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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Appellants' Reply 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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INTRODUCTION

This appeal is not merely about "hot coffee" or 15 cents. The issue before the Court is whether retailers are constitutionally and statutorily immune from suit under California's strong consumer protection laws if they violate the law by imposing sales tax reimbursement charges on tax-exempt items.

To answer that question, the Court need look no further than the plain text of the constitutional and statutory provisions at issue. In our Opening Brief, we established that, by their own plain language, Article XIII, section 32 of the California Constitution ("section 32") and its corollaries in the California Revenue and Tax Code ("Tax Code") do not bar Plaintiffs' claims. First, section 32's bar against enjoining tax collection (mirrored by Tax Code § 6931) expressly applies only in "proceedings . . . against this State or any officer thereof." Cal. Const. art. XIII, § 32. Second, section 32's restriction on remedies (implemented by various Tax Code provisions) expressly applies only to "action[s] to recover the tax paid." *Id.* Whether its two sentences are read separately or together, section 32 cannot be read to bar Plaintiffs' claims because Target is not the State and this is not a tax refund action.

Likewise, because section 32's restriction on remedies applies only to "action[s] to recover the tax paid," the Tax Code procedures that

comprise the "manner . . . provided by the Legislature" for seeking tax refunds—including the Tax Code's exhaustion requirements—do not apply to Plaintiffs' claims. They apply only to taxpayers seeking tax refunds. As Target concedes, Plaintiffs are not taxpayers and could not seek a tax refund.

Third, California's UCL plainly authorizes consumers to seek restitution of "*any* money" acquired by unfair competition—with no exception for sales tax reimbursement charges. Cal. Bus. & Prof. Code § 17203 (emphasis added). Both the UCL and the CLRA also provide that their remedies for addressing unfair competition are cumulative, rather than exclusive, to those of other laws. *Id.* § 17205; Cal. Civ. Code § 1752. Consistently with this, the tax regulations themselves specifically recognize consumers' rights to pursue remedies against retailers outside of the Tax Code.

In sum, the express language of California's Constitution, Tax Code, and broad consumer protection statutes disposes of Target's claim of immunity. Target's entire argument, therefore, consists of a series of efforts to dodge the actual wording of the provisions on which it relies and persuade the Court that it nonetheless *should* be immune from Plaintiffs' claims. None of Target's arguments have merit.

First, Target cannot articulate any policy interest that would justify rewriting the Constitution and statutes in its favor, nor can it cite a single

case prior to the decision below that applied section 32 or its statutory corollaries in an action against a non-governmental entity. Even in actions against the State, section 32 does not bar courts from ever issuing decisions that could affect tax collection. It bars only pre-payment litigation, in order to protect the State's budgeted revenue from delay and disruption. Concerns about delay to tax collection are not implicated here, because Plaintiffs' claims against Target have nothing to do with whether or not Target remits sales tax to the State. Sales tax, which retailers are required by law to remit, is separate and distinct from sales tax reimbursement charges, which retailers may impose on their customers if they so choose.

Second, Target's sky-is-falling reasons for why it should be granted immunity have nothing to do with the State and everything to do with Target's own interests. Even if section 32 recognized the interests of private retailers—which it does not—Target's concerns would not entitle it to immunity from liability. For instance, Target argues that if Plaintiffs ultimately prevail on their claims, it would not wish to file a refund claim, because it could not be certain that the Board would grant it. But Target's reluctance to avail itself of its remedies under the Tax Code is no reason to immunize the company from consumer protection actions. Likewise, Target argues that because the Tax Code is unclear, it is justified in imposing sales tax reimbursement charges on all sales without regard to specific exemptions. While Target would evidently prefer that its

customers, rather than the company, bear the risk that it is unlawfully charging sales tax reimbursement, that is not—and should not become—the law.

Third, Target's argument that only the Board is authorized to interpret and enforce the tax laws is wrong as a matter of both law and policy. Courts have the ultimate authority to determine the validity of taxes, and it is essential that they retain that power in disputes between retailers and their customers.

Finally, Target argues that its customers do not need consumer protection laws, because the company "simply has not" imposed excess sales tax reimbursement charges. But Plaintiffs' allegations must be taken as true at this stage of the case. The only issue in this appeal is the threshold question of whether Plaintiffs can bring their claims *at all*. There has been no merits briefing and no discovery, and Target will have plenty of time later to defend itself on the merits. More importantly, if the rule adopted by the Court of Appeal becomes law, even if a retailer *has* violated the law, it will now be immune from liability under California's consumer protection laws.

