S202037

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN J. McWILLIAMS, on behalf of himself
and all others similarly situated,
Plaintiff and Appellant,

vs.

CITY OF LONG BEACH
Defendant and Respondent.

After a Decision by The Court of Appeal
Second Appellate District, Division Three
Case No. B200831

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC361469

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF and *AMICI CURIAE* BRIEF OF CONSUMER ACTION, NASCAT, AND THE TAX FOUNDATION IN SUPPORT OF APPELLANT

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Application for Permission to File *Amici Curiae* Brief

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to Rule 8.2000(c) of the California Rules of Court, *amici curiae* Consumer Action, NASCAT, and the Tax Foundation, hereby apply for permission to file an *amici curiae* brief in support of Appellant, John J. McWilliams, in this matter.

In support thereof, the interests of *amici* are as follows:

> Consumer Action ("CA"), founded in 1971, is a national non-profit education and advocacy organization which serves consumers nationwide by advancing consumer rights, publishing educational materials, advocating for consumers in the media and before lawmakers, and comparing prices on credit cards, bank accounts, and long distance services. CA is based in San Francisco with offices in Los Angeles and Washington, D.C. CA serves the consumer interest through its national network of 11,000 community-based organizations, of which 3,500 are based in California.
>
> The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT is an association of law firms and attorneys who primarily represent plaintiffs in civil actions brought in federal and state courts. NASCAT has member firms all over the country, ranging in size from small firms and solo practitioners to firms with large numbers of lawyers handling class actions. NASCAT's members litigate cases seeking to recover damages on behalf of victims of violations of antitrust, civil rights, commercial, consumer, employee and retiree benefits, environmental, insurance, and securities laws, as well as violations of federal and state constitutions.
>
> The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to make information about government finance reform more understandable and accessible to the general public. Based in Washington, D.C., our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by

educating the legal community about economics and principled tax policy.

Despite divergence among the *amici* with respect to their specific goals, each has a palpable interest in this appeal. NASCAT has a palpable interest in this appeal to the extent it will affect the manner and circumstances under which California taxpayers and consumers in general may seek redress against California municipalities and other governmental bodies. The Tax Foundation has an institutional interest in this Court's ruling because the decision may be cited as authority by other states confronting similar questions of preserving taxpayer remedies through legislative and judicial processes. In particular, the Tax Foundation concerns itself with the implications of this Court's decision on taxpayers' ability to seek meaningful remedy for illegal tax collection. *Amici* are united in their commitment to ensuring that all taxpayers continue to have equitable, meaningful, and uniform means through which to present claims against California municipalities and other governmental bodies for tax refunds.

The *amici curiae* brief submitted herein will assist the Court in the examination of this precedent, as well as amendments to the California Constitution and enactments of the Legislature, concerning the ability of municipal and local governments to supplant statewide procedure for bringing a claim for tax refunds to be brought against governmental entities. As explained herein, *amici* believe that the Legislature has provided a comprehensive system of procedures to be followed, and intended that consumers benefit from a uniform statewide procedure rather than being subject to multiple ad hoc, contradictory, and opaque municipal and local governmental procedures when bringing tax refund claims against governmental entities.

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BRIEF OF *AMICI CURIAE*

I. Legislative Intent Clearly Indicates a Desire to Create a Fair and Uniform Procedure for Consumers to Bring Tax Refund Claims Against Government Entities, which Benefits Consumers and the Expedient Handling of Claims

In *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, this Court outlined the purposes behind enactment of the Government Claims Act ("the Act"), which replaced "myriad state statutes and local ordinances" that governed claims against California government entities prior to 1959 and instead "established a standardized procedure for bringing claims against local government entities." (*Id.* at 246-47.) Finding the "more than 150 separate procedures for directing claims against local government entities" to be "too complex," the Legislature instead enacted Section 910, which governs all claims, including tax refund claims, against governmental entities in California. (*Id.* at 247.)

Indeed, in 1959 the California Law Revision Commission ("CLRC" or the "Commission"), in reviewing the web of statutes, county and city charters, and ordinances that determined redress for grievances against government ordinances, concluded that "the enactment of numerous and conflicting claims provisions has created grave problems both for governmental entities and those who have just claims against them," and that the procedures "governing the presentation of claims against governmental entities is unduly complex, inconsistent, ambiguous and difficult to find [and] often results in the barring of just claims." (CLRC, Recommendation and Study Relating to the Presentation of Claims Against Public Entities (1959) 2 Cal. Law Revision Com. Rep. at A-7, *available at* http://www.clrc.ca.gov/pub/Printed-Reports/*Non%20Searchable/Pub019.pdf (hereinafter "CLRC Rep." or "the Report").) The Report

highlighted a multitude of problems with a system which was both decentralized and lacking transparency.

