

NO. S173972

IN THE SUPREME COURT OF CALIFORNIA

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**KIMBERLY LOEFFLER, et al.,**  
*Plaintiffs and Appellants,*

v.

**TARGET CORPORATION,**  
*Defendant and Respondent.*

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**Appellants' Opening Brief on the Merits**

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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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## **STATEMENT OF THE ISSUES**

1. Does Article XIII, section 32 of the California Constitution bar consumers from filing lawsuits against retailers under applicable law, including California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*), for imposing sales tax reimbursement charges on transactions that are not taxable? (No.)
  
2. Does the California Revenue & Tax Code (Cal. Rev. & Tax Code §§ 6001 *et seq.*) bar consumers from filing lawsuits against retailers under applicable law, including the UCL and CLRA, for imposing sales tax reimbursement charges on transactions that are not taxable? (No.)

## **KEY LEGAL PROVISIONS**

### **Cal. Const. art. XIII, § 32:**

No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such a manner as may be provided by the Legislature.

### **Cal. Rev. & Tax Code § 6931:**

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.

### **Cal. Bus. & Prof. Code § 17203:**

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

### **Cal. Civ. Code § 1760:**

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

## SUMMARY OF ARGUMENT

Plaintiffs allege that Target, a retailer, illegally imposed sales tax reimbursement charges on sales of goods that are tax-exempt. Seeking redress, they have brought quintessential consumer protection claims under California’s landmark consumer protection statutes: the CLRA and the UCL. The Second District Court of Appeal, however, held that this lawsuit is barred by Article XIII, section 32 of the State Constitution and its statutory corollary in the Tax Code—provisions that by their own terms are inapplicable to actions against private companies and those that do not seek a tax refund.<sup>1</sup> Prior to that decision, no court had ever expanded the protective reach of these provisions beyond government actors. For four reasons, the Court of Appeal’s decision should be reversed.

First, Article XIII, section 32 of the California Constitution does not apply to or bar this lawsuit. It applies only to proceedings “*against this State or any officer thereof.*” Cal. Const. art. XIII, § 32 (emphasis added); *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 281 n.6, 165 Cal.Rptr. 122 (noting that section 32 “applies only to actions against the state”). This is not a lawsuit against the “State or any officer thereof.” The State of California is not a party to this action. Target is not an officer of the State. Section 32 does not bar actions by consumers

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<sup>1</sup> The Court of Appeal’s opinion was published at *Loeffler v. Target Corp.* (2009) 93 Cal.Rptr.3d 515, 173 Cal.App.4th 1229.

against private companies. Furthermore, the second sentence of section 32 only applies to actions “to recover [a] tax paid,” Cal. Const. art. XIII, § 32, and this lawsuit does not seek to recover a tax paid. In California, retailers—not their customers—pay sales tax to the State. Consumers pay sales tax reimbursement charges to retailers. This lawsuit concerns illegal sales tax reimbursement charges. Finally, by expanding the scope of section 32 to Target, the Court of Appeal distorted the purpose of the provision, which is to protect the State against delays in tax collection, not to immunize companies that violate the consumer protection laws.

Second, the California Tax Code does not apply to or bar this lawsuit. Like Article XIII, section 32 of the Constitution, which it mirrors, Tax Code section 6931 bars only litigation against the State. It does not apply to—let alone bar—actions by consumers against private companies like Target. *See Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 Cal.2d 156, 163, 78 P.2d 731 (for purposes of sales tax, “[t]he relationship of sovereign power and taxpayer [is] between the state and the retailer, not between the state and the consumer”). Likewise, the Tax Code’s requirement that taxpayers must exhaust their administrative remedies before pursuing a tax refund lawsuit does not apply to nontaxpayers such as Plaintiffs, who have no administrative remedies to exhaust. In fact, the regulations implementing the Tax Code expressly recognize the rights of consumers to “pursue refunds from persons who

collected tax reimbursement from them in excess of the amount due.” 18  
Cal. Code Regs. § 1700(b)(6).

Third, the consumer protection statutes under which Plaintiffs have brought this lawsuit plainly permit these claims. The UCL and CLRA were enacted to provide remedies when businesses commit unfair or illegal acts that take money from consumers. It is black-letter law that these statutes are to be read broadly. The UCL, for example, provides that courts may order restitution of “*any* money . . . which may have been acquired by means of such unfair competition.” Cal. Bus. & Prof. Code § 17203 (emphasis added). This Court has described the statute’s coverage as “sweeping, embracing *anything* that can properly be called a business practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548 (emphasis added). As for the CLRA, by its very terms it is to be “liberally construed” to protect consumers “against unfair and deceptive business practices.” Cal. Civ. Code § 1760. Neither the UCL nor the CLRA contains an exception to courts’ broad authority to remedy and enjoin unlawful and deceptive practices where those practices are alleged to involve wrongful sales tax reimbursement charges. *Cf. Dell, Inc. v. Super. Ct. (Mohan)* (2008) 159 Cal.App.4th 911, 930, 71 Cal.Rptr.3d 905 (holding that retailer had improperly imposed sales tax reimbursement charges in putative consumer class action under UCL and

CLRA). A retailer should not automatically be immune from liability under California's consumer protection statutes whenever the allegedly unfair charges at issue implicate an interpretation of the Tax Code. *See* Letter of Edmund G. Brown, Jr., Attorney General, in Support of Petition for Review at 4 (Cal. Sup. Ct. No. S173972, July 6, 2009) ("A.G. Letter") (lower court decision "effectively removes an unscrupulous seller's possible reticence not to charge his customers a bogus amount of money by calling it 'sales tax.'").

Fourth, the Court of Appeal's interpretation of the law leaves California consumers with no meaningful remedy when subjected to an unlawful practice that occurs under the guise of a sales tax reimbursement charge. Plaintiffs do not dispute that, as nontaxpayers, consumers lack standing to seek redress from the State Board of Equalization ("Board") under the Tax Code. Nor does the Tax Code itself provide consumers with a cause of action against retailers that have wrongfully imposed sales tax reimbursement charges. By holding that consumers are barred from seeking redress *outside* of the Tax Code for these wrongful charges, the Court of Appeal cut off their only viable avenue of relief. If the lower court's decision becomes law, a retailer's conduct will be effectively unreviewable as long as it imposes wrongful charges under the guise of sales tax reimbursement. *See* A.G. Letter at 1 ("[T]he Court of Appeal decision opens a loophole that would allow unscrupulous businesses to take

advantage of consumers and collect greater sums . . . than the consumers actually owe, free from the worry that they can be held accountable.”). The suggestion of the court below that consumers’ interests will be sufficiently protected by the Board or the retailers that have overcharged them is unrealistic at best. Neither the Board nor the retailer has any financial interest in seeing consumers recoup their losses.

In sum, nothing in the California Constitution or the Tax Code bars these consumers’ claims against Target, and to hold otherwise would create unwarranted immunity from judicial review of a large category of illegal, unfair, and deceptive business practices. The decision of the Court of Appeal should be reversed.

### **STATEMENT OF THE CASE**

#### **A. Factual Background**

Plaintiffs Kimberly Loeffler and Azucema Lemus allege that Target, a private retailer, imposed and collected sales tax reimbursement charges of 8.25% on their purchases of hot coffee drinks “to go” or for “take out” from various Target stores in California, despite a provision in the Tax Code that exempts these products from sales tax. (AA 86 at ¶ 5.) The basis for Plaintiffs’ allegations is that Tax Code section 6359 and Sales and Use Tax Regulation 1603 provide that the sale of hot coffee drinks “to go” or for “take-out” is not subject to sales tax. (AA 87 at ¶ 10.) Plaintiffs allege that

Target’s improper sales tax reimbursement charges violated California’s consumer protection laws.