In sum, this Court should decline to rewrite the California Constitution and Tax Code in order to grant Target immunity from consumer protection claims.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CONSTITUTION, TAX CODE, AND CONSUMER PROTECTION LAWS ESTABLISHES THAT PLAINTIFFS' CLAIMS ARE NOT BARRED.

As we established in our Opening Brief, the question of whether Article XIII, section 32 of the California Constitution bars Plaintiffs' claims can be answered by reading the text itself:

> 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 (emphasis added).

Section 32's first sentence, which bars injunctions against tax collection, applies only in "proceeding[s] . . . against the State" or a State officer. Its corollary in the Tax Code contains nearly identical limiting language. Cal. Rev. & Tax Code § 6931. Section 32's second sentence, which restricts the means by which a party that has paid tax may seek to "recover the tax paid," applies by definition only to tax refund actions. For the same reason, the "manner" for seeking tax refunds provided by the Legislature in the Tax Code applies only to tax refund actions. By their own terms, these provisions do not apply to Plaintiffs' claims against Target.

Target's entire argument in this case is an attempt to distract the Court from the actual wording of the constitutional and statutory provisions at issue. Its claim of immunity should be rejected.

A. Article XIII, Section 32's Rule Against Enjoining Tax Collection Applies Only In Actions Against the State or a State Officer.

This Court has consistently held that section 32 "means what it says" and "applies only to actions against the state." *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 284, 281 n.6, 165 Cal.Rptr. 122; *see also Eisley v. Mohan* (1948) 31 Cal.2d 637, 641, 192 P.2d 5 ("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").[1]

Target offers no response at all to this clear limiting language. Instead, Target glosses over the actual wording and proposes that, "in the context of this case," section 32 means something it does *not* say. Target Br. at 10. Section 32's hidden meaning, according to Target, can be deduced from this Court's decisions in *Woosley v. State of California* (1992) 3 Cal.4th 758, 13 Cal.Rptr. 2d 1, and *State Board of Equalization v. Superior Court* (*O'Hara & Kendall Aviation, Inc.*) (1985) 39 Cal.3d 633,

[1] The Second District Court of Appeal recently applied this rule to hold that section 32 did not bar a taxpayer's claims against a *city*. *City of Anaheim v. Super. Ct.* (2009) 179 Cal.App. 4th 825, 102 Cal.Rptr.3d 171, 175.

217 Cal.Rptr. 238. Target Br. at 10–11. But *Woosley* and *State Board* interpreted section 32 in actions *against the State*—and thus the threshold applicability of the provision was never in doubt.[2] Indeed, Target cannot point to a single case—prior to the decision below—that has *ever* applied section 32 or its statutory corollaries to immunize a private corporation. Because Target is not the State or a State officer, it simply is not entitled to the constitutional or statutory immunity it claims.

B. Article XIII, Section 32's Restriction On Remedies and the Tax Code's Administrative Exhaustion Requirements Apply Only To Actions "To Recover the Tax Paid."

Target next argues that "the Legislature did not provide for the type of suit brought by Plaintiffs." Target Br. at 17. Target's theory is that under section 32, all disputes involving taxes must be resolved in the manner prescribed by the Legislature, and the Legislature's statutory scheme *in the Tax Code* does not provide remedies for non-taxpayers like Plaintiffs. That argument hinges on a selective reading of only the last 11 words of section 32: "in such a manner as may be provided by the

[2] Other than confirming the limited scope of section 32, *Woosley* and *State Board* are irrelevant here. In *Woosley*, a taxpayer filed a class action against the Board for a refund of use taxes (which, unlike sales taxes, are imposed on consumers). 3 Cal.4th at 767. The Court held that only taxpayers who had individually exhausted their administrative remedies in the Tax Code by filing claims for use tax refunds could participate in the class action. *Id.* at 788. And in *State Board of Equalization*, another taxpayer refund action, the Court held that a taxpayer must pay the full amount of disputed tax due before bringing a suit. 39 Cal.3d at 642–43.

Legislature." Cal. Const. art. XIII, § 32. But like its bar against injunctions, section 32's restriction on remedies contains unambiguous limiting language: it states that "*[a]fter payment of a tax . . ., an action may be maintained to recover the tax paid . . .* in such a manner as may be provided by the Legislature." *Id.* (emphasis added). In other words, it restricts only tax refund actions. *See Woosley*, 3 Cal.4th at 789 (section 32 "expressly provides that *actions for tax refunds* must be brought in the manner prescribed by the Legislature") (emphasis added); *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).

As we explained in our Opening Brief (at 20, 30–32), and as Target concedes (Target Br. at 17), Plaintiffs are not taxpayers and do not (and could not) seek a tax refund. Thus, by its own terms, section 32's restriction on how "actions to recover tax paid" does not apply to Plaintiffs' claims.

