NO. S173972

IN THE SUPREME COURT OF CALIFORNIA

KIMBERLY LOEFFLER, et al.,
Plaintiffs and Appellants,

v.

TARGET CORPORATION,
Defendant and Respondent.

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Answering Brief in Response to *Amicus Curiae* Briefs Filed in Support of Target

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On Appeal from an Order by the Court of Appeal, Second Appellate District, Division Three, Case No. B199287, Affirming Order Sustaining Demurrer

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INTRODUCTION

In this case, the Court must decide whether California retail customers who are wrongly charged for "sales tax reimbursement" on tax-exempt purchases will lose the right to bring consumer protection claims against the retailer. It is undisputed that the provisions on which Target relies in arguing that Plaintiffs' claims are barred—Article XIII, section 32 of the California Constitution and Tax Code § 6931—are limited by their own plain language to actions against the State and actions to recover tax paid. It is also undisputed that Target is not the State, and that Plaintiffs as nontaxpayers cannot recover tax paid. Nonetheless, Target's *amici* urge the Court to extend those facially irrelevant provisions to this case and immunize retailers from liability under consumer protection laws whenever the retailer asserts that the unlawful charge at issue is for "sales tax reimbursement."[1] There is no basis in law or policy for creating such blanket immunity for retailers.

[1] The Target *amici* consist of: (1) Rite Aid Corp., Walgreen Co., CVS Caremark Corp., CVS Pharmacy Inc., Albertson's Inc., and PETCO Animal Supplies Stores, Inc., all of whom are defendants in pending consumer class actions alleging wrongful sales tax reimbursement charges (*see Amici Curiae* Br. in Supp. of Target Corp. ("Retailers Br.") at iii-iv); (2) DirecTV, Inc. (*see* Br. of *Amicus Curiae* DirecTV, Inc. ("DirecTV Br.")); and (3) the State Board of Equalization (*see* Brief of *Amicus Curiae* Cal. State Bd. of Equalization in Supp. of Target Corp. ("Board Br.")).

As a threshold matter, the *amicus* brief filed by the State Board of Equalization on behalf of Target is not entitled to judicial deference. The Board does not point to a single formal agency rule—or any other exercise of its delegated authority—in which it has concluded that consumers' claims are barred, and the opinions advanced here flatly contradict its prior position. Moreover, the Board is no better qualified than the Court to interpret Constitutional provisions or statutes, and it certainly has no particular expertise on the proper scope and applicability of the consumer protection laws. Indeed, the most important piece of information to be gleaned from the Board's brief is that, while the Board concedes Target's charges in this case are "likely" unlawful, it sees no problem with retailers disregarding tax exemptions if they believe doing so is in their best interests. If there was any question as to whether the Board could be relied on to protect consumers' interests, it is put to rest by the Board's brief in this case.

The first argument made by Target's *amici*—that the Tax Code and the consumer protection laws are at odds with each other—is easily dispensed with. The consumer protection laws govern only the relationship between private businesses their customers, whereas the sales tax laws govern only the tax relationship between businesses and the State. Target's *amici* attempt to create a conflict by blurring the distinction between California's sales tax scheme, in which the retailer is the taxpayer, and

fundamentally different schemes such as the use tax scheme, in which retailers act as collection agents for the government. The Court should not be fooled. Retailers imposing sales tax reimbursement charges are *not* fulfilling any legal obligation and are *not* acting as agents of the State. Therefore, permitting consumers to seek redress from retailers will not inhibit retailers' compliance with any legal requirement.

Second, allowing Plaintiffs' claims to proceed will not, as Target's *amici* contend, undermine the Tax Code's refund procedures for taxpayers. Those procedures are not available to nontaxpayer consumers like Plaintiffs and are not implicated in this case. Furthermore, there is no Tax Code provision that permits Target to charge sales tax reimbursement on goods that are exempt. On the contrary, retailers are required to comply with and properly apply tax exemptions, and to seek clarification from the Board if needed. While no one denies that retailers may choose to pay tax to the State on tax-exempt sales, nothing permits them to reimburse themselves by passing that charge onto their customers under the guise of sales tax reimbursement. There is simply no conflict between the Tax Code and the consumer protection laws.

Third, a court's resolution of whether Target is liable to its customers will not interfere with the Board's authority to administer the Tax Code. To the extent resolution of Plaintiffs' claims would require a court to interpret and apply the tax exemption statute, that kind of statutory

interpretation is well within the judiciary's normal role. Furthermore, the Board has already issued regulations and taxpayer education materials making plain that sales of hot coffee "to go" are not subject to sales tax unless certain conditions are met. If Plaintiffs' claims are permitted to proceed, a court need only determine whether Target charged its customers in violation of law and, if so, whether its customers are entitled to remedies.

Fourth, Target's *amici* cannot point to a single remedy other than those in the consumer protection laws that would provide redress to Plaintiffs. The far-fetched solutions proposed by the Board—for instance, that a consumer read educational pamphlets designed for retailers or "invoke the power of the legislature"—are nothing short of absurd. If anything, these proposed "remedies" prove Plaintiffs' point that they have no meaningful redress other than the consumer protection claims they have asserted in this case.

Fifth, Target's *amici* make a grab-bag of eleventh-hour arguments for why Plaintiffs' claims should be dismissed even if the Court rules that they are not barred by the Tax Code or the Constitution. For example, the *amici* argue that Target's alleged practice of wrongly charging its customers is not a "business practice" within the scope of the UCL, and that Plaintiffs' claims are barred by the voluntary payment doctrine. These arguments are outside the scope of the question on which this Court granted review, are not at issue in this appeal, and are meritless.

Finally, there is no good policy reason to immunize retailers from the consumer protection claims at issue in this case. The Tax Code empowers the Board to protect the State's interests by levying fines and penalties against businesses that underpay sales tax. Unless overcharged consumers can seek redress by bringing consumer protection claims like these, there will be no countervailing incentive for retailers to avoid overcharging their customers—and no recourse for consumers who are wrongly charged. Target, however, like any other retailer, has many options that would not subject it to liability under consumer protection laws. It is free to charge sales tax reimbursement on sales that are legally taxable. If, as it and its *amici* claim, the tax exemption laws and regulations are unclear or compliance is inconvenient, it is free to remit moneys to the State as if all its sales were taxable. If it has overpaid sales tax to the State, it can seek a refund using the Tax Code's refund procedures. It is even free to raise prices. What Target *cannot* do, however, is falsely charge sales tax reimbursement and mislead customers into believing that something is taxable when it is not. And it may not achieve an unfair advantage over other retailers by avoiding the accounting costs of tracking tax exemptions when its law-abiding competitors have to assume that cost. Most important, it may not shift the financial burden of its legal noncompliance to its customers. That is precisely the kind of unfair business practice the UCL and CLRA were designed to address.

ARGUMENT

I. PLAINTIFFS' CONSUMER PROTECTION CLAIMS AGAINST TARGET DO NOT CONFLICT WITH THE TAX CODE OR UNDERMINE THE BOARD'S AUTHORITY TO ADMINISTER IT.

Target's *amici* argue that the Constitution and Tax Code should be extended to bar Plaintiffs' claims because permitting them to go forward would undermine the Tax Code's statutory refund procedures and conflict with the Board's administration of the Tax Code. Neither is true. Plaintiffs seek to bring quintessential consumer protection claims against a retail business. This lawsuit poses no threat to the Board's authority or the taxpayer refund procedures.

A. The Board's *Amicus* Brief Is Not Entitled to Judicial Deference.

As a threshold matter, the Board's arguments that Plaintiffs' consumer protection claims against Target are barred by the Constitution and Tax Code is not entitled to deference by this Court. While statutory interpretations of administrative agencies are entitled to deference by courts in some circumstances, this is not one of them. Both the U.S. Supreme Court and this Court have held that no deference is appropriate where (a) the agency is merely expressing its legal opinion on a Constitutional provision or statute, rather than interpreting its own regulations or exercising its delegated lawmaking power, and thus has no advantage over the Court; (b) the agency's position conflicts with a prior position it has

taken; or (c) the agency is opining on an issue that is outside its area of expertise. All three factors are present here.

