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Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

Plaintiffs-Appellants,

v.

CITY OF OAKLAND

Defendant-Respondent

PETITION FOR REVIEW

After a Published Decision from the Court of Appeal
First Appellate District Court Case No. A154986
Alameda County Superior Court Case No. RG16821376

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PETITION FOR REVIEW

TO CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES:

Per California Rules of Court, Rule 8.500, Petitioner the City of Oakland ("Oakland" or "the City") petitions for review of the published decision of the Court of Appeal for the First Appellate District, Division One, reversing the trial court's order sustaining the City's demurrer as to the validity of the franchise fees challenged by Respondents Robert Zolly, Ray McFadden, and Stephen Clayton (collectively, "Respondents"). (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 260 Cal.Rptr.3d 541 (filed Mar. 30, 2020, as mod. on denial of rehg. Apr. 17, 2020 (*Zolly*).) Attached as Appendix A is a copy of the *Zolly* opinion, as modified on denial of rehearing.[1]

I. ISSUES PRESENTED FOR REVIEW

This petition raises three issues regarding whether true franchise fees, negotiated between local municipalities and private-sector city service providers, are subject to voter approval requirements for taxes set forth in California Constitution, Article XIII C, as amended by Proposition 26 in 2010. The uniform and proper development of these issues, including clarification of this Court's 2017 *Jacks v. City of Santa Barbara* decision,

[1] The Superior Court's May 29, 2018 Order Sustaining Demurrer is attached as Appendix B pursuant to California Rule of Court 8.504(e)(1)(B).

has great financial and public health and safety consequences for city and county governments and their residents throughout California.

1. Are franchise fees categorically exempt from the definition of "tax" as "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property," under California Constitution, Article XIII C, section 1, subdivision (e)(4)[2]?

2. Is *Jacks v. City of Santa Barbara* intended to apply beyond its pass-through surcharge facts and to reach all franchise contracts following the passage of Proposition 26, particularly in light of the significant adverse financial and public health and safety consequences throughout California if *Jacks* is broadly applied?

3. Are franchise fees, negotiated between local governments and private-sector service providers and paid by the franchisees, "imposed" by a local government on taxpayers within the meaning of California Constitution, Article XIII C, section 1, subdivision (e), and section 2?

[2] For convenience and brevity, references to California Constitution, Article XIII C, Section 1, subdivision (e) may be referred to herein as, "Article XIII C." Article XIII C, Section 1, subdivision (e)(4) is referred to herein as "Exemption 4."

II. WHY REVIEW SHOULD BE GRANTED

Review should be granted to settle three important issues related to the treatment of franchise fees under the California Constitution's voter approval requirements for "taxes" following the adoption of Proposition 26 and this Court's *Jacks v. City of Santa Barbara* decision, and to secure the uniformity of trial and appellate court decisions throughout California in this area.

This case involves the intersection of two divergent areas of law: the treatment of public service franchises and franchise fees, and voter-imposed constitutional restrictions on local taxation. These distinct lines of authority converged, for the first time, in this Court's decision in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248.

This Court should grant review to (1) settle whether franchise fees are categorically exempt from the definition of "tax" by virtue of the passage of Proposition 26, which added an exemption to the definition of "tax," which the parties and the Court of Appeal concur covers franchise contracts; (2) settle on the proper interpretation of this Court's *Jacks* decision, which involved a pass-through surcharge that pre-dated Proposition 26; and (3) settle whether a local government "imposes" a tax on taxpayers within the meaning of Article XIII C when the local government enters a franchise contract with a private-sector service provider.

A. Clarification of the Scope of Proposition 26's Exemption of Franchise Fees from Article XIII C's Definition of "Tax"

Proposition 26, effective November 3, 2010, defined "tax" in connection with the various voter approval statutes. While expanding the definition of "tax," Proposition 26 simultaneously carved out seven exemptions from that definition. As acknowledged by this Court in *Jacks*, Exemption 4 applies to franchise fees. (*Jacks*, 3 Cal.5th at 262-63.) Based on a plain reading of Article XIII C and applying the rules of statutory construction, the City submits that Exemption 4 is a "categorical" exemption such that there is *no* requirement that the franchise fee be tested by a "reasonable relationship" to cost or value to fall within the exemption. The City's interpretation of Exemption 4 is consistent with California courts' historical treatment of franchise fees as "non-taxes."

This Court explicitly reserved this question in *Jacks*:

> We are concerned only with the validity of the surcharge under Proposition 218. *Proposition 26's exception from its definition of 'tax' with respect to local government property is not before us.*

(*Jacks*, 3 Cal.5th at 263 fn. 6 (emphasis added).)

The *Zolly* court deemed Exemption 4 to be ambiguous, and then looked to the final paragraph of Article XIII C, section 1, speaking to the local government's burden of proof, to support its conclusion that Exemption 4 is governed by a "reasonable relationship" test. The court did so even

though Exemption 4 – unlike other exemptions in that section – has no "reasonable relationship" or "reasonable cost" language.

This is an issue of first impression, reserved in *Jacks* for a future case. This case squarely presents the issue. If Exemption 4, like other Article XIII C exemptions that lack the reasonability term, is a categorical exemption, then the Court of Appeal is mistaken and the Superior Court's dismissal of Respondents' challenge to Oakland's franchise fees is correct. Resolving this issue clearly is of great importance: there are thousands of current franchise contracts entered into between California cities and counties and private-sector service providers. Without resolution now, this issue will repeatedly be raised, at great cost, with significant financial and public health and safety consequences in the balance. This Court's guidance is needed.