For the same reason, the Tax Code procedures that *comprise* the "manner . . . provided by the Legislature" for seeking tax refunds—including the Tax Code's various administrative exhaustion requirements—do not apply to Plaintiffs' claims. *See* Cal. Rev. & Tax Code §§ 6902, 6902.3, 6904, 6905, 6931, 6932, 6933, 6934. Those procedures, by

definition, apply only to taxpayers. Indeed, Target has conceded that the Tax Code "limits the persons who can apply for a sales tax refund to persons who are required to file sales tax returns." *See* Target Ans. to *Amicus* Brief of A.G. (Ct. App.) at 15 (citing Tax Code § 6902).

Nonetheless, Target singles out a lone provision among the Tax Code's tax refund provisions—§ 6932—and claims that its administrative exhaustion requirement applies to "not just retailers but customers and anyone else." Target Br. at 18.[3] That argument is manufactured out of whole cloth. Any doubt about the provision's meaning was laid to rest by this Court, which explained that § 6932 requires that "[b]efore filing suit for a *tax refund*, a *taxpayer* must present a claim for refund to the Board." *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 206, 105 Cal.Rptr.2d 407 (emphasis added). The cases Target cites (Target Br. at 17–18) do not sustain its overly broad characterization of § 6932, because they only address tax refund claims. *See*, *e.g.*, *Woosley*, 3 Cal.4th at 792 (courts may not expand "methods for seeking *tax refunds* expressly provided by the Legislature") (emphasis added); *Barnes v. State Bd. of*

[3] Section 6932, which is contained in Tax Code Chapter 7, Article 2 ("Suit for Refund"), provides that "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." Article 1, "Claim for Refund," contains the procedures taxpayers must exhaust prior to bringing a claim pursuant to Article 2.

Equalization (1981) 118 Cal.App.3d 994, 1001–02, 173 Cal.Rptr. 742 (*taxpayer*'s failure to exhaust administrative remedies barred his *tax refund* suit) (emphasis added). Target's reading of Tax Code § 6932 cannot withstand scrutiny.

Furthermore, the mere existence of a statutory or regulatory enforcement scheme such as the Tax Code's refund provisions does not suggest, let alone prove, that the Legislature intended the scheme to be "exclusive." Target Br. at 19. Rather, private UCL actions "supplement the efforts of law enforcement and regulatory agencies." *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313, 93 Cal.Rptr.3d 559 (emphasis added). The existence of an administrative or statutory enforcement scheme does not bar a UCL action absent clear Legislative intent. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568, 71 Cal.Rptr.2d 731 (penal code provision and enforcement statute did not evidence Legislature's intent to create "comprehensive and exclusive scheme for combating the sale of tobacco to minors" and immunize retailers from civil liability); *id.* at 572 ("[E]ven though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code."); *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38, 44–45, 77 Cal.Rptr.2d 709 (insurance code did not constitute exclusive regulatory scheme immunizing title insurance company from

UCL claims predicated on the company's refusal to issue insurance); *Ticconi v. Blue Shield of Cal. Life & Ins. Co.* (2008) 160 Cal.App.4th 528, 542 n.13, 72 Cal. Rptr.3d 888 ("[W]e reject any suggestion that a private party may not sue to enforce underlying laws when those laws provide for enforcement by a public officer.").[4]

Section 32's restriction on tax refund remedies and the Tax Code's scheme for tax refunds do not bar Plaintiffs' claims.

C. The UCL, CLRA, and Tax Regulations Expressly Authorize Plaintiffs' Claims.

Target's argument that there is "no Legislative authority" for this lawsuit (Target Br. at 17) is also foreclosed by the plain language of the UCL, CLRA, and tax regulations. As we explained in our Opening Brief, the UCL expressly provides that consumers may seek restitution of "*any* money . . . acquired by . . . unfair competition." Cal. Bus. & Prof. Code § 17203. Unless another statute expressly provides otherwise, the UCL's

[4] The sole case on which Target relies for its assertion that the Tax Code's refund procedures are exclusive—*Farmers' Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 40 Cal.Rptr.3d 653—does not support that claim. In *Farmers' Insurance*, the Court of Appeal merely invoked the uncontroversial principle that the statute at issue in that case (the insurance code) did not create a private right of action. 137 Cal.App.4th at 853–54. The question of whether a cause of action existed *outside* of the insurance code, in the UCL, was not at issue in *Farmers' Insurance*, because this Court had already resolved that issue in the plaintiffs' favor in *Quelimane*, 19 Cal.4th at 44–45. Also, the *Farmers' Insurance* court did not even need to reach the question because no UCL claims remained at the time of the appeal. *Id.* at 848.

remedies are "cumulative . . . to the remedies or penalties available under all other laws of this state." *Id.* § 17205. The CLRA, likewise, is to be "liberally construed and applied to promote its underlying purpose[] [of] protect[ing] consumers against unfair and deceptive business practices." Cal. Civ. Code § 1760. Its remedies, like those of the UCL, are expressly "not exclusive" but rather are "in addition to any other procedures or remedies . . . in any other law." Cal. Civ. Code § 1752.