1. The Board's Argument On the Constitutional and Statutory Provisions at Issue Here Should Be Accorded No Weight.

The Board's positions in its *amicus* brief are not entitled to deference because they "do[] not implicate the exercise of a delegated lawmaking power; instead, [they] represent[] the agency's view of [a] statute's legal meaning and effect, questions lying within the constitutional domain of the courts." *Yamaha Corp. v. State Bd. of Equalization* (1988) 19 Cal.4th 1, 11, 78 Cal.Rptr.2d 1. An agency's legal opinion is not entitled to the deference that is accorded to a regulation or other official formal position. *See Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 212–13 (denying deference to an agency's position taken in litigation because it was "unsupported by regulations, rulings, or administrative practice" and noting that "we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"). Here, the Board has not pointed to a single formal rule or regulation in which it previously took the position that consumers are barred from bringing consumer protection claims against retailers by section 32 or its statutory corollaries.

Furthermore, agency positions are not accorded weight by courts unless the agency has a "comparative interpretive advantage over the

courts" *and* there are additional factors indicating that the agency's position is "probably correct." *Yamaha*, 19 Cal.4th at 12 (citation omitted). Neither is true here. While the Board has expertise interpreting its own regulations, it cannot be said to have an "interpretive advantage" over the Court in assessing the meaning of a Constitutional provision or statute. *See id.* ("A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute."); *Bonnell v. Med. Bd. of Cal.* (2003) 31 Cal.4th 1255, 1265, 8 Cal.Rptr.3d 532 ("we are less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation").

Moreover, there are no additional factors suggesting that the agency's position is "probably correct." To the contrary, the factors that typically provide some assurance that an agency's position is correct—for example, when the agency issues statutory interpretations contemporaneously with legislative enactment of the statute, or enacts a proposed rule after notice and opportunity for public comment—are sorely lacking here. *See Yamaha*, 19 Cal.App.4th at 13. Furthermore, the Board's argument that section 32 and its statutory corollary bar Plaintiffs' claims against Target is contrary to the plain language of those provisions, which limits their applicability to actions "against th[e] State." Cal. Const. art. XIII, § 32; Cal. Rev. & Tax Code § 6931. This Court has refused to give weight to agency interpretations that are inconsistent with unambiguous

statutory language. *See, e.g., Bonnell*, 31 Cal.4th at 1265 (refusing to defer to agency's interpretation of government code provision that was incorrect "in light of the unambiguous language of the statute"). The Board's argument in this case should likewise be accorded no weight.

2. The Board's Current Argument Contradicts Its Prior Position.

The U.S. Supreme Court has emphatically rejected arguments made by agencies when those arguments are inconsistent with the agency's past position. *See, e.g., Wyeth v. Levine* (2009) 129 S.Ct. 1187, 1201 (declining to defer to FDA's pro-preemption argument where it contradicted "the FDA's own long-standing position without providing a reasoned explanation"); *Bates v. Dow Agrosciences* (2005) 544 U.S. 431, 449 (finding Solicitor General's position to be "particularly dubious" given the fact that the U.S. had advocated for the opposite position five years earlier).

Here, the Board's argument that Plaintiffs' claims against Target are barred is particularly suspect given that the Board's legal counsel previously said the exact opposite of what it says here. Responding to legal questions from an attorney for a retailer, the Board warned that charging for sales tax reimbursement on a tax-exempt item may well violate the consumer protection laws:

> The State Board of Equalization has jurisdiction with respect to the excess tax provisions of the Sales and Use Tax Law. The local district attorney's office has jurisdiction over consumer protection laws found in the Business and

> Professions Code. Whether the consumer fraud provisions would be applicable where tax reimbursement is collected on a nontaxable transaction would be a matter of local determination. Without regard to the language of Regulation 1700, we cannot authorize any practice which might violate consumer protection laws. Our recommendation would be that you seek further advice as to this matter from the consumer protection division of your local district attorney's office.

Letter from Gary J. Jugum, Assistant Chief Counsel, State Bd. of Equalization, to Matthew Kilroy (Apr. 18, 1997).[2] This letter leaves no doubt that the Board's current litigation position represents a change from its prior position on this issue.

Wyeth is particularly on point here. In *Wyeth*, the drug manufacturer argued that FDA approval of a drug's label preempted state-law failure-to-warn claims, based largely on the regulatory preamble to a new FDA regulation on prescription drugs. The Supreme Court held that the FDA's preamble did not "merit deference" because it was not "an agency regulation with the force of law." 129 S.Ct. at 1200–01. Instead, the Court explained, the preamble constituted a "mere assertion that state law is an obstacle to achieving [the agency's] statutory objectives," and had been promulgated without any notice to the public or opportunity to comment. *Id.* The Court also rejected the FDA's preamble on the grounds that it

[2] The letter is attached as Exhibit A to the Request for Judicial Notice filed simultaneously with this brief.

stated a position "at odds with what evidence we have of Congress' purposes," *id.* at 1201, explaining that "Congress has repeatedly declined to preempt state law." *Id.* at 1204. The Court concluded that "the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight." *Id.* The Court declined to defer to the FDA's *amicus* brief for the same reasons. *See id.* at 1203 n.13.

Here, as in *Wyeth*, the Board's position is a "mere assertion" that permitting Plaintiffs' consumer protection claims to go forward would be an obstacle to its administration of the tax laws. It is not contained in any formal agency action with the force of law. And as in *Wyeth*, the Board's argument is not only at odds with the language of the statutes and its prior positions, but also with the fact that the Legislature has repeatedly declined to limit the scope of the state consumer protection laws, electing instead to "expand[] the [UCL]'s coverage." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 182, 83 Cal.Rptr.2d 548.

3. The Board Has No Expertise on the Scope of the Consumer Protection Laws.

Many of the opinions voiced in the Board's brief concern the scope of the state consumer protection laws—an area well outside the Board's expertise. The Board identifies itself as the agency charged with administering the tax laws, but it then purports to "demonstrate that the Legislature did not intend for *consumer protection statutes* designed to be

broadly interpreted in order to affect remedies for a wide range of unfair or illegal business practices" to apply in cases like this one. Board App. for Leave at 3 (emphasis added). Since the Board has no particular expertise regarding the scope of the consumer protection laws, the Court should not defer to its position. In *Bonnell*, this Court held that an agency's interpretation of a statute concerning time limits for filing petitions for reconsideration of a decision was not entitled to judicial deference where the agency had no particular expertise in interpreting the statute. *See* 31 Cal.4th at 1265. The Supreme Court and U.S. Court of Appeals for the Ninth Circuit have reached similar conclusions. *See, e.g., Adams Fruit Co. v. Barrett* (1990) 494 U.S. 638, 649–50 (rejecting Department of Labor's view on the scope of a private right of action under the Migrant and Seasonal Agricultural Worker Protection Act where Department's role in administering the Act was merely to promulgate motor vehicle standards; explaining that reviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer); *Parola v. Weinberger* (9th Cir. 1988) 848 F.2d 956, 959 (declining to defer to the General Accounting Office's interpretation of an environmental statute, noting that "where agencies interpret statutes outside their administrative ken, it is not clear that their interpretations are entitled to any particular deference, because they are not 'specialists' in the operation of those statutes").

In contrast, the California Attorney General—the office authorized to enforce the state consumer protection laws—has disagreed with the Board, appearing as *amicus* in this case to express its view that Plaintiffs' claims are "precisely the type of wrongdoing that the UCL and the CLRA are intended to address." Br. of Attorney General as *Amicus Curiae* in Support of Appellants ("A.G. Br.") at 1–2, 19. Former state legislators William Bagley and Barry Keene reached the same conclusion. *See Amicus Curiae* Br. of Former State Legislators William T. Bagley and Barry D. Keene in Support of Plaintiffs/Appellants ("Legislators' Br.") at 20 ("The Legislature has already provided an adequate remed[y] for [consumers] through the UCL and CLRA."). The Board's musings on California's consumer protection laws should be accorded no deference whatsoever.