**B. The Difference Between Sales Tax and Sales Tax Reimbursement Charges**

Under California law, retailers—not their customers—are the payers of sales tax. As taxpayers, retailers (unlike their customers) are subject to detailed requirements and procedures under the sales tax provisions of the Tax Code. Retailers, in turn, are permitted, but not legally required, to collect “sales tax reimbursement” charges from consumers as a matter of contract on purchases of tangible property subject to sales tax.

**1. Sales Tax**

The State of California imposes sales tax on all retailers “[f]or the privilege of selling tangible personal property at retail.” Cal. Rev. & Tax Code § 6051. Sales tax is “imposed upon the seller, not the buyer.” *Gen. Elec. Co. v. State Bd. of Equalization* (1952) 111 Cal.App.2d 180, 185, 244 P.2d 427. Thus, retailers, not their customers, are taxpayers for purposes of sales tax, and “the tax relationship is between the *retailer only* and the State.” *Livingston Rock & Gravel Co. v. Salvo* (1955) 136 Cal.App.2d 156, 160, 288 P.2d 317 (emphasis added). The Tax Code sets out detailed procedures for, among other things, the authority of the Board to determine whether the tax returns submitted or amount of tax paid by a retailer are deficient (Cal. Rev. & Tax Code § 6481); to assess penalties against the

retailer for negligent underpayment (*id.* § 6484) or fraud (*id.* § 6485); and to bring lawsuits against the retailer to collect delinquent tax (*id.* § 6711).

In the event a retailer contends that it is being required to remit more sales tax than is actually owed, the retailer may file a lawsuit seeking a refund from the State. Before doing so, however, the retailer must comply with two prerequisites. First, it must pay the disputed tax. Cal. Const. art. XIII, § 32; Cal. Rev. & Tax Code § 6931. This rule is known as the “pay first, litigate later” rule. *Cal. Logistics, Inc. v. State* (2008) 161 Cal.App.4th 242, 247, 73 Cal.Rptr.3d 825. Second, the retailer must file an administrative claim for a refund with the Board under Chapter 7, Article 1 of the Tax Code. *See* Cal. Rev. & Tax Code §§ 6901, 6902, 6902.3, 6904. If the Board denies the administrative claim, the retailer may then bring a tax refund suit in court against the Board under Chapter 7, Article 2. *See id.* § 6932.<sup>2</sup>

## **2. Sales Tax Reimbursement Charges**

Retailers are permitted, though not required, to pass the cost of sales tax on to their customers by imposing sales tax reimbursement charges on taxable transactions. Assuming an item is subject to sales tax, a retailer may add a sales tax reimbursement charge to the price of the item if the

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<sup>2</sup> Tax Code Section 6932 provides: “No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1.”

“agreement of sale” between the retailer and the customer so provides. Cal. Civ. Code § 1656.1; 18 Cal. Code Regs. § 1700(a)(1). This agreement is normally the purchase receipt.

The Board’s regulation implementing the sales tax refund provisions of the Tax Code expressly states that customers may “pursue refunds from persons who collected tax reimbursement from them in excess of the amount due.” 18 Cal. Code Regs. § 1700(b)(6). Neither the Tax Code nor the regulations, however, provide any procedures by which customers may file a claim or lawsuit over wrongful sales tax reimbursement charges.

The Tax Code does not obligate the Board to investigate whether a retailer has imposed sales tax reimbursement charges when no sales tax was legally due, nor to ensure that any wrongfully charged sales tax reimbursement is refunded to consumers. Under the Tax Code, excess sales tax reimbursement charges imposed by retailers may be remitted to the State instead of being returned to the customer. In the event the Board does ascertain that a retailer has imposed a sales tax reimbursement charge on a transaction that is not taxable, the Tax Code provides that the retailer must *either* return the money to the customer or remit it to the State. Cal. Rev. & Tax Code § 6901.5. The implementing regulations likewise provide that retailers may refund sales tax reimbursement charges to their customers “[w]henver the board ascertains that a [retailer] has collected excess sales tax reimbursement,” but only if the retailer “desires to do so,

rather than incur an obligation to the state.” 18 Cal. Code Regs. §§ 1700(b)(2), (b)(3). If a retailer “fails or refuses to refund” tax reimbursement charges wrongfully collected from consumers, the excess money from sales tax reimbursement charges can be paid to the State and offset the retailer’s tax liability. *Id.* § 1700(b)(4). Significantly, the regulations provide that “[t]he provisions of this regulation with respect to offsets do 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.* § 1700(b)(6).

### **C. Procedural History**

Plaintiffs filed this putative class action on October 6, 2006, and filed a Second Amended Complaint (which was the operative complaint at the time the action was dismissed by the trial court) on March 2, 2007. They asserted several causes of action, including (1) violation of California’s Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*); (2) violation of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*); (3) violation of California Revenue and Tax Code § 6359; and (4) money had and received.<sup>3</sup> (AA 85, AA 21.) On behalf of a class of all similarly-situated California residents, Plaintiffs sought restitution,

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<sup>3</sup> Plaintiffs originally asserted additional causes of action for conversion and negligent misrepresentation but did not appeal the dismissal of those claims.

damages, and an injunction prohibiting Target from continuing to impose the unlawful charges.

Target demurred. On April 9, 2007, the Superior Court sustained the demurrer and entered judgment in favor of Target, holding that Plaintiffs were not “appropriate complainant[s] pursuant to the statutory [scheme]” and that they could not “file a taxpayer’s action for . . . relief from this kind of tax.” (RT B-2:3–18, AA 177) Plaintiffs timely appealed on May 17, 2007. (AA 181.)

In a published decision, the Court of Appeal affirmed the judgment of the Superior Court on May 12, 2009. The court first acknowledged that, because consumers such as Plaintiffs are not taxpayers of sales tax, they cannot seek a sales tax refund from the State under the Tax Code. The court explained:

The only way to litigate a sales tax refund dispute under [the Tax Code] is for the retailer, as the taxpayer, to pay the tax, exhaust its administrative remedies by filing a claim for a refund with the [Board], and if the claim is denied or not acted upon, to file a suit for a sales tax refund. Because they are not the taxpayers, plaintiffs cannot file a *claim* for a sales tax refund and thus cannot file a *suit* for a sales tax refund. In other words, plaintiffs do not have standing to commence a sales tax refund suit.

*Loeffler*, 93 Cal.Rptr.3d at 518. The court then held that the Tax Code itself—specifically section 6901.5—does not provide a private right of action for consumers against retailers. *Id.* at 524–26.<sup>4</sup>

The court further held that Plaintiffs cannot seek redress against retailers that have wrongfully imposed sales tax reimbursement charges by filing consumer protection and common law claims, because these claims are barred by Article XIII, section 32 of the California Constitution and its statutory corollary, section 6931 of the Tax Code. *Id.* at 519, 526–31. The court did not analyze the purpose and scope of the UCL and CLRA or the extensive body of law applying these statutes. Nor did it analyze the plain language of the constitutional and Tax Code provisions, which bar only actions against the State or its officers and prepayment litigation by taxpayers.

