S277628

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BARBARA MORGAN et al., Plaintiffs and Appellants, v. YGRENE ENERGY FUND, INC. et al., Defendants and Respondents.	D079364 (4th Dist. Div. 1) (Super. Ct. No. 37-2019-00052045-CU-OR-CTL) D079369 (4th Dist. Div. 1) (Super. Ct. No. 37-2019-00059601-CU-OR-CTL)
JANET ROBERTS et al., Plaintiffs and Appellants, v. RENEW FINANCIAL GROUP, LLC et al., Defendants and Respondents.	

San Diego County Sup. Ct. Cases 37-2019-00059601-CU-OR-CTL & 37-2019-00052045-CU-OR-CTL

Hon. Richard S. Whitney, Department 68, (619) 450-7068

PETITION FOR REVIEW

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1. Issues Presented

This case presents the issue of the trial courts' power to hear and decide Unfair Competition Law claims brought by senior citizen consumer home owner borrowers against private party defendants for market place conduct arising out of the private party defendants' performance of contracts with local municipal governments, which governments hired them to implement, finance and manage local Property Assessed Clean Energy (PACE) programs, ***without prior presentation of such claims to local tax authorities and prior review of the merits of such claims by County Assessment Appeals Boards***.

The Court of Appeal affirmed an order of the trial court dismissing a putative class of senior citizen plaintiffs' claims against private party defendants for violation of the Unfair Competition Law based on its finding that the UCL claim was a challenge to a tax and was required to first comply with the

administrative exhaustion requirements attendant to an action for a tax refund or cancellation of a tax assessment lien.

The decision squarely presents this Court with the opportunity to rule upon two issues of critical importance:

A. Do County Boards of Equalization have jurisdiction to address the Plaintiffs' Unfair Competition Law claims against private party defendants? Specifically, are such claims a type of "threshold factual question" that are implicit in any assessment" like the ownership issue presented in *Williams & Fickett v. County of Fresno*, 2 Cal. 5th 1258, 1269, (2017)?

B. Is the Court of Appeal's Decision Affirming Dismissal of Unfair Competition Law claims brought against private party defendants at odds with this

Court's admonition to be wary of limiting Unfair Competition Law claims in the context of challenges only tangentially related to tax matters? *Loeffler v. Target Corp*., 58 Cal. 4th 1081, 1142 (Cal. May 1, 2014) (dissent)

2. The Court Should Grant Review to Ensure that Judicial Tribunals Retain their Ability to Use the Unfair Competition Law to Deal with the Innumerable " 'New Schemes which the Fertility of Man's Invention Would Contrive, Even Where Such Claims Involve a Tax Issue *Loeffler v. Target Corp*., (2014) 58 Cal. 4th 1081.

Review is requested based on Cal Rule of Court 8.500(b) because it is both necessary to settle important questions of law and to securing uniformity of decision in the context of consumer protection law challenges in some way related to PACE (Property Assessed Clean Energy) programs. Counsel for Appellants has been informed that one or more ***County Assessment Boards will file briefs with the Court asserting their position***

(contrary to the Court of Appeal decision appealed from here) ***that such boards lack jurisdiction to hear any dispute involving PACE tax assessment liens***. Unless the law is clarified, Petitioners claims and future UCL claimants may not be heard *in any forum*, undermining the critical importance of the law in 'enabl[ing] judicial tribunals to deal with the innumerable " 'new schemes which the fertility of man's invention would contrive *Loeffler v. Target Corp.*, (2014) 58 Cal. 4th 1081, 1125.

Members of this Court in L*oeffler v. Target Corp*., 58 Cal. 4th 1081 (Cal. May 1, 2014) (dissent) warned against carving out additional holes in California's consumer protection statutes just because a matter touches upon some aspects of a tax issue:

> The court's ruling, though erroneous, ***need not be read to broadly establish that a consumer action may never go forward if it involves a tax issue.*** This case implicates a rather arcane and complicated question of taxability. *Future cases may implicate tax questions that are distinguishable from the one at issue here.*
>
> ***In light of California's strong legislative policy against deceptive business practices, courts should hesitate to [**88] expand the hole that***

> ***today's decision carves out of our consumer protection statutes***.
>
> *Loeffler v. Target Corp*., 58 Cal. 4th 1081, 1142 (Cal. May 1, 2014) (dissent)

Unlike the complicated interpretation of tax law and related regulations presented in *Loeffler*, which this Court held would benefit from prior review by the Franchise Tax Board, the administrative agency with the both the *expertise and statutory mandate to interpret the tax law*, here the only connection to a tax is that the alleged violations of the UCL took place while these private defendants were performing contractual duties in connection with a municipal finance transaction.

3. Private Defendants' Newest "Scheme" Involves a Business Model of Purely Asset Based Lending to Senior Citizen Homeowners *in the Immediate Aftermath of the Financial Crises Caused by Such Predatory Lending*, an Activity They Argue is Both Immune from Unfair Competition Laws *and Court Review* Because They are Funded Through a Governmental Conduit Bond Issuer

The putative class action claim here is brought on behalf of tens of thousands of California senior citizens who borrowed

money for home improvements from Property Assessed Clean Energy (PACE) programs. PACE programs use municipal conduit bond financing, traditionally used to allow banks and other financial institutions to make direct loans to commercial projects with public benefit (e.g. airports, sports stadiums), ***to instead for the first time be used make consumer home loans for home improvements***. The legislative purpose behind PACE was to combat global warming by encouraging financing of home improvements improving energy efficiency and creating new clean energy production, such as home insulation, "cool roofs", "heat reflective paint" and solar panels.

In traditional commercial lending, these loans are viewed as a form of "direct" lending:

> *Orrick Public Finance Manual*: ("In the conduit financing context, "private placement" or "direct lending" typically refers to a transaction in which a single party, such as a bank, purchases and holds an entire bond issue issued to fund a conduit loan to a conduit borrower..**in economic substance, these are two-party transactions consisting of a loan** (funded by way of a governmental conduit issuer) **from the bond purchaser to the conduit**

borrower.. ***the bond purchaser is really acting as a lender…***

Plaintiffs' legal theory advances the argument that the business decisions made by each of the three defendant PACE Program Administrators rendered each a "direct lender" of the loans made here to the class of Plaintiff senior citizens. Each PACE Administrator also "*purchas[ed] and holds an entire bond issue issued to fund a conduit loan to a conduit borrower"* and is therefore argued to be "in the business of lending money" to consumer borrowers. A further allegation is that because each defendant chose to work in close connection with home improvement contractors to promote these loans, and themselves engaged in ancillary home improvement related services such as setting maximum price guidelines, verifying construction permit compliance, providing dispute resolution services between homeowner and contractors, screening and policing the conduct of their affiliated contractor pool, each was a defacto "seller of home improvement services" under *King v. Central Bank*, 18 Cal. 3d

840 (1977). (Bank making secured loans financing insurance policies can be deemed a "seller of insurance services" under the Retail Installment Sales Act; Codified and clarified by Civil Code section 1801.6 (exempting *licensed* lenders from the definition of "seller under the Act and preserving the case law looking to the *substance*, not *form* of a transaction when deciding upon the applicability of the Act to a particular transaction).