B. There Is No Conflict Between the Consumer Protection Laws and the Tax Code.

1. The Consumer Protection Laws Govern the Relationship Between Retailer and Customer, While the Tax Code Governs the Relationship Between Retailer and State.

The Board's central theme is that because the consumer protection laws have different purposes, requirements, and remedies than the Tax Code does, the two sets of laws are "fundamentally in conflict." Board Br. at 34; *see also id.* at 39–40. But there is no such conflict. Rather, the two sets of laws regulate separate spheres of conduct. As former legislators

Bagley and Keene have explained, the plain language of the provisions at issue makes harmonizing them not only possible, but simple:

> *Harmonizing* the legal prohibitions against suits seeking a refund from the State for taxes paid or enjoining the State from collecting taxes with the broad remedies the UCL and CLRA provide to those unlawfully, falsely or fraudulently charged by private businesses or persons for what they do not owe, is not difficult. It merely requires acceptance of the plain language of the different measures distinguishing, as they do, between the State and the private sector. The UCL and CLRA provide remedies solely against *private* parties like defendant, and not the State or any agent thereof. The California Constitutional provision and its statutory analogue prohibiting suits to enjoin or interfere with the collection of taxes, on the other hand, apply to protect only the *State or any agent thereof*, and not private parties who falsely label their unlawful charges a "sales tax reimbursement."

Legislators' Br. at 16 (emphasis in original). The Board's argument that the consumer protection laws do not apply here because they were "not intended to regulate relationships between ordinary citizens and the State," Board Br. at 22–23, ignores the distinction between private retailers and the State. The issue in this case is a retailer's conduct towards its customers—and that is precisely what the UCL and CLRA are designed to regulate.[3]

[3] The Board repeatedly attempts to discount the fact that Plaintiffs' lawsuit is not an action against the State. According to the Board, because Target might possibly choose to cross-complain against the Board, Plaintiffs' claims "constitute[] an action against the State despite the fact that the [Board] was not sued in the first instance." Board Br. at 26; *see also* Board Br. at 9, 12. But Target, as the taxpayer, may file a claim and lawsuit against the Board regardless of whether it is liable to its customers for wrongful sales tax reimbursement charges. It is undisputed that Target is perfectly within its legal rights to do so. *See* Board Br. at 36 ("persons who

(continued on next page)

The Board also repeatedly insists that because nontaxpayers like Plaintiffs have no legal remedies in the Tax Code or tax regulations, they have no remedies at all. *See* Board Br. at 16 (suggesting that the Court would need to "create a new private right of action out of whole cloth" in order to permit Plaintiffs' claims to proceed); *id.* at 24 (agreeing that Reg. 1700(b)(6) provides that "if there are any other statutory remedies provided, customers may still pursue them," but suggesting that this language is meaningless because the regulation *itself* "does not provide such a remedy"). But, of course, the fact that the *Tax Code* does not provide a remedy for nontaxpayers does not, as the Board would urge, mean that the Legislature has not provided remedies for them elsewhere. As Plaintiffs' *amici* explained, "[W]hether the predicate statute confers a private right of action is 'immaterial' to determining whether the plaintiff can state a claim under the UCL, even if the predicate law is expressly limited to enforcement by 'public lawyers.'" Br. of *Amici Curiae* Consumer Watchdog, Public Good, ConsumerAffairs.com, and National Association of Consumer Advocates in Support of Plaintiffs and Appellants at 8–9

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must file sales and use tax returns may file claims for refund") (citing Tax Code § 6902(a)). If Target does bring an action against the Board—whether in a cross-complaint or in a separate refund action—the Board could then raise its own defenses to Target's claim against it, including, presumably, Article XIII, section 32 of the Constitution and its Tax Code corollaries.

(*citing Stop Youth Addiction, Inc. v. Lucky Stores* (1998) 17 Cal.4th 553, 562, 71 Cal.Rptr.2d 731).

In short, there is no basis for the Board's argument that the consumer protection laws "do not apply" here. *See* Board Br. at 16. As the Attorney General points out, "[h]ad Target wrongly called the disputed charge a 'charitable donation' or a 'to-go fee,' there is little doubt that the UCL and CLRA would apply. . . . There is no reason why falsely labeling a payment as a 'tax' should transform otherwise actionable misconduct and allow defendants to escape the bounds of the UCL and CLRA." A.G. Br. at 18–19.

2. Allowing Plaintiffs' Claims to Proceed Will Not Undermine the Tax Refund System.

The Board argues energetically that tax refund procedures are the exclusive means by which tax disputes can be litigated. *See* Board Br. at 10–11. Its primary support for this broad proposition is this Court's decision in *Woosley v. State of California* (1992) 3 Cal.4th 758, 13 Cal.Rptr. 2d 1. In *Woosley*, however, the Court repeatedly made clear that its holding limiting plaintiffs to the statutory refund procedures applied to "actions for *tax refunds*." 3 Cal.4th at 789 (emphasis added); *see also id.* ("strict legislative control over the manner in which *tax refunds* may be sought is necessary") (emphasis added); *id.* at 792 (section 32 "precludes this court from expanding the *methods for seeking tax refunds* expressly

provided by the Legislature") (emphasis added). In other words, *Woosley* addresses the available remedies for taxpayers, but says nothing about available remedies for *non*taxpayers. And while it is undisputed that the only remedy by which a *taxpayer* may recover allegedly illegal *taxes* is to comply with the statutory refund procedures, it does not follow that courts may never resolve any dispute about a tax outside of that narrow context.

The Board also makes the startling claim that allowing Plaintiffs' claims to proceed "would constitute a judicial repeal of the California tax refund statute." Board Br. at 32. Even a cursory examination of the Board's argument, however, reveals that its bold assertion has no basis in either law or logic. Plaintiffs' ability to sue in court cannot and will not undermine or circumvent a system of tax refund laws to which Plaintiffs—who are not taxpayers—have no access in the first place. Stated another way, any requirement to exhaust administrative procedures available only to taxpayers seeking tax refunds from the State does not bar nontaxpayers from seeking redress from non-state actors. *See* Appellants' Opening Br. at 30-33; Appellants' Reply Br. at 7–11. Allowing this lawsuit to proceed will leave intact the rule that those who have access to the system of tax refunds are required to use it. But those who do not, need not.

In support of its attempts to characterize Plaintiffs' claims as an effort to circumvent the Tax Code's refund process, the Board relies heavily on the Ninth Circuit's opinion in *Brennan v. Southwest Airlines*

(9th Cir. 1998) 134 F.3d 1405. But the tax relationships analyzed in *Brennan* were entirely different. First, the airline passenger plaintiffs in *Brennan* were *taxpayers* seeking a *tax refund*, who therefore had legal standing and the requirement to first seek relief directly from the government through administrative processes. *See id.* at 1408, 1412. Plaintiffs here, as the Board concedes (Board Br. at 2), are *not* taxpayers and have no available recourse through the Board's administrative processes. Second, the *Brennan* defendants *were not taxpayers* but were acting as "agents for the United States" in collecting tax—not tax reimbursement—from their customers. *See id*. at 1408, 1411. Target, in contrast, *is* the taxpayer here, and it is not required under any law to collect anything at all from its customers.[4]

Brennan's rejection of consumer claims was merely an application of the uncontested rule that aggrieved taxpayers must first exhaust their administrative remedies with the taxing agency before going to court. *See id.* at 1412. Because the *Brennan* plaintiffs were the taxpayers for purposes of the federal tax at issue and were suing to recover wrongfully collected

[4] Target is permitted, but *not* required, by law to charge its customers sales tax reimbursement to cover the cost of taxes *it* is required to pay to the State. Cal. Civ. Code § 1656.1 (retailer "may" add sales tax reimbursement to sales price); 18 Cal. Code Regs. § 1700(a)(1); *Livingston Rock & Gravel Co. v. DeSalvo* (1955) 136 Cal.App.2d 156, 161, 288 P.2d 317 (rights of retailer to collect sales tax reimbursement "are optional and may be waived").

tax, the court held that they were required to pursue that remedy by way of a tax refund claim. *Id.* at 1409–10. The court explained that, under federal law, the plaintiffs should have first exhausted their administrative remedies, and then sued the United States, not its collection agents. *Id.* at 1412.