Instead, the court characterized this lawsuit as a “sales tax dispute,” and noted that Article XIII, section 32 provides that tax refunds may only be recovered in a manner provided by the Legislature. *Id.* at 518–19. The court found that the “manner provided by the Legislature” was to exhaust administrative remedies with the Board before filing suit, and reasoned that, because Plaintiffs as nontaxpayers were not permitted to use that administrative process, they were not permitted to file a lawsuit. As a

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<sup>4</sup> Plaintiffs do not appeal this part of the lower court’s ruling.

result, the court essentially put consumers in a “Catch-22”: not only did they lack standing under the Tax Code, but they were barred from seeking relief except through that same Tax Code. *Id.* The court also interpreted Article XIII, section 32 as prohibiting any court action that “may affect the state’s sales tax revenues,” and found that Plaintiffs’ suit would have such an impermissible effect. *Id.* at 527. On these grounds, the court affirmed the dismissal of Plaintiffs’ claims.

On September 9, 2009, this Court granted Plaintiffs’ Petition for Review.

**D. Statement of Appealability**

The decision and judgment by the trial court sustaining Target’s demurrer finally disposed of all issues between the parties and is a final, appealable judgment.

**STANDARD OF REVIEW**

Because this appeal involves purely legal questions, the Court should review the Court of Appeal’s decision *de novo*. *See McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415, 106 Cal.Rptr.2d 271. In addition, at this stage of proceedings, the Court should assume the truth of the factual allegations in the complaint. *See Gerawyn Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515–16, 101 Cal.Rptr.2d 470.

## ARGUMENT

### **I. ARTICLE XIII, SECTION 32 OF THE CALIFORNIA CONSTITUTION DOES NOT APPLY TO OR BAR THIS LAWSUIT.**

Target seeks to avoid scrutiny under the lens of California’s broad consumer protection statutes by invoking a shield intended to protect not private companies, but only the State. It erroneously claims Article XIII, section 32 of the California Constitution presents an absolute bar to the instant action. The section provides in its entirety:

No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such a manner as may be provided by the Legislature.

Cal. Const. art. XIII, § 32. By disregarding the plain language of the section making it inapplicable to this case, Target manufactures for itself and the retail community wholesale immunity from suit for deceptive practices involving sales tax reimbursement charges. This immunity has no basis in either law or policy.

#### **A. Section 32 Only Applies to and Bars Actions Against the “State or Any Officer Thereof.”**

The language of section 32’s first sentence limiting its applicability to proceedings against the State or its officers is unambiguous: its prohibition against injunctions only applies in a court proceeding “against this State or any officer thereof.” Cal. Const. art. XIII, § 32. This

provision is plainly inapplicable to Plaintiffs' action, which is not against the State or State officers.

There is no "safe harbor" in section 32 for entities other than the State. "When the language of a statute or constitutional provision is clear and unambiguous, judicial construction is not necessary and the court should not engage in it." *Agnew v. Cal. State Bd. of Equalization* (1999) 21 Cal.4th 310, 323, 87 Cal.Rptr.2d 423; *see also Rossi v. Brown* (1995) 9 Cal.4th 688, 695, 38 Cal.Rptr.2d 363 ("Where the language [of a constitutional provision] is clear, it should be followed."). Accordingly, in *Eisley v. Mohan* (1948) 31 Cal.2d 637, 641, 192 P.2d 5, this Court held that "the section applies only to an action against the state or an officer thereof with respect to his duties in assessing or collecting a state tax for state purposes." Interpreting a predecessor to section 32 containing identical limiting language, the Court found the express prohibition against suing the State meant the section presented no bar to relief in an action against a *county* assessor challenging a *local* property tax assessment.<sup>5</sup> *Id.* at 641–42. Thirty-two years later, after section 32 had been amended to its present form, this Court once again confirmed that "Section 32 applies only to

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<sup>5</sup> Slight differences in language in the provisions preceding the current section 32 are immaterial for purposes of this case. "Since 1910, there have been similar constitutional provisions which have been subject to numerous minor revisions and renumberings." *Pacific Gas & Elec. Co.*, 27 Cal.3d. at 280 n.3.

actions against the state.” *Pacific Gas & Elec. Co.*, 27 Cal.3d at 281 n.6 (citing *Eisley*); see also *Howard Jarvis Taxpayers Ass’n v. City of La Habra* (2001) 25 Cal.4th 809, 822 n.5, 107 Cal.Rptr.2d 369 (finding section 32 did not apply in action against local governments). Clearly, then, the section does not apply here, in an action against a private company that can make no claims to be a governmental body, much less the State itself. Its language clear, “section 32 means what it says.” *Pacific Gas & Elec. Co.*, 27 Cal.3d at 284.

Prior to the lower court’s decision, no court had ever found that section 32 barred litigation outside the context of actions against governmental bodies. To the contrary, courts throughout California have considered the merits of actions against private companies for wrongful sales tax reimbursement charges without so much as a mention of section 32. See, e.g., *Dell*, 159 Cal.App.4th 911 (holding that retailer had improperly imposed sales tax reimbursement charges in putative consumer class action under UCL and CLRA); *Laster v. T-Mobile USA, Inc.* (S.D. Cal. Aug. 11, 2008, No. 05cv1167 DMS (AJB)) 2008 WL 5216255 (declining to dismiss consumers’ claims against retailer for wrongful sales tax reimbursement charges in putative class action under UCL and CLRA); *Botney v. Sperry & Hutchinson Co.* (1976) 55 Cal.App.3d 49, 127 Cal.Rptr. 263 (determining in consumer class action against retailer to recover sales tax reimbursement that retailer’s conduct was lawful); *Livingston Rock &*

*Gravel Co.*, 136 Cal.App.2d at 163 (holding in dispute between retailer and customer that customer was not contractually obligated to pay retailer sales tax reimbursement); *see also Sav-On Drugs, Inc. v. Super. Ct.* (1975) 15 Cal.3d 1, 123 Cal.Rptr. 283 (deciding discovery dispute in context of consumer class action against retailers over excessive sales tax reimbursement charges); *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790, 802, 117 Cal.Rptr. 305 (holding that Board could be joined as party in “customer’s action against the retailer”).

To reach its erroneous interpretation of section 32, the court below ignored the language limiting its applicability (“in any proceeding . . . against this State or any officer thereof”) and focused only on its substantive prohibition. *See Loeffler*, 93 Cal.Rptr.3d at 524 (“The first sentence of article XIII, section 32 bars injunctions against the collection of state taxes.”) As the lower court correctly noted, *id.* at 527, the substantive *rule* of section 32 prohibiting injunctions against the collection of taxes has been “construed broadly to bar not only injunctions, but also a variety of prepayment judicial declarations or findings which would impede the prompt collection of a tax.” *State Bd. of Equalization v. Super. Ct. (O’Hara & Kendall Aviation, Inc.)* (1985) 39 Cal.3d 633, 639, 217 Cal.Rptr. 238. Because of the section’s limiting language, however, that rule *applies* only in actions against the State or its officers. The cases on which the lower court relied did not have occasion to confront the question

of whether the section applies in the first instance because, in each, the action was against the State or its officers. See, e.g., *Western Oil & Gas Ass'n v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 242 Cal.Rptr. 334 (action against Board); *State Bd. of Equalization*, 39 Cal.3d 633 (same); *Pacific Gas & Elec. Co.*, 27 Cal.3d 277 (same); *Modern Barber Colls., Inc. v. Cal. Employment Stabilization Comm'n* (1948) 31 Cal.2d 720, 192 P.2d 916 (action against a State employment commission); *Cal. Logistics*, 161 Cal.App.4th 242 (action against State).<sup>6</sup> The fatal flaw in the lower court's interpretation of section 32 is that it failed to recognize that while section 32's anti-injunction rule is broad, the category of cases in which it applies is exceptionally narrow. This case is plainly not within the category of cases barred by section 32.