Both the UCL and the CLRA expressly provide remedies for the types of wrongs alleged in this case, and neither contains any exception for wrongful sales tax reimbursement charges. Against this backdrop, the regulations implementing the Tax Code expressly recognize and preserve 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).

Apparently, Target's theory is that because the *Tax Code* does not create a private right of action for consumers, the Legislature must have meant to provide them no remedies at all. This Court has repeatedly rejected that argument, however, holding that "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 (emphasis added); *see also Zhang v. Super. Ct. (Cal. Capital Ins. Agency)* (2009) 178 Cal.App.4th 1081, 1090, 100 Cal.Rptr.3d 803 ("[A]lthough the Unfair Insurance Practices does not provide a private cause of action, in the UCL the Legislature clearly *has* provided such a remedy for conduct that falls within its purview."). This is because the UCL "'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548 (citation omitted).

In sum, the legislative authority for Plaintiffs' claims is found in the UCL and CLRA.

II. NO POLICY REASON JUSTIFIES REWRITING CALIFORNIA'S CONSTITUTION AND STATUTES TO IMMUNIZE TARGET FROM PLAINTIFFS' CLAIMS.

Because the plain language of the provisions at issue easily resolves this appeal, the Court need not even consider Target's remaining arguments. Should the Court disagree, however, we respond below.

A. Target Is Not the Legal Equivalent of the State, and Plaintiffs' Claims Are Not "Substantively Indistinguishable" From a Tax Refund Lawsuit.

Unable to dispute section 32's plain language, Target simply skips past the limiting words in section 32 as though they do not exist and argues

that it should become the first private company ever entitled to the same protections as the State. According to Target, the "relevant inquiry" is whether this action "may affect the state's sales tax revenues." Target Br. at 11–12. But as the cases Target cites demonstrate, that inquiry does not arise unless the action itself is against the State. *See, e.g., Woosley*, 3 Cal.4th 758 (action against State); *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 (action against Board); *Pacific Gas & Elec. Co.*, 27 Cal.3d 277 (action against Board); *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, Inc. v. State* (2008) 161 Cal.App.4th 242, 73 Cal.Rptr.3d 825 (action against State). These cases provide no support for Target's sweeping interpretation of section 32.

Furthermore, Target's interpretation is rooted in a fatal misunderstanding of the policy behind section 32. Even within the limited category of cases in which it applies—actions against the State—section 32 does not, as Target suggests, bar courts from doing anything that could possibly "affect" tax collection. Target Br. at 16. It only bars courts from enjoining the collection of a disputed tax before it is paid. *See State Bd. of Equalization*, 39 Cal.3d at 638 (under section 32 "[a] taxpayer may not go

into court and obtain adjudication of the validity of a tax which is due but not yet paid").

As this Court has explained, the purpose of section 32 is "to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted." *Pacific Gas and Elec. Co.*, 27 Cal.3d at 283. This "pay first, litigate later" rule makes perfect sense: it ensures that the State, not the taxpayer, gets the financial benefit of the doubt while a tax dispute is pending. *See State Bd. of Equalization*, 39 Cal.3d at 638–39. Indeed, courts regularly invalidate state sales taxes in post-payment refund actions. *See, e.g.*, *Preston*, 25 Cal.4th at 205–06 (taxpayer who had paid tax on partially exempt purchase was entitled to refund); *Ontario Cmty. Found., Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 814, 201 Cal.Rptr. 165 (taxpayers who had paid tax under protest were entitled to refund); *cf. Pacific Motor Transp. Co. v. State Bd. of Equalization* (1972) 28 Cal.App.3d 230, 236, 104 Cal.Rptr. 558 ("courts are frequently . . . passing upon the validity of tax regulations after payment of the required tax"). Such decisions necessarily "affect . . . tax collections in other pending and future cases." *Id.* However, they aid, rather than impede, tax collection by "add[ing] certainty and conclusive legality to the process." *Id.*; s*ee also Monterey Peninsula Taxpayers Ass'n v. County of Monterey* (1992) 8 Cal.App.4th 1520, 1541, 11 Cal.Rptr.2d 188 (section 32 does not "immuniz[e] taxes

from . . . judicial invalidation [or] sanction budgetary reliance on revenues generated by an unconstitutional tax"); *cf. Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 824–25, 107 Cal.Rptr.2d 369 (despite disruption to budgetary planning processes, cities and counties could not rely indefinitely on unauthorized taxes). As we explain in our Opening Brief (at 23–26), a close examination of the case law flatly disproves Target's contention that section 32 is so broad that it bars "any action" that could "directly or indirectly affect the Board's collection of sales taxes" (Target Br. at 16).