It is undisputed that Plaintiffs here—unlike the *Brennan* plaintiffs—are not taxpayers, have no recourse against the government, and have no administrative remedies under the Tax Code to exhaust. That being so, the existence of administrative exhaustion requirements does not operate to bar Plaintiffs' claims. *See* Appellants' Opening Br. at 30–32; Appellants' Reply Br. at 7–10.[5]

Nor do any of the policy rationales articulated in *Brennan* apply here. First, the concern that the defendant may be placed between two competing and mutually exclusive obligations if it can be sued by its customers does not exist here. In *Brennan*, the airlines "did not choose the

[5] In its attempt to blur critical distinctions between consumer-taxpayers who have administrative remedies and consumer-nontaxpayers who do not, the Board also muddies the waters with a discussion of use taxes. *See*, *e.g.*, Board Br. at 2–3. However, the use tax scheme differs from the sales tax scheme in a critical way. Consumers in California must pay use tax on purchases from out-of-state retailers that do not collect California sales tax. *See* State Bd. of Equalization, *Tax Rate FAQ for Sales & Use Tax*, at http://www.boe.ca.gov/sutax/faqtaxrate.htm#1 (last visited May 3, 2010). Consumers who pay use tax—like any taxpayer—may file claims for tax refunds with the Board. *See* Board Br. at 2. They therefore must exhaust their administrative remedies before filing a lawsuit. Board Br. at 2. But while "some consumers purchasing tangible personal property . . . in California have remedies under the refund statutes" (Board Br. at 2), it is undisputed that Plaintiffs do *not* have such remedies.

role of collecting agents," but were *required by law* to collect taxes from their customers (and could be criminally penalized for not doing so). 134 F.3d at 1411 (internal quotations and citation omitted). Here, however, Target *chooses* to collect sales tax reimbursement charges and is in no sense a "collecting agent" for the State, despite the Board's efforts to characterize it as such. *See* part I.B.3 below.

Second, the purpose of an administrative exhaustion requirement is not frustrated by allowing a lawsuit to proceed where there is no procedure to exhaust. *See* Appellants' Opening Br. at 31–32. The *Brennan* court was concerned that allowing taxpayer-plaintiffs to pursue their claims against the airlines would open the door for all taxpayers to circumvent the administrative procedures for tax refunds and go immediately to court (to sue the hapless private collection agents). *Brennan*, 134 F.3d at 1411. But here, there is nothing for Plaintiffs to circumvent. As this Court has held, claims—even those related to taxation—not subject to determination through administrative processes are appropriate for court review in the first instance. *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 320, 87 Cal.Rptr.2d 423 (no failure to exhaust administrative tax remedies where the complaint "did not involve any issue subject to determination through the administrative refund remedy available to plaintiff").

Third, and finally, to the extent that the limitations periods embedded in administrative procedures are intended to protect the public

fisc from stale claims, *see Brennan*, 134 F.3d at 1411 (one purpose is "to protect the Treasury by providing strict limitations periods for tax refund suits") (citation omitted), that purpose is not undermined by this lawsuit. Plaintiffs here cannot and do not seek recovery from the government. And they cannot circumvent statutes of limitation in an administrative procedure that does not apply to them.

3. Retailers Do Not Act As Sales Tax Collection Agents For the State and Have No Statutory Duty to Impose Sales Tax Reimbursement Charges.

The Board refers to Target as a mere "conduit" for tax collection, going so far as to claim that "[t]he retailer [ ] stands in the shoes of the state in applying [sales] tax to a particular transaction," and is merely "carrying out its statutory duties to the state" by imposing sales tax reimbursement charges. Board Br. at 23–24, 28. That argument cannot be reconciled with the Tax Code itself.

First, while the Board's "retailer-as-collection-agent" characterization may be true for *use* taxes, it is flatly wrong when it comes to the *sales* tax reimbursement charges at issue in this case.[6] For purposes of use tax, the consumer is actually the taxpayer, and the retailer is required

[6] Either sales tax or use tax may apply to a particular transaction, but not both. *Bank of America Nat'l Trust & Svgs. Assn. v. State Bd. of Equalization* (1963) 209 Cal.App.2d 780, 793, 26 Cal.Rptr.348; Cal. Rev. & Tax Code § 6401. State Bd. of Equalization, *Your Use Tax Responsibility*, available at http://www.boe.ca.gov/sutax/faqusetax.htm.

by law to collect use tax at the time of the applicable transaction as the collection agent for the State. *See* Cal. Rev. & Tax. Code § 6203 (retailer "shall" collect use tax from purchaser at time of taxable transaction). Sales tax reimbursement, in contrast, is completely optional, and the retailer—not the consumer—is the taxpayer.[7] *See* Cal. Civ. Code § 1656.1; 18 Cal. Code Regs. § 1700(a)(1). Thus, even where an item is subject to sales tax under the law, retailers have no statutory duty to impose sales tax reimbursement charges on their customers. And certainly it cannot be argued that retailers are under any legal obligation to collect sales tax reimbursement on items for which *no tax is owed to the state*. On the contrary, a tax exemption creates a legal duty on the part of retailers *not* to impose sales tax reimbursement charges on customers. *See* part I.B.4 below.

The Board's primary support for its "Target-is-the-equivalent-of-the-State" argument is a federal case that addressed the unrelated question of whether sales tax imposed on leases to the federal government violated

[7] Retailers can minimize their tax bill and maximize profits if they take advantage of their ability to separately list sales tax reimbursement charges: it allows the retailer to calculate its taxable gross receipts as the "amount received less the amount of the tax added, [thereby] avoid[ing] payment . . . of a tax on the amount [of] the tax." *Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 Cal.2d 156, 164, 78 P.2d 731. But even if the retailer chooses to pass the economic burden of sales tax on to its customers in the form of sales tax reimbursement, this Court has found that sales tax is still not levied on the consumer. *Id.* at 163. "The tax being a direct obligation of the retailer . . ., it is neither in fact nor in effect laid upon the consumer." *Id.* at 164.

federal immunity from state taxation. *United States v. Cal. State Bd. of Equalization* (9th Cir. 1981) 650 F.2d 1127, 1131–32. There, the Ninth Circuit concluded that the incidence of California's sales tax actually fell on the United States as lessee because the lessor would more than likely pass the burden of the tax on to the United States in the form of sales tax reimbursement. *Id.* at 1132. But even if that is the law in the narrow category of sales or lease transactions with the United States, it does not change the relevant law with respect to the type of transactions at issue here: retailer sales to the public. Under California law, Target is in no way a collection agent here. Cal. Civ. Code § 1656.1; *Western Lithograph Co.*, 11 Cal.2d at 163–64; *Livingston*, 136 Cal.App.2d at 161–62.

4. The Challenged Conduct Is Not Permitted By the Tax Code.

Target's Retailer *amici* argue that the consumer protection laws conflict with the Tax Code because retailers are "expressly permit[ted]" under the Tax Code to impose sales tax reimbursement charges on tax-exempt items. Retailers' Br. at 2–3, 17–28. The Retailers' position appears to be that the provisions of the Tax Code that obligate retailers to pay sales tax and exempt hot coffee "to go" combine to create a "safe harbor" that bar Plaintiffs' consumer protection claims. *See* Retailers' Br. at 16–17.[8]

[8] To the extent that the Retailer *amici* are arguing that Target has not violated the consumer protection laws, that argument is premature. Target

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The Retailers' theory, apparently, is based on the presumption in the Tax Code that "all gross receipts are subject to [sales] tax until the contrary is established." *See* Retailers' Br. at 17 (citing Cal. Rev. & Tax Code § 6091). According to the Retailer *amici*, the laws and regulations applicable to hot coffee "to go" are "lengthy and complex and often subject to various interpretations," and thus do not "establish an exemption to defeat the presumption of taxability." Retailers' Br. at 18 & n.4; *see also id.* at 38 n. 9 (bemoaning "how difficult it is for a retailer to navigate the issue of taxability"); DirecTV Br. at 23–24 (complaining that retailers do not have a "crystal ball that accurately predicts [when] sales tax is due"). The argument that retailers are "permitted" to impose sales tax reimbursement charges on tax-exempt sales whenever they decide that the tax laws are complex fails on many levels.