The defendants assert that the fact that their actions are performed as independent contractors implementing PACE programs on behalf of local governments renders their conduct immune from challenge under the Unfair Competition Law ***and requires that the Plaintiffs pursue claims against the government and to comply with all administrative exhaustion requirement prerequisite to litigation claims against the government per Revenue and Taxation Code section 5140.***

Plaintiffs / Petitioners respond that the dismissal of their claims to date is yet an additional advantage of this newest "scheme" devised by Defendants, ***who claim the ability engage in a massive program of asset backed lending*** (no credit checks or ability to pay standard – the only lending criteria being sufficient equity to guarantee repayment on foreclosure) and ***who further argue that this new scheme precludes any Court challenge without first requiring a would be Plaintiff to seek a tax refund and cancellation from the government***, ***which both Appellants and local County Assessment Appeals Boards agree***, ***is a remedy they lack the power to give***. The scheme is almost too perfect. It is the very type of claim that the UCL was designed to address:

> The UCL was intended " 'to permit tribunals to enjoin on-going wrongful business [**76] conduct in whatever context such activity might occur' " and to " 'enable judicial tribunals to deal with the innumerable " 'new schemes which the fertility of man's invention would contrive
>
> *Loeffler v. Target Corp.*, (2014) 58 Cal. 4th 1081, 1125.

The legislature failed to pass laws directly regulating the behavior of these private party defendants until well after the transactions by the putative class plaintiffs. PACE Program Administrators first because subject to some form of licensure and government regulation effective January 1, 2019. Financial Code section 22001(e). The failure of a comprehensive governmental response was likely the result of the legislature not foreseeing the outsized role private capital would play in the implementation, finance, and administration of municipal PACE programs:

> When created, it was presumed that public agencies would run the PACE program themselves; instead the majority of cities or counties have contracted out the services to new unregulated private entities to administer the PACE program. Only one program runs their own PACE program internally: Placer County.
>
> "Keeping Up With PACE: A Joint Oversight Hearing on Residential Property Assessed Clean Energy Programs" California Assembly Committee on Banking and Finance Thursday, June 9, 2016 10:00 a.m. - 1:00 p.m. Room 437

Even with the new licensure requirement, the legislature has still not considered the consumer law implications of this ***first ever use of the conduit bond lending model in a consumer loan context***. The new PACE Program Administrator License regulates the PACE Administrators in a capacity analogous to that of a mortgage broker. The amended law included PACE Program Administrators in the class of persons required to be licensed under the California Finance Law and simultaneously amended the Business and Professions Code sections governing mortgage origination to add PACE Program Administrators to the list of those excluded from the requirement of the Real Estate license law to be licensed as a mortgage broker. Business and Professions Code section 10133.1. This strongly suggests the legislature viewed the work of a Program Administrator as being tantamount to that of real estate broker. A Program administrator is defined as:

> (a) "Program administrator" means a person administering a PACE program on behalf of, and with the written consent of, a public agency. "Program administrator" does not include a public

agency.

Financial Code section 22018.

Compare that to the definition of Finance Lender, ***and Ygrene's and Renew's ongoing conduct is more plainly that of a <u>Finance Lender</u>*** as well:

> "Finance lender" includes any person who is engaged in the business of making consumer loans or making commercial loans…."
>
> Financial Code section §22009.
>
> "Consumer loan" means a loan, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes.
>
> Financial Code section 22203

In their contracts with local governments hiring them to implement, finance and administer PACE programs, the private party defendants were given a choice as to financing, they could raise it from third parties', or they could provide it all themselves. They chose to provide the capital themselves. If the Program Lenders had chosen the less lucrative option of

arranging for third party financing (instead of loaning their own money), they might well be in the position of solely *brokering the loans of others*.

The legislature has not addressed the legal impact of these same PACE Administrators entering into Master Bond Purchase Agreements wherein they assumed the role of *lender* in addition to that of an *administrator*. This business decision has consequences for the laws applicable to Defendant Ygrene Energy and Renew Financial *going forward* and is the subject of two non-class claims seeking Public Injunctive Relief under the Unfair Competition Law as to the future conduct of these two defendant conduit lenders. According to the Court of Appeal, these two must be first brought before the Assessment Appeals Board, and an in even cannot proceed unless and until a tax refund is first sought from the non-party government tax collectors.

4. **This Court Has Recognized that Although Assessment Appeals Boards Can Hear Disputes Outside of its Principal Equalization of Value Function, *Those Matters Must Still Involve "Threshold Factual Issues" Pertinent to its Constitutional Grant of Authority*. *Williams & Fickett v. County of Fresno*, 2 Cal. 5th 1258 (2017)**

The merits of these claims are not at issue here, but if the Court of Appeal decision is not reversed, ***they will never be addressed, in any forum***. That is because the issues that the claims present for resolution are not "threshold factual question" relating to the boards equalization function as discussed by this Court in a decision addressing the issue of the board's jurisdiction:

> In his concurring and dissenting opinion, Justice Chin asserts that county boards lack jurisdiction to decide claims of nonownership such as the one raised here. (See conc. & dis. opn. of Chin, J., post, at pp. 1288, 1292.) But ***this view fails to fully appreciate that a county board may need to decide certain threshold facts in the proper exercise of the equalization function, and that it lies within the authority of these bodies to make these decisions.*** (See Cal. Const.,

> art. XIII, § 16; Rev. & Tax. Code, § 5142, subd. (c).) Questions regarding a change in ownership are among these issues, but they do not represent the only factual determination that, although it does not strictly concern the specific value that may be attached to property, nonetheless may be pertinent—even essential—to the fulfillment of a county board's basic equalization duties. ***Indeed, the concurring and dissenting opinion's overly circumscribed view of the jurisdiction of county boards would seem to call into question these entities' ability to decide a bevy of threshold factual questions that are implicit in any assessment***.
>
> *Williams & Fickett v. County of Fresno*, 2 Cal. 5th 1258, 1269, (2017)

The boards are not Courts of general jurisdiction. *Security National Guaranty, Inc. v. California Coastal Com*., 159 Cal. App. 4th 402, 419 (2008) ("The Commission, like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the state Constitution or by statute").

The Court of Appeal here erroneously relied on *the Boards' ability to stipulate to not hear* non-valuation issues as expanding the scope of its Constitutional mandate. The power to stipulate was not intended to affect the board's jurisdiction, but *presumes jurisdiction exists over the matter upon which it stipulates*. There is still a requirement that the matter heard *relates to its equalization function or some "threshold factual matter" pertinent to that function.*

As of the writing of this Petition, several local assessment appeals board are expected to petition this Court to de-publish the Court of Appeal decisions on the grounds that ***in the view of the appeals boards themselves, they lack any jurisdiction at all to address challenges to PACE tax assessment liens***, *even those where a government is a named party and the relief sought is the voiding of an assessment lien and the refund of taxes paid to a government*. De-publication alone will leave unresolved the critical issues, **creating the likelihood of more cases like Plaintiffs' wherein Courts affirm dismissals of civil**

litigation for failure to exhaust remedies before administrative tribunals that themselves disclaim any jurisdictional basis upon which to act.

5. Review of the Court of Appeal Decisions Will Also Serve to Clarify the Subtle, But Important Distinctions Between the Administrative Exhaustion and Primary Jurisdiction Doctrines as Delineated by This Court in *Jonathan Neil & Assoc., Inc. v. Jones*, (2004) 33 Cal. 4th 917, 930-932

Finally, a grant of review will enable this Court to clarify the important distinction between administrative exhaustion and ***the related but analytically distinct doctrine of primary jurisdiction***. Petitioners believe that the Court of Appeal decision dismissing this dispute brought only against private parties was in part the result of its failure to distinguish between the two doctrines in its analysis of the matter. This Court has explained that while there is a great deal of overlap between the respective analytical frameworks addressing exhaustion defense claims, they ***are different in subtle but important ways*** that

can result in great injustice if Courts of Appeal evaluate the issue under the improper framework.

