Civil 8-12-09

S174507

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTUARDO ARDON, [redacted]

Plaintiff/Appellant

vs.

CITY OF LOS ANGELES

Defendant/Respondent

SUPREME COURT
FILED

JUL 21 2009

Frederick K. Ohlrich Clerk

Deputy

After a Decision By The Court of Appeal
Second Appellate District, Division Three
Case No. B201035

Appeal from the Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC 363959

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner is asking the Court to grant review of the opinion (the "Opinion") of the Second District Court of Appeal issued on May 28, 2009, modified on June 16, 2009, in this matter in order to consider whether the decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 (*"City of San Jose" or "San Jose"*) should be extended to apply to claims for tax refunds. (Petition for Review ("Petition"), at 1) However, this Court has already considered that question in *Woosley v. State of California* (1992) 3 Cal.4th 758 (*"Woosley"*) and expressly and resoundingly rejected the request to extend *San Jose*. In *Woosley*, this Court reaffirmed the importance of section 32 of article XIII of the California Constitution (providing for strict legislative control over tax refund claims) and the broad and fundamental public policies underlying it, and concluded that claims for tax refunds must strictly comply with applicable claiming requirements. Numerous decisions of the Courts of Appeal are in accord. The sole outlying and inconsistent case, *County of Los*

Angeles v. Superior Court (real party Oronoz), 159 Cal.App.4th 353 (2008) ("*Oronoz*"), has now been disavowed by the Second District, restoring consistency to the case law.

In other words, the Opinion issued in the instant case not only complies with this Court's precedent and express direction, it restored uniformity among the courts of appeal as well. There is no remaining conflict of law to resolve and review should be denied.

If the Court were to grant review, however, Respondent City of Los Angeles would request that the issue for review be reframed as a more neutral and more complete question than that presented by Petitioners and that the court not depublish the Opinion below without also depublishing the *Oronoz* decision it overruled.

LEGAL DISCUSSION

I. SUPREME COURT REVIEW IS NOT NECESSARY BECAUSE NO CONFLICT OF LAW EXISTS

This Court may order review of a Court of Appeal decision "when necessary to secure uniformity of decision or settle an

important question of law." (California Rules of Court, Rule 8.500(b)(1).) In the instant case, however, there is no conflict in the decisions of the Courts of Appeal. More importantly, the Court of Appeal decisions are now in harmony with this Court's decision in *Woosley*. The single outlying and inconsistent decision – *Oronoz* – was disavowed in the Opinion below. Therefore, review by this Court is not necessary because the issue has been settled at the appellate court level.

A. In *Woosley* This Court Rejected The Extension of *San Jose* To Tax Refund Claims

This Court held in *Woosley v. State of California* that class claims are not allowed in tax refund actions. (1992) 3 Cal.4th 758, 789. Specifically, this Court held "that the holding of *City of San Jose*...should not be extended to include claims for tax refunds." *Id.*

Woosley involved a plaintiff who sought to pursue a class claim for a refund of vehicle license fees and use taxes. *Id.* at p. 788. This Court found that the class claim was not authorized by the statutes

governing vehicle license fees and use taxes. *Id.* Moreover, in reaching its decision this Court required that the plaintiff in that matter *strictly comply* with the applicable claims statute. *Id.*, at pp. 789-790. This ruling enforced the California Constitution's assignment to the legislature of exclusive control over tax refund claim procedures. "The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. provides in this regard: 'After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, *in such manner as may be provided by the Legislature.*' (Italics added.)" *Id.* at 792. Thus, this Court held that where the legislature did not expressly authorize a class claim for tax refunds, courts were forbidden from implying one. *Id.*

Not only was this ruling based on the Constitution, it was based on the importance of protecting tax revenue needed to fund essential public services. This Court explained the policy underlying the decision in *Woosley* as follows:

> "This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues."

Id. As explained in the Opinion here, *Woosley* followed a long line of Supreme Court cases that broadly construed article XIII, section 32 because of the importance of the underlying public policies. Opinion, 174 Cal.App.4th at p. 381. The Supreme Court cases relied upon in *Woosley* "emphasized that article XIII, section 32 serves the important purpose of prohibiting an unplanned disruption of revenue collection, so that essential public services dependent on the funds are not unnecessarily interrupted." *Id. (citations and internal quotations omitted).*

In light of the public policy expressed in *Woosley,* the Second District here recognized that in instances where a "plaintiff seeks to assert a class action on behalf of a very large number of people, and the governmental entity faces an unexpected and huge liability[,]" such as in the instant action, "[i]t is vital that the Legislature retain

control over the manner in which claims may be asserted, so that governmental entities have sufficient notice of claims to allow for predictable and reliable fiscal planning." Opinion, 174 Cal.App.4th at p. 381.