First, the Retailer *amici* cite no statutory language that "expressly permits" retailers to impose sales tax reimbursement charges on tax-exempt sales—and no statute does so. As the Attorney General has explained, in the absence of clear statutory language, courts may not create "implied safe harbors" for allegedly unlawful conduct. *See* A.G. Br. at 10 n.2.

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will have ample time to defend its conduct on the merits. The only question in this appeal is whether Plaintiffs may go forward with their claims.

Second, as explained in the Reply Brief (at 27–29), the complexity of the law is not a legal basis for immunizing retailers from liability. As Bagley and Keene explain:

> [W]e are puzzled by what, if anything, defendant's lack of absolute certainty . . . about whether "take-out" orders for hot coffee are exempt from sales tax has to do with the issue to be decided. . . . We know of no public policy encouraging or even permitting a retailer to charge customers for sales tax reimbursement on items that are not taxable because the retailer can't figure out whether they are exempt, and then, by turning the money . . . over to the State, absolve itself of any liability[.]

Legislators' Br. at 3.

Third, as explained in the Reply Brief (at 27–29), the regulations governing the taxability of hot coffee "to go" are quite clear. *See* 18 Cal. Code Regs. § 1603(e) (sales of hot coffee to go which are not sold as part of a meal are not subject to tax unless the retailer falls under specific exceptions, none of which Target claims applies). If a retailer truly believes that there is "ambiguity. . . as to whether [a] particular retail sale is tax exempt," Retailers' Br. at 39, it is that retailer's responsibility to seek clarification from the Board. *See* Board Br. at 28 ("The role of the retailer in paying sales tax and collecting reimbursement is thus to apply SBE regulations and administrative instructions to its operations to determine the proper application of tax. If it needs further guidance, it may obtain it from SBE."). Here, any retailer seeking such guidance could have easily found it in the Board's own publication, which states unequivocally that the sales at

issue in this case are not subject to tax. *See* State Bd. of Equalization, *Pub. 22: Tax Tips for the Dining and Beverage Industry* at 3 (March 2006), available at http://www.boe.ca.gov/pdf/pub22.pdf ("Sales of the following beverages are not taxable when sold for a separate price to go: Hot beverages, such as coffee"). Given that retailers can always obtain clarification from the Board, there is no basis for permitting them to simply ignore tax exemptions that they deem too "complex." The effect of any such rule would be to gut the tax exemption laws enacted by the Legislature. More important, the rule Target seeks here would immunize *all* retailers from liability under the consumer protection laws for charging sales tax reimbursement on tax-exempt items, no matter how clear the tax laws at issue are. Reply Br. at 27.

Fourth, the Board concedes that it is "likely" that at least some of the sales tax reimbursement charges challenged by Plaintiffs were indeed unlawful. *See* Board Br. at 28. But according to the Board, this is not a problem, because retailers need not "take advantage of every possible tax exemption," but rather can choose to "waive the advantage of a law intended solely for [their] benefit." *See* Board Br. at 14 (citing Cal. Civ. Code § 3513). This is preposterous. The sales and use tax exemptions are not intended "solely for [the] benefit" of retailers like Target. Rather, the purpose of the exemption in Section 6359—the provision exempting food and beverages, including hot coffee to go—is to "provide[] tax relief to

consumers of food products, by reducing their price." Legislative Analyst's Office, *Report on California's Tax Expenditure Programs: Sales and Use Tax Programs Part 1*, available at http://www.lao.ca.gov/1999/tax_expenditure_299/tep_299_salestax1.html (last visited Apr. 14, 2010) (emphasis added).[9] While no one would deny that Target can waive *its own* benefit by choosing to pay sales tax on tax-exempt items—or by declining to claim a refund of tax it overpays—nothing in the Tax Code or any other law permits Target to take money from its *customers* under the guise of sales tax reimbursement when no tax is owed, for the sake of convenience, cost savings, or any other reason.

As this Court long ago held, a tax exemption should not be used as a "sword for gaining a profit from the public." *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 294, 268 P. 347. In *Ventura Refining*, a fuel seller opposed the State's attempt to collect taxes owed on grounds that the sales at issue were tax-exempt. 204 Cal. at 289. The Court upheld the tax liability, reasoning that because the seller had already charged its buyers for

[9] Section 6359 is one of many tax exemptions for products that are clearly intended to benefit the end user of a product. *See* Cal. Rev. & Tax. Code § 6359(a) (exempting from tax the sale of "food products for human consumption"); *id.* § 6369(a) (exempting the sale of medicines); *id.* § 6369.1 (exempting the sale of "hemodialysis products supplied to a patient on order of a licensed physician"); *id.* § 6369.2 (exempting the sale of assisted mobility devices such as wheelchairs "when sold to an individual for the personal use of that individual as directed by a physician").

the tax, it had waived any right it would have had to rely on the exemption. *Id.* at 295–96. While the facts of *Ventura Refining* were different from those in this case, its message could not be more relevant: a retailer may not benefit from a tax exemption unless it passes the benefit on to its customers. Here, even if Target was entitled to waive its own benefit by paying sales tax on tax-exempt goods, it is not entitled to also waive the cost-savings benefit intended for its customers by charging sales tax reimbursement on those goods. And if Target and its *amici* prevail and consumer protection lawsuits against retailers are barred, then retailers will be free to disregard tax exemption laws—at the expense of their customers and without any accountability—whenever they believe it is in their best interests to do so.

C. This Lawsuit Does Not Improperly Encroach Upon the Board's Authority.

The Board argues that only it "has the authority to determine whether taxes have been illegally collected or computed." Board Br. at 26. This argument is grounded in an apparent fear that, if retailers are not immunized from liability under consumer protection laws for charges they claim are related to sales tax, courts will intrude into the Board's domain of administering the tax laws. This concern is unfounded.

First, the Board quotes out of context a statement in *City of Gilroy v. State Bd. of Equalization* (1989) 212 Cal.App.3d 589, 605, 260 Cal.Rptr.

723: "[O]nly the Board has the authority to determine whether taxes have been illegally collected or computed." Board Br. at 26. But in *City of Gilroy*, while the court did use that language in the context of holding that a *local government* (as opposed to the Board) lacks the right to participate in taxpayers' refund proceedings, it then went on to *disagree* with the Board's construction of the relevant tax statute. 212 Cal.App.3d at 604–05. The Court emphasized that the *court*, not the Board, "bear[s] the ultimate responsibility for construing the statute." *Id.* at 597. Thus, resolving disputes about tax issues is not the exclusive province of the Board.

Second, the Board protests that a resolution of this case will require a court to determine whether or not the sales at issue were exempt from sales tax. But in that way, this case is no different from the myriad other UCL/CLRA actions based on violation of a predicate statute. Construing the meaning of statutes, after all, is one of the primary activities of courts. *See*, *e.g.*, *Yamaha*, 19 Cal.4th at 7 ("The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution . . . .").

Third, while the Board must resolve tax refund claims in the first instance before a taxpayer can file a refund action in court, courts can and do interpret tax laws outside of the tax refund process. In *County of Sonoma v. Board* (1987) 195 Cal.App.3d 982, 241 Cal.Rptr. 215, for example, a local government that was not a taxpayer, but that stood to gain

revenue if certain energy sales were taxed, brought a claim to challenge the Board's position that those sales were tax-exempt. The Board argued that the plaintiff lacked standing to challenge its interpretation of the Tax Code, but the court disagreed:

> Nothing [in the local laws or contract between Sonoma and the Board] suggests that either Sonoma County or the Legislature ever intended to grant the Board absolute, unlimited and arbitrary authority to interpret the tax laws without the possibility of judicial review.