> ...***the exhaustion doctrine ...consists of at least three <u>distinct</u> strands, justified by somewhat different rationales.*** First, when a statute and lawful regulations pursuant thereto establish a quasi-judicial administrative tribunal to adjudicate statutory remedies, the aggrieved party is generally required to initially resort to that tribunal and to exhaust its appellate procedure.
>
> *Jonathan Neil & Assoc., Inc. v. Jones*, (2004) 33 Cal. 4th 917, 930-932

This Court of Appeal erroneously assumed there was *an express statutory command to require prior administrative exhaustion here*, notwithstanding (1) the plain language of Revenue and Taxation Code section <u>which by its terms applies only to actions ***against Cities and Counties***</u> for the refund of a tax *and (2) the fact that no Cities or Counties are parties to this case*:

> §5140. Standing to bring action against city or county for tax refund
>
> The person who paid the tax...may bring an action only in the superior court, but not in the small claims

> division of the superior court, ***against a county or a city*** to recover a tax which the board of supervisors of the county or the city council of the city has refused to refund on a claim filed pursuant to Article 1(commencing with Section 5096) of this chapter...
>
> Revenue and Taxation Code Section 5140[1]

The Court of Appeal erred in relying in part on the Loeffler decision to preclude Plaintiffs' claims but simultaneously not employing the analysis required under that primary jurisdiction doctrine relied upon by the Loeffler Court as the basis for its decision. *Jonathan Neil & Assoc., Inc. v. Jones*, (2004) 33 Cal. 4th 917, 930-932:

> Third, courts have required "exhaustion of 'external' administrative remedies in a variety of public contexts." … In such cases, although the legislative intent to resort in the first instance to administrative remedies is not entirely clear, courts have required exhaustion when they "have expressly or implicitly determined that the administrative agency possesses a specialized and specific body of expertise in a field that particularly equips it to handle the subject matter of the dispute. … ***In addition to the above three categories,*** we have recognized in some cases that ***although exhaustion is not required, the doctrine of "primary jurisdiction" of administrative agencies***, long used in federal law,

[1] The Court of Appeal read the Claims requirement as merely denoting standing.

> ***should be invoked to require resort to an administrative agency to resolve issues within its particular area of expertise***.....exhaustion and primary jurisdiction are "two closely related concepts[citation]... [***T]he primary jurisdiction doctrine advances two related policies: it enhances court decision making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws***.[Citations.]"No rigid formula exists for applying the primary jurisdiction doctrine [citation]. Instead, **resolution generally *hinges on a court's determination of the extent to which the policies noted above are implicated in a given case***. [Citations.] This discretionary approach leaves courts with considerable flexibility to avoid application of the doctrine inappropriate situations, as required by the interests of justice."
>
> *Jonathan Neil & Assoc., Inc. v. Jones*, (2004) 33 Cal. 4th 917, 930-932

By deciding the exhaustion question under the wrong analytical framework (by assuming that exhaustion was ***statutorily required*** as this was **in fact** *an action seeking a tax refund and a cancellation of a tax assessment lien*), the Court of Appeal never engaged in the "*determination of the extent to which **the policies** noted above **[were] implicated in [this] case***".

This case presents an excellent vehicle for clarifying the

importance of applying the proper analytical framework to questions of exhaustion according to the criteria set forth by this Court in its decision in *Jonathan Neil & Assoc., Inc. v. Jones*, (2004) 33 Cal. 4th 917, 930-932.

6. To the Extent the Court of Appeal Decided the Case Based On its Reading of the Complaint as Actually Seeking to Void the Tax Liens *as to the Government*, Or as Actually Seeking *a* Tax Refund *from the Government*, The Court of Appeal Mischaracterizes the Complaint and a Petition for Reconsideration on this Issue Was Filed by Petitioners and Denied by the Court

By forcing the claims against private parties to the process for claims against government defendants, the *substantive effect* of the Court Appeal's decision was to rule that *governments imposing the tax are indispensable parties to this action* and that had they been joined, the statutory exhaustion would plainly have been required of them. Rather than being ***protective*** of the tax assessment and collection processes essential to a governments' ability to provide necessary public services, ***the Court of Appeal decisions forces taxpayers to mount a***

challenge to the tax process <u>that would otherwise not have been made</u>.

As cited to the Court of Appeal below, Courts can be creative in fashioning remedies that can work around the fact that third parties, *perhaps in a better position to afford relief to the Plaintiffs*, **are simply not in the case or are otherwise immune from liability for other reasons**. See e.g. *Oakland v. California Constr. Co.*, (1940) 15 Cal. 2d 573 (action against private party for a full refund of total amount financed by assessment lien NOT a challenge to a tax if assessment lien is left in place); *Hassell v. Bird*, (2018) 5 Cal. 5th 522 (Communications Decency Act immunity from damages claims held by party with the closest connection to the harm (YELP, which hosted a defamatory business review) ***is no bar to Court ordered injunctive relief against the defaming party to compel them <u>to ask YELP to take the review down</u>***); *People v. Custom Craft Carpets*, (1984) 159 Cal. App. 3d 676 (Court has broad authority under Business and Professions Code section

17200 claims to fashion relief *even where third parties in a better position to provide relief are not present in the case*). Given the flexible remedies permitted under the Unfair Competition Law, the complaints' allegations that the liens are "void or unenforceable" ***should be read in the only way reasonable in light of the fact that no governmental taxing authorities are named defendants, i.e., that they are void and unenforceable as to the defendant's ability to benefit from them.***

The complaint names only private party defendants making it legally and factually impossible to seek the voidance of a government tax lien and or a tax refund from the government. The injunctive relief and restitution claims are directed specifically at the private parties, to make a "request" of the government to remove the tax liens, and to pay back money received in reliance on the PACE assessment security interests as it is received by the private parties, ***and only after the tax process has run its course, from assessment, through***

collection and remittance to the defendants. To the extent certain phrases in the complaint claim the assessment liens to be void, they should either be read as being "void" *as to the "ability of the defendants to profit from them"* or leave to amend to remove the references should be granted.

7. There Have Been a Significant Number of Defaults On These PACE Home Improvement Loans Made Without Any Inquiry into the Ability of the Homeowner to Repay Them And Based Solely on Sufficient Equity Available to Cover a Foreclosure.

The Western Riverside Council of Governments (WRCOG) is one of several associations of government that act as conduit bond issuers for their participating government members. The conduit bond issuers boast of never having foreclosed on a PACE loan but that is only due to their decision to outsource the foreclosures to mortgage lenders on properties with existing mortgage loans, and as to homes with paid off mortgages, ***their decision to sell the delinquent PACE receivables to third party investors who agree to forgo foreclosure for 5 years to create a decent interval between default and the loss of the***

senior's home. The following is an excerpt from the October 5, 2020 minutes of a WRCOG board meeting discussing the measures WRCOG takes to insure that WRCOG *itself* never has to initiate a judicial foreclosure, ***while also ensuring that bondholders (the PACE ASSIGNEE defendants in the Amended Complaint at issue) get paid in full and without interruption:***

> October 5, 2020 - PACE Programs Activity Update: Review of WRCOG's PACE Programs Consumer
>
> Protections and Deferral of Judicial Foreclosure on Delinquent PACE Properties:
> ***
> ***Senior citizens account for approximately 24% of all PACE assessments;*** they comprise approximately 29% of the overall population of the state.
> ***
> **In order to ensure a PACE delinquency does not result in a foreclosure**, *WRCOG partners with a third party, First National Assets (FNA), which purchases the PACE delinquencies*. ***In this manner, bond investors are paid in a timely fashion*** and *property owners are not subject to any foreclosure proceeding* ***initiated by WRCOG***.
> ***
> As in past years, staff are requesting the deferment of foreclosure for delinquencies incurred during Tax Year 2019/2020. Additionally, staff is requesting the

automatic deferment of foreclosure in subsequent years so long as a third party, such as FNA, is in place to purchase PACE delinquencies.
Committee member Mike Lara asked if there is a limit on what FNA will cover on the shortfalls.
Mr. Dailey responded that there is no limit. FNA has assured WRCOG that it will be able to remain as the third party to purchases PACE delinquencies.
***
As ***WRCOG has no control of mortgage companies***, there is a concern that the mortgage companies that deal with PACE are working above board. ***What has been the premier reason for foreclosures*.**
***
Committee member Goodland asked what WRCOG's cost is regarding FNA. Mr. Dailey responded that **WRCOG does not pay FNA for its services. FNA comes whole when a property owner comes current on their property tax payments**.