First, statewide, claims procedures varied widely in almost all regards, including: "the types of claims . . . subject to presentation requirements, the official to whom claims must be presented, the information which the claimant must furnish, the requirements of verification and signature, the time allowed for consideration . . . and the time allowed for commencing an action after a claim is rejected." (*Id.* at A-8.) With 174 separate claims provisions in California, claims were ambiguous and overlapping, which meant that "claimants, attorneys and courts [were] often confused as to which, if any, of several claims provisions applie[d] to a particular case." (*Id.*) A recent California Supreme Court decision agreed that the pre-1959 system of "numerous state statutes and local ordinances" against "state, local and municipal governments" were a "Byzantine claims system" lacking standardization. (*DiCampli-Mintz v. Cnty. of Santa Barbara* (Cal. Dec. 6, 2012) No. S194501, 2012 Cal. LEXIS 11151, at *27.) Under that system, the same claim might be subject to different procedural requirements based on the city or county governing, and a court handling multiple local jurisdictions would have to navigate contradictory and overlapping claims procedures. This leads to the simultaneous proliferation of different claim provisions and holes, where some claimants are left out but others have multiple procedures to navigate. (See CLRC Rep. at A-7.) Additionally, residents who move even short distances would have to learn entirely new claims procedures for identical claims, and would risk losing those claims if they failed to understand or follow a procedural hurdle.

Second, and relatedly, under the pre-1959 system, disparate claims procedures led to situations where just claims were denied based on technical failures to comply with claims procedures despite the fact that

"the defect clearly did not impair the effectiveness of the claim in fulfilling the basic notice-giving function and purpose of the claim filing requirement." (CLRC Rep., *supra*, at p. A-8.) The purpose of enacting uniform claims filing procedures is so that a local government may be aware of the claims levied against it and deal with them expeditiously before a lawsuit need be filed. (See *Ardon*, 52 Cal.4th at 252.) It should not be to discourage or deny meritorious claims by preventing residents from filing them or succeeding on them because they cannot understand the technical requirements of the statute. (Accord *id.* ("That Policy favoring fiscal responsibility . . . does not justify precluding legitimate class proceedings for the refund of allegedly illegal claims.").) Disparate procedures have the problem, thus, of both precluding meritorious claims and also leading to unnecessary litigation. (*Id.*)

Third, disagreements about policy between cities results in "extreme nonuniformity multiplied and scattered throughout many independent statutes, city charters and ordinances." (*Id.* at A-19.) This increases the likelihood that failures by residents, entities and courts will occur, since the more complicated the regulatory system, the more chance for error. These conflicts and disagreements also compound the inefficiencies that exist by having multiple claims systems.

Fourth, a lack of uniform procedure prevents claim or issue preclusion on particular types of claims, and also means that courts are interpreting hundreds of slightly different statutes. This increases the likelihood that "no consistent pattern appears in the judicial decisions dealing with the extent to which the principles of waiver and estoppel may be invoked to preclude a governmental entity from relying upon technical noncompliance with a claims provision." (*Id.* at A-8.)

All arguments about the specific applicability of the statute aside, it is clear that the Act was designed specifically to eliminate a set of

disparate, confusing, and contradictory claims presentation ordinances that made evaluating claims against government entities difficult to navigate and even more difficult to resolve fairly.

II. The California Statewide Process for Tax Refund Claims is Specific, Fair, and Transparent, while the City's Code is Vague, Ambiguous, and Opaque.

Instead of the confusing and contradictory ordinances adopted by various municipal, city, and county governments prior to 1959 for claims against government entities, the California Legislature adopted the Government Claims Act ("the Act"). The Act is transparent, specific, and fair.

First, the Act specifies all procedural steps necessary for claimants to file. The plain language of the Act outlines, for a claim against a city like Long Beach: (1) who may present a claim, § 905; (2) the information that should be contained in the claim, § 905; (3) the time within which the claim must be presented, § 911.2; (4) the time within which the City must notify a claimant of deficiencies, § 910.8; (5) the actions the City may take in responding to the claim, § 912.6, and the time within which the City must act, § 912.4; (6) the mechanisms and proper parties for service, § 915; (7) and how and to whom notice of the City's actions in relation to a claim must be delivered, § 915.4. The mechanisms are specific, and outline each step for claimants in a detailed fashion.

The purpose of such a detailed procedure "is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." (*Ardon*, 52 Cal.4th at 247 (quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d. 447, 455 (internal quotation marks omitted)).) Thus, both claimants and government entities are served by the Act. Local governments have a mechanism through which claims may be investigated

and dealt with without protracted and unpredictable litigation, and claimants who seek redress from a government entity have clear and fair options.