195 Cal.App.3d at 990. The court also explained that its resolution of the tax-exemption question would pose no threat to the Board's authority to administer the tax laws:

> In our tripartite system of government the Legislature enacts the laws, the executive branch (of which the Board is a part) implements and administers those laws, and ultimate responsibility for interpretation of the laws is vested in the judiciary. The Board has failed to proffer any convincing justification for its theory of nonreviewability which differentiates the circumstances of this case from the myriad number of situations where courts review executive interpretations of laws enacted by the Legislature. Such judicial review has not and need not disrupt the orderly administration of the tax laws. In sum, we totally reject this assertion of executive non-reviewability.

Id.; *see also City of Gilroy*, 212 Cal.App.3d at 604–05.

In *Dell, Inc. v. Superior Court (Mohan)* (2008) 159 Cal.App.4th 911, 71 Cal.Rptr.3d 905, likewise, the court determined—in a case that did not arise from a tax refund claim—that the transaction at issue was not subject to tax and disagreed with the Board's position that the transactions were

taxable. The court noted that "[w]e respect SBE's interpretation of the tax laws as applied to the Dell transaction but we cannot endorse it." 159 Cal.App.4th at 929. One factor mitigating against deference to the Board in *Dell* was the absence of a "long-standing and consistent interpretation" on the issue. *Id.* at 936. The court also discounted the Board's argument that the court's rule would make its auditing efforts more burdensome.[10] *Id.*

Finally, to the extent that Plaintiffs' claims against Target may require the trial court to interpret the tax exemption at issue, the court would be informed and guided by the Board's existing interpretations. As the explained in part I.B.4 above, those interpretations and explanations are quite clear. The mere fact that a court would be required to perform the task of applying the Board's regulations and interpretations to the facts of this case is not a reason to bar Plaintiffs' claims from proceeding.

In short, the Board's argument that Plaintiffs' claims would undermine its authority to administer the tax laws does not stand up to scrutiny.

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[10] Other cases the Board cites further confirm that the interpretation of the tax laws (as with any other statute) is a judicial function. *See, e.g., King v. Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1012–13, 99 Cal.Rptr. 802 (disagreeing with the Board's interpretation of the Tax Code and holding that the transaction at issue was not a "sale" subject to tax; noting that the Board's position was not only incorrect, but also inconsistent with its prior position); *Botney v. Sperry & Hutchinson Co.* (1976) 55 Cal.App.3d 49, 127 Cal.Rptr. 263 (ruling on proper calculation of sales tax).

II. TARGET'S *AMICI* FAIL TO DEMONSTRATE THAT CONSUMERS HAVE REMEDIES UNDER THE TAX CODE.

Target's *amici* echo the company's argument that its customers have no need for consumer protection laws because they have ample remedies under the Tax Code. The Board, for example, protests that Plaintiffs failed to use any "remedy that may be available to them under the Revenue and Taxation Code" (Board Appl. for Leave at 2) and that Plaintiffs could have chosen to "pursue the remedies available under the [Tax Code]." Board Br. at 39; *see also* Retailers' Br. at 10 ("plaintiffs never presented the issue to the Board"). Neither the Board nor Target's other *amici*, however, identify a single remedy for nontaxpayers such as consumers under the Tax Code.[11]

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[11] Nor does Target identify any such remedies. Indeed, an examination of the materials Target cites show no support for its claim. For example, Target argues that "consumers who believe they have paid excess sales tax reimbursement may complain to the State Board of Equalization and obtain refunds without the need for litigation." Target Br. at 23. But the only resource Target cites for this says no such thing. *See* State Bd. of Equalization, *Pub. 53-A: 10 Consumer Sales and Use Tax Questions*, available at http://www.boe.ca.gov/pdf/pub53a.pdf (last visited Apr. 13, 2010). Rather, that publication provides one-sentence answers to 10 questions such as: "Why must I pay tax on my 'free' cellular phone?" and "I bought a sweater and paid the store extra to gift-wrap it. Why was the gift-wrapping charge taxed?" This is the only Board publication that purports to provide help to consumers with sales tax questions. *See* State Bd. of Equalization, *Sales & Use Tax Publications*, at http://www.boe.ca.gov/sutax/staxpubsn.htm (last visited Apr. 13, 2010) (listing over 80 publications for taxpayers and one for "consumers").

Target also boasts that the Board's web site "provides consumers" with resources for contacting and making appointments at Board district offices throughout the state for "specific questions and complaints." But as

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For instance, while DirecTV argues that consumers have the right to "file a complaint with the Board" under Tax Code § 6901.5 (DirecTV Br. at 11), that provision does not instruct consumers on how to file a complaint; does not obligate the Board to respond to consumer complaints; and actually provides that even if the Board *does* discover that a retailer has collected excess sales tax reimbursement, the retailer has the option of simply turning over the wrongly collected money to the State. *See* Opening Br. at 9-11; Reply Br. at 29–30 (contrasting consumers' "right to complain" with actual remedies taxpayers have under the Tax Code). The Board itself admits that Plaintiffs do not have administrative remedies in the Tax Code. Board Br. at 3 (contrasting consumers paying sales tax reimbursement with "use tax taxpayers and federal purchasers in sales tax transactions, *both of whom already have available administrative remedies*") (emphasis added).

The "numerous" non-legal remedies the Board argues consumers have are not remedies at all. *See* Board Br. at 41. For instance, the Board argues that consumers can try calling some phone numbers listed in its Publication 51. *Id.* But Publication 51 itself makes clear that the products

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the Board's website makes clear, those resources are for *taxpayers*, not consumers. *See* State Bd. of Equalization, *Make an Appointment*, at http://www.boe.ca.gov/sutax/appointment.htm (last visited Apr. 13, 2010) (instructing taxpayers that in order to schedule an appointment they must "select the type of appointment needed" from a list of issues such as "obtain a seller's permit"; "close your seller's permit"; "obtain an escrow clearance"; and "reinstate a revoked permit.")

and services it describes are "intended to help California *taxpayers* such as small business owners, tax practitioners, and nonprofit organizations, with their *tax obligations*." State Bd. of Equalization, *Pub. 51: Resource Guide to Free Tax Products and Services* at 1 (Sept. 2009), available at http://www.boe.ca.gov/pdf/pub51.pdf (emphasis added); *see also id.* (describing resources to "help[] taxpayers comply with the tax laws" and "directing you, the taxpayer, through the entire process from starting your business through correctly filing returns, to your rights as a California taxpayer"). This is entirely consistent with the Board's responsibility to administer the Tax Code, which governs the relationship between the State and its taxpayers—not third parties. But even if the Board *did* provide telephone numbers specifically for nontaxpayers like Plaintiffs—and even if some consumers actually called—the ability to call the Board is not a "remedy" because no law requires the Board to take any kind of action on behalf of consumers. *See* Reply at 29–30.[12] The Board admits that even if it chose to take some action, it could provide only "prospective relief" by acting to "change a retailer's tax practices" going forward. *See* Board Br. at 42. And unsurprisingly, the Board fails to point to any relief—prospective

[12] As Plaintiffs have previously explained, it is extremely unlikely that any significant number of consumers would realize they had wrongly been charged for sales tax reimbursement and individually report their concern the Board. Appellants' Opening Br. at 44.

or otherwise—that it has provided to a consumer nontaxpayer in response to a complaint about wrongfully charged sales tax reimbursement. Indeed, the Board's position is apparently that retailers are not required to comply with tax exemptions at all. Board Br. at 13.

The Board's suggestion that Plaintiffs can "contest the validity of SBE regulations" or "invoke[] the power of the Legislature" to "request relief from . . . erroneous Board staff interpretations" (Board Br. at 43) is laughable. Plaintiffs' claims do not challenge any Board regulation or interpretation as invalid or erroneous. On the contrary, Plaintiffs rely on Regulation 1603(e) and the Board's interpretations of it, which make clear that the sales at issue in this case are exempt from sales tax. *See* Reply Br. at 27–28. Plaintiffs' dispute is not with the Board, but with Target. Until and unless the Legislature amends the consumer protection laws to exempt from their scope claims against retailers for business practices that involve charges labeled "sales tax reimbursement," Plaintiffs need not seek a change in law in order to obtain redress.