Mr. Dailey responded that staff asks annually the deferment of judicial foreclosure proceedings. Regarding older data, **a county typically will wait five years prior to initiating any foreclosure proceedings as a result of not paying property tax payments**. To review assessments in years prior to 2019/2020 would not be an accurate view.
WRCOG has no influence over mortgage lenders.

Minutes of Meeting on PACE, downloaded from WRCOG website at:

https://wrcog.us/DocumentCenter/View/8771/5A-ec-110220?bidId=

WRCOG is only one of several associations of government that act as conduit bond issuers for the PACE programs that contracted with the three named PACE lender defendants who buy 100% of the bonds issued. **Cynically, WRCOG kicks the can down the road long enough to sanitize the connection between this predatory lending and the eventual loss of hundreds of senior citizens' homes.** The fact is, these defaults registered by WRCOG are only a small share of the actual harm caused, because as discussed at the meeting, most defaults are initiated by mortgage lenders who pay the delinquent assessments and foreclose on the mortgage obligation. Thus, many more defaults caused by PACE are not showing up in the "foreclosure statistics" relied upon by bond issuer to hide the extent of the problem.

Many of these senior citizens will bring litigation to stay in their homes. ***Uncertainty in the law here may deprive them of redress in any forum***. Trial Courts may find exhaustion **to**

be required only for Plaintiffs to be rebuffed by the boards themselves *who deny any jurisdiction* over the issue. This Court is urged to accept review of the decision and to decide the critical questions raised.

8. Conclusion:

In Plaintiffs' view, the Court of Appeal failed to heed the admonition of this Court to recognize that not all cases tangentially related to taxes implicate complicated tax questions or policies that weigh in favor of refusing to hear claims under the Unfair Competition Law. The Court was not sufficiently "hesita[at] to expand the hole that [the *Loeffler*] decision carve[] out of our consumer protection statutes."

This Court is requested to reverse and remand the case such that a Court can evaluate these UCL claims against private parties on their merits, so that this "new(est) scheme[] which the fertility of man's invention [has] contrive[d]" does not frustrate

the use of the UCL as a key tool "***to enable judicial tribunals to deal with [such] schemes.***" *Loeffler v. Target Corp.*, (2014) 58 Cal. 4th 1081, 1125.

Respectfully Submitted,

James Swiderski. Date: December 7, 2022

James Swiderski,

Counsel for Appellants

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the Petition for Review filed by Appellants is proportionally spaced, has a font size of 13 points or more, including footnotes, and contains 4779 words (excluding the cover, the tables, this certificate, the signature blocks, and exhibits), which is less than the number of words permitted by the Rules of Court. In making this certification, I have relied on the word count of the word processing program, Microsoft Word for Microsoft used to prepare this brief.

James Swiderski. Date: December 7, 2022

James Swiderski,

Counsel for Appellants

Filed 11/1/22

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BARBARA MORGAN et al., Plaintiffs and Appellants, v. YGRENE ENERGY FUND, INC. et al., Defendants and Respondents.	D079364 (Super. Ct. No. 37-2019-00052045-CU-OR-CTL)
JANET ROBERTS et al., Plaintiffs and Appellants, v. RENEW FINANCIAL GROUP, LLC et al., Defendants and Respondents.	D079369 (Super. Ct. No. 37-2019-00059601-CU-OR-CTL)

APPEALS from judgments of the Superior Court of San Diego County, Richard S. Whitney, Judge. Judgments affirmed. Requests for judicial notice denied.

James Swiderski for Plaintiffs and Appellants.

Buckley, Fredrick S. Levin and Ali M. Abugheida for Defendants and Respondents Ygrene Energy Fund, Inc., GoodGreen 2016-1, GoodGreen 2017-1, GoodGreen 2017-2, GoodGreen 2018-1, GoodGreen 2019-1, GoodGreen 2015 LLC, GoodGreen 2016-1 LLC, GoodGreen 2016-1 Trust, GoodGreen Holdings 2016-A Trust, GoodGreen 2017-1 Trust, GoodGreen Funding 2016-1 LLC, GoodGreen Funding 2017-1 LLC, GoodGreen 2017-2 LLC, GoodGreen Funding 2017-R1 LLC, GoodGreen Funding 2018-1 LLC, GoodGreen Holdings 2016-A Trust, Renew Financial Group LLC, Renew 2017-1, Renew 2017-2, and Renew 2018-1.

Reed Smith, Jesse L. Miller, David J. de Jesus and Emily F. Lynch for Defendants and Respondents Wilmington Trust, N.A., as Trustee of Hero Funding Trust 2015-2, Hero Funding Trust 2015-3, Hero Funding Trust 2016-1, Hero Funding Trust 2016-2, Hero Funding Trust 2017-1, Hero Funding Trust 2017-3, and Hero Funding Trust 2018-1.

Akin Gump Strauss Hauer Feld and Neal R. Marder for Defendants and Respondents Golden Bear 2016-1, LLC, Golden Bear 2016-2, LLC, and Golden Bear 2016-R, LLC.

The issue in these consolidated appeals is not an unfamiliar one—whether plaintiffs were required to first exhaust administrative tax remedies before filing this lawsuit. But it arises in a novel context where property tax and home improvement financing intersect.

In 2008, California enacted a Property Assessed Clean Energy program (PACE) as a method for homeowners to finance energy and water conservation improvements. Like an ordinary home equity loan, a PACE debt is created by contract and secured by the improved property. But like a tax, the installment payments are billed and paid as a special assessment on the improved property, resulting in a first-priority tax lien in the event of default.

The named plaintiffs in these putative class actions are over 65 years old and entered into PACE contracts. Barbara Morgan, for example, borrowed over $100,000 for "reflective coating" and "energy efficient" windows. Her resulting 20-year special tax assessment bears 8.49 percent interest, increasing her property taxes by nearly $15,000 annually. Similarly, plaintiff John Brown borrowed over $100,000 for a new air conditioner, a "cool roof," and "permeable ground cover," a fancy name for concrete pavers. The annual percentage rate on his PACE loan is 9.29 percent. His property taxes increased by over $11,400 annually for 20 years.

The defendants are private companies who either made PACE loans to the plaintiffs, were assigned rights to payment, and/or administered PACE programs for municipalities. The gravamen of the complaint in each case is that PACE financing is actually, and should be treated as, a secured home improvement loan. Plaintiffs allege that defendants engaged in unfair and deceptive business practices by violating consumer protection laws, including

Civil Code section 1804.1 subdivision (j), which prohibits taking a security interest in a senior citizen's residence to secure a home improvement loan.

The liability theories are intriguing, but we need not and do not address them here. The appeals turn instead on a procedural issue. Generally, a taxpayer may not pursue a court action for a refund of property taxes without first applying to the local board of equalization for a reduction and then filing an administrative claim for a refund. (Rev. and Tax. Code,[1] §§ 1603, 5097; see *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1307–1308 (*Steinhart*).) "[S]trict legislative control over the manner in which tax refunds may be sought is necessary so that government entities may engage in fiscal planning based on expected tax revenues." (*Woosley v. State of California* (1992) 3 Cal.4th 758, 789.)

Here, defendants demurred to the complaints on the sole ground that plaintiffs failed to allege they first exhausted administrative remedies. The trial court agreed, sustained the demurrers without leave to amend, and entered a judgment of dismissal in each case.