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<sup>6</sup> Although *Brennan v. Southwest Airlines* (9th Cir. 1998) 134 F.3d 1405, was an action against a private company and was relied upon by the lower court, it provides no support for the proposition that section 32 applies to actions against non-state actors. Unlike section 32, the federal statute prohibiting injunctions against tax collection at issue in *Brennan* does not contain language limiting its applicability to actions against the State. See 26 U.S.C. § 7421(a) ("Except as provided in [various sections], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."). Moreover, unlike this case, the plaintiffs in *Brennan* were found to be taxpayers seeking a tax refund, and the private company acted as a tax collection agent for the federal government. *Brennan*, 134 F.3d at 1411.

**B. Section 32’s Second Sentence, Restricting the Means By Which Tax Refunds May Be Sought, Only Applies to Lawsuits By Taxpayers to Recover the Tax Paid.**

Further evidence that section 32 does not bar this lawsuit can be found in its second sentence. By its terms, the second sentence of section 32, which restricts the manner in which tax refunds may be sought, applies only to taxpayers—in this case, retailers (who pay sales tax) and not customers (who pay sales tax reimbursement charges). Section 32 clearly states that the party that paid a tax “claimed to be illegal” may sue to “recover the tax paid . . . in such manner as may be provided by the Legislature.” Cal. Const. art. XIII, § 32. Plaintiffs have not paid any sales tax and do not seek a refund of any tax. Sales tax is levied on and paid by retailers for the privilege of selling tangible personal property in the State. *Livingston Rock & Gravel*, 136 Cal.App.2d at 160; Cal. Rev. & Tax Code § 6051. Since Plaintiffs are not taxpayers and do not seek a tax refund, the restriction in section 32 is simply not directed at them.

Nevertheless, according to Target and the lower court, the phrase “in such manner as may be provided by the Legislature” requires Plaintiffs to seek relief only by way of the tax refund procedures in the Tax Code. They say Plaintiffs’ lawsuit must fail because, as nontaxpayers, Plaintiffs are ineligible under the Tax Code to file a claim for refund with the Board, which is a prerequisite to filing a tax refund lawsuit against the Board. *See Loeffler*, 93 Cal.Rptr.3d at 518, 524. They misread section 32 to require

that consumers—nontaxpayers—seek recourse through a procedure that is admittedly unavailable to them.<sup>7</sup>

To reach this absurd conclusion, Target conveniently ignores all words in the second sentence of section 32 that limit its applicability to taxpayers. Target interprets the sentence as though it applies not just to “an action . . . to recover the tax paid . . . after payment,” but to “any action requiring interpretation of the Tax Code.” By doing so, Target’s interpretation takes the phrase “in such manner as may be provided by the Legislature” entirely out of context and renders the remainder of the sentence surplusage, in violation of basic rules of statutory construction. *See Cal. Mfrs. Ass’n v. Pub. Utils. Comm’n* (1979) 24 Cal.3d 836, 844, 157 Cal.Rptr. 676 (“Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided.”); *Fields v. Eu* (1976) 18 Cal.3d 322, 328, 134 Cal.Rptr. 367 (“words or phrases are not to be viewed in isolation”).

Alternatively, Target’s position implicitly assumes that the meaning of the word “tax” in the second sentence of section 32 includes “sales tax

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<sup>7</sup> The lower court’s reliance for this point on *Woosley v. State of California* (1992) 3 Cal.4th 758, 13 Cal.Rptr.2d 30, is misplaced. *Woosley*—an action by taxpayers against the State—merely invoked the uncontroversial principle that “article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature.” 3 Cal.4th at 792. The principle does not apply where tax refunds are not sought.

reimbursement charge,” which is what the instant Plaintiffs paid and claim was wrongfully imposed. But this is at odds with the use of the word “tax” in the first sentence, which contemplates a tax collected by the State rather than a charge imposed by someone else. Moreover, this Court has clearly rejected an expansive reading of the word “tax,” refusing even to include interest accrued on delinquent taxes within the meaning of the word as it is found in section 32. *Agnew*, 21 Cal.4th at 323, 326–27. No sound basis exists here to expand the plain meaning of the word “tax.” *See id.* at 327 (“[C]ourts, in interpreting statutes levying taxes, may not extend their provisions . . . beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included.”).

The second sentence of section 32 constrains the taxpayer in its quest to recover “tax[es] paid,” but says nothing about claims and procedures nontaxpayers such as the instant Plaintiffs may have against private retailers. Those avenues for relief lie elsewhere, outside of the Tax Code, including in the UCL and CLRA.

In sum this action by customers of Target seeking to recover wrongfully imposed charges does not implicate section 32 because the action is not against the State and is not an action to seek a tax refund. By

its plain language, Article XIII, section 32 of the California Constitution does not bar Plaintiffs' claims.<sup>8</sup>

**C. The Court of Appeal Misunderstood and Distorted the Policy Underlying Section 32, Which Is to Protect the State From Delays in Tax Collection, Not to Immunize Private Companies.**

Policy concerns should not override the plain language of a constitutional provision. *Agnew*, 21 Cal.4th at 322–23. But even the underlying policy of section 32 supports the conclusion that it was intended to protect only the State—that is, the State's ability to collect taxes unless and until a particular tax is declared invalid. The policy considerations behind section 32 do not, however, support the notion that private companies are entitled to immunity for violating consumers' rights.

The limitations on the applicability of section 32 are expressions of concern that the State—not the taxpayer—should get the benefit of tax monies while litigation is pending. The overarching concern animating the section is that the prompt payment of taxes is imperative to fund public services which depend on tax revenue, and that any delay in the collection of those taxes due to litigation would be unreasonable and unworkable. As this Court explained:

The important public policy behind this constitutional provision “is to allow revenue collection to continue during

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<sup>8</sup> By the same reasoning, Plaintiffs' common law claim for money had and received is not constitutionally barred.

litigation so that essential public services dependent on the funds are not unnecessarily interrupted.” [*Pacific Gas and Electric Co.*, 27 Cal.3d at 283.] “The fear that persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions. [Citation.] As was said by Mr. Justice Field in *Dows v. City of Chicago*, 11 Wall. (78 U.S.) 108, 110 [ ], ‘Any delay in the proceedings of the officer, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.’” (*Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 731-732 [ ].)

“‘The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason.’ [citations omitted].”

*State Bd. of Equalization*, 39 Cal.3d at 638–39. The concern is to avoid delay in the collection of taxes by the State and its officers. *Modern Barber Colls.*, 31 Cal.2d at 726. In fact, the rule embodied by section 32 is often referred to as the “pay first, litigate later” rule. *Cal. Logistics*, 161 Cal.App.4th at 247. This case does not conflict with the policy goals of section 32 because it will not interfere with the tax collection duties of State officers while litigation is pending.

The lower court held that section 32 barred claims where the relief sought “may affect the state’s sales tax revenues” or would have an “indirect effect . . . on the collection of taxes by the state.” *Loeffler*, 93 Cal.Rptr.3d at 527. The concern of section 32 is not, however, to avoid all potentially negative effects on the State’s tax revenue, as this would

contradict the express language of the section and effectively create a bar to all legal challenges to taxes in all forms.