III. THE OTHER ARGUMENTS MADE BY TARGET'S *AMICI* ARE NOT PROPERLY BEFORE THE COURT AND ARE MERITLESS.

A. The Court Should Not Affirm Dismissal of Plaintiffs' Claims Based On New Arguments Raised Solely By Target's *Amici*.

Target's *amici* toss out a number of other arguments for why, assuming Plaintiffs' claims are not barred by the Constitution or Tax Code, they still should not be permitted to go forward. Specifically, Target's *amici* suggest that imposing sales tax reimbursement charges on tax-exempt sales is not a "business practice" within the scope of the consumer protection laws; that Plaintiffs have failed to state a claim under the "unfairness" prong of the UCL; and that Plaintiffs' claims are barred by the "voluntary payment doctrine." These arguments, which are made for the first time in eleventh-hour *amicus* briefs, are not remotely relevant to the questions on which this Court granted review and should not be considered for that reason alone. Target has not sought dismissal of any of Plaintiffs' claims on these grounds. Therefore, the parties never briefed these issues in the courts below, and no court has yet passed on any of them. This Court consistently declines to rule on issues raised under such circumstances.

In *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 711, 209 Cal.Rptr. 682, this Court reiterated the "universally recognized" rule that "an appellate court will consider only those questions properly raised by the appealing parties . . . and any additional questions presented in a brief filed

by an amicus curiae will not be considered." (Citations omitted.) *See also Roberts v. City of Los Angeles* (1939) 7 Cal.2d 477, 489, 61 P.2d 323 ("[T]he court will not determine or pass upon other questions which might have been raised [by the parties] and which are suggested by the amici curiae.") (citation omitted); *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 446 n.10, 128 Cal.Rptr.2d 454 ("We adhere to the general rule that issues not raised by the appealing parties but advanced for the first time by amici curiae are not considered.") (citation omitted); *California Assn. for Safety Educ. v. Brown* (1994) 30 Cal.App.4th 1264, 1275, 36 Cal.Rptr.2d 404 (noting that "California courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court, and are not urged by the parties on appeal"); *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-14, 187 Cal.Rptr. 310 ("Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.") (citations omitted). Given the "universally recognized" rule that California courts do not consider the arguments of *amici* advanced for the first time on appeal, there is no basis for extraordinary treatment of these eleventh-hour arguments here.

B. This Appeal is Not an Appropriate Vehicle For Resolving the UCL's "Unfairness" Test.

Target's *amici* argue that Target's alleged charging of sales tax reimbursement on tax-exempt sales is not "unfair" under the UCL. *See* Retailers' Br. at 29–42, Board Br. at 19–20. There is no basis for dismissing Plaintiffs' claims on this basis. As a threshold matter, this appeal would present a particularly inappropriate vehicle for the Court to determine what test applies to consumer claims under the UCL's "unfairness" prong, given that the parties have never briefed this issue and the courts below never addressed it. Indeed, the Court only recently denied review of a case in which the issue was squarely presented. *Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581, 101 Cal.Rptr.3d 697, *pet. for review denied*, No. S179049, Mar. 10, 2010.

Even if the question of whether Plaintiffs have stated a claim under the "unfairness" prong were properly before the Court, it should not be decided on demurrer without further factual development. Allegations that a business practice is unfair under the UCL raise questions of fact which can only be tested by a summary judgment motion or at trial. *See McKell re Wash. Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1473, 49 Cal.Rptr.3d 227 ("[T]he determination of whether [a business practice] is unfair is one of fact which requires a review of the evidence from both parties. It thus cannot usually be made on demurrer.") (citations omitted); *Progressive*

West Ins. Co. v. Yolo County Super. Ct. (2005) 135 Cal.App.4th 263, 286, 37 Cal.Rptr.3d 434 ("The balancing test required by the unfair business practice prong of section 17200 is fact intensive and not conducive to resolution at the demurrer stage."); *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1167, 93 Cal.Rptr.2d 439 ("'unfairness' is an equitable concept that cannot be mechanically determined under the relatively rigid legal rules applicable to the sustaining or overruling of a demurrer") (citation omitted); *cf. People v. McKale* (1979) 25 Cal.3d 626, 635, 159 Cal.Rptr. 811 ("What constitutes 'unfair competition' or 'unfair or fraudulent business practice' under any given set of circumstances is a question of fact . . . .") (citations omitted).

At any rate, even if Plaintiffs ultimately failed to demonstrate that Target's conduct is unfair, that would not preclude them from surviving demurrer on the alternative grounds that Target's practice was "unlawful" and/or "fraudulent" under the UCL. See *Cel-Tech Commc'ns*, 20 Cal. 4th at 180 (because the UCL is "written in the disjunctive, . . . a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa"). The only question presented in this appeal is whether all of Plaintiffs' causes of action are barred by the Constitution and Tax Code. If the Court holds that they are not, it should remand the case to the trial court to resolve any remaining issues in the first instance.

C. Target's *Amici*'s New Arguments Lack Merit.

Even if they were properly before the Court, Target's *amici*'s tangential arguments provide no basis for affirming the demurrer.[13]

1. Target's Alleged Practice of Charging Its Customers For Sales Tax Reimbursement On Tax-Exempt Items Is a "Business Practice" Under the UCL.

There can be no serious doubt that Target's alleged practice of charging its customers for sales tax reimbursement on tax-exempt items is a "business practice." There is no requirement under the UCL, notwithstanding the Board's argument to the contrary (Board Br. at 17), that the challenged practice comprise a defendant's primary business. *See, e.g., Bondanza v. Peninsula Hosp. & Med. Ctr.* (1979) 23 Cal.3d 260, 152 Cal.Rptr. 446 (hospital's method of collecting patient fees was unlawful under UCL even though hospital's primary business was providing medical services, not collecting fees); *People v. James* (1981) 122 Cal.App.3d 25, 177 Cal.Rptr. 110 (UCL applied to allegations that liquor store owner had entered into kickback scheme with tow truck company to tow vehicles from his allotted parking places). Nor must a plaintiff demonstrate that a defendant has retained the benefit of its conduct or profited from the unfair practice. *See Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23

[13] If the Court does elect to resolve any new issues raised solely by Target's *amici*, Plaintiffs respectfully request that the Court grant the parties leave to address them in supplemental briefing.

Cal.4th 163, 177, 96 Cal.Rptr.2d 518 (focus of restitution remedy under UCL is on restoring money to the victim). Rather, the statute prohibits "wrongful business conduct in whatever context such activity might occur." *Cel-Tech Commc'ns*, 20 Cal.4th at 180. As former legislators Bagley and Keene explain:

> That defendant may not retain for itself the wrongly charged "sales tax reimbursement," does not shield it from liability to its customers for having acted illegally in making them pay "reimbursement" in advance for an imaginary tax, one that is not owed. Whether the retailer benefits greatly by keeping these reimbursement charges itself or turns them over to the state and merely reaps the more modest savings of not having to program its cash registers to recognize and account for "exempt" from "non exempt items," is legally beside the point. . . . The touchstone for redress under the[] consumer protection laws is "injury" to the consumer, not benefit or profit to the business engaged in the unlawful conduct.

Legislators' Br. at 5-6.