Likewise, Target's claims that "its collection of sales tax reimbursement is an inextricable part of the state's collection of sales tax" (Target Br. at 16 n.14), and that Plaintiffs' claims are "substantively indistinguishable" from a tax refund claim against the State (Target Br. at 11) cannot withstand scrutiny. The actual policy of section 32—protecting the State against delays in and disruptions to tax collection—is not implicated here, because the State can collect sales tax from Target regardless of whether Target charges its customers sales tax reimbursement. Notwithstanding Target's attempt to blur them together, the distinction between sales tax and sales tax reimbursement charges is clear. Retailers are required to pay sales tax to the State. Cal. Rev. & Tax Code § 6051. In contrast, retailers are *not* required by law to impose sales tax reimbursement. Rather, they are permitted—if they so choose—to add a

sales tax reimbursement charge to the price of a taxable item. *See* Cal. Civ. Code § 1656.1 ("Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale."); 18 Cal. Code Regs. § 1700(a)(1); *Livingston Rock & Gravel Co. v. Salvo* (1955) 136 Cal.App.2d 156, 161–62, 288 P.2d 317 (Tax Code "is merely optional with the retail merchant as to whether he will reimburse himself from his customers," and "reimbursement of the amount of the tax rests upon the contractual arrangements of the parties") (citation omitted). Target's claims that it is not "allowed . . . to sell tax-free hot coffee to go" (Target Br. at 3), and that it is "compelled" to impose sales tax reimbursement charges "for the benefit of a taxing agency" (Target Br. at 24), are demonstrably false.

In sum, Target fails to articulate any cognizable State interest that would justify treating it as the legal equivalent the State and treating Plaintiffs' claims as the legal equivalent of sales tax refund claims.

B. Target's Own Interests Do Not Entitle It To Constitutional or Statutory Immunity.

The heart of Target's argument is that *its own* interests will be negatively affected if this Court does not immunize it from liability. Target warns that a decision allowing Plaintiffs' claims to proceed will "wreak havoc on retail businesses" and urges the Court to consider the effects of

such a ruling on Target. Target Br. at 13. Target complains, for instance, that, if Plaintiffs ultimately prevail on their claims, there will be no point in the company exercising its right under the Tax Code to file a refund claim with the Board, because "the odds are overwhelming" that the claim will be denied by both the Board and the reviewing court. Target Br. at 14. In the same breath, Target protests that it could not possibly *sue* the Board for a refund, because "no claim was filed." Target Br. at 14. The Court should dismiss Target's pity-the-poor-retailer argument.

First of all, Target's interests are irrelevant to the constitutional and statutory questions before this Court. Section 32 and its statutory corollaries do not address, let alone protect, the interests of private retailers. *See State Bd. of Equalization*, 39 Cal.3d at 638–39.

Second, Target's sky-is-falling scenarios ignore basic facts. There is no possible way, for example, that Target would end up "paying twice." Target Br. at 15. Assuming Target has, as it claims, remitted the money it took from Plaintiffs to the Board, *if* Plaintiffs prevail, *and* the Board denies Target's refund claim, *and* that decision is upheld in court, Target will pay only once: to the Board. It will not "pay" any second amount to its customers out of pocket, because it will be required only to *return* to its customers the money *it took from them* as sales tax reimbursement. Thus, even under its worst-case scenario, Target will still only pay once.

Likewise, there is no good reason why Target cannot seek a sales tax refund from the Board, nor to believe Target's speculation that the Board would deny its claim because it would rely on the company's earlier interpretation of the Tax Code. Target Br. at 14. After all, if the Board always denied refund claims on grounds that the retailer's original decision to pay the sales tax at issue was correct, all tax refund claims would be futile. But that clearly is not the case. *See* State Bd. of Equalization, 2007–08 Annual Report at 29, *available at* http://www.boe.ca.gov/annual/pdf/2008/4-sales08.pdf. (taxpayers received "more than $116.1 million in sales and use tax refunds" in fiscal year 2007–08).[5]

Target next complains that, even if the Board granted its claim for a refund, it might not recover 100% of the money it would be required to reimburse its customers, because the statute of limitations is longer for UCL actions than for refund actions under the Tax Code. Target Br. at 14. Presumably, Target believes that its customers—not the company—should bear the financial risk that it is improperly imposing sales tax

[5] Furthermore, even if the Board declined Target's refund claim, there is no reason to suspect that a reviewing court would simply accept the Board's ruling. The case law is replete with examples of courts exercising their independent authority to determine the validity of taxes and refund claims.

reimbursement charges. If Target is dissatisfied with its remedies under the Tax Code, however, it is free to express its concerns to the Legislature.