In other words, the Opinion here follows this Court's decision in *Woosley*, both as to its holding and as to the policy and reasoning underlying the decision.

B. The Decisions Of The Courts Of Appeal Uniformly Apply This Court's Decision In *Woosley* To Local Taxes

Petitioner here argues that *Woosley* should not apply to refunds of local taxes. However, for more than a decade, California appellate authority has consistently recognized that the *Woosley* rule and its reasoning applies to local taxes. In *Neecke v. City of Mill Valley*, 39 Cal.App.4th 946, 962 (1996), the First Appellate District specifically rejected the argument that the *Woosley* rule is inapplicable to tax refund actions against local municipalities, observing that:

> "the argument ... is belied by the *Woosley* decision itself. Nothing in the language of *Woosley* indicates an intent to limit that case's holding to claims statutes addressed to state, as opposed to local, taxes; indeed, that part of the court's opinion dealing with the class claim issue twice uses the term 'government entities.'"

The court below agreed with *Neecke* and interpreted the term "government entities" as "broad and plural" and not "limited to the state alone." Opinion, 174 Cal.App.4th at 384.

In reaching this conclusion, both *Neecke* and the Second District in the instant case, emphasized the fact that *Woosley* had expressly overruled *Schoderbek v. Carlson*, 113 Cal.App.3d 1029 (1980). *Neecke*, 39 Cal.App.4th at 962-963; Opinion, 174 Cal.App.4th at 385. *Schoderbek*, relying upon *San Jose*, had held that class claims and class actions for refunds of local property taxes were permitted. As noted by the *Neecke* court,

> "[t]here was simply no reason for the Supreme Court to disapprove of *Schoderbek* unless the court intended its *Woosley* holding to apply to local, as well as state, taxes."

Neecke, 39 Cal.App.4th at 962-963. The court here agreed. Opinion, 174 Cal.App.4th at 384.

Neecke's reading of *Woosley* and its treatment of *Schoderbeck* was again recently quoted with approval in *Batt v. City and County of San Francisco*, 155 Cal.App.4th 65, 77 (2007) (depublication request denied, Jan. 3, 2008, Cal. S. Ct. Case No. S158168), a case involving a purported class action claim for a local tax refund brought under a municipal claiming ordinance. The plaintiff in *Batt* argued that *Woosley* was not controlling and should be "narrowly applied." *Id.*, at p. 76. In response to the plaintiff's contention that all of the cases expressly disapproved in *Woosley* involved state taxes, as opposed to local taxes, the court in *Batt* stated, "We could not disagree more, as we made clear – or at least believed we made clear – 12 years ago in *Neecke*." *Id.* Moreover, the court in *Batt* stated: "It may be true, as plaintiff asserts, that *Woosley* does not 'categorically' forbid class

actions in tax refund cases. But it did in effect preclude refund class actions except where the antecedent administrative claim on behalf of the putative class is expressly authorized by statute." *Id.*, at p. 77. Finally, although expressly applicable to the state, the court in *Batt* found that article XIII, section 32 equally applicable to local governments. *Id.*, at p. 84, citing *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129. Accordingly, the *Batt* court rejected a purported class claim for a local tax refund.

Similarly, *Howard Jarvis Taxpayers Association v. City of Los Angeles* involved a purported class action for the refund of a local tax. The court there noted that under *Woosley*, "class-action-type lawsuits seeking a refund of fees and taxes are barred unless each plaintiff has first filed an administrative refund claim with the City." (2000) 79 Cal.App.4th 242, 250.