First, the conclusion that the section's scope is virtually without bounds flies in the face of section 32's language *permitting* postpayment refund actions. *See State Bd. of Equalization*, 39 Cal.3d at 638 (“[T]he sole legal avenue for resolving tax disputes is a postpayment refund action.”). Second, if section 32 barred all litigation that could affect state tax revenues in some way, then *all* tax litigation, including postpayment refund actions, would be barred. A postpayment action that successfully challenged the validity of a tax, for example, would necessarily affect future tax collection and the State's tax revenues, and even that sort of claim would be barred under the lower court's approach. However, postpayment refund actions are indisputably and expressly *permitted* by section 32, and courts resolve them routinely. *See, e.g., Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 105 Cal.Rptr.2d 407; *Ontario Cmty. Found., Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 881, 201 Cal.Rptr. 165; *Western Lithograph Co.*, 11 Cal.2d 156.

Furthermore, the power of courts to declare taxes illegal should not be curtailed by a generalized public policy concern over impairing tax revenue sources. *See Howard Jarvis Taxpayers Ass'n*, 25 Cal.4th at 824–25 (despite disruption to budgetary planning processes, cities and counties could not rely indefinitely on unauthorized taxes). Indeed, judicial

pronouncements on the validity of taxes can promote, rather than hinder, the tax collection process:

State and federal courts are frequently, in one way or another, passing upon the validity of tax regulations after payment of the required tax. These determinations then affect taxpayers and tax collections in other pending and future cases. Rather than an impediment, such decisions must be considered as in aid of tax collection, for they tend to add certainty and conclusive legality to the process.

*Pacific Motor Transp. Co. v. State Bd. of Equalization* (1972) 28

Cal.App.3d 230, 236, 104 Cal.Rptr. 558. Section 32 does not and should not immunize state taxes from all judicial review. *See Monterey Peninsula Taxpayers Ass'n v. County of Monterey* (1992) 8 Cal.App.4th 1520, 1541, 11 Cal.Rptr.2d 188 (“[T]he prohibition[] against . . . injunctions do[es] not promote fiscal stability by immunizing taxes from constitutional scrutiny and judicial invalidation. Nor do[es it] sanction budgetary reliance on revenues generated by an unconstitutional tax.”). Even more to the point, the policy considerations behind section 32 do not contemplate immunity for taxpayers or private companies from lawsuits. Indeed, the interests of private companies are not considered at all. Thus, by extending section 32’s protective reach from the State to Target, the court below not only disregarded the section’s plain language, but it also misinterpreted the provision’s purpose.

**II. THE CALIFORNIA TAX CODE DOES NOT APPLY TO OR BAR THIS LAWSUIT.**

Target next seeks to avoid accountability under California law by claiming that the statutory counterpart to Article XIII, section 32 of the Constitution shields it from lawsuits by its customers. This reading of section 6931 of the Tax Code is contrary to the plain language of the provision, which—like section 32—makes clear that it protects only the State, and not private retailers. Nor do the Tax Code’s administrative exhaustion procedures bar nontaxpayers from filing suits against retailers. In fact, the Tax Code and its regulations specifically contemplate that consumers may seek redress against retailers outside of the Tax Code for wrongfully imposed sales tax reimbursement charges.

**A. Tax Code Section 6931 Only Applies to and Bars Actions Against the “State” or “Any Officer of the State.”**

California Revenue & Tax Code Section 6931 “applies article XIII, section 32 to sales and use tax disputes.” *State Bd. of Equalization*, 39 Cal.3d at 638; *see also Agnew*, 21 Cal.4th at 327 (statutory provision “mirrors” constitutional provision). The statutory provision provides, in its entirety:

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court *against this State or against any officer of the State* to

prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.

Cal. Rev. & Tax Code § 6931 (emphasis added). Like the Constitutional provision it mirrors, the plain language of section 6931 makes clear that it does not apply to—let alone bar—actions against private companies. As this Court has recognized, “it is doubtful that the Legislature intended the scope of the statutory bar to be broader than that of the constitutional bar.” *Agnew*, 21 Cal.4th at 327; *see also Western Oil & Gas Ass’n*, 44 Cal.3d at 213 n. 2 (“[O]ur discussion of the constitutional bar to prepayment relief applies with equal force to the statutory proscription.”).

First, it is black-letter law that a court construing a statutory provision “is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language.” *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475, 224 P.2d 677. Rather, as this Court has explained, “the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs.” *Lennan v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, 36 Cal.Rptr.2d 563 (quotations omitted). The role of the court in construing a statute “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted[.]” *Ventura County Dep’ty Sheriffs’ Ass’n. v.*

*Bd. of Retirement* (1997) 16 Cal.4th 483, 492, 66 Cal.Rptr.2d 304 (quoting Cal. Code Civ. P. § 1858).

Like that of its constitutional corollary, the language of section 6931 limiting its applicability to proceedings against the State or its officers is unambiguous. Its prohibition against injunctions applies “in any proceeding in any court against *this State* or against any *officer of the State.*” Cal. Rev. & Tax Code § 6931 (emphasis added). It is only by inserting terms that the Legislature omitted, or omitting terms that the Legislature inserted, that Target and the court below could extend this statutory provision to bar a court action against a private company.

Second, section 6931, like Article XIII, section 32, has been held to be a “bar to prepayment litigation” by taxpayers. *Agnew*, 21 Cal.4th at 319–20; *see also Flying Dutchman Park, Inc. v. City & County of San Francisco* (2001) 93 Cal.App.4th 1129, 1135, 113 Cal.Rptr.2d 690 (noting that California courts typically deny relief “where a taxpayer has failed to pay an assessed tax before filing a refund action”); *id.* at 1139–40 (describing “the general rule requiring a taxpayer to pay delinquent taxes before seeking judicial intervention challenging the tax”); *cf. Marchica v. State Bd. of Equalization* (1951) 107 Cal.App.2d 501, 512, 237 P.2d 725 (explaining that a postpayment refund suit is a taxpayer’s “only legal remedy”). The prohibition on prepayment litigation by taxpayers does not

apply to this case. It makes no sense as applied to litigation by nontaxpayers.

In sum, Tax Code section 6931, like section 32, is limited in applicability to actions against the State or its officers and to prepayment litigation by taxpayers. It does not bar Plaintiffs' claims here.

**B. The Tax Code's Other Provisions and Regulations Confirm that the Tax Code Does Not Bar this Lawsuit.**

Plaintiffs cannot be barred by a failure to exhaust administrative remedies where they had no administrative remedies to exhaust in the first place. The lower court's suggestion that Plaintiffs' lawsuit against Target cannot go forward because it would "circumvent[]" the claims process" of the Tax Code, *Loeffler*, 93 Cal.Rptr.3d at 529, disregards the fact that the Tax Code's administrative claims process does not apply in the first place to nontaxpayers. Furthermore, the tax regulations expressly confirm that the extensive procedures governing the relationship between the State and taxpayers were not intended to preclude nontaxpayers from seeking relief outside of the Tax Code.

For purposes of sales tax, "[t]he relationship of sovereign power and taxpayer [is] between the state and the retailer, and *not between the state and the consumer.*" *Western Lithograph Co.*, 11 Cal.2d at 163 (emphasis added). Accordingly, the Tax Code imposes various requirements on retailers, including the requirements that a retailer must first pay a disputed

tax and exhaust its administrative remedies with the Board before filing a tax refund lawsuit. Cal. Rev. & Tax Code §§ 6931, 6932. In contrast, these administrative remedies are not available to consumers, as the lower court recognized. *See Loeffler*, 93 Cal.Rptr.3d at 518 (“Because they are not the taxpayers, plaintiffs cannot file a *claim* for a sales tax refund and thus cannot file a *suit* for a sales tax refund.”). Nor should they serve as a bar to Plaintiffs’ claims.