Most importantly, to the extent that Target *would* experience inconvenience or cost as the result of a court finding that it wrongly imposed sales tax reimbursement charges on its customers, that should not dictate the outcome of this appeal. If Target violated California law, it should be liable, not immune. If Target has, as it claims, paid the money it took from Plaintiffs to the State, then it should seek and obtain a tax refund. If, for whatever reason, Target is unable to obtain a full refund, then that is nothing more than a foreseeable and acceptable consequence of its actions. And, of course, if Target did not break the law in the first place, then it will not be liable to Plaintiffs and their claims will be dismissed on the merits. Any of these outcomes would be fair. What would not be fair, however, would be for consumers to bear the burden of improperly imposed sales tax reimbursement charges, and for Target and all other retailers in California to be immune from lawsuits *even if they break the law*—and that is precisely what the Court of Appeal held.

C. Courts Have, and Should Retain, the Ultimate Authority To Interpret and Enforce the Tax Statutes.

Target argues that "only the Board may enforce the tax statutes," and that a ruling for Plaintiffs would permit "self-interested consumers" to "usurp the authority of the Board" in determining the validity of tax laws.

Target Br. at 20. But as we explained in our Opening Brief, courts, not the Board, have the ultimate authority to determine the proper construction and application of the tax statutes. *See, e.g., Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1 (court's "ultimate interpretation" of Tax Code is an "exercise of the judicial power . . . conferred upon the courts by the Constitution") (internal quotations omitted); *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"); *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 ("it is our duty and not that of the [Board] to construe the true meaning of [the statute]"); *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).[6] Courts

[6] The cases Target cites for the Board's supposed exclusive authority to enforce sales tax statutes hold no such thing. Target Br. at 20. Both *Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192, 273 Cal.Rptr. 639, and *City of Gilroy v. State Board of Equalization* (1989) 212 Cal.App.3d 589, 260 Cal.Rptr. 723, involved *court review* of the Board's decision-making with respect to sales tax.

should retain that authority in disputes between retailers and their customers (and post-payment refund actions), and the Board should retain its authority to rule on tax refund claims in the first instance.

Under the rule advocated by Target (and adopted by the Court of Appeal), however, courts would no longer decide sales tax reimbursement disputes between retailers and consumers. And because consumers cannot bring these claims before the Board, *retailers*—not their customers, not courts, and not the Board—would have final authority to interpret the law on sales tax reimbursement charges. There is no legal or policy basis for granting retailers such sweeping immunity.

III. TARGET'S ARGUMENT THAT ITS CUSTOMERS DO NOT NEED CONSUMER PROTECTION LAWS IS WRONG.

Finally, Target repeatedly insists that "there is no need" for the company to be subject to the State's consumer protection laws here. Target Br. at 22, 27. That argument, like Target's other policy arguments, is irrelevant to the question of whether the company is constitutionally and statutorily immune from suit and is another attempt to circumvent the clear constitutional and statutory language that resolves this appeal. Even if Target's position on the usefulness of the consumer protection laws were relevant, none of its arguments withstands scrutiny.

A. Target's Insistence That It Has Not Violated the Law Is Irrelevant To Whether It Is Immune from Suit.

Target argues that the UCL and CLRA are unnecessary here because it "has not engaged in any conduct forbidden by law" (Target Br. at 2) and thus "there is no wrong" to remedy (Target Br. at 24). These merits arguments are premature. *See People ex rel. Lungren v. Super. Ct.* (1996) 14 Cal.4th 294, 300, 58 Cal.Rptr.2d 855 ("Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly we assume that the complaint's properly pleaded material allegations are true . . . .").

More importantly, the question of whether or not Target will ultimately be found liable is irrelevant to this appeal, because the Court of Appeal's sweeping holding immunizes retailers from lawsuits before substantive litigation on the merits has taken place and even if they have violated the law. Under the Court of Appeal's decision, a retailer could flagrantly impose a charge of any amount it chose, and as long as it labels that charge "sales tax" on the receipt, the consumer has no recourse.