Similarly, *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, was recognized by *Batt* as "clearly pertinent to any meaningful discussion of the issue here." *Batt*, 155 Cal.App.4th at 82,

fn.9. *Kuykendall* was a consumer class action seeking the refund of a San Diego sales tax that had previously been held unconstitutional by the California Supreme Court. The trial court there had certified a class, granted plaintiff's motion for summary judgment and effectively imposed a constructive trust on the challenged tax revenue. *Kuykendall*, 22 Cal.App.4th at pp. 1200-1201. Citing *Woosley*, the Fourth Appellate District sustained the Board's position that § 32 of article XIII precludes a court from expanding the methods for seeking tax refunds expressly provided by the legislature, and agreed that statutes governing administrative tax refund procedures are to be strictly enforced. *Kuykendall*, 22 Cal.App.4th at 1202-1203. In so doing, the *Kuykendall* court rejected the argument that a taxpayer can "maintain a common law reimbursement action based on principles of restitution and constructive trust without complying with statutory conditions, specifically ... administrative claim requirements." *Kuykendall*, 22 Cal.App.4th at 1204. The *Batt* court explicitly endorsed this conclusion (*Batt*, 155 Cal.App.4th at 85), and along with

Neecke and *City of Los Angeles*, these authorities should remove any doubt that the *Woosley* rule applies to local taxes.

In *IBM Personal Pension Plan v. City and County of San Francisco* the Court of Appeal again followed *Woosley.* The court there focused on the second sentence of section 32 and its assignment to the Legislature of plenary control over tax refund actions:

> "Because article XIII, section 32 vests the Legislature with plenary control over the manner in which tax refunds may be obtained, a party "must show strict, rather than substantial, compliance with the administrative procedures established by the Legislature."

IBM Personal Pension Plan, 131 Cal.App.4th 1291, 1299, quoting *Neecke, supra*, 39 Cal.App.4th at p. 961, citations omitted.

Again, in *Cod Gas & Oil Co. v. State Bd. of Equalization* (1997) 59 Cal.App.4th 756, 759-60, the Court of Appeal applied *Woosley* to require strict compliance with claiming requirements for refunds of county sales taxes. In that case, involving allegedly illegal county sales taxes, the Third Appellate District declined to relax the

refund procedures specifically authorized by the Legislature – and have cited *Woosley*'s broad policy rationale for rejecting class claims. *Id.*; *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410 at pp. 1419-1421 (same, relying on Woosley).

Thomas v. City of East Palo Alto, 53 Cal.App.4th 1084 (1997), followed the same reasoning with respect to a class action seeking the refund of a municipal parcel tax, though reaching the opposite result. In that case, each member of the class had submitted an administrative claim on an individual basis prior to the commencement of the lawsuit. Distinguishing *Woosley* and *Neecke*, the appellate court explained that because each plaintiff had submitted an administrative claim meeting the conditions required by *Woosley* and *Neecke,* a class action was appropriate. *Thomas*, 53 Cal.App.4th at p. 1095. Again, the requirements of express legislative authorization and strict compliance were recognized and applied in the context of a local tax refund.

Finally, as mentioned in the Petition, the unanimous decision in *Loeffler v. Target Corp.* was issued by the Second Appellate District

in the same month as the Opinion here and reiterates that article XIII, section 32 *and the policies underlying it* must be broadly construed. (2009) 173 Cal.App.4th 1229; Petition at 9. The plaintiffs in *Loeffler* were retail customers who sought a refund of sales tax on their own behalf and on behalf of the class they purported to represent, without the taxpayer (the retail vendor) going through the usual administrative procedure. *Loeffler* (2009) 173 Cal.App.4th 1229, 1234. The trial court sustained, without leave to amend, demurrers to the plaintiffs' pleadings and entered judgment in favor of the defendant "on the ground, among others, that article XIII, section 32 of the California Constitution bars plaintiffs' action." *Id.* In affirming the trial court's ruling, the Second District concluded: "Our Supreme Court has broadly construed article XIII, section 32 in light of the overriding policies behind that provision. Article XIII, section 32 ***and the policies which it represents*** bar plaintiffs' action...." *Id.* at 1251 (emphasis added). Once again, the courts are completely consistent in their instruction that section 32 must be broadly construed and the

policies underlying it are of overriding importance and must be given great weight.

As illustrated by the authorities cited above, the ***overwhelming*** weight of California appellate authority recognizes the application of the *Woosley* rule to local taxes.

C. The Sole Outlying Appellate Decision Was Overruled

Indeed, there was only one appellate authority that held inconsistently with the long line of cases discussed above, and it has been overruled. As Appellant Admits, *Ardon* overruled *Oronoz's* holding that a claim under Government Code section 910 for a refund of local taxes could be asserted on behalf of a class. Petition, at 4. Sixteen months after the decision in *Oronoz* a substantially similar panel[1] of Division Three of the Second Appellate District held in

[1] In *Oronoz*, supra, 159 Cal.App.4th 353 the Panel of the Court of Appeal, Second Appellate District, Division Three ,consisted of Croskey, J., with Klein, P.J. and Aldrich, J., concurring. In *Ardon*, supra, the Panel of the Court of Appeal, Second Appellate District, Division Three, consisted of Kitching, J., with Klein, P.J., concurring and Croskey, J., dissenting.