This Court confronted an analogous situation in *Agnew v. State Board of Equalization*. In *Agnew*, a taxpayer asked the Court to declare invalid the Board’s policy of requiring prepayment of interest on taxes due, in addition to the taxes themselves, before a tax refund claim would be considered. 21 Cal.4th at 313–14. The Board moved to dismiss the claim, arguing in part that the plaintiff had failed to exhaust his administrative remedies before filing the declaratory relief action. *Id.* at 320. This Court rejected that argument:

We . . . reject the Board’s claim that this action should not proceed because plaintiff failed to exhaust his administrative remedies before filing the declaratory relief action. . . . To the extent that the complaint sought a judicial determination of the validity of the Board’s interest prepayment policy it *did not involve any issue subject to determination through the administrative refund remedy available to plaintiff*.

*Id.* at 320 (emphasis added). Under *Agnew*, then, a taxpayer’s claim that is not subject to review by the Board through any available administrative procedure is properly reviewable by a court in the first instance. This rule

is even stronger as applied to nontaxpayers such as Plaintiffs, who are not subject to *any* administrative exhaustion requirements under the Tax Code. Plaintiffs cannot “circumvent” a procedure that by its terms does not apply to them.<sup>9</sup>

The tax regulation on sales tax reimbursement confirms that the administrative procedures do not have preclusive effect on nontaxpayers. Far from barring claims against retailers by their customers, this regulation expressly 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.” 18 Cal. Code Regs. § 1700(b)(6).

Because Plaintiffs are not taxpayers, section 6932’s mandate that taxpayers must file an administrative claim before filing suit does not apply to them. *See Preston*, 25 Cal.4th at 206 (section 6932 requires that “[b]efore filing suit for a tax refund, a *taxpayer* must present a claim for refund to the Board.”) (emphasis added). Indeed, nothing in the California Tax Code bars consumers’ claims against retailers to recover wrongfully imposed sales tax reimbursement charges. Consistent with section

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<sup>9</sup> The Ninth Circuit’s opinion in *Brennan*, 134 F.3d 1405, is not to the contrary. The plaintiffs in *Brennan*—unlike Plaintiffs here—were found to be taxpayers, and administrative remedies were available to them. *Brennan* thus did not create a “Catch-22” for consumers whereby they are limited to pursuing remedies through a procedure that is unavailable to them.

1700(b)(6) of the tax regulations, consumers' remedies lie elsewhere, outside of the Tax Code, in the UCL, CLRA, and common law.

**III. CALIFORNIA'S BROAD CONSUMER PROTECTION STATUTES EMPOWER COURTS TO ADDRESS THE ILLEGAL CHARGES AT ISSUE IN THIS LAWSUIT.**

Plaintiffs allege that Target's imposition of sales tax reimbursement charges on tax-exempt transactions violated the CLRA and the UCL. Each of these statutes provides remedies for the wrongs alleged in this case, and neither contains any exception for wrongful sales tax reimbursement charges. The Court of Appeal's decision conflicts with the language of the UCL and CLRA and with this Court's extensive precedent interpreting and applying these laws. Furthermore, the lower court's creation of an unprecedented exception to courts' broad authority under these statutes would immunize retailers from liability for a large category of unlawful charges, harming both consumers and law-abiding businesses. As the Attorney General explained:

The Court of Appeal decision opens a loophole that would allow unscrupulous businesses to take advantage of consumers and collect greater sums from them than consumers actually owe, free from the worry that they can be held accountable under California's consumer protection statutes and subject to the remedies provided by these laws.

A.G. Letter at 1.

The UCL and CLRA contain no exception for the type of unfair charge at issue here. Under the UCL, a plaintiff is entitled to injunctive

relief and restitution where an “unlawful, unfair or fraudulent” business act or practice has occurred. Cal. Bus. & Prof. Code § 17200. The broad scope of the UCL is clear from its language. The UCL specifically provides that courts may order restitution of “*any* money . . . acquired by . . . unfair competition.” *Id.* (emphasis added).

This Court has described the scope of the UCL as “sweeping, embracing *anything* that can properly be called a business practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns*, 20 Cal.4th at 180 (emphasis added). The Court has explained that the statute’s broad scope was intended to allow courts to stop wrongful business conduct in new and ever-evolving contexts:

The unfair competition law . . . has a broader scope for a reason. The Legislature intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its broad sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man’s invention would contrive.

*Id.* at 180–81 (internal citations and quotations omitted).

The UCL “‘borrows’ violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.” *Id.* at 180 (citation omitted). “Virtually any federal, State, or local law can serve as the predicate for an action under § 17200 based on

unlawful business practices.” *Gemisys Corp. v. Phoenix Am., Inc.* (N.D. Cal. 1999) 186 F.R.D. 551, 564.

While UCL claims are not unlimited in scope, in that a plaintiff may not “plead around an absolute bar to relief simply by recasting the cause of action as one of unfair competition,” this rule means simply that “[a]cts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law.” *Cel-Tech Commc’ns*, 20 Cal.4th at 182–83. No statute or case—prior to the decision below—suggests that a Tax Code violation may not be a predicate for a UCL violation.<sup>10</sup>

Moreover, “a private plaintiff may bring a UCL action even when the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action.” *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296, *cert. granted*, 537 U.S. 1099, 123 S.Ct. 817, *and cert. dismissed as improvidently granted* (2003) 539 U.S. 654, 123 S.Ct. 2554 (*quoting Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565, 71 Cal.Rptr.2d 731). In other words, the UCL creates causes of action for violations of statutes that do not do so themselves. *See, e.g., Diaz v. Allstate Ins. Group* (C.D. Cal.

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<sup>10</sup> The constitutional and statutory provisions that Target argues bar Plaintiffs’ claims do not make it lawful for companies to impose sales tax reimbursement charges where no sales tax is due. Therefore, they do act as an “absolute bar” to Plaintiffs’ claims. *See Cel-Tech Commc’ns*, 20 Cal.4th at 182. As we explain above in parts I and II, these provisions merely bar actions against the State and prepayment litigation by taxpayers.

1998) 185 F.R.D. 581, 594 (“laws that have been enforced under § 17200’s ‘unlawful’ prong include state anti-discrimination laws, environmental protection laws, state labor laws, and state vehicle laws”); *Haskell v. Time, Inc.* (E.D. Cal. 1997) 965 F. Supp. 1398, 1402 (“A private plaintiff may bring an action under §§ 17200 and 17204 to redress any unlawful business practice, including an unlawful practice that does not otherwise permit a private right of action, such as a criminal statute.”).

To further its broad purpose, the UCL empowers a court to make “such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of” unfair competition. Cal. Bus. & Prof. Code § 17203. The court’s equitable imperative “is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149, 131 Cal.Rptr.2d 29. Restitution under Section 17203 “is not solely intended to benefit the victims by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations.” *People ex rel. Kennedy v. Beaumont Invs.* (2003) 111 Cal.App.4th 102, 135, 3 Cal.Rptr.3d 429 (internal quotes and citations omitted).