The City argues that it has enacted a specific ordinance that covers tax refunds, Long Beach Municipal Code ("LBMC") § 3.68.160, and additional ordinances that cover claims against the City generally, LBMC §§ 3.48.060-3.48.070, both of which should trump the Act. But this so-called procedure for tax refund claims is confusing and ambiguous. First, the plain language of the city ordinance refers to refunds brought by service suppliers, not taxpayers. Appellant—and the Court of Appeal—conclude that this forecloses the City's argument that the Act is not controlling. (See Plaintiff's Answer Brief on the Merits (hereinafter "Pl.'s Br.") at 23.) Regardless, the City's interpretation requires resort to multiple explanations, sections, and complicated provisions that are interpreted by the City to preclude class claims but otherwise do not give clear instructions to claimants as to how to file their claims.

The City's insistence that any procedure not expressly stated within the ordinance is disallowed only further confuses the situation. For one thing, it is contradicted by the plain language of LBMC § 3.48.070. (See Pl.'s Br. at 23-24.) For another, no procedure whatsoever is specified for the many steps that claimants would need to follow to have their claims heard. No part of the LBMC cited by the City specifies who may file a tax refund claim, how to file a claim, what the parties' response deadlines are, how to correct procedural errors, or how to provide notice or service. This essentially allows the City to do exactly what the CLRC was concerned about prior to the 1959 enactment of the Government Claims Act: reject meritorious claims for technical errors, confusing claimants and providing no transparent mechanism for evaluating claims.

Even if the City's interpretation of its claims process is consistent with the language of the ordinance at issue, it is not the only reasonable interpretation, and it is not codified. Rather, the City's interpretation is in response to this lawsuit, and is subject to change based on shifting priorities or City personnel, without any change whatsoever to the ordinance language. For both consumers and cities, this makes it impossible for a system under which claims may be fairly evaluated to exist.

The city argues extensively that local claiming requirements should be respected, relying on the need for government to predict revenues and payment obligations in order to provide stable funding for essential public services. (See City of Long Beach's Opening Brief on the Merits (hereinafter Def.'s Br.) at 39-40.) But the need for procedure to "minimize disruption" does not apply here. (*Id.* at 40 (quoting *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 71-72).) First, the need for predictable revenue does not allow local governments to deny legitimate claims in the name of funding public services. (See *Ardon*, 52 Cal.4th at 252.) Second, if the question is predictability, a class claim that resolves all instances of a known issue (in this case, the ability of the city to keep collecting a telephone tax when federal law has determined it no longer valid to collect) is actually far more predictable for funding purposes than intermittent claims by thousands of individual litigants. Here, the city has the ability to resolve all claims related to this particular tax refund uniformly and expeditiously, without contradiction or overlapped effort. (Accord CLRC Report at A-7 (stating that the "two principal purposes" of claims statutes are to "give the governmental entity an opportunity to settle just claims before suit is brought" and to "permit the entity to make an early investigation of the facts on which a claim is based, thus enabling it to defend itself against unjust claims and to correct the conditions or practices which gave rise to the claim").) Unless the city's argument is merely that

they should be able to retain taxes illegally collected in order to fund public services deemed more essential, predictability is better served by following the uniform statewide procedure already determined to allow class claims to resolve this type of dispute.

Finally, from a policy perspective, the City of Long Beach's claims process is not the only relevant claims process. There are approximately 145 cities and counties in California with a telephone user tax. If any city or county can overrule a uniform government claims procedure with its own, the very problems outlined by the 1959 CLRC Report of nonuniform claims procedures will come to exist in California once again. Claimants will be unable to navigate the fair, transparent process provided by the Act, and will instead be subject to contradictory and confusing local policy. Government entities will be more likely to be subject to protracted litigation, and some meritorious claimants will have their claims denied for technical failures unrelated to the merits of the claim presented.

For the foregoing reasons as well as those stated in Appellant's submissions to this Court, *amici curiae* respectfully submit that the judgment of the Court of Appeal, reversing the trial court's grant of demurrer, should be affirmed.

Dated: December 17, 2012 Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 2,017 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

Dated: December 17, 2012

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[Proposed]

ORDER GRANTING APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

Good cause appearing, IT IS HEREBY ORDERED that the Application for Leave to File *Amici Curiae* Brief in Support of Plaintiff/Appellant is granted. The *Amici Curiae* Brief in Support of Plaintiff/Appellant is hereby accepted for filing.

Dated: _____ _____

Presiding Justice

CERTIFICATE OF SERVICE

I, Richard Anthony, hereby certify that I am a citizen of the United States and a resident of the State of California, over the age of eighteen, and not a party to the within action. My business address is 275 Battery Street, 29th Floor, San Francisco, CA 94111.

On this 17th day of December 2012, I filed the original and 13 copies of the foregoing Application for Leave to File *Amici Curiae* Brief and *Amici* Brief in Support of Plaintiff/Appellant in McWilliams v. City of Long Beach, No. BC 361469 (the "Submission"), with the Clerk of the Supreme Court California by Same-Day Courier, and served one copy of the Submission to all parties as notated on the attached service list via Federal Express Overnight Delivery.

Dated: December 17, 2012

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