Ardon that "*Oronoz* was incorrectly decided" and "[w]e overrule that aspect of *Oronoz* in this case." Opinion, 174 Cal.App.4th at p. 383.

A panel in the same district of the Court of Appeal may overrule another panel's decision. *Imperial Irrigation District v. State Water Resources Control Board,* (1990) 225 Cal. App. 3d 548, 556 (in ruling on a matter it previously remanded to the trial court the Court of Appeal noted that "of course [it] has the power to reconsider its prior decisions."); *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598 217 Cal. App. 3d 1591 (decision of another panel of the same court may be overturned for compelling reasons); *Opsal v. U.S. Automobile Assoc.* (1991) 2 Cal. App. 4th 1197, 1203-1204 (following *Bolden*, permissible to overrule decision of another panel of same court).

Here, *Ardon* unequivocally found that *Oronoz* was incorrectly decided. *Ardon*, supra, 174 Cal.App.4th at p. 383. The *Ardon* court exceeded mere disagreement with its decision in *Oronoz*, but specifically stated that it "overrule[d]" *Oronoz* to the extent it conflicted with the finding that "a [Government Code] section 910

claim for a tax refund on behalf of a class is precisely the type of claim prohibited by the plain language of *Woosley*" and the policy underlying article XIII, section 32. *Id.* at p. 384.

Thus, the Second District brought its decisions in line with *Woosley,* article XIII, section 32 and the large body of appellate authority holding that strict compliance with claiming requirements is required for tax refund claims. There remains no inconsistency or conflict for this Court to resolve.

D. *San Jose* Is Not Applicable to Tax Refund Claims

Petitioners attempt to use *City of San Jose v. Superior Court* to create a conflict is not persuasive. *San Jose* simply has no applicability here. As noted above, this Court has unequivocally held "that the holding in *City of San Jose*...should not be extended to include claims for tax refunds." *Woosley*, 3 Cal.4th at p. 789.

Moreover, the plaintiffs in *San Jose* consisted of "real property owners" who "proceed on theories of nuisance and inverse condemnation" seeking "recovery for diminution in the market value

of their property caused by aircraft noise, vapor, dust, and vibration." *San Jose*, *supra,* 12 Cal.3d at pp. 452-453. *San Jose* was not a tax refund action and therefore does not implicate any of the constitutional or policy concerns that motivated the decisions in *Woosley, Neecke, Batt,* the many other appellate court decisions discussed above or, indeed, the decision here.

Not unexpectedly, therefore, *San Jose* contains no discussion of article XIII, section 32 or its underlying policies. Instead, as recognized by the court below (*Ardon*, supra 174.Cal.App.4th at p. 384) *San Jose* relied on a policy *favoring* class actions as expressed by statute. *San Jose*, supra, 12 Cal.3d at 457. This Court has expressly recognized that tax refund claims are different. *Woosley*, *supra*, 3 Cal.4th at p. 789. The court below agreed finding that article XIII, section 32's provisions requiring that actions for tax refunds be brought as set forth by the Legislature (and the underlying policy concern that local governments engage in fiscal planning) "outweighs the statutory policy in favor of class actions." Opinion, 174 Cal.App.4th at p. 384.

In sum, *San Jose* cannot be used to create a conflict where none exists. Given that it does not involve a tax refund and never addresses article XIII, section 32 *San Jose* is plainly distinguishable from tax refund claims and this Court has already declined the invitation to extend *San Jose* to tax refund cases. It is not necessary to repeat this conclusion.