On appeal, plaintiffs primarily contend they were not required to pursue administrative remedies because they have sued only private companies and do not challenge "any aspect of the municipal tax process involved." (Italics omitted.) But as we will explain, the complaints seek tax refunds, an injunction against future tax assessments, and removal of tax liens. Despite their assertions to the contrary, plaintiffs do challenge their property tax assessments. And although they have not sued any government entity, the "consumer protection statutes under which plaintiffs brought their action cannot be employed to avoid the limitations and procedures set out by

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1 Undesignated statutory references are to the Revenue and Taxation Code.

the Revenue and Taxation Code." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1092 (*Loeffler*).)

Plaintiffs also contend that the exhaustion rule should not apply because their liability theories involve legal issues that an assessor's board lacks expertise to resolve. The Legislature, however, has given such boards " 'jurisdiction over nonvaluation issues.' " (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1271 (*Williams & Fickett*).) Thus, we conclude that plaintiffs were required to submit their claims through the administrative appeals process in the first instance. Their failure to do so requires the judgments to be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Because the appeals challenge a judgment of dismissal entered upon the sustaining of a demurrer without leave to amend, we draw the operative facts from the complaints. (*Steinhart*, *supra*, 47 Cal.4th at p. 1304, fn. 1.)

A. *PACE Programs*

In 2008, the Legislature determined that promoting energy efficient improvements to real property was "necessary to address the issue of global climate change." (Stats. 2008, ch. 159 (Assem. Bill No. 811) § 2; Former Sts. & Hy. Code, § 5898.14, subd. (a)(1).) Recognizing that the cost "prevents many property owners from making these improvements," it authorized "the legislative body of any city" to "finance" the installation of energy efficiency improvements that are permanently affixed to real property. (Former Sts. & Hy. Code, § 5898.14 (Stats. 2008, ch. 159, § 2).) The Legislature envisioned that municipalities would borrow money by selling bonds to private investors. In turn, local government would lend the money to homeowners, who would use it to pay contractors for installing energy and/or water conservation

upgrades. (Sts. & Hy. Code, § 5898.22, subd. (d).) The PACE loan would be repaid by an assessment added to the homeowner's annual property tax bill, and thus secured by a priority tax lien that runs with the land.

As enacted in 2008, PACE seemingly offered many benefits for homeowners. Expensive improvements, such as solar energy panels could be purchased with no down payment. And because the maximum amount financed would be based on the property's value—not the borrower's net income or ability to repay—there was no need to verify employment or require good credit. PACE offered other benefits too. Anticipated energy savings were expected to at least in part offset the increase in property tax, and the improvements were expected to increase the property's market value.

When it first enacted PACE, the Legislature anticipated that local governments would operate their own programs, as they did with other aspects of municipal finance. This may explain why the 2008 legislation "did not provide any mechanism for disclosure of loan terms or regulation of the conduct of lenders."

But despite the public financing envisioned, private companies (with profit motives) soon offered turn-key solutions to local governments interested in establishing a PACE program. These companies, known as PACE program administrators (Administrators), contracted with local governments to handle the program on their behalf. Administrators screen contractors to work under the program, ensure construction permits are obtained, spot check the work, set price guidelines and, working through the contractors, solicit homeowners to borrow. In short order, Administrators were running almost all of the PACE programs throughout the state.

Administrators market municipal bonds to third parties, the proceeds of which fund the home improvements. Alternatively, Administrators buy the municipal bonds themselves—in effect becoming the PACE lender too.

The complaints allege that each of the Administrator/defendants "chose the more lucrative option of buying all of the bonds itself." Plaintiffs maintain that in economic substance, this is a two-party transaction consisting of the homeowner/borrower and the Administrator/lender. According to the complaints, the only difference between this type of financing and an ordinary home improvement loan is that the PACE debt is in the form of a municipal bond instead of a promissory note.[2] The economic reality is that government does not fund the project or otherwise provide any financial subsidy. It is involved solely to provide tax exempt interest for investors who purchase the bonds and thereby fund the private work. Essentially, the government's issuance of bonds provides a " 'conduit' " for private financing to " 'pass through' " to the recipient of the bond proceeds. (See *California Statewide Communities Development Authority v. All Persons Interested etc.* (2007) 40 Cal.4th 788, 794.) According to the complaints, "In bond parlance, this has long been recognized to be indistinguishable, in substance, from a two-party loan, one lender, one borrower." Plaintiffs insist

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[2] Why finance through a municipal bond and not a promissory note from homeowner to lender? Because interest payments on municipal bonds are generally tax exempt, making it an attractive investment (as well as giving borrowers the benefit of a lower interest rate). Moreover, because the debt is secured by a property tax lien, "the PACE bondholders are able to default the homeowner on their missing a single payment and commence foreclosure proceedings promptly thereafter."

that, in substance, "the PACE loans were privately funded home improvement loans, consumer loans in every sense of the word."[3]

B. *The Morgan and Roberts Complaints*

In 2020, Barbara Morgan, Marcia Bordine, and Arlene Hill filed a first amended putative class action complaint against Renovate America, Inc., Ygrene Energy Fund, LLC, and Renew Financial Group, LLC (collectively Lenders), which they allege are "engage[d] in the business of lending money for the purpose of financing home improvement loans" and acted as Administrators (the Morgan Complaint). Plaintiffs further state they are each over the age of 65, and were "solicited and signed up for home improvement services" with financing provided by Lenders. They maintain that "[e]ach was confused by the process, and did not comprehend that they would be putting their homes in jeopardy by agreeing to unaffordable loan obligations that they had no hope of being able to pay off according to the terms of repayment."[4] In a separate action and represented by the same

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[3] The Complaint acknowledges that since PACE's inception in 2008, "efforts were made to reform the program." Most recently in 2019, for example, the Legislature prohibited PACE program administrators from approving an assessment contract without first making a "reasonable good faith determination that the property owner has a reasonable ability to pay the annual payment obligations for the PACE assessment." (Fin. Code, § 22686.)

[4] The Morgan Complaint also names as defendants: Ygrene Energy Fund, Inc., GoodGreen 2016-1, GoodGreen 2017-1, GoodGreen 2017-2, GoodGreen 2018-1, GoodGreen 2019-1, GoodGreen 2015 LLC, GoodGreen 2016-1 LLC, GoodGreen 2016-1 Trust, GoodGreen Holdings 2016-A Trust, GoodGreen 2017-1 Trust, GoodGreen Funding 2016-1 LLC, GoodGreen Funding 2017-1 LLC, GoodGreen Funding 2017-2 LLC, GoodGreen Funding 2017-R1 LLC, GoodGreen Funding 2018-1 LLC, and GoodGreen Holdings 2016-A Trust. Morgan and Bordine allege that their repayment obligations

lawyer who filed the Morgan Complaint, another group of plaintiffs, Janet Roberts, Alfonso Robinson, John Brown, Joan Banks, Lyn Ramskill, and Evigildo Lamitar, filed a virtually identical lawsuit against Renew Financial Group, LLC and several "Renew" and "Golden Bear" entities they allege "came to own security interests" in plaintiffs' homes.[5]

The complaints do not allege fraud. Nor do plaintiffs challenge the quality of the improvements their PACE loans purchased. Rather, plaintiffs allege they were "confused about the terms of the loans they were being solicited for" and did not appreciate "the financial burden that would result" and the risk of foreclosure.

Plaintiffs assert causes of action under the Unfair Competition Law based on alleged violations of (1) Civil Code section 1804.1, subdivision (j) [prohibiting taking a security interest in a senior citizen's home under a home improvement contract]; (2) Civil Code section 1803.2 [failing to admonish, "IF YOU SIGN THIS CONTRACT, YOU WILL BE PUTTING UP YOUR HOME AS SECURITY"]; (3) Financial Code section 22750 [requiring a finance lender license]; and (4) Business and Professions Code section 7159.2 [requiring contractors to be paid by joint check]. They claim that as a result of these violations, Lenders are prohibited from collecting interest, finance

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were assigned to one of more of these defendants "as part of a common plan of sequential securitization of the loan receivable."

