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May 10, 2017

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter in Support of Petition for Review
McClain, et al. v. Sav-On Drugs, et al.
Second Appellate District, Division Two, Nos. B265011 & B265029
Supreme Court of California Case No. S241471

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, Public Citizen submits this amicus letter urging the Court to grant the pending petition for review in the above-captioned case.

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 has long worked both to advance consumers' access to safe, effective, and affordable health care and to protect consumers' right to seek redress in the courts. Public Citizen often represents consumer interests in litigation, including as amicus curiae in this Court and the United States Supreme Court.

Public Citizen urges the Court to accept review of this case because it presents an important question regarding consumers' ability to require retailers who collect excess sales tax reimbursements from them to seek refunds of that excess amount from the state Board of Equalization ("the Board"). This Court has recognized such a remedy, *see Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, but has not yet determined "the exact showing required of consumers to demonstrate their entitlement" to it. *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, at p. 1134. If the court of appeal's decision is allowed to stand, however, consumers will *never* be able to demonstrate their entitlement to the 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" on tax exempt items. In this case alone, consumers—here, people with diabetes—are alleged to have been overcharged by millions of dollars per year.

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

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, supra*, 58 Cal.4th at p. 1108. When a retailer erroneously pays too much in sales tax, the retailer can seek a refund from the Board. *See Rev. & Tax. Code § 6901 et seq.* If the retailer collected sales tax reimbursement from its customers for the refunded amount, the retailer must pass on the refunded amount to its customers. *See Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252.

In *Javor, supra*, 12 Cal.3d 790, this Court considered whether consumers have a remedy when retailers collect excessive sales tax reimbursements from them, pay the excessive amount to the Board, and fail to seek a refund. In *Javor*, 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 reimbursements 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 excessive state sales tax reimbursements 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.” *Id.* 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. 801-02. 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. It held, however, 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.” *Id.* “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.” *Id.*

B. This Court Should Grant Review To Clarify the Circumstances in Which Consumers May Bring an Action To Require Retailers To Seek a Tax Refund and Should Permit Such an Action Here.

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 on the test strips and lancets, but that these

items have been exempt from sales tax since 2000. The plaintiffs seek to compel the defendant retailers to apply for a tax refund from the Board and for the Board to award such a refund.

Thus, this case presents a similar set of circumstances to *Javor*: 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.” *Id.* 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.” *Id.*

Nonetheless, the court of appeal held that the remedy permitted in *Javor* 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.” *Op.* at pp. 3-4. The court concluded that none of the three requirements were met.

The court of appeal’s holding is incorrect, and, if allowed to stand, would eviscerate the *Javor* remedy. Indeed, under the court of appeal’s reasoning, the *Javor* remedy would not even have been available in *Javor* itself.

With regard to the court of appeal’s first requirement, the “statutory tax refund remed[ies]” that the court found sufficient—such as the abilities to “urge the Board to initiate an audit of the retail pharmacies’ practices in collecting sales tax” and to petition the Board to amend or repeal the regulation exempting the relevant sales from taxation, *Op.* at pp. 20-21—do not replace the need for a remedy that allows the consumer to require the taxpayer to seek a refund. Moreover, if the ability to engage in these activities rendered the remedy permitted in *Javor* unavailable, consumers would never be entitled to the remedy, because consumers can always engage in such “informal efforts.” *Loeffler, supra*, 58 Cal.4th at p. 1123.

With regard to the court of appeal’s second requirement, the court held that judicial recognition of the remedy sought by the plaintiffs would be inconsistent with the Tax Code. But this Court has described “a remedy that is directed at requiring the taxpayer to make a claim for refund from the Board” as “consistent with the current governing statutory scheme.” *Id.* at p. 1133 (emphasis added); *see also id.* at p. 1101 (“[A] judicial proceeding to compel the retailer/taxpayer to seek a refund from the Board ... invokes, rather than avoids, tax code procedures.”); *Javor, supra*, 12 Cal.3d at p. 802 (“We think 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.”). Moreover, under the court of appeal’s reasoning, remedies that required retailers to seek refunds would always be inconsistent with the Tax Code and therefore always unavailable.

Finally, with regard to the court of appeal’s third requirement, the *Javor* remedy should not be limited to instances in which the Board has already determined that a refund is due. This

Court has described the *Javor* remedy as being 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 such an ascertainment already having been made. And this Court has recognized that the Board “may lack incentive to examine returns on its own initiative to determine whether retailers have remitted excess taxes to it.” *Id.* at p. 1115. Refusing consumers a remedy if the Board has not previously determined that the consumers are entitled to a refund would allow the Board, by avoiding a decision on the issue, to keep “excessive monies collected by the retailers” to which “it is not entitled,” thereby undermining the “integrity of the sales tax.” *Javor, supra*, 12 Cal.3d at p. 800.

In short, if this Court does not grant review, the *Javor* remedy will be decimated, to the detriment of California’s consumers. Consumers who are charged too much sales tax—or are charged sales tax on items that the state specifically decided should not be taxed—will be deprived of the ability to seek a refund of the excessive payments collected from them. The retailers will have “no particular incentive to request the refund on [their] own.” *Javor, supra*, 12 Cal.3d at p. 801. 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.” *Id.* at p. 802.

In *Loeffler*, this Court declined to “consider the exact showing required of consumers to demonstrate their entitlement to the *Javor* remedy,” because the plaintiffs in that case had not pursued such a remedy. 58 Cal.4th at p. 1134. This case, in contrast, provides a perfect opportunity for the Court to explain when the remedy is available. The Court should grant the pending petition for review and hold that consumers such as the plaintiffs here can bring an action to require retailers to seek a sales tax refund from the Board.

Respectfully submitted,

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