Target concedes this, but argues that even if it *has* imposed wrongful sales tax reimbursement charges, section 32 provides it with a "safe harbor" for its conduct. Target Br. at 28. But as this Court has made clear, a "safe harbor" exists only where "another provision . . . actually 'bar[s]' the action

or clearly permit[s] the conduct." *Cel-Tech Commc'ns*, 20 Cal.4th at 183. No provision does that here.

B. Target's Argument That It Did Not Benefit From the Unlawful Charges Is Irrelevant To Whether It Is Immune From Suit.

Target energetically argues that it had "nothing to gain" by unlawfully imposing sales tax reimbursement charges on its customers, and that even if it did so, it should not be held accountable because it pays "every penny" it collects from its customers to the State and thus it has not benefitted from breaking the law. Target Br. at 1–2. Presumably, Target expects the Court to take its word on this. But no discovery has been conducted, there is no evidence in the record yet, and none of the supposed bases for Target's assertion provides any support for its claim.

First, Target shows a sales receipt as supposed evidence that it could "under no circumstances" have kept the money it charged Plaintiffs as sales tax reimbursement. Target Br. at 1–2. But a receipt cannot prove that Target paid to the State *any* money it charges as sales tax reimbursement, let alone the specific charges at issue in this case. It shows only that Target imposed a sales tax reimbursement charge on an item Plaintiffs claim is tax-exempt.

Second, Target may well have an incentive to charge its customers sales tax reimbursement without regard to whether a particular item is taxable, because imposing blanket sales tax reimbursement charges on

everything is easier than figuring out the details. Effectively, it passes the burden of determining what is and is not tax-exempt onto its customers, while erring on the side of making them pay.[7]

Third, Target points out that the law requires retailers to remit sales tax to the State. Target Br. at 1, 7. But of course, the mere existence of a legal requirement in no way proves that Target actually complied with that requirement. Indeed, the tax regulations themselves account for the possibility that retailers might impose sales tax reimbursement charges and not remit the money as sales tax to the State. *See* 18 Cal. Code Regs. § 1700(b)(2); *see also* State Bd. of Equalization, *Sales Tax Evasion, available at* http://www.boe.ca.gov/invest/salestax.htm (explaining that retailers may be guilty of sales tax evasion if they "collect sales tax reimbursement from their customers on sales but intentionally fail to report and pay the tax collected").

Most importantly, even if Target *did* remit to the State the amounts it allegedly took from Plaintiffs, that would not make its conduct any less

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[7] *See* part III.C, below. Notably, by imposing a separate sales tax reimbursement charge on its customers rather than raising its prices, Target can actually reduce its own sales tax burden. See *U.S. v. Cal. State Bd. of Equalization* (9th Cir. 1981) 650 F.2d 1127, 1131–32 & 1132 n.6 (explaining that because sales tax reimbursement charges are excluded from taxpayers' gross receipts for sales tax purposes in California, a taxpayer pays more in taxes if it absorbs the tax itself through higher prices than if it collects sales tax reimbursement from its customers).

unlawful. California's consumer protection laws focus on the harm to consumers, not the benefits to businesses. *See, e.g.*, *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149, 131 Cal.Rptr.2d 29 (object of restitution under UCL is to "return[] to the plaintiff funds in which he or she has an ownership interest"); *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 177, 96 Cal.Rptr.2d 518 (focus of restitution remedy under UCL is on restoring money to the victim). Furthermore, the Court of Appeal's decision immunizes *all* retailers from liability, regardless of what they do with the money they take.

Finally, Target implies that Plaintiffs' claims are not "legitimate" because they are individually too small to matter, and attacks Plaintiffs' counsel for pursuing them. Target Br. at 31. Those criticisms fly in the face of this Court's jurisprudence on the critical role of consumer class actions in deterring wrongdoing. *See, e.g.*, *In re Tobacco II Cases*, 46 Cal.4th at 313 ("[C] onsumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights . . . when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions.") (quotation omitted).

C. Target's Argument That the Tax Code Is Complicated Is Irrelevant To Whether It Is Immune From Suit.

Target's next defense is that, even if it has wrongly imposed sales tax reimbursement charges, it should not be held liable because its gross receipts are "presumptively" taxable, and the specific tax regulation on hot coffee to go is "far from a model of clarity." Target Br. at 7, 29 n.22. In other words, Target would prefer not to be bothered with the details when it can simply charge its customers sales tax reimbursement on everything.