Hill also sued Renovate America, Inc. and named as additional defendants: Wilmington Trust, NA, as Trustee of Hero Funding Trust 2015-2; Hero Funding Trust 2015-3; Hero Funding Trust 2016-1; Hero Funding Trust 2016-2; Hero Funding Trust 2016-3, 2016-4, 2017-1; Hero Funding Trust 2017-2; Hero Funding Trust 2017-3; Hero Funding Trust 2018-1.

[5] Specifically, these defendants are Renew 2017-1, Renew 2017-2, Renew 2018-1, Golden Bear 2015-1, LLC , Golden Bear 2016-1, LLC, Golden Bear 2016-2, LLC, and Golden Bear 2016-R, LLC.

charges, "and possibly the entire balance if the violation is found to have been 'willful.' "

C. *The Demurrers and Ruling*

In December 2020 the defendants demurred to both the Morgan and Roberts complaints on the grounds that plaintiffs failed to "exhaust administrative remedies."[6] The trial court sustained the demurrers without leave to amend and entered a judgment of dismissal in each of the actions. On defendants' unopposed motions, we consolidated the two appeals for argument and decision.

DISCUSSION

A. *Plaintiffs Were Required to Exhaust Administrative Remedies*

Generally, " 'a party must exhaust administrative remedies before resorting to the courts.' " (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 383.) This rule advances two policies. It allows an agency to decide matters within its expertise without court interference. (*Ibid.*) Second, administrative proceedings "aid[ ] judicial review by allowing the agency to draw upon its expertise and develop a factual record for the court's consideration." (*Ibid.*) Even where the administrative remedy " 'may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' ' " (*Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.)

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6 Defendants sued by Hill and those sued by Morgan and Bordine filed separate demurrers raising the same issues. The court resolved both demurrers in a single minute order.

The California Constitution gives the Legislature exclusive control over the procedure under which a taxpayer may recover certain tax payments. Article XIII, section 32 provides: "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."[7] It also specifies that "[t]he Legislature shall pass all laws necessary to carry out [its] provisions." (Cal. Const., art. XIII, § 33.)

The county assessor is responsible for preparing the local tax roll and assessing all taxable property in the county. (§ 401.) Taxpayers have the right to challenge an inaccurate or illegal tax assessment and to claim a refund of taxes. The county board of supervisors meeting as a board of equalization, or an assessment appeals board (board) hears those challenges. (§§ 1601, subd. (a), 1603.)

The process is initiated by an application for assessment reduction under section 1603, subdivision (a), which provides: "A reduction in an assessment on the local roll shall not be made unless the party affected . . . files with the county board a verified, written application showing the facts claimed to require the reduction and the applicant's opinion of the full value of the property." Under section 1610.8, the board may "cancel[ ] improper assessments." An order for refund cannot be made unless a verified claim is filed under section 5097. The taxpayer may file an action in the

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7 Although by its terms, the California Constitution, article XIII, section 32 applies to state-imposed taxes (see *Conolly v. County of Orange* (1992) 1 Cal.4th 1105, 1114; but see *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 962), it has been held to also apply to local taxes as a matter of public policy. (*California State University, Fresno Assn., Inc. v. County of Fresno* (2017) 9 Cal.App.5th 250, 262.)

superior court to recover a tax that the board has refused to refund after a duly filed claim. (§ 5140.)

Here, the complaints do not allege (and apparently cannot be amended to allege) compliance with these statutes. Plaintiffs contend, however, that they were not required to do so because they have sued private entities and "do[ ] not . . . challenge any aspect of the municipal tax process involved . . . ." Relying on *Oakland v. California Construction Co.* (1940) 15 Cal.2d 573 (*Oakland*), plaintiffs assert that a "request by private party property owners for the return of money paid out on a void contractual obligation [is] not a challenge to an assessment lien" and, therefore, does not require that they first exhaust administrative remedies.

These arguments fail because they mischaracterize the complaints. For purposes of applying the exhaustion rule, the PACE assessments can only be treated as taxes. This is because PACE assessments are collected "in the same manner as ordinary ad valorem property taxes are collected." (Gov. Code, § 53340, subd. (e).) Under Revenue and Taxation Code section 4801, "taxes" include "assessments collected at the same time and in the same manner as county taxes." (§ 4801; see *Kahan v. City of Richmond* (2019) 35 Cal.App.5th 721, 737 [administrative procedure for seeking a tax refund applies to garbage collection fees that are collected at the same time and manner as county property taxes].)

Moreover, plaintiffs seek injunctive relief (1) requiring "property tax payments" to "municipal taxing authorities" as "PACE tax assessments" to be "released back" to each property owner; and (2) prohibiting defendants from initiating collection procedures on delinquent accounts. Plaintiffs ask that these orders remain in place until defendants successfully "request[ ] that the local governments remove the voluntary tax assessments on the properties."

Using "released back" instead of "refund" does not change the objective reality that plaintiffs seek court orders to cancel property tax obligations and obtain a refund of taxes they have already paid.

We also find the Supreme Court's decision in *Oakland* to be materially distinguishable. That case did not involve a challenge to any tax. Rather, the city of Oakland sought to void street improvement contracts based on a contractor's alleged fraud during the bidding process. (*Oakland*, *supra*, 15 Cal.2d at pp. 574–575.) The work was financed by a special assessment on the properties benefited by the improvement. The defendants in *Oakland* asserted that the action was time-barred under a 30 day period for challenging special property tax assessments. (*Id*. at p. 578.) The Supreme Court rejected that argument because the city was not seeking to void any tax assessment, but rather the contract for the work of improvement. (*Ibid*.)

Thus, *Oakland* holds that a government entity can seek to void a public works contract between itself and a contractor without challenging the tax assessments that were made to pay for it. But here, plaintiffs are not governmental entities. And they *are* challenging their tax assessments—they want the assessment cancelled and tax payments refunded. Indeed, they allege that defendants' statutory violations render "void any security interest" in plaintiffs' homes—i.e., the property tax liens.

In a related argument, plaintiffs contend that the exhaustion rule only applies to lawsuits against government. Because they seek restitution of tax payments remitted to private entities, plaintiffs maintain there are simply no administrative remedies to exhaust. They find support for this view in section 5140, which provides that the "person who paid the tax" is authorized to bring a refund action against "a county or a city" to recover tax the county or city has refused to refund. By negative implication, they argue that since

they are not suing "a county or a city," the administrative refund process does not apply.

This argument is undermined if not foreclosed by the Supreme Court's decision in *Loeffler*. In that case, the court held that consumers had to first exhaust administrative tax remedies before bringing an action under the Unfair Competition Law to challenge a retailer's alleged misrepresentation about whether a sale of hot coffee was subject to sales tax. (*Loeffler*, 58 Cal.4th at pp. 1092, 1134.) The *Loeffler* plaintiffs asserted they were not required to exhaust administrative remedies because they were not suing the government, nor were they seeking a tax refund.[8] (*Loeffler*, at p. 1102.) The Supreme Court disagreed, explaining that the question of taxability had to be first decided administratively, followed by judicial review of the agency's decision. (*Id*. at p. 1127.) An injunction prohibiting retailers from collecting sales tax "could indirectly reduce the flow of tax revenue in the future" and thus involved policies the exhaustion rule was intended to address. (*Id*. at p. 1131.)