E. There Is No Conflict in Authority Regarding the Applicability of Article XIII Section 32 to Tax Refund Claims

Petitioner's attempt to create a conflict in need of resolution as to the applicability of article XIII, section 32 likewise fails. Article XIII, section 32 contains two sentences. The first sentence prohibits judicial interference with tax collection: "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." This first sentence expressly identifies the "State and its officers" as

the subject taxing authorities who may not be judicially restrained from collecting a tax.[2]

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[2] Interestingly, although courts have acknowledged that the language of the first sentence of section 32 specifies "the State," they nevertheless have found that public policy required that the anti-injunction provision in the first sentence of section 32 be applied to all taxes in California, whether state or local. *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1138 (no injunctive or declaratory relief against local parking tax); *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 481 (no injunctive or declaratory relief against local business tax); *accord Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444 1457 fn. 22. Thus, equitable relief is barred as to local taxes where a claiming procedure exists by which a taxpayer must pay a tax, file a valid claim for refund, and then seek a judicial determination of the validity of the tax in a postpayment refund action. *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 72-73 (local transient occupancy tax); *Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1013-1014 (local property tax); *Flying Dutchman,* 93 Cal.App.4th at p. 1137; *Writers Guild,* 77 Cal.App.4th 475 at p. 479. The rationale expressed in these cases for precluding injunctive or declaratory relief in tax cases is the strong public policy favoring the uninterrupted funding of governmental activities, and disfavoring interference with the government's ability to provide essential public services. The anti-injunction prohibition in the first sentence of section 32 is one embodiment of that public policy. "This principle is generally known as the "pay first, litigate later" rule, and it applies at all levels of government-the federal (26 U.S.C. §§ 7421, subd. (a), 7422, subd. (a); 28 U.S.C. §§ 1346, subd. (a)(1), 2201, subd. (a); *Flora v. United States* (1958) 357 U.S. 63, 67-75; *Cheatham et al. v. United States* (1875) 92 U.S. 85, 88-89); the state (Cal. Const., art.

The second sentence of section 32 -- the one at issue here -- establishes strict legislative control over tax refund actions and is not similarly limited to the State and its officers. That second sentence reads: "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." Cal. Const., art. XIII, § 32. This second sentence of section 32 contains no limitation on the types of tax refunds that are subject to this exclusive legislative authority. It is the second sentence that was relied upon by this Court in *Woosley.*

Petitioner here attempts to manufacture a conflict in law by citing to cases addressing the applicability of the first sentence – the anti-injunction provision. *Pacific Gas & Electric Co. v. State Bd. of*

XIII, § 32; Rev. & Tax. Code, §§ 6931 [sales and use taxes], 19381, 19382 [franchise and income taxes]; *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638); and the local (Rev. & Tax. Code, §§ 4807, 5140 [property taxes]; S.F. Bus. & Tax Regs. Code, § 6.15-4, subd. (a) [persons challenging tax "must first pay the amount of the disputed tax ... prior to seeking judicial relief"]; *Flying Dutchman, supra*, at p. 1136-1138; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 483). *Batt,* 155 Cal.App.4th at pp. 71-72 (citations and footnotes omitted, other bracketed text in original.

Equalization (1980) 27 Cal.3d 277 (writ against state agency to compel reduction in tax prior to payment denied; expressly distinguishing *Star-Kist Foods, Inc. v. Quinn* (1960) 54 Cal.2d 507 as involving a "county assessment"); *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2004) 25 Cal.4th 809, 822 (dicta in a footnote states that section 32's bar on "injunctive and writ relief in tax actions against *the State of California* and its officers" was not applicable to local government officers). Nowhere in these opinions did the Supreme Court discuss the second sentence of section 32.

Nor does the case of *Eisley v. Mohan* (1948) 31 Cal.2d 637, 641 create a conflict to be resolved. *Eisley* construed the *predecessor* to article XII, section 32 which contained markedly different language. That predecessor provision – former section 15 of the same article XIII – read:

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

> collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected.

Former Cal. Const. art. XIII, § 15, as of 1948. Former section 15 is thus grammatically different from section 32; section 15 comprised a single sentence rather than two different sentences with different subjects. Moreover, former section 15 did not contain section 32's clear assignment to the Legislature of exclusive authority regarding tax refund procedures. Former section 15 authorized a refund action "as may be provided by law." Thus, judicial interpretations of this section are of limited, if any, value in interpreting the meaning of section 32's express delegation of authority to "the Legislature."

In addition, former section 15 limits *all* of its terms to "any tax levied under the provisions of this article" – *i.e.*, taxes imposed under article XIII of the Constitution. No such

limitation exists in section 32, which expansively protects *all* tax revenues. Section 32's prohibition on injunctive relief against State officers applies to "a tax claimed to be illegal"; and section 32's delegation of authority to the Legislature regarding refund actions has no restriction at all regarding the type of tax or taxing authority. Thus, the *Eisley* case construing former section 15 cannot reasonably be read to create a conflict with *Woosley* or any other interpretation of section 32 as it exists today.

