rights of customers to pursue refunds from persons who collected tax reimbursement from them in excess of the amount due.'" (*Id.* at p. 702 [quoting Cal. Code Regs., tit. 18, § 1700, subd. (b)(6)].) In *Loeffler*, this Court explained that the provision could reasonably be interpreted to refer to the *Javor* remedy. Specifically, it stated that the regulation "reasonably may be interpreted to refer to our recognition that, when neither the Board nor the taxpayer has an interest in 'ascertaining' whether excess reimbursement has been charged, in limited circumstances consumers may file an action to require the taxpayer to seek a refund." (*Loeffler*, *supra*, 58 Cal.4th at p. 1122 [citing *Javor*].) This Court's observation that this provision of the regulation implementing Section 6901.5 could reasonably be interpreted to refer to the *Javor* remedy demonstrates that the Court did not believe that Section 6901.5 precludes that remedy.

In its brief, the CDTFA argues that the remedy sought by the plaintiffs is inconsistent with the tax code because it "runs afoul of the rule that any ''taxability' question[] is committed in the first instance to the Board, subject to judicial review under the restrictions and pursuant to the procedures provided by the tax code.'" (CDTFA Br. at p. 35 [quoting *Loeffler*, *supra*, 58 Cal.4th at p. 1100].) To the contrary, however, the *Javor* remedy retains the primary role of the Board: It requires retailers to seek a refund from the Board, at which point the Board determines in the first instance whether a refund is owed, subject to judicial review. (See *Loeffler*, *supra*, 58 Cal. 4th at p. 1104 [explaining that, under the *Javor* remedy, a

consumer brings "an action to require a taxpayer to seek a refund from the Board, a proceeding in which the Board would ascertain whether excess reimbursement had been charged and, assuming any excess reimbursement had been charged and, assuming any excess had been remitted by the taxpayer to the state, issue a refund"].) The remedy thus "invokes, rather than avoids, tax code procedures" (*id*. at p. 1101), and is consistent with that code.

C. The *Javor* remedy should not be limited to cases in which the Board has already determined that a refund is due.

The Court of Appeal held that the *Javor* remedy is only available when "the Board has already determined that the person seeking the new tax refund remedy is entitled to a refund." (*McClain*, *supra*, 9 Cal. App. 5th at p. 690.) Likewise, the CDTFA argues in its brief that *Javor* "requires the taxing entity to have already ascertained that excess sales tax reimbursement has been collected and paid over." (CDTFA Br. at p. 28.). This Court, in contrast, has described the *Javor* remedy as available in certain circumstances in which "neither the Board nor the taxpayer has an interest in 'ascertaining' whether excess reimbursement has been charged" (*Loeffler*, *supra*, 58 Cal.4th at p. 1122), thereby indicating that the remedy does not depend on the Board already having ascertained that a refund is owed.

The ability for consumers to seek relief under *Javor* regardless of whether the Board has already determined that a refund is due is necessary to overcome the incentive problems that motivated the Court in *Javor*. As the Court has explained, retailers "may have no particular interest in pursuing a tax refund," and the Board "may lack incentive to examine returns on its own initiative to determine whether retailers have remitted

excess taxes to it—that is, whether taxes have been *overpaid*." (*Id.* at p. 1115.) Limiting the *Javor* remedy to instances in which the Board has *already* determined that the customers are owed a refund would remove consumers' access to the remedy precisely in those situations in which neither retailers nor the Board have sufficient incentive to determine on their own whether excessive sales tax reimbursement was collected. It would thereby increase the likelihood of the Board "becom[ing] enriched at the expense of the customer to whom the amount of the excessive tax actually belongs." (*Javor*, *supra*, 12 Cal.3d at p. 802).

The Court of Appeal suggested that, only if the Board has already decided that a refund is due would the refusal to allow the *Javor* remedy "unjustly enrich either the taxpayer/retailer or the Board." (*McClain*, *supra*, 9 Cal. App. 5th at p. 690.) But regardless of whether the Board undertakes the determination that the Court of Appeal considered necessary, sales tax reimbursement may erroneously be charged on tax-exempt items and remitted to the Board, where it may remain "despite the fact that the customer is the one entitled to it." (*Javor*, *supra*, 12 Cal.3d at p. 801.). Indeed, the erroneously charged sales tax reimbursement is particularly likely to remain with the Board in cases in which the Board has failed to ascertain whether excessive sales tax reimbursement was charged.

Similarly, the defendant retailers argue that *Javor* was based on constructive trust principles, and that those principles do not apply where entitlement to a refund is in dispute. *Javor* discusses constructive trusts only in its discussion of *Decorative Carpets*, *supra*, 58 Cal.2d 252, stating that *Decorative Carpets* was grounded on the general principle that "'[o]ne who gains a thing by fraud, accident, mistake, . . . is, unless he has some other and better right thereto, [an] involuntary trustee of the thing gained,

for the benefit of the person who would otherwise have had it.' A mistake of law that causes the erroneous computation of tax reimbursements and payments . . . gives rise to an involuntary trust.'" (*Javor*, supra, 12 Cal.3d at p. 798 [quoting *Decorative Carpets*, *supra*, 58 Cal.2d at p. 254 [quoting Civil Code section 2224]].) Nothing in *Javor* or *Decorative Carpets* indicates that the constructive trust principles grounding *Decorative Carpets* apply only if everyone agrees that a mistake was made and on the exact contours of the mistake.

This Court adopted the *Javor* remedy to ensure that the Board could not "use the refund procedure to abdicate its responsibility to the customer, particularly where the Board stands to unjustly profit under such circumstances." (*Javor*, *supra*, 12 Cal.3d at p. 800.) Refusing consumers a remedy if the Board has not previously determined that the consumers are entitled to a refund would allow the Board to do exactly that: It would allow the Board, by declining to decide on its own whether consumers were entitled to a refund, to keep "excessive monies collected by the retailers" to which "it is not entitled." (*Ibid*.) This Court should hold that the availability of the *Javor* remedy does not depend on whether the Board has previously ascertained that a tax refund is owed, and that the remedy is available to the plaintiffs here.

CONCLUSION

This Court should reverse the Court of Appeal's decision and allow the plaintiffs to pursue their claim seeking to require the retailers to seek refunds from the Board.

Dated: April 2, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that, according to the word-count feature in Microsoft Word, this Brief of Amicus Curiae Public Citizen, Inc. contains 3,680 words, including footnotes, but excluding the application and the content identified in rule 8.520(c)(3).

Dated: April 2, 2018

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