Similarly here, plaintiffs' PACE assessments undoubtedly would be affected by the adjudication of the complaints. They allege that the PACE loans are "void at inception for illegality" and the resulting security interest (i.e., a property tax lien) is also unlawful and "void." Because the tax rests exclusively upon the validity of the PACE financing, a judgment that the debt and security interest are illegal and void would seem to negate the sole basis of the tax assessment. Under *Loeffler*, it is the nature of the relief sought and the availability of an administrative remedy to achieve it—not whether the

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[8] The legal incidence of sales tax is on the seller, not the consumer. (See *First American Title Ins. Co. v. California Dept. of Tax & Fee Administration* (2021) 71 Cal.App.5th 603, 611.)

defendant is a private or public entity—that triggers the exhaustion rule. Here, the net result or effect of the liability theories in the complaints would be to absolve plaintiffs of a tax liability (although not a contractual liability).[9] Because an administrative procedure exists to resolve that issue in the first instance, plaintiffs were required to invoke it. Moreover, contrary to plaintiffs' contention, section 5140 addresses standing, not exhaustion. It provides in part: "The person who paid the tax . . . may bring an action only in the superior court . . . against a county or a city to recover a tax which the board of supervisors . . . has refused to refund on a claim . . . . No other person may bring such an action . . . ." (*Ibid.*)

B. *Plaintiffs Have Not Alleged Facts Triggering An Exception*[10]

Even if exhaustion of administrative remedies is generally required, a second question is whether the facts alleged in the complaints, deemed true on demurrer, trigger an exception to the exhaustion requirement. Plaintiffs ask us to apply a broad exception to exhaustion on the grounds that "no purpose would be served" by requiring the board to consider a pure legal issue—whether consumer protection statutes apply to these PACE loans.

A limited exception to the exhaustion rule has generally been recognized where " 'the administrative agency cannot provide an adequate remedy' and 'when the subject of a controversy lies outside the agency's

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9 Whether a judgment in this case would have claim or issue preclusion effect in some other action is not before us and we express no opinion on it. We merely acknowledge the practical reality of a potential final judgment determining the tax liens are illegal and void.

10 After oral argument, we asked the parties to file additional briefs, which we have considered, on whether the complaints allege facts triggering any exception to the exhaustion rule.

jurisdiction.' " (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1274.) But in this case, an adequate remedy does exist. By statute, the board "shall" refund property tax that is erroneously or illegally assessed. (§ 5096, subds. (b), (c).)

Plaintiffs are correct that "the central responsibility of county boards is to decide questions of valuation." (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1269.) But the board's jurisdiction extends to nonvaluation issues as well. (*Id*. at p. 1270.) This authority is manifest in section 5142, which provides that a taxpayer may avoid the assessment appeal process if they and the assessor stipulate that "only nonvaluation issues" are involved. If the board accepts this stipulation, it "shall be deemed compliance" with the requirement to exhaust administrative remedies. (§ 5142, subd. (b).) This stipulation process "would be meaningless . . . if an exhaustion requirement did not apply to nonvaluation issues." (*Williams & Fickett*, at p. 1271.)

Another exception to the exhaustion rule—the so-called nullity exception—has been recognized "specific to tax disputes." (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1275.) Exhaustion is not required where the assessment " 'is a nullity as a matter of law because, for example, the property is tax exempt, nonexistent or outside the jurisdiction [citations], *and* no factual questions exist regarding the valuation of the property which, upon review by the board of equalization, might be resolved in the taxpayer's favor, thereby making further litigation unnecessary.' " (*Ibid.*, italics added.)

In supplemental briefing, Plaintiffs concede that the nullity exception does not apply in this case. That concession is likely compelled by prior validation judgments that plaintiffs admit "approved the PACE bonds and their validity as tax assessments."[11] Nevertheless, plaintiffs insist that the

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11 A validation proceeding is used to secure a judicial determination that proceedings by a local government entity, such as the issuance of municipal

board lacks "any power or competence" to address the issues raised by their complaints and, therefore, the same policies that underlie the nullity exception dictate a similar exception should be applied here.

We disagree. To be sure, the board has special competence in determining the value of real property. (See *Stenocord Corp. v. City and County of San Francisco* (1970) 2 Cal.3d 984, 988.) But the exhaustion doctrine advances other policies too, such as " 'easing the burden on the court system . . . and providing a more economical and less formal means of resolving a dispute.' " (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1268.) It also facilitates developing a complete record and affords a " 'sifting process [citation], unearthing the relevant evidence and providing a record which the court may review.' " (*Ibid.*) Here, for example, plaintiffs allege they "did not comprehend that they would be putting their homes in jeopardy by agreeing" to the PACE assessments and have "no hope of being able to pay off" the taxes. They further allege being victimized by "high pressure sales efforts" from persons acting on defendants' behalf to "peddl[e] the loan products." There are other factual issues on causation, given that plaintiffs admit they were not defrauded and they obtained financing for home improvements they contracted for.

The board, is a "constitutional agency exercising quasi-judicial powers." (See Notes to Decisions, Cal. Const., art. XIII, § 16; *International Medical Systems, Inc. v. Assessment Appeals Bd.* (1997) 57 Cal.App.4th 761, 766.) It is capable of addressing these questions in the first instance. (See *Williams & Fickett*, *supra*, 2 Cal.5th at p. 1269, fn. 6 [county boards decide "a bevy of

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bonds, are valid, legal, and binding. " ' "Assurance as to the legality of the proceedings surrounding the issuance of municipal bonds is essential before underwriters will purchase bonds for resale to the public." ' " (*City of Grass Valley v. Cohen* (2017) 17 Cal.App.5th 567, 587.)

threshold factual questions that are implicit in any assessment"].) Accordingly, we conclude that the complaint does not allege facts triggering any exception to the exhaustion rule.[12]

C. *Not a Merits Determination*

Plaintiffs assert that while we "could" reverse the judgment "based on administrative exhaustion" we "should" also rule on whether they have "stated a valid claim" on the merits. But the demurrers were limited to whether plaintiffs had failed to exhaust administrative remedies. So is the order sustaining the demurrers. Any determination of merits would, therefore, be an advisory opinion. (See *Stockton Teachers Assn. CTA/NEA v. Stockton Unified School Dist.* (2012) 204 Cal.App.4th 446, 464, fn. 11 ["An appellate court does not 'inform the litigants what the opinion of the court is upon a question that has not been raised in the action, or what its decision would be if the question should be presented' "]; see also *Crown Oil Corp. v. Superior Court* (1986) 177 Cal.App.3d 604, 613 [appellate review of demurrer limited to issue(s) raised on demurrer].) Whether plaintiffs' substantive claims have merit is not before us, and we express no opinion on such matters.[13]

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12 We also reject plaintiffs' assertion that rather than involving the exhaustion rule, their claims are more appropriately analyzed as "a *primary jurisdiction* challenge." That doctrine applies only in cases " ' "originally cognizable in the courts." ' " (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 933.) For reasons explained in the body of this opinion, plaintiffs' claims are not originally cognizable in court.

13 Plaintiffs' requests for judicial notice of legislative materials and Department of Corporations documents pertains to the merits and are denied. (See *People v. Doane* (2021) 66 Cal.App.5th 965, 969, fn. 1 [denying request for judicial notice of documents as "unnecessary to our decision"].)

DISPOSITION

The judgments are affirmed. Respondents are entitled to costs on appeal.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.

Defendants' requests for judicial notice of a complaint and judgment in a validation action and other documents are denied on the same grounds.

Filed 11/21/22

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BARBARA MORGAN et al., Plaintiffs and Appellants, v. YGRENE ENERGY FUND, INC. et al., Defendants and Respondents.	D079364 (Super. Ct. No. 37-2019-00052045-CU-OR-CTL) **ORDER MODIFYING OPINION AND DENYING REHEARING** **NO CHANGE IN JUDGMENT**
JANET ROBERTS et al., Plaintiffs and Appellants, v. RENEW FINANCIAL GROUP, LLC et al., Defendants and Respondents.	D079369 (Super. Ct. No. 37-2019-00059601-CU-OR-CTL)

THE COURT:

It is ordered that the opinion filed November 1, 2022 be modified as follows:

1. On page 10, at the end of the top paragraph, after the words " 'and possibly the entire balance if the violation is found to have been "willful," ' " add the following sentence:

> In what plaintiffs have styled as their "fourth cause of action" alleging violations of Financial Code section 22750, and the "fifth cause of action" invoking Business and Professions Code section 7159.2, plaintiffs seek "public injunctive relief"—that is, an order (1) prohibiting defendants from "engaging in the business of making consumer loans unless and until each is property licensed as a Finance Lender," and (2) requiring each program administrator to include a joint check requirement in any future agreement.