In sum, the cases cited by Petitioner as limiting section 32 to state claims have not addressed section 32's *second* sentence. As discussed above, those cases that have addressed the second sentence of section 32 have uniformly concluded that this *second* sentence applies to all taxes, state or local.[3]

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[3] Similarly, although not addressing the permissibility of class claims, *Macy's Dept. Stores, Inc. v. City and County of San Francisco, supra*, 143 Cal.App.4th 1444, also concluded that section 32 applies to local taxes. There, the Court of Appeal considered whether the measure of interest due on a refund of a local business tax was governed by state statute, or by the interest provision of a local ordinance. In ruling that

II. IF REVIEW IS GRANTED, THERE IS ONLY ONE ISSUE TO BE ADDRESSED: WHETHER A CLASS CLAIM AGAINST A GOVERNMENT AGENCY FOR A TAX REFUND MUST STRICTLY COMPLY WITH APPLICABLE CLAIMING REQUIREMENTS?

Instead of requesting review of the basic issue addressed by the Court of Appeal, Petitioner attempts to pick and choose only certain aspects of the Court below's reasoning, framing his issues in terms of the *City of San Jose* case and whether section 32 applies to actions against local entities.[4] However, a complete analysis of the issue – as

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the interest rate was governed by state statute, the court relied on the second sentence of section 32 and characterized the payment of interest on the local tax refund as a "requirement[] of state *constitutional* and statutory law." *Id.* at p. 1458 & fn. 24, emphasis added. Thus, the court explicitly applied to a local tax the constitutional requirement of section 32 that interest be paid in the "manner … provided by the Legislature."

[4] Petitioner frames the issues for review as follows (Petition, at 1):

i) 'Does Government Code Section 910, as constructed by this Court's decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 [115 Cal.Rptr. 797] (*City of San Jose*), permit the filing of a class claim with a local public entity for the refund of local taxes?"

exemplified by the decision in the Court below – gives no special priority to *San Jose* and looks at all the pertinent decisions, as well as the public policies underlying those decisions and Section 32. (Thus, for example, the decision below notes that the policies underlying *San Jose* do not apply to local tax refund cases, whereas the policies underlying Section 32 apply and are of critical importance.)

Although as discussed above, these issues have been resolved consistently and completely by this Court and the various courts of appeal, if the Court were to revisit these issues it should do so in the context of the broader question:

> Must a class claim against a government agency for a tax refund strictly comply with applicable claiming requirements?

The issue, as presented by Respondent, is thus similar to the manner in which it was framed by the Court below:

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ii) "Does article XIII, section 32 of the California Constitution apply to action against local entities for the refund of local taxes?"

> "[W]hether the claimant is required to comply strictly with the requirements of the [claiming] statute or whether the claimant can merely substantially comply. If strict compliance is required, the claimant cannot pursue a class claim. On the other hand, if the claimant's substantial compliance can satisfy the statute, he or she can pursue such a claim."

Opinion, 174 Cal.App.4th at p. 378.

Alternatively, if the Court would prefer to break the question into component parts, the City respectfully suggests that the component issues, more completely and neutrally framed, would be:

i. Should this Court's decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 [115 Cal.Rptr. 797], be extended to allow the filing of class claims against local public entities for tax refunds?

ii. Does this Court's decision in *Woosley v. State of California* (1992) 3 Cal.4th 758 [13 Cal.Rptr.2d 30],

require that tax refund claims against local entities strictly comply with applicable claiming requirements?

iii. Does article XIII, section 32 of the California Constitution require that tax refund claims against local entities strictly comply with applicable claiming requirements?

iv. Does public policy require that tax refund claims against local entities strictly comply with applicable claiming requirements?

Although each of the various components listed above is part of the evaluation, there is really only one question. Petitioner's framing of the issues limits review, if granted, to an examination of only certain aspects and focuses unduly on *San Jose*.

The decision below cannot be separated from its reliance on *Woosley*'s discussion of article XIII, section 32 and the underlying policy considerations in reaching the conclusion that "[t]he wisdom and language of *Woosley* pertains as strongly to claims for refunds of local taxes as it does to claims for refunds of state taxes." Opinion,

174 Cal.App.4th at 386. In fact, the Petitioner for Review devotes substantial attention to addressing the Opinion's finding that the policy considerations regarding government fiscal planning outweigh the policy cited in *San Jose,* yet poses no issue to the Court addressing those policy considerations. See Petition, at 19-21. Appellant should not now be permitted to frame the issues in a manner eschewing discussion of *Woosley* and the reasoning and policy underlying that decision.