The Board's only remaining theory, then, is that when a business imposes a charge on its customers that (it claims) is for sales tax reimbursement, the retailer is "facilitat[ing] the payment of sales tax," and that sales tax is a "non-consensual legal obligation." Board Br. at 16. But the argument that imposing sales tax reimbursement is somehow a "legal obligation"—and thus not a "business practice"—cannot be squared with the Tax Code. Under the Tax Code, as explained above, retailers are legally required to pay sales tax (on taxable items) to the State. Cal. Rev. & Tax Code § 6051. But they are expressly *not* required to impose sales tax

reimbursement, *even on items that are subject to sales tax*. Rather, sales tax reimbursement is a matter of contract. *See* Cal. Civ. Code § 1656.1; *Livingston Rock & Gravel*, 136 Cal.App.2d at 161–62. As the Board admits, "a 'business practice' denotes some kind of relationship, *usually contractual*, among the parties." Board Br. at 17 (emphasis added). Furthermore, the cases cited by the Board demonstrate that a retailer's choice to impose and itemize sales tax reimbursement (rather than absorb the cost of sales tax or make sales on a tax-included basis) is purely a business decision. *See, e.g.*, *DeAryan v. Akers* (1939) 12 Cal.3d 781, 785, 87 P.2d 695 (recognizing that charging for sales tax reimbursement is for some retailers an "economic necessity" if the retailer is "to remain in business"); *Western Lithograph*, 11 Cal.2d at 164 (sales tax reimbursement is, "so far as the consumer is concerned, part of the price paid for the goods"). The Board concedes that a business might intentionally impose sales tax reimbursement on tax-exempt items in order to avoid the "overhead expenses" of complying with the exemption. Board Br. at 14.

In sum, both the law and practical realities dictate the conclusion that the decision to impose sales tax reimbursement is a business decision and is unrelated to the retailer's legal obligation to pay sales tax. There is no basis for arguing that this practice is not encompassed by the "sweeping" scope of the UCL. *Cel-Tech Commc'ns*, 20 Cal.4th at 180. Notably, neither Target nor its Retailer *amici* dare make this argument.

2. Plaintiffs' Claims Are Not Barred By the "Voluntary Payment Doctrine."

Target's *amicus* DirecTV argues that Plaintiffs' lawsuit should be barred by the so-called "voluntary payment doctrine." *See* DirecTV Br. at 19–21. But that doctrine has no bearing on this case, because it has been applied only in the narrow set of cases in which a taxpayer seeks to recover taxes paid in error and there is no statute under which the taxpayer is entitled to a refund. *See, e.g., Sierra Inv. Corp. v. Sacramento County* (1967) 252 Cal.App.2d 339, 342, 60 Cal.Rptr. 519 (voluntary payment doctrine prohibited recovery of taxes paid by mistake on a parcel of real property plaintiff did not own). DirecTV has failed to identify a single case where this doctrine was applied to bar consumers from recovering money obtained through unfair or unlawful business practices under the UCL, and Plaintiffs submit that no such case exists.

The void of cases addressing the voluntary payment doctrine in the context of California's consumer protection statutes is unsurprising given that the doctrine simply cannot be reconciled with the UCL. This Court has long recognized that the purpose of the UCL is to provide consumers with a vehicle to "obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition." *State v. Altus Finance, S.A.* (2005) 36 Cal.4th 1284, 1303, 32 Cal.Rptr.3d 498,

512 (*citing Kraus v. Trinity Management Servs., Inc.* (2000) 23 Cal.4th 116, 126, 96 Cal.Rptr.2d 485). Indeed, since the passage of Proposition 64, a UCL action may *only* be brought by a person "who has suffered injury in fact and has lost money or property"—by definition a person who has paid the charge at issue. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 306, 93 Cal.Rptr.3d 559. DirecTV's untenable position that the UCL, which expressly provides the right for consumers to seek restitution for money taken by means of unfair or illegal business practices, is somehow trumped by the archaic "voluntary payment doctrine" finds no support in the laws of this state or the jurisprudence of this Court.[14]

[14] Target's Retailer *amici* make the related argument that "[o]nce the customer has agreed to pay [a charge], he or she should not be permitted to file a lawsuit seeking a refund." Retailers' Br. at 19–20. The retailers' theory is that a customer is presumed to have agreed to pay sales tax reimbursement on a transaction if sales tax appears on the receipt, and "cannot then use the UCL to avoid the agreement." Retailers' Br. at 19. This argument, like the argument that Plaintiffs' claims are barred by the "voluntary payment doctrine," cannot withstand scrutiny. The existence of a receipt or other evidence of a contractual agreement between plaintiff and defendant is typical in California consumer cases and is hardly a ground for dismissal. *See, e.g.*, *McKell*, 142 Cal.App.4th at 1471 ("A cause of action for unfair competition under the UCL may be established independent of any contractual relationship between the parties.") (quotations omitted). Furthermore, the itemization of sales tax reimbursement on a receipt creates only a "rebuttable presumption" that the purchaser has agreed to pay the charge, and cannot be construed as evidence of intent to pay sales tax reimbursement on a tax-exempt item. *See* Cal. Civ. Code § 1656.1(a)(3), (d); *Amicus Curiae* Br. of Assn. of Concerned Taxpayers in Support of Plaintiffs and Appellants at 12-13.

DirecTV's reliance on *Southern Service Co. v. Los Angeles County* (1940) 15 Cal.2d 1, 5, 97 P.2d 963, is misplaced. *See* DirecTV Br. at 19. In *Southern Service*, taxpayers sought to recover taxes illegally collected pursuant to an excessive county tax rate. The county argued that the refund claim should be dismissed because the state legislature, seeking to insulate the state's economy during the Great Depression, had amended the law to bar refunds of taxes collected prior to 1939 where the funds had already been allocated for a public purpose. *See* 15 Cal.2d at 6. The amendment applied to pending actions, and the only exceptions were taxes paid under duress or coercion. *Id.* At issue in *Southern Service* was whether the legislature had acted within its constitutional powers in withdrawing the right to a refund; the Court concluded that it had. *Id.* at 11-12. *Southern Service* has no bearing on the question presented here, as it does not speak to whether consumers may seek restitution under the UCL.

In sum, the "gotcha" system envisioned by Target's *amici*, under which retail customers cannot challenge a charge if they have already paid it, simply does not exist under California law.

3. The Cost of Complying With Consumer Protection Laws Does Not Justify Immunizing Retailers from Liability.

Many of Target's *amici*'s arguments as to why Plaintiffs should not be permitted to pursue their claims are actually policy arguments against the entire notion of enforcing consumer protection laws. For instance,

Target's *amici* argue that if retailers are required to comply with tax laws in order to avoid liability to their customers, prices will go up and "the public will be harmed." DirecTV Br. at 18; *see also* Board Br. at 14 (insisting that if Target is required to properly distinguish between exempt and non-exempt sales, the "administrative expense" of such legal compliance "would likely be passed on to Target's customers, in the form of higher prices"). But Target's *amici* offer no proof that holding corporations accountable under consumer protection laws will necessarily increase the costs of goods or services.[15]

More importantly, "the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws." *Ting v. AT&T* (N.D. Cal. 2002) 182 F.Supp.2d 902, 931 n.16, *aff'd in relevant part* (9th Cir. 2003) 319 F.3d 1126 (citations omitted); *cf. A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 491–92, 186 Cal.Rptr. 114 ("[R]isk of loss is most appropriately borne by the party best able to prevent its occurrence."). If Target's *amici* truly believe that California retail customers would be better off without

[15] On the contrary, because they provide incentives to cease unfair practices, consumer class actions to remedy unfair business practices often *reduce* prices. *See* Public Citizen, *Six Common Transactions That Cost Less Because of Class Actions* (Aug. 20, 2003), at www.citizen.org/congress/civjus/class_action/articles.cfm?ID=10278.

consumer protection laws, and that the public will benefit if retailers are given free reign to disregard tax exemptions, they are free to direct that sweeping argument to the Legislature.

CONCLUSION

The Court should reverse the decision of the Court of Appeal.

Dated: May 5, 2010 Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(b) and 8.520(c), the undersigned counsel hereby certifies that the foregoing ANSWERING BRIEF IN RESPONSE TO AMICUS CURIAE BRIEFS FILED IN SUPPORT OF TARGET is double-spaced, printed in Times New Roman 13 point text, and contains 11,935 words. The above word count was determined using the Word Count function of the Microsoft Word program, and excludes words in the Table of Contents and Table of Authorities.

Dated: May 5, 2010 Respectfully Submitted,

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