B. Clarification of the Proper Application and Interpretation of *Jacks v. City of Santa Barbara*

In *Jacks*, this Court analyzed whether a one-percent surcharge imposed by the City of Santa Barbara, forwarded by the utility to ratepayers on their electricity bills, and remitted dollar-for-dollar back to Santa Barbara with *no* financial obligation by the utility to pay any part of the surcharge, was subject to voter approval requirements for taxes under the *pre-Proposition 26* version of Article XIII C. This Court, extrapolating from *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, and similar cases involving *non-franchise* fees – *e.g.*, regulatory fees, user fees,

property development fees – held that the Santa Barbara surcharge was not a valid "franchise fee" and was subject to Proposition 218's voter approval requirements to the extent that it was not "reasonably related to the value of the franchise." (*Id.* at 257.)

In interpreting the scope of the *Jacks* decision under the *post-Proposition 26* version of Article XIII C, the Court of Appeal disregarded Article XIII C's plain language, the clear intent of Proposition 26 (to categorically exempt franchise fees from Article XIII C's voter approval requirements), and the historical treatment of franchise fees as non-taxes. The *Zolly* court instead held that *Jacks* – despite not addressing Proposition 26 or its application to franchise fees – should be extended to cover all franchise fees, and not just the type of surcharge analyzed in *Jacks*. The Court of Appeal's opinion expands *Jacks* beyond its limited facts, misreads the plain language of Article XIII C and Exemption 4, and ignores key legislative history materials relating to Proposition 26 that demonstrate the absence of any intent to restrict franchise fees or define them as a "tax." This Court's guidance is needed.

C. Clarification of the Meaning of "Imposed" in the Context of a Franchise Fee

The voter approval requirements of Article XIII C apply only to fees "imposed" by local government upon taxpayers. But a franchise fee is the price paid by a franchisee (not a taxpayer) for the franchise, namely, the

contract consideration for the right to do business with the local government entity.

The term "impose" within Article XIII C in the context of a franchise fee has not been squarely addressed, reflecting the fact that California law has historically treated franchise fees as non-taxes. Franchise fee revenue is indisputably an important component of public sector finances. Clarification by this Court of the Article XIII C gateway definitional term, to "impose" on a taxpayer, is needed.

III. STATEMENT OF THE CASE

In February 2012, the City initiated a Request for Proposal ("RFP") procurement process for new waste-hauling, mixed materials and organics, and recycling franchise contracts to take effect July 1, 2015. (Compl. ¶1, 1 JA 3; *id.* ¶¶19-20, 1 JA 7.)[3]

After a lengthy and difficult bidding and negotiations process, the Oakland City Council on August 27, 2014 granted the City's exclusive recycling services franchise to California Waste Solutions Inc. ("CWS"), and on September 29, 2014 granted the City's exclusive franchise for mixed materials & organics collection services to Waste Management of Alameda County ("WMAC"). Both contracts were contingent on the parties' further

[3] Citations to "JA" are to the Joint Appendix submitted in the Court of Appeal.

negotiation and execution of their respective contracts. (*See* 1 JA 323-26 ("CWS Ordinance"); 1 JA 139-42 ("WMAC Ordinance").)

The WMAC Ordinance included the following provision regarding the franchise fee at issue in this appeal:

> *In consideration of the special franchise right granted by the City to Franchisee to transact business, provide services, use the public street and/or other public places, and to operate a public utility for Mixed Materials and Organics collection services*, *Franchisee shall remit a monthly franchise fee payment to the City*, as specified in the Contract. From July 1, 2015, through June 30, 2025, Franchisee shall pay the City a monthly franchise fee of Twenty-Five Million Thirty-Four Thousand Dollars ($25,034,000) per annum, subject to annual adjustment on July 1 each year, as specified in the Contract.

(1 JA 141 at § 6 (emphasis added).) Using similar language, the CWS Ordinance set a franchise fee of $3,000,000 subject to annual adjustment. (2 JA 326 at § 5.) The adoption of the WMAC Ordinance reduced the City's total franchise fees from their former levels. (Second Amended Complaint ("SAC"), ¶47, 2 JA 284.)

On June 29, 2016, the Zolly Respondents filed a lawsuit challenging the contracts' rates, franchise fees, and AB 939 fee under Proposition 218. (1 JA 1-51.) Three rounds of complaints and demurrers followed; in each round, the City prevailed and the Zolly Respondents were given leave to amend. (1 JA 098-101; 1 JA 271-72.)

On June 29, 2017, while the City's second demurrer was under submission, this Court decided *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248. The City brought *Jacks* to the Superior Court's attention. (1 JA 211-270.) On July 12, 2017, the Superior Court sustained the City's demurrer in full, with leave to amend. (1 JA 271-72.) Regarding Respondents' franchise fee challenge, the Superior Court agreed with the City that "[a] fee paid for government property interest is compensation for the use or purchase of that government asset, rather than compensation for a cost." (*Id*.) The Court further noted, quoting *Jacks*, that "'historically, franchise fees have not been considered taxes, and nothing in Proposition 218 reflects an intention to treat amounts paid in exchange for property interests as taxes.'" (*Id.* (quoting *Jacks*, 3 Cal.5th at 262).)

On August 28, 2017, the Zolly Respondents filed their Second Amended Complaint ("SAC") for declaratory relief, renewing their claim that the franchise fees and AB 939 fee are subject to Proposition 218. (2 JA 275-88.) The City again demurred.