First, it is worth noting that Target's proposed immunity would protect retailers even where a particular tax regulation is perfectly clear. Assume the tax regulation at issue stated in its entirety: "No sales of any widgets are ever taxable." Under the Court of Appeal's holding, if a retailer added a "sales tax reimbursement" charge of $5 to every one of its sales of widgets, it would be 100% immune from liability under consumer protection laws.

Second, notwithstanding Target's attempt to sow confusion by quoting several paragraphs of irrelevant regulatory text (Target Br. at 29–30 n.22), the tax regulation that applies to the transactions at issue in this case—Regulation 1603(e)—is quite clear. This regulation provides that sales of hot coffee to go which are not sold as part of a meal are *not* subject to sales tax *unless* (1) the retailer is a drive-in (18 Cal. Code Regs. § 1603(b)); (2) more than 80% of the retailer's gross receipts are from the

sale of food products to be consumed on the premises (i.e., the retailer is a restaurant) (*id.* § 1603(c)); or (3) the retailer charges admission (*id.* § 1603(d)). 18 Cal. Code Regs. § 1603(e). Target has not claimed that it meets any of these three exceptions. Any remaining doubt on the taxability of hot coffee to go is dispelled by a Board publication for taxpayers in Target's situation:

> Sales of the following beverages are not taxable when sold for a separate price to go: Hot beverages, such as coffee . . . .

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.

Third, even where tax laws *are* unclear, that does not entitle a retailer to impose sales tax reimbursement charges on its customers without regard to whether sales are legally taxable or not. The presumption that "gross receipts are subject to tax" does not prove that an item in any particular sale (or itemized on any particular receipt, for that matter) is taxable. *See* Cal. Rev. & Tax Code § 6091; *State Bd. of Equalization*, 39 Cal.3d at 640 ("The sales tax is not a tax on isolated transactions."). Nor does it entitle a retailer to "err on the side" (Target Br. at 15) of charging its customers more in order to avoid responsibility for separating taxable sales from tax-exempt sales. Retailers, not their non-taxpayer customers, should bear the burden of determining the applicability of tax exemptions—and

should do so *before* they impose sales tax reimbursement charges. Consumer protection actions provide an appropriate economic incentive for retailers to take a serious look at whether transactions are taxable, and, if the tax laws or regulations are unclear, to seek clarification from the Board.

If Target seriously contends that the tax statutes and regulations applicable to its business operations are too complicated for the company and its legal advisors to figure out and implement properly, it should make that argument to the Legislature or the Board.

D. Consumers' Ability To "Complain" To the Board Does Not Make Consumer Protection Laws Unnecessary.

Finally, Target argues that, even if has violated the law, its customers do not need consumer protection laws, because they can pick up the phone and call the Board of Equalization—"the only remedy they need." Target Br. at 23. That is pure speculation.

As we explained in our Opening Brief (at 39–46), non-taxpayers such as Plaintiffs have no legal remedies under the Tax Code. Target concedes that only *it* can file a tax refund claim or lawsuit (Target Br. at 17), and states that it has no interest in doing so (Target Br. at 14). Target claims, however, that customers nonetheless do not need remedies under the consumer protection laws, because they have the "right to complain" to the Board. Target Br at 23. But a "right to complain" is not a substitute for a legal remedy, because the Board is under no obligation to act on informal

complaints from non-taxpayers. (In contrast, the Tax Code requires the Board to act on refund claims by retailers within six months or be subject to suit. *See* Cal. Rev. & Tax Code § 6934.) There is not a shred of evidence to support Target's bald assertion that "a customer's complaint to the Board triggers an investigation and, when appropriate, an audit of the retailer's books and records." Target Br. at 5. As we explained in our Opening Brief (at 43), the Tax Code's audit provisions simply authorize the Board to verify the accuracy of tax returns to determine whether a retailer has underpaid tax; they do *not* require the Board to respond to consumer complaints or to investigate whether a retailer has wrongfully charged sales tax reimbursement. In fact, the Board audits fewer than 1% of all taxpayer accounts per year for *sales and use tax combined*. *See* State Bd. of Equalization, 2007–08 Annual Report at 29, *available at* http://www.boe.ca.gov/annual/pdf/2008/4-sales08.pdf. And even among the subset of such audits that apply to sales tax reporting, there is no indication that *any* are prompted by phone calls from non-taxpayers such as retail consumers.

In sum, Target's contention that California's consumer protection laws are "unnecessary" in this case is meritless. To the contrary, both the allegations in this case and Target's arguments to the Court demonstrate that these laws are essential to protect Target's customers.

CONCLUSION

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

Dated: February 1, 2010

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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 APPELLANTS' REPLY BRIEF ON THE MERITS is double-spaced, printed in Times New Roman 13 point text, and contains 7,422 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: February 1, 2010

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