If review is granted, Respondent respectfully requests this Court accept the broader issue presented here for review or, at the least, each of the component issues.

III. RESPONDENT REQUESTS THAT THE DECISION BELOW NOT BE DEPUBLISHED PENDING REVIEW OR, IN THE ALTERNATIVE, THAT *ORONOZ* BE DEPUBLISHED AS WELL.

Pursuant to California Rules of Court, rule 8.1105, subdivision (e), a grant of review by the Supreme Court effectively depublishes

the decision of the Court of Appeal at issue, *unless the Supreme Court orders otherwise.*[5] "In short, while an appellate court may *certify* (i.e., approve) an opinion for publication, the ultimate decision as to whether the opinion shall be published rests with the Supreme Court." *People v. Superior Court ("Clark")* (1994) 22 Cal.App.4th 1541, 1547 (interpreting rule 976(c)(2) the precursor to rule 8.1105(e)).

Since the Opinion below overruled *Oronoz* (Opinion, 174 Cal.App.4th at p. 383; Petition, at 4), if the Court accepts review, both decisions should be viewed as questionable authority until the Court decides this case. In order to preserve the issue cleanly for the Court here, *Oronoz* should be depublished as well. In the alternative, if this

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[5] Specifically, subdivision (e) of rule 8.1105 provides:

> "(1) Unless otherwise ordered...an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.
>
> (2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review."

Cal. Rules of Court, rule 8.1105, sub. (e).

Court chooses not to disturb *Oronoz*, the Opinion here should likewise remain undisturbed pending review.

CONCLUSION

The Opinion issued in the instant case not only complies with this Court's precedent and express direction, it restores uniformity among the courts of appeal. There is no conflict of law to resolve; therefore, review is not warranted and should be denied.

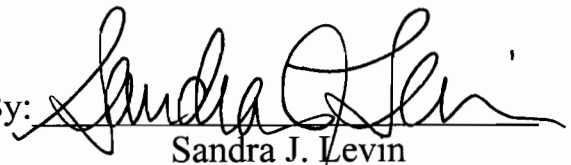
However, if this Court does grant review, Respondent City of Los Angeles requests that the issue for review be reframed as a more neutral and complete question and that this Court not depublish the

Opinion below without also depublishing the *Oronoz* decision it overruled.

DATED: July 27, 2009

Respectfully submitted,

COLANTUONO & LEVIN, PC

By: 

Sandra J. Levin
Attorneys for Defendant and Respondent,
CITY OF LOS ANGELES

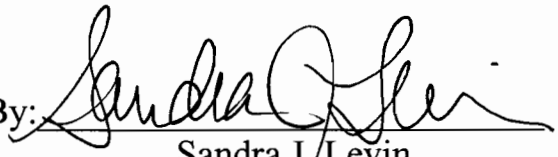
CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

The text of this document consists of 4,830 words, as counted by the Word version 2007 word-processing software program used to generate the document.

DATED: July 27, 2009

Respectfully submitted,
COLANTUONO & LEVIN, PC

By: 
Sandra J. Levin
Attorneys for Defendant and Respondent,
CITY OF LOS ANGELES

DECLARATION OF SERVICE

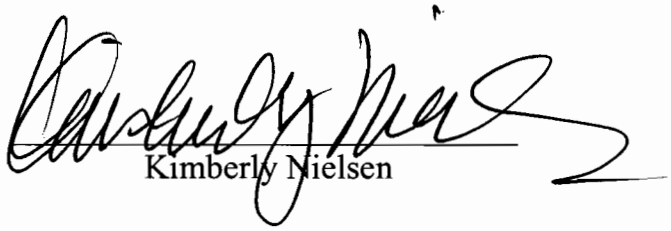
I, Kimberly Nielsen, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 555 West Fifth Street, 31st Floor, Los Angeles, California 90013.

2. That on July, 27, 2009, declarant served the **ANSWER TO PETITION FOR REVIEW** via Federal Express Overnight Delivery in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of July, 2009, at Los Angeles, California.



Kimberly Nielsen

Estuardo Ardon v. City of Los Angeles, et al.
Supreme Court Case No. S174507

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