On May 29, 2018, following extensive oral argument, the Superior Court issued its Order Sustaining Demurrer in Part without Leave to Amend and in Part with Leave to Amend. (2 JA 460-67.) After careful analysis, including a comparison of the fundamental differences between the Oakland franchise fees and the Santa Barbara surcharge in *Jacks*, the Superior Court rejected Respondents' challenge to Oakland's franchise fees. The court ruled

that Respondents had not "alleged circumstances sufficient to bring the franchise fees in the instant case within the narrow exception, recognized in *Jacks,* to the general principle, also set forth in *Jacks,* that '[h]istorically, franchise fees have not been considered taxes' and that '[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses.'" (2 JA 473.) The Superior Court ruled that to hold otherwise "would subject municipalities to potential taxpayer-challenge lawsuits over every franchise agreement into which they enter regardless of whether the fees are imposed on the franchisee rather than the consumer and regardless of how small the amount of the franchise fees negotiated by the parties may be" – a "sweeping and burdensome change in the long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities" not supported by *Jacks*. (*Id.*)

The Superior Court sustained the demurrer as to Respondents' AB 939 fee claim with leave to amend regarding potential future annual increases, but Respondents elected not to amend and instead to proceed to the Court of Appeal. On July 19, 2018, the Superior Court entered a Judgment of Dismissal with Prejudice. (2 JA 468-80.)

On August 3, 2018, the Zolly Respondents appealed. (2 JA 496.) Briefing followed, including amicus briefs filed by the League of California

Cities and the Howard Jarvis Taxpayers Association ("HJTA"). The City filed an Answer to the HJTA amicus brief and a Motion for Judicial Notice ("MJN") of two key documents: the Proposition 26 Voter Information Guide, and a Legislative Analyst's Office report regarding tax-related voter approval requirements. (2/20/2020 MJN Exs. 1-2.)

Following oral argument, the Court of Appeal filed its published opinion reversing the Superior Court's order dismissing the franchise fee challenge, but affirming the dismissal of Respondents' challenge to the annual AB 939 fee increase.[4]

On April 14, 2020, the City filed a Petition for Rehearing, noting that the Court of Appeal opinion appeared to have overlooked the City's Answer to the HJTA amicus brief and accompanying Motion for Judicial Notice. On April 17, the Court of Appeal issued an order denying rehearing but granting the City's motion for judicial notice. (*See* Appendix A.)

IV. LEGAL DISCUSSION

A. Review Is Needed to Clarify the Scope of Proposition 26's Exemption of Franchise Fees from Article XIII C's Definition of "Tax"

The scope of Proposition 26's exemption of franchise fees from the definition of "tax" is an issue of first impression that this Court expressly reserved in *Jacks.* This case squarely presents this important question: is the

[4] The AB 939 ruling is not at issue in this petition.

exemption categorical or is it qualified by *Jacks*'s "reasonable relationship" test? The Court's resolution will provide crucial guidance on issues affecting all cities and counties and their residents.

1. Franchise Fees Have Historically Been Treated as "Non-Taxes," and Relevant California Voter Initiatives Have Not Altered That Status

For over 100 years, public agencies in California have provided public services to city and county residents through private-sector franchisees under authority vested in them by the California Constitution and by statute. (*E.g.*, *County of Alameda v. Pacific Gas and Electric Co.* (1997) 51 Cal.App.4th 1691, 1694-95 (outlining history of municipal franchises); *Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors of Santa Barbara County* (1989) 209 Cal.App.3d 940, 949 (listing examples of franchises granted by local governments).) As this Court recognized in *Jacks*, "a franchise is a form of property, and a franchise fee is the price paid for the franchise." (*Jacks,* 3 Cal.5th at 268, 262 (citations omitted).) As fees negotiated as consideration for valuable property rights, "[h]istorically, franchise fees have not been considered taxes," and thus have not been subject to any restrictions on taxation. (*Id.* at 262.)

Voter amendments limiting taxation began with Proposition 13 in 1978. Proposition 13 added Article XIII A to the California Constitution, which limits the rate at which ad valorem property taxes may be increased. (Cal. Const., art. XIII A, §§ 1, 2.) It also requires two-thirds voter approval

for a local government to impose "special taxes." (*Id.*, § 4.) In 1986, voters enacted Proposition 62, adding Sections 53720 through 53730 to the Government Code, mandating that all local taxes, not just "special" taxes, are subject to voter approval.

In 1996, California voters passed Proposition 218, which added Articles XIII C and XIII D to the California Constitution. Article XIII C defines the concepts of general and special taxes that were adopted as part of Proposition 62. (Cal. Const., art. XIII C, §§ 1(a), (c).) Article XIII C also incorporates the voter approval requirements of Propositions 13 and 62 by requiring voter approval of any general or special taxes "impose[d], extend[ed], or increase[d]" by any local government. (*Id*., §§ 2(a), (b), (d).) Significantly, Proposition 218 and the accompanying ballot materials made no mention of franchise fees.

In 2010, Proposition 26 added a new definition of the word "tax" to Article XIII C, defining a "tax" as "any levy, charge, or exaction of any kind imposed by a local government." (Cal. Const., art XIII C § 1, subd. (e).) The definition also expressly carved out seven exemptions from the definition of "tax." This appeal involves Section 1(e)(4) ("Exemption 4"), which excludes from the definition of tax any "charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." As this Court acknowledged in *Jacks*, Exemption 4 applies to amounts paid in exchange for government property interests, such as

franchise fees. (*Jacks*, 3 Cal.5th at 262-63.) Compared with the first three exemptions in sub-section (e), each of which includes an express requirement that the particular charge not exceed the "reasonable costs" or "reasonable regulatory costs" of the service or activity in order not to be a "tax," Exemption 4 contains no corresponding requirement that the charge must not exceed, or must be related to, the "reasonable" cost or value of the property rights conveyed. (Cal. Const., art XIII C § 1, subd. (e).)