As set forth above, Plaintiffs allege that Target falsely labeled and collected from Plaintiffs and other California customers a sales tax

reimbursement charge on transactions for which no sales tax was owed. Seeking restitution of such wrongfully charged sums is a classic type of UCL claim. Indeed, this Court recently reaffirmed the importance of UCL actions such as this one:

[C]onsumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may 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. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313, 93 Cal.Rptr.3d 559

(quotation omitted). The *Tobacco II* Court further emphasized that “[c]lass actions have often been the vehicle through which UCL actions have been brought.” *Id.*

The CLRA, likewise, is a broad remedial statute aimed at protecting consumers from deceptive business practices. Its preamble states:

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

Cal. Civ. Code § 1760. This Court has explained that “[t]he CLRA was enacted in an attempt to alleviate social and economic problems stemming

from deceptive business practices.” *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077, 90 Cal.Rptr.2d 334. To accomplish this purpose, the CLRA prohibits nearly twenty different deceptive practices, including representing that a transaction involves rights or obligations which it does not involve, or which are prohibited by law; and inserting an unconscionable provision into a contract. *See* Cal. Civ. Code § 1770(a).

The remedies available under the CLRA include compensatory damages, punitive damages and special penalties, as well as injunctive relief and restitution. *See* Cal. Civ. Code § 1780; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437–38, 97 Cal.Rptr.2d 179. These remedies are expressly “not exclusive” but rather are “in addition to any other procedures or remedies . . . in any other law.” Cal. Civ. Code § 1752.

California’s consumer protection laws have been described as “among the strongest in the country.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242, 110 Cal.Rptr.2d 145. These statutes clearly empower courts to address the type of unfair charge at issue in this lawsuit. The Court of Appeal’s invention of a new, major exception to these statutes, notably without any discussion of this Court’s extensive precedent interpreting and applying them, should not be allowed to stand.

**IV. THE COURT OF APPEAL’S DECISION LEAVES CHEATED CONSUMERS WITHOUT A REMEDY AND ELIMINATES JUDICIAL REVIEW OF SALES TAX REIMBURSEMENT DISPUTES.**

**A. Without Consumer Protection Claims, California Consumers Will Have No Effective Remedy Against Retailers that Wrongfully Impose Sales Tax Reimbursement Charges.**

By holding that retailers are immune from liability whenever they impose unlawful charges under the label of sales tax reimbursement, the Court of Appeal has left California consumers with no effective remedy when their rights are violated. Under the lower court’s holding, if a retailer wrongfully imposes sales tax reimbursement charges on consumers—whether intentionally or unintentionally—the only party that may litigate the error is the one that made the error (the retailer), and the only party that may correct the error is the one that stands to benefit from the error (the Board or the retailer). The only party that has lost money (the consumer) can do nothing. This is not and cannot be the law.

The court below held that consumers such as Plaintiffs may “seek refunds of sales tax reimbursement only in the manner provided by the sales tax statutes.” *Loeffler*, 93 Cal.Rptr.3d at 530. It is undisputed, however, that, because they are not taxpayers, consumers have no standing to seek redress from the Board under the Tax Code. *See id.* at 524 (“Since only taxpayers may file a claim for a refund and plaintiffs are not taxpayers, they have no standing to assert a claim with the Board.”). And without

filing a claim with the Board, according to the court, consumers cannot file a lawsuit. *Id.* at 518, 524. The upshot of the Court of Appeal’s holding is that consumers’ only chance of redress is to hope that the retailer or the Board of Equalization will take action on their behalf.

This is wishful thinking, not a remedy. Consumers cannot rely on the Board or the retailers that have wrongfully charged them to protect their rights, because these parties’ interests are not aligned with the interests of consumers who have been overcharged. The Court of Appeal shrugged off the practical implications of its holding, speculating that consumers could receive a refund of excess sales tax reimbursement if (1) the Board determines, based on a retailer’s claim for a refund of overpaid tax or its own review, that excess sales tax reimbursement has been collected; or (2) a retailer prevails in a suit against the Board for a refund of overpaid sales tax. *Id.* at 518. The court admitted, however, that “[n]either of these circumstances exists here.” *Id.* As we explain below, these circumstances are unlikely ever to exist.

**1. The Interests of Retailers Conflict with the Interests of Consumers.**

The Court of Appeal suggested that consumers may recover wrongfully imposed sales tax reimbursement charges from retailers if the retailers seek a refund of overpaid sales tax from the State. But as this Court has recognized, there is a conflict of interest between retailers and

their customers when it comes to seeking sales tax refunds. A retailer that has overpaid sales tax is not obligated by law to seek a refund. Moreover, that retailer has no incentive to seek such a refund in order to return wrongfully imposed sales tax reimbursement charges to its customers.

This Court confronted an analogous situation in *Javor v. State Board of Equalization*, 12 Cal.3d 790. In *Javor*, a consumer brought a class action against retailers and the Board, alleging that the retailers had failed to credit their purchases for a portion of sales tax reimbursement charges they did not owe. 12 Cal.3d at 793–94. As in the instant case, it was not known whether the retailers had “paid said sales tax to the Board, or ha[d] retained it, or owe[d] it to the Board.” *Id.* at 794. The Court noted that the procedures in the Tax Code permitting retailers to seek refunds did not adequately represent the interests of consumers:

Defendant retailers are under no statutory obligation to claim any refunds from the Board for the benefit of plaintiff and have no financial interest in doing so. Defendant Board is under no statutory obligation to voluntarily refund said taxes to plaintiff and has no financial interest in doing so.

*Id.* at 795. The Court further explained:

Under the procedure set up by the Board the retailer is the only one who can obtain a refund from the Board; yet, since the retailer cannot retain the refund himself, but must pay it over to his customer, the retailer has no particular incentive to request the refund on his own.

*Id.* at 801. While *Javor* addressed a Tax Code provision not at issue in this case, the Court’s concern with consumers’ rights is equally applicable here.

Because retailers have no incentive to make a claim for money they must ultimately return to their customers, consumers cannot rely on retailers to seek refunds on their behalf. *See Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252, 255–56, 23 Cal.Rptr. 589 (where retailer admitted it sought refund of overpaid sales tax “for itself only and [did] not intend to pass it on to [its] customers,” court conditioned refund to retailer on proof that retailer would refund wrongfully imposed sales tax reimbursement charges to consumers).

Of course, a retailer that has wrongfully imposed sales tax reimbursement charges on customers but has *not* paid the corresponding sales tax to the State would have no claim for a refund. Nor would such a retailer have anything to gain by voluntarily reporting its unlawful conduct to the Board. As a result, consumers cannot rely on retailers to protect their interests, especially where a retailer intentionally charges customers non-existent “tax” and keeps it for profit.<sup>11</sup>

## **2. Consumers Cannot Rely on the Board to Protect Their Interests.**

The Court of Appeal also hypothesized that consumers can rely on the Board to provide a remedy when retailers wrongfully impose sales tax reimbursement charges. *See Loeffler*, 93 Cal.Rptr.3d at 518, 530. But even

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<sup>11</sup> Target has not argued in this case that it has remitted to the State the money it collected from Plaintiffs as sales tax reimbursement charges, nor has it indicated that it has sought a refund from the Board of that money.

a cursory examination of this assumption makes clear that the Board cannot be expected to zealously guard the rights of consumers.