2. The last paragraph on page 14 and ending on page 15, after the words " 'No other persons may bring such an action . . . .' (*Ibid.*)"—insert the following paragraph:

> This same analysis applies to what plaintiffs have labeled as their fourth and fifth causes of action for public injunctive relief. The underlying premise of each is that defendants are either sellers of home improvement services or are engaged in the business of making loans. Public injunctive relief is, as its name suggests, a remedy, not a theory of liability. These remedial requests are based on the same legal theories, arise from the same alleged operative facts, and involve the same alleged primary rights as the first three causes of action. The only difference is the nature of the remedy sought. (See *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 961 [public injunctive relief is a remedy under the Unfair Competition Law].) "Injunctive relief is a remedy, not a cause of action. [Citations.] A cause of action must exist before a court may grant a request for injunctive relief." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65.) Here, because the first three causes of action fail as a matter of law, the fourth and fifth, seeking additional remedies, necessarily fail as well.

The petition for rehearing is denied.

There is no change in judgment.

McCONNELL, P. J.

Copies to: All parties

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: Morgan v. Ygrene Energy Fund, et al. Court of Appeal Case Number: D079364 Superior Court Case Number: 37-2019-00052045-CU-OR-CTL	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:
   325 West Washington Street #2125 San Diego CA 92103
   b. My electronic service address is *(specify)*: Law@WhatIsTheLaw.com
3. I electronically served the following documents *(exact titles)*:
   Petition for Review
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: See attachments (2 pages)
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   See attachments
   b. Electronic service address of person served: See attachment
   c. On *(date)*: December 7, 2022

☒ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 7, 2022

James Swiderski
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

APP 009E, Item 4

Attorneys for: YGRENE ENERGY FUND, INC.; GoodGreen 2016-1, GoodGreen 2017-1, GoodGreen 2017-2, GoodGreen 2018-1, GoodGreen 2019-1, GoodGreen 2015 LLC, GoodGreen 2016-1 LLC, GoodGreen 2016-1 Trust, GoodGreen Holdings 2016-A Trust, GoodGreeen 2017-1 Trust, GoodGreen Funding 2016-1 LLC, GoodGreen Funding 2017-1 LLC, GoodGreen Funding 2017-2 LLC, GoodGreen Funding 2017-R1 LLC, GoodGreen Funding 2018-1 LLC, and GoodGreen Holdings 2016-A Trust:

Abugheida, Ali	aabugheida@buckleyfirm.com
Caunca, Cecilia	ccaunca@buckleyfirm.com
Levin, Fredrick	flevin@buckleyfirm.com

Attorneys for:

WILMINGTON TRUST, N.A., AS TRUSTEE OF HERO FUNDING TRUST 2015-2; HERO FUNDING TRUST 2015-3; HERO FUNDING TRUST 2016-1; HERO FUNDING TRUST 2016-2; and HERO FUNDING TRUST 2017-1; HERO FUNDING TRUST 2017-2; HERO FUNDING TRUST 2017-3; HERO FUNDING TRUST 2018-1

Emily Lynch	elynch@reedsmith.com
Miller, Jesse L.	jessemiller@reedsmith.com
Peters, Matthew T.	mtpeters@reedsmith.com

APP 009E, Item 4

Attorneys for: RENEW FINANCIAL GROUP, LLC; Renew 2017-1, Renew 2017-2; Renew 2018-1

Abugheida, Ali	aabugheida@buckleyfirm.com
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Levin, Fredrick	flevin@buckleyfirm.com

Attorneys for Golden Bear 2016-1 LLC; Golden Bear 2016-2, LLC; and Golden Bear 2016-R, LLC

Marder, Neal	nmarder@akingump.com
Thomas, Tatiana	tthomas@akingump.com
Whitaker, Melissa	mwhitaker@akingump.com
Doubroff, Colleen	cdoubroff@akingump.com

PROOF OF SERVICE (Court of Appeal)

[x] **Mail** [ ] **Personal Service**

Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form. Do not use this form for proof of electronic service. See form APP-009E.

Case Name: Morgan v. Ygrene

Court of Appeal Case Number: D079364

Superior Court Case Number: 37-2019-00052045

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My [ ] residence [x] business address is *(specify)*:
   325 West Washington Street #2125 San Diego CA 92103
3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b):*
   Petition for Review

   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

   (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

   (a) [x] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

   (b) [ ] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

   (2) Date mailed: December 7, 2022

   (3) The envelope was or envelopes were addressed as follows:

   (a) Person served:
   (i) Name: Judge Whitney, Superior Court Judge
   (ii) Address:
   Superior Court of San Diego County, Dept. 68 330 West Broadway, San Diego CA 92101

   (b) Person served:
   (i) Name: Summer Stephan, San Diego County District Attorney
   (ii) Address:
   San Diego County District Attorney, 330 West Broadway, San Diego CA 92101

   (c) Person served:
   (i) Name: Clerk of the Supreme Court of California
   (ii) Address: 350 McAllister Street
   San Francisco, CA 94102-4797

   [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

   (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state):

Form Approved for Optional Use
Judicial Council of California
APP-009 [Rev. January 1, 2017]

Case Name: Morgan v. Ygrene	Court of Appeal Case Number: D079364
	Superior Court Case Number: 37-2019-00052045

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 7, 2022

James Swiderski
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

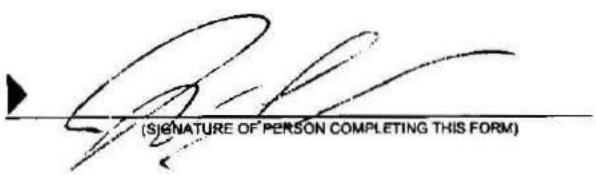
PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: Morgan v. Ygrene Energy Fund, et al. Court of Appeal Case Number: D079364 Superior Court Case Number: 37-2019-00052045-CU-OR-CTL	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:
   325 West Washington Street #2125 San Diego CA 92103
   b. My electronic service address is *(specify)*: Law@WhatIsTheLaw.com
3. I electronically served the following documents *(exact titles)*:
   Petition for Review
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: Rob Bonta, Attorney General
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   Attorney General, State of California
   b. Electronic service address of person served: Dept. of Justice Website Upload for 17200 brief
   c. On *(date)*: December 7, 2022
   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 7, 2022

James Swiderski
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)


(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

www.courts.ca.gov

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Morgan v. Ygrene Energy Fund, Inc. et al**
Case Number: **TEMP-J6HB4N31**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Law@WhatIsTheLaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Petition for Review to the California Supreme Court

Service Recipients:

Person Served	Email Address	Type	Date / Time
James Swiderski James Swiderski 185761	Law@WhatIsTheLaw.com	e-Serve	12/7/2022 2:47:41 PM
Neil Marder 126879	nmarder@akingump.com	e-Serve	12/7/2022 2:47:41 PM
Ali Abugheida 285284	aabugheida@buckleyfirm.com	e-Serve	12/7/2022 2:47:41 PM
Jesse Miller Pro Hac Vice	jessemiller@reedsmith.com	e-Serve	12/7/2022 2:47:41 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/7/2022
Date

/s/James Swiderski
Signature

Swiderski, James (185761)
Last Name, First Name (PNum)