Proposition 26's exemption for franchise fees as charges for the use or purchase of government property is consistent with the historical treatment of franchise fees as non-taxes. (*See Jacks*, 3 Cal.5th at 262.) Indeed, before *Jacks*, no California court had held or suggested that a true franchise fee paid in exchange for the purchase of franchise rights could be considered a "tax" subject to constitutional restrictions and voter approval requirements. The Court of Appeal relied on *Jacks* to reach the incorrect conclusion that Exemption 4 is not absolute but instead is qualified by *Jacks*'s "reasonable relationship to value" test. This Court should grant review to clarify the meaning and effect of Proposition 26's Exemption 4.

2. The Plain Language of Article XIII C, as Amended by Proposition 26, and Its Ballot Initiative History Manifest an Intent to Categorically Exempt Franchise Fees from the Definition of "Tax"

In analyzing whether Oakland's franchise fees are subject to Article XIII C's definition of "tax," the Court of Appeal ultimately held, relying on

Jacks, that the franchise fees must be "reasonably related to the value of the franchise," and that "[o]nly that portion with a reasonable relationship may be exempt from the 'tax' definition." (*Zolly*, 47 Cal.App.5th at 88.) In so holding, the Court of Appeal misinterpreted the plain language of Article XIII C and Exemption 4, and disregarded key ballot initiative history and secondary sources that establish a *categorical* exemption for franchise fees. Review is needed to resolve the proper interpretation of Article XIII C and California's tax approval scheme.

a) The Court of Appeal's Misapplication of Principles of Statutory Construction and Misreading of Article XIII C Require Clarification

Zolly raises important questions regarding the correct interpretation of Article XIII C's definition of "tax" and the specific exemptions enumerated therein, added following Proposition 26's passage. Is Article XIII C's plain language clear on its face, or must courts resort to external sources, such as ballot initiative materials, to discern its meaning? The Court of Appeal ruled the latter, primarily relying on an asserted ambiguity arising out of sub-section (e)'s closing provision regarding the government's burden of proving whether a given charge is a "tax." (*Zolly*, 47 Cal.App.5th at 86-87.)

The Court of Appeal's analysis violates basic principles of statutory construction. Courts interpreting a voter initiative such as Proposition 26 start with "the initiative's language, giving the words their ordinary meaning and

construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, [courts] presume the voters intended the meaning apparent from that language, and [courts] may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

The language of Article XIII C, and of Exemption 4 specifically, is clear and unambiguous: any charge that is "imposed for entrance to use or use of local government property, or the purchase, rental, or lease of local government property" is not a "tax" and is categorically exempt from voter approval requirements. (Cal. Const., art. XIII C, § 1, subd. (e)(4); *see also* 2/20/2020 MJN, Ex. 1, 2014 Legislative Analyst's Office Report at 3, 5.)[5] Unlike other exemptions in Article XIII C, section 1, Exemption 4 does *not* include any requirement that a franchise fee be "reasonably" related to "cost," much less the value of the franchise. (*Compare* Cal. Const., art. XIII C, § 1 subd. (e)(1)-(3) (referencing "reasonable costs").) Under well-established principles of statutory construction, the inclusion of a "reasonability" requirement in the first three exemptions underscores the absence of a similar requirement in Exemption 4, and is evidence of voter intent to impose different requirements for different types of charges. (*See*,

[5] The Legislative Analyst's Report is available at https://lao.ca.gov/reports/2014/finance/local-taxes/voter-approval-032014.pdf.

e.g., *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

The Court of Appeal correctly recognized this critical distinction between the specific language of Exemptions 1 through 3 and Exemption 4: "The fourth exemption does not expressly state the charge for entrance to or use of local government property must be reasonable. This absence contrasts with the first three exemptions, which do explicitly include such a requirement." (*Zolly*, 47 Cal.App.5th at 86 (emphasis added).)

But, the Court of Appeal then erred by focusing not on Exemption 4's plain language and its lack of any "reasonability" requirement. It instead fixated on sub-section (e)'s statement regarding the government's '"burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.'" (*Id.* at 86-87 (quoting Cal. Const., art. XIII C, § 1, subd. (e)).) Stating that "the subdivision is silent as to whether this requirement applies to all seven exemptions, or only to the first three exemptions that explicitly include a reasonableness requirement," the court "f[ou]nd the provision ambiguous and look[ed] to the intent and objective of the voters in enacting the provision to guide [its] interpretation." (*Id.* at 87.)

The Court of Appeal's flawed interpretation leads to absurdities. A natural reading of the final paragraph's plain language is that it merely allocates the burden of proving the requirements of each exemption, but does not add any substantive requirements. Accordingly, a local government would have the burden of proving "reasonable costs" where an exemption so requires (*i.e.*, the first three). Nothing in the text suggests, however, that the burden of proof clause is meant to add substantive requirements to any exemption. By so holding, the Court of Appeal improperly "add[ed] to the statute…to conform to some assumed intent not apparent from that language." (*Pearson*, 48 Cal.4th at 571.) At the same time, the Court of Appeal's decision violates the basic tenet of statutory interpretation that "[i]nterpretations that lead to absurd results or render words surplusage are to be avoided" (*Tuolumne Jobs*, 59 Cal.4th at 1037) because its holding renders the specific "reasonablity" language in Exemptions 1 through 3 mere surplusage.

The Court of Appeal's reading also leads to absurdity because the concept of "reasonable costs" does not make sense in the context of franchise fees. Franchise fees are payments made in consideration for the right to enjoy and purchase valuable government property rights (franchises); they are not *costs* for services or activities provided or performed by the government. The notion of "cost" is completely out-of-place in the franchise fee context. Accordingly, the only way to interpret the burden of proof language *without*

reducing the specific "reasonability" language of Exemptions 1 through 3 to surplusage or otherwise leading to absurdities is that it simply allocates the burden of proving the varying requirements of each exemption, nothing more.

Inventing ambiguity where it does not exist, the Court of Appeal improperly read into Exemption 4 a non-existent "reasonability" requirement. This Court should grant review to resolve this important question of statutory construction that affects every city or county franchise contract in California.

b) Even Assuming, Arguendo, That Article XIII C Is Ambiguous, Key Evidence of Voter Intent Would Dictate the Opposite of the Court of Appeal's Holding

Even if Article XIII C were ambiguous, that alone would not answer whether Exemption 4 can properly be read to include a "reasonability" test, as the Court of Appeal concluded. The Court of Appeal's truncated review and analysis of Proposition 26's ballot initiative history and related sources incorrectly favored broad-sweeping statements of intent over more specific analyses that evince an intent to treat franchise fees separately under the law, consistent with their historical characterization as "non-taxes."

The Court of Appeal found that Proposition 26's ballot initiative history shows a general intent "to expand the definition of what constituted a 'tax' for purposes of article XIII C" and that "[n]owhere does the

[Legislative Analyst's] analysis identify any narrowing of the definition of a state or local tax." (*Zolly*, 47 Cal.App.5th at 87-88 (citing Voter Info. Guide, Gen. Elec. (Nov. 2, 2010) analysis of Prop. 26 by the Legislative Analyst, p. 57).)

But by stopping there, the Court of Appeal overlooked more specific statements that clearly identify the types of fees and charges the measure was intended to impact – that is, *not* franchise fees. Although the Court of Appeal acknowledged the Legislative Analyst's statement that "other fees and charges 'Are Not Affected'" by Proposition 26 (Voter Info. Guide, Gen. Elec., p. 58), it failed to account for the Legislative Analyst's explanation of the ballot initiative to determine *which* types of charges *are* affected and which are not.

A proper analysis shows that Proposition 26's primary purpose was to address improper regulatory fees and did not identify franchise fees as a type of charge Proposition 26 was intended to affect – salient evidence that franchise fees were meant to be absolutely exempted from any definition of "tax," consistent with historical case law. (*See also Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326 (Proposition 26 was passed "in an effort to curb the perceived problem of a proliferation of *regulatory fees* imposed by the state") (emphasis added).)

For instance, although the Court of Appeal selectively quoted from the Findings and Declarations of Purpose that Proposition 26 was intended

to "account for the recent phenomenon whereby…local governments have disguised new taxes as 'fees'…" (*Zolly*, 47 Cal.App.5th at 88), the court elided the very next sentence, which directly refers to "regulatory fees" as the target of the initiative: "Fees couched as 'regulatory' but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes." (*See* Prop. 26, Findings and Declarations of Purpose, section 1(e) (2010).)

Consistent with this stated purpose, in the Voter Guide's "Background" section, the Legislative Analyst explained that "fees and charges…typically pay for a particular service or program benefitting individuals or businesses," and described the "three broad categories of fees and charges": "user fees," "regulatory fees," and "property charges." (*See* MJN Ex. 2, Voter Information Guide for 2010 General Election, https://repository.uchastings.edu/ca_ballot_props/1335, Analysis by Leg. Analyst at 56.)

"Franchise fees" are notably absent from this list, and do not fall within the definition of a "user fee," "regulatory fee," or "property charge." A franchise fee is *not* (1) a fee "charged to a person using a service" (user fee); (2) "charged in connection with regulatory activities" (regulatory fee); or (3) charged to "pay for improvements and services that benefit [a] property

owner" (property charge). (MJN Ex. 2, Analysis by Leg. Analyst at 56; *see also Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217 (defining user fees); *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 843, fn. 6 (defining regulatory fees) (citing *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 876 (quoting *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375)).) Nor is a franchise fee imposed to "pay for a particular service or program benefitting individuals or businesses." (MJN Ex. 2, Analysis by Leg. Analyst at 56.) Rather, it is a contractually bargained-for payment between the government and the private-sector franchisee for the purchase of valuable franchise rights. (*See*, *e.g.*, *Santa Barbara County Taxpayer Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 949.)

The Legislative Analyst further highlighted "disagreements regarding regulatory fees" as a key factor underlying Proposition 26, noting that "[o]ver the years, there has been disagreement regarding the difference between *regulatory fees* and taxes….." (MJN Ex. 2, Analysis by Leg. Analyst at 57 (emphasis added); *id.* at 58 ("[g]enerally, the types of fees and charges that would become taxes under the measure [Proposition 26] are ones that government imposes to address health, environmental, or other societal or economic concerns").) This background, too, makes no mention of franchise fees as a concern underlying Proposition 26.

The arguments for and against Proposition 26 were likewise focused on regulatory fees. (*See* MJN Ex. 2, Arguments at 60-61 (proponents argued Proposition 26 would protect "legitimate fees such as those to clean up environmental or ocean damage, fund necessary consumer regulations, or punish wrongdoing," while opponents argued it was driven by "big oil, tobacco, and alcohol companies" wishing to avoid environmental and consumer protection fees, and would "harm local public safety and health").) These arguments have nothing to do with franchise fees.

Indeed, *nowhere* does the Proposition 26 Voter Guide manifest any intent to impose limitations on franchise fees. That the ballot is *silent* regarding franchise fees is "indicative of an absence of intent to affect that subject." (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197, fn. 19 (ballot arguments' "total silence on a subject can indeed be indicative of an absence of intent to affect that subject").)

Oakland's interpretation is further supported by a 2014 Legislative Analyst's Office's report entitled, "A Look at Voter-Approval Requirements for Local Taxes" ("2014 LAO Report"), which contradicts the Court of Appeal's ruling that Proposition 26 was intended to restrict franchise fees. (*See* MJN Ex. 1.) In asking, "Is the Charge a Tax?," the Legislative Analyst's Office explained: "In general, a local government levy, charge, or exaction is a tax and subject to voter approval unless it meets at least one of seven

exemptions defined in the State Constitution….Some charges are *categorically exempt*: fines and penalties for violating the law, *entrance charges and charges for use of government property*, local property development charges, and property assessments and property-related fees imposed in accordance with Proposition 218." (*Id.* at 3 (emphasis added); *id.* at 5, Fig. 3 (flow chart showing a "charge for use of government property" categorically is "not a tax and voter approval is not required").) Thus, the Legislative Analyst confirmed after-the-fact that charges for the "use of local government property," or the "purchase…of local government property," under Article XIII C's Exemption 4 – such as franchise fees – are *categorically exempt* from voter approval requirements and are not subject to any "reasonability" test.

Although the Court of Appeal ultimately took judicial notice of the Voter Guide and 2014 LAO Report, it did not fully analyze those materials or the City's arguments. The court granted Oakland's Motion for Judicial Notice only after Oakland's Petition for Rehearing pointed out that its Answer to the HJTA amicus brief and the accompanying Motion may have been overlooked. (*See Zolly*, 47 Cal.App.5th at 78, fn. 2.) The Court of Appeal thus never reconciled the inconsistencies between the broader statements of Proposition 26's purpose on which it relied and the more specific explanations of the precise charges that Proposition 26 was intended to cover – which exclude franchise fees. This Court should grant review to

resolve these open questions and engage in a complete analysis of Proposition 26's ballot initiative history and related secondary sources to adequately assess voter intent relevant to interpreting the amended language of Article XIII C and its impact on franchise fees.

In sum, this case presents an important issue of first impression that this Court expressly left open in *Jacks*. The Court of Appeal's analysis of this issue was incomplete and incorrect. Review should be granted to give definitive guidance on the proper interpretation of Proposition 26's Exemption 4, which affects franchise contracts statewide.

B. The Court Should Clarify the Proper Application and Interpretation of *Jacks v. City of Santa Barbara*

The Court also should grant review to clarify the intended scope and application of *Jacks* to franchise fees that post-date Proposition 26 and are subject to its amended constitutional definitions. *Jacks* found that a particular surcharge imposed by Santa Barbara on ratepayers was subject to Proposition 218's restrictions on taxation to the extent that the surcharge did not "bear a reasonable relationship to the value received from the government." (*Jacks*, 3 Cal.5th at 269.) But the Santa Barbara surcharge in *Jacks* was a direct pass-through to ratepayers, not a true franchise fee that the utility, Southern California Edison ("SCE"), was legally obligated to pay to the city as contract consideration. Moreover, *Jacks* expressly did not consider whether franchise fees are exempted from Proposition 26's definition of "tax."

Accordingly, the *Zolly* court is the first appellate court to attempt to reconcile the language of Proposition 26 with the "reasonable relationship to value" test this Court articulated in *Jacks*. This Court should grant review to instruct lower courts on whether, or in what circumstances, *Jacks* governs post-Proposition 26 franchise fees.

As described above (*see*, *supra*, Section II.B), the *Jacks* Court acknowledged that its decision was limited to the challenged one-percent "surcharge" and did not involve the underlying one-percent franchise fee that the plaintiffs did not challenge. (3 Cal.5th at 263, fn. 6 ("We are concerned only with the validity of the *surcharge* under Proposition 218.") (emphasis added).).

In *Zolly*, the Superior Court found that the *Jacks* surcharge is factually distinct from Oakland's franchise fee because it was not a fee paid *by SCE* to Santa Barbara for franchise rights. Rather, it was a "direct 'pass-through'…to the ratepayers" because it was "(a) itemized as a 'separate charge' on consumer electricity bills; (b) mandatorily collected by the franchisee, SCE; and (c) remitted by SCE, dollar for dollar, to the City of Santa Barbara, pursuant to the agreement with the city." (*See* Appendix B, 5/29/2018 Order Sustaining Demurrer, 2 JA 473.) SCE had *no* liability for the surcharge, even if some ratepayers failed to pay. *Zolly*, by contrast, involves a true franchise fee paid for out of the franchisees' assets, with no direct pass-through to ratepayers.

Based on these factual differences, the Superior Court read *Jacks* narrowly, rejecting the invitation to expand *Jacks* beyond its limited facts. The court explained that "Plaintiffs have not alleged circumstances sufficient to bring the franchise fees in the instant case within the narrow exception, recognized in *Jacks,* to the general principle, also set forth in *Jacks,* that '"[h]istorically, franchise fees have not been considered taxes'" and that '"[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses.'"" (2 JA 473 [citations omitted].) The Superior Court further reasoned that "[t]o conclude otherwise would subject municipalities to potential taxpayer-challenge lawsuits over every franchise agreement into which they enter regardless of whether the fees are imposed on the franchisee rather than the consumer and regardless of how small the amount of the franchise fees negotiated by the parties may be." (2 JA 473.) The Superior Court concluded that "[s]uch an outcome is beyond the facts of the *Jacks* decision and, therefore, is also beyond its holding. . . If our Supreme Court intended such a sweeping and burdensome change in the long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities, it will need to say so directly in a case alleging facts equivalent to those alleged by Plaintiffs herein. This court declines to

interpret the holding of the *Jacks* decision beyond its atypical facts." (2 JA 473 [citation omitted].)

In contrast, the Court of Appeal dismissed these factual distinctions as irrelevant to the ultimate question of "whether a charge constitutes a legitimate fee or an unlawful tax," noting that "*Jacks* thus guides our analysis." (*Zolly*, 47 Cal.App.5th at 85.) In concluding that the City's franchise fees must bear a "reasonable relationship" to the value of the franchise to not be a "tax" under Article XIII C, the Court of Appeal extended *Jacks* beyond its limited holding: that a fee passed on directly and wholly to ratepayers may be an improper "tax" under Proposition 218 to the extent it is not reasonably related to the value of the franchise. The Court of Appeal wedged *Zolly* into the *Jacks* framework despite these material factual differences and even though *Jacks* explicitly limited its holding to Proposition 218.

This case squarely presents the question whether *Jacks* applies more broadly to all franchise fees, or is limited to its particular pass-through surcharge facts. A wave of litigation on this issue is anticipated, warranting this Court's review now.

C. The Court Should Grant Review to Clarify What It Means for A Charge to Be "Imposed By A Local Government"

The Court of Appeal erred on a third important issue warranting this Court's review: what it means for a charge to be "imposed by a local

government." (Cal. Const., art XIII C § 1, subd. (e) & § 2.) If a fee is not "imposed by a local government," it is, by definition, not a "tax." The courts below reached different conclusions regarding the meaning of the term "imposed" in the context of a contractually-negotiated franchise fee.

The Superior Court ruled that the franchise fees negotiated between Oakland and the private sector waste-hauling service providers are not a "tax" because they are not "imposed." Consistent with a long line of cases, the court ruled that the Oakland franchise fees are contract consideration for franchise rights that the service providers voluntarily assumed the obligation to pay (and that taxpayers in turn had *no* obligation to pay). (2 JA 472-73.)

In *Jacks*, by contrast, SCE did not "assume the burden of paying the surcharge"; instead, it was "imposed" on taxpayers because it was passed through directly to them on their bills for remittance to Santa Barbara. (*Jacks*, 3 Cal.5th at 270-71.)

Ignoring these material distinctions, the Court of Appeal rejected the Superior Court's ruling that Oakland's negotiated franchise fees are not "imposed," and found that this Court had "implicitly rejected this argument in *Jacks.*" (*Zolly*, 47 Cal.App.5th at 88.) The Court of Appeal accepted the premise of *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com*. (2012) 209 Cal.App.4th 1182, that the term "impose" "'usually refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation,'" but asserted that "no

one asserts the [Oakland] franchise fee is not 'the first enactment' of the charge." (*Id.* at 89.)

Yet Oakland in fact had argued, based on *Sunset Beach*, that even if the fee is arguably "imposed" by the city on the *franchisees* through the contract process, the extension of that fee to ratepayers as part of the rates they pay for services does not mean the fee is "imposed by a local government" on taxpayers to render it a "tax." (*See* Respondent's Br. on Appeal at 42-43; 2 JA 306-07 (City's demurrer briefing).) As the Superior Court cautioned, "[t]o conclude otherwise would subject municipalities to potential taxpayer-challenge lawsuits over every franchise agreement into which they enter regardless of whether the fees are imposed on the franchisee rather than the consumer," which was "an outcome [] beyond the facts of the Jacks decision and, therefore, [] also beyond its holding." (2 JA 474.)

A recent Second District Court of Appeal opinion, *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, rehg. den. May 14, 2020, appears to agree with the Superior Court and thus creates a split with the Court of Appeal's decision in this case. There, the Second District rejected the inmates' attempt to challenge as improper taxes certain commissions negotiated and paid by telecommunications providers to various counties for exclusive contract rights. The inmates argued that the excessive commissions significantly increased their telephone costs and thus,

that *they*, not the telecom providers, were in effect paying an illegal tax. The court rejected that argument:

> Plaintiffs paid nothing to the counties, and they had no legal responsibility to pay anything to the counties. Simply asserting that they effectively or indirectly 'paid the illegal tax' does not make it true. Plaintiffs may have paid exorbitant charges to the *telephone provider*, but they did not make any payment to the *county* and they had no legal obligation to do so.

(*Id.* at *6.) The same reasoning applies to *Zolly*, where ratepayers have not made any payment to the City and have no legal obligation to do so – they merely pay their rates to the waste-hauling and recycling franchisees.[6]

These cases demonstrate the need for this Court's guidance on the meaning, under Article XIII C, of "imposing" a fee on taxpayers in the context of a city's negotiated fee with a private-sector service provider.[7]

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[6] The *County Inmate* court distinguished *Jacks* and *Zolly* on the ground that neither case raised an issue of standing to seek a refund of an improper tax. Regardless, the court's reasoning in *County Inmate* is inconsistent with *Zolly*, further highlighting the need for review to provide clarity and uniformity.

[7] In *California Cannabis Coalition v. Upland* (2017) 3 Cal.5th 924, this Court addressed the meaning of the term "impose," confirming that it means "'to establish,' not to collect." (*Id.* at 944.) However, the Court did not address the issue presented here: whether a franchise fee paid by a private-sector service provider pursuant to a government contract – which the taxpayer has no legal obligation to pay – can be deemed to be "imposed by a local government" upon the taxpayer for purposes of Article XIII C's definition of "tax."

D. Absent Review and Reversal, Harsh Financial and Public Health and Safety Consequences Will Flow from the Court of Appeal's Decision

The practical effects of the Court of Appeal's mistaken decision also warrant this Court's immediate intervention. The adverse consequences for the residents of Oakland and of similarly cash-strapped cities throughout California will grow harsher by the day as the global pandemic and 2020-2021 recession wreak havoc on public entities' finances – with tax revenues dropping precipitously while the demands upon city services skyrocket.

The Court of Appeal's decision threatens to subject cities and counties to costly lawsuit after costly lawsuit, impair cities' and counties' ability to provide essential public services, and harm the most vulnerable among Californians. Even before 2020, California's largest cities, such as Oakland, faced budgetary challenges. If the Court of Appeal's misinterpretations are not reviewed and if franchise fee revenue is thereby jeopardized, cities like Oakland will face impossible decisions regarding which essential services to cut. Should there be fewer police officers when the police force is already understaffed? Fewer firefighters to protect life and property during conflagrations and wildfires? Fewer emergency medical personnel to respond to emergency calls, as California confronts a pandemic of uncertain scope and duration? Fewer Public Works Department personnel to maintain cities' parks and public spaces? Less money to maintain and rebuild cities' aging infrastructure? Fewer outreach workers and essential harm reduction

services for homeless and unsheltered people, whose numbers and need for assistance will only grow as economic hardship increases? Cuts in public library resources, widening the educational gap between middle class and limited means families? The list goes on. These real-world consequences weigh strongly against the Court of Appeal's decision to overturn a long line of California cases holding that franchise fees negotiated with private-sector service providers are non-taxes.

The Superior Court correctly ruled that there was nothing in Proposition 218's legislative history to change the historical characterization of franchise fees as non-taxes, and that suddenly subjecting all franchise fees to voter approval requirements for "taxes" would represent a "sweeping and burdensome change in the long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities." (2 JA 463-64.) The Superior Court's interpretation of Proposition 218 was consistent with *Jacks*, which noted that "[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses." (*Jacks*, 3 Cal.5th at 262; *see also id.* at 267.)

The Superior Court's decision declining to apply *Jacks* to the distinct circumstances presented by Oakland's franchise contracts struck the right balance. On the very different facts presented in *Jacks*, this Court could not

have intended to overturn settled case law holding that franchise fees are non-taxes, to wreak havoc on cities' and counties' ability to provide essential public services, or to ignore the real-world consequences of its holding. Review should be granted both to clarify the law and to avert this looming catastrophe.

E. Absent Review and Reversal, the Court of Appeal's Decision Will Impracticably Subject Every Franchise Contract to a "Reasonable Relationship to Value" Test and Force Cities and Counties into Incessant Litigation Over Valuation

The impracticability of imposing a blanket "reasonable relationship to value" test on all franchise contracts is yet another reason for review. Conceptualized correctly, a franchise fee is contract consideration exempt from the definition of "tax." But if, contrary to longstanding California case law, franchise fees are now subject to a "reasonable value" test to avoid being considered a "tax" requiring voter approval, this exposes every franchise contract of every city and county to costly, lengthy, and repeated litigation over "reasonable value."

In practice, two competing experts will never agree upon one "reasonable value" for the franchise fee in something as complex, high-stakes, and valuable as a long-term waste-hauling contract of a major city. The city's expert will opine, consistent with California franchise contract case law and marketplace reality, that the "reasonable value" of the franchise is the contract consideration, *i.e.*, the franchise fee. But a narrowly-focused

plaintiff – who does not concern himself or herself with the impairment of cities' ability to provide essential public services and the resulting harm to public health, safety, and welfare – will seek out an expert to provide a different, low-ball "value."

What then happens? Who decides if the city's expert's market-driven contract consideration opinion prevails, or the plaintiff's expert's "low-ball" opinion prevails, or if there is yet another "reasonable value?" Is this issue to be litigated in court, and if not, before which body? What happens if a new plaintiff, dissatisfied with the result of the first dispute, enters the fray and promotes a different "reasonable value?" Does the "ruling" of whichever body that decides "reasonable value" get appealed, and if so, to whom? This litigious valuation process could take several years to play out. Yet, for public health and sanitation reasons, cities must have their garbage picked up every day without interruption, and cannot afford to add several years' delay to their contracting processes.

Oakland's preparations for and issuance of its RFP, bidding and selection process, negotiations and contract drafting, ordinance drafting, and public hearing process took over 30 months to complete. (1 JA 006-35.) Oakland's recycling contract was not signed until just before the expiration of the superseded contract. Does this litigation process occur before the city can issue its RFP? During the bidding process? While the City and the winning bidder are in negotiations? After the contract is finalized and while

the prevailing franchisees are performing the contracts? And if the City's valuation is at risk for being set aside, how can the City intelligently negotiate with the waste-hauling/recycling franchisees and ensure continuous waste-hauling and garbage services without interruption?

In short, overturning the historical treatment of franchise fees as "non-taxes" and imposing a novel test requiring assessment of the fees' "reasonable relationship" to the franchise's value will make an already-complicated public procurement process even more complicated, lengthy, and costly. This new burden should not be imposed in connection with the provision of an essential public service like waste and garbage collection and disposal.

Historically, courts have wisely refrained from wading into the marketplace to disrupt cities' and counties' contracts with private-sector providers by substituting a different "value" for the market participants' negotiated price. Now is most definitely not the time to begin.

V. CONCLUSION

Zolly raises three important issues related to the treatment of franchise fees under the California Constitution's tax and voter approval provisions, which will arise repeatedly in the future, with broad-sweeping financial and public health and safety consequences for cities and counties and their residents. Oakland respectfully requests this Court's review of these important issues.

Dated: June 8, 2020

Respectfully submitted,

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

/s/ *Barbara Parker*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it includes 8,375 words, including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: June 8, 2020

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

APPENDIX

APPENDIX A

Filed 3/30/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROBERT ZOLLY et al., Plaintiffs and Appellants, v. CITY OF OAKLAND, Defendant and Respondent.	A154986 (Alameda County Super. Ct. No. RG16821376)

The City of Oakland (City) entered into various waste management contracts with Waste Management of Alameda County (WMAC) and California Waste Solutions Inc. (CWS). As part of those contracts, WMAC and CWS agreed to pay franchise fees to the City, and the City redesignated part of WMAC's franchise fee as a fee imposed pursuant to Public Resource Code section 41901 (the Redesignated Fee). Plaintiffs Robert Zolly, Ray McFadden, and Stephen Clayton filed a complaint for declaratory relief against the City