First, the Tax Code provisions cited by the court below in support of its speculation do not obligate the Board to act on behalf of consumers. *See id.* at 518. Section 6481, for example, simply authorizes the Board to compute the amount of tax owed by a retailer and make a “*deficiency determination*” based on information other than the tax return if it is “*not satisfied with . . . the amount of tax*” paid by the retailer. Cal. Rev. & Tax Code § 6481 (emphasis added). As long as the tax paid by a retailer is not “deficient”—for example, if a retailer has remitted sums it wrongfully imposed as sales tax reimbursement charges to the Board—the Board would have no reason to be “unsatisfied” with the amount of tax being paid, and thus no incentive to audit the retailer’s sales tax payments. Section 7054 likewise simply authorizes the Board to audit taxpayers in order to verify the accuracy of tax returns. Starkly missing from either provision is any requirement that the Board investigate whether a retailer has wrongfully imposed sales tax reimbursement charges on its customers.<sup>12</sup>

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<sup>12</sup> This Court criticized a similar system as inadequate to protect consumers’ rights:

The entire burden is upon the customer. . . . The Board has not required the retailer to notify his customer that the refund is due and owing, even though the retailer has all the necessary information. In short under the procedure which it has established, the Board is very likely to become enriched at the

Second, an individual consumer who has been unfairly charged a small sum is unlikely to take action. It is extremely unlikely that a significant number of consumers would realize that they had been wrongfully charged for sales tax reimbursement. Even if numerous customers suspected that they had been unfairly charged, it is unlikely that many would know they had a legal basis for this suspicion. It is even less likely that a significant number of these customers would be motivated to figure out how to report the problem to the Board so that the Board would become aware of a problem larger than one transaction. As this Court has recognized, when consumers suffer individually small losses, “[i]ndividual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action.” *Vasquez v. Super. Ct.* (1971) 4 Cal.3d 800, 808, 94 Cal.Rptr. 796. If Target’s alleged wrongdoing can be remedied only by each consumer who was harmed individually contacting the Board on a case-by-case basis, it will never be remedied at all.

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expense of the customer to whom the amount of the excessive tax belongs.

*Javor*, 12 Cal.3d at 801–02. Here too, consumers cannot rely on the Board to protect their interests, because the Board stands to benefit from wrongfully imposed sales tax reimbursements that are then remitted to the State.

Third, even if an occasional motivated consumer did contact the Board, there is no reason to believe that the Board routinely investigates consumer complaints regarding sales tax reimbursement charges, let alone *sua sponte* requires retailers to issue refunds to wrongfully charged customers. The Tax Code itself makes clear that, in the event the Board *does* ascertain that a retailer has imposed a sales tax reimbursement charge on a customer for an amount that is not taxable, the retailer can refuse to refund the wrongfully charged amount to the customer, and instead remit it to the State. Cal. Rev. & Tax Code § 6901.5; *see also* 18 Cal. Code Regs. § 1700(b)(2)–(b)(3) (retailer may refund sales tax reimbursement charges to its customers if it “desires to do so, rather than incur an obligation to the state”).

Finally, any notion that the Board can be expected to represent the interests of retail consumers should be dispelled by the facts of this case. During the course of this litigation, the Board was made aware of Plaintiffs’ allegations. However, rather than investigate the allegations that a retail taxpayer was imposing wrongful tax reimbursement charges on its customers, the Board responded by filing an *amicus* brief in support of Target arguing that these nontaxpayers cannot sue a retailer. *See* Brief of *Amicus Curiae* State Board of Equalization (Cal. Ct. App. No. B199287, Dec. 12, 2008). As the Attorney General has since explained to this Court, the Board’s argument is wrong. *See* A.G. Letter.

The bottom line is that by stripping consumers of their UCL, CLRA, and common law claims, the Court of Appeal's decision leaves consumers with no realistic or effective remedy, even if they are charged sales tax reimbursement on an item for which no tax is owed and even if the retailer simply keeps the overcharge.

**B. Eliminating Consumers' Claims Against Retailers Will Eliminate Judicial Review of Sales Tax Reimbursement Disputes.**

If the Court of Appeal's interpretation of law stands and consumers are barred from bringing legal claims against retailers for imposing wrongful sales tax reimbursement charges, a large category of disputes will never be subject to judicial review at all, because they do not arise from a taxpayer's claim for a refund. In addition to depriving consumers of any remedy for these allegations, this result would divest courts of their duty and authority to resolve these kinds of disputes.

This Court has long held that courts have the ultimate authority to interpret and enforce the Tax Code. In *Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d 1, for example, this Court held that the Board's interpretation of the Tax Code was not dispositive of whether a retailer owed sales tax to the State on particular transactions. The Court explained:

[I]t is the duty of this court . . . to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction.

The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution[.]

19 Cal.4th at 7 (*quoting Bodingson Mfg. Co. v. Cal. Employment Comm'n* (1941) 17 Cal.2d 321, 109 P.2d 935); *see also Ontario Cmty. Found.*, 35 Cal.3d at 822 (rejecting Board's interpretation of sales tax exemption); *Preston*, 25 Cal.4th at 219 n. 6 ("agency interpretations are not binding or necessarily even authoritative") (citation omitted); *Borders Online, LLC v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1193, 29 Cal.Rptr.3d 176 ("court independently determines the meaning of a statute"); *Sea World, Inc. v. County of San Diego* (1994) 27 Cal.App.4th 1390, 1406, 33 Cal.Rptr.2d 194 ("[a]lthough the [Board's] letters also arguably provide some support . . ., it is our duty and not that of the [Board] to construe the true meaning of [the statute]").

While many disputes are between retailers and the State, in a large number of cases the only truly aggrieved party is the consumer. In such disputes, courts have consistently held that consumers may seek redress in court. For example, in *Dell v. Superior Court*, consumers filed a putative class action under the UCL and CLRA alleging that Dell had wrongfully imposed sales tax reimbursement charges on optional service contracts sold with computers. 159 Cal.App.4th at 916. Like Plaintiffs here, they sought restitution, damages, attorneys' fees, and an order enjoining the retailer from continuing to impose the charges. *Id.* at 920. Reaching the merits of

the substantive taxability question, the Superior Court held that Dell's sales of service contracts were not subject to tax. *Id.* at 917. The Court of Appeal affirmed, holding that that "the proper approach under [the Tax Code] is to tax the computer (tangible personal property) and not the service contract (service or intangible property)." *Id.* at 930.

Likewise, in *Laster v. T-Mobile*, the court held that consumers could bring claims under the UCL and CLRA against a retailer that had allegedly imposed improper sales tax reimbursement charges. The plaintiffs claimed that T-Mobile engaged in an unfair and deceptive practice when it imposed a sales tax reimbursement charge on customers based on the full retail cost of cell phones that were advertised as "free" or discounted. 2008 WL 5216255 at \*1. The retailer moved to dismiss the claims, arguing that the Tax Code permitted it to impose sales tax reimbursement charges based on the full retail cost, but the court refused to dismiss the claims on that basis. *Id.* at \*16; *see also Livingston Rock & Gravel Co.*, 136 Cal.App.2d at 163 (in dispute between retailer and customer, holding that customer was not contractually obligated to pay retailer sales tax reimbursement); *Botney*, 55 Cal.App.3d at 55 (in consumer class action against retailer to recover sales tax reimbursement, determining that retailer's conduct was lawful).

The ruling of the court below would strip these cases out of the judicial system. And because claims by consumers against retailers cannot be brought before the Board, eliminating judicial review of these disputes

would mean that they would no longer be subject to review at all. Under this system, *retailers* would become the final interpreters of the Tax Code. This result has no basis in the Constitution, the Tax Code, or this Court's precedent, and it cannot be allowed to stand.

### CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeal.

Dated: November 9, 2009

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**CERTIFICATE OF WORD COUNT**

Pursuant to Rules of Court 8.204(c) and 8.500(d)(1), the undersigned counsel hereby certifies that the foregoing APPELLANTS' OPENING BRIEF ON THE MERITS is double-spaced, printed in Times New Roman 13 point text, and contains 11,833 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: November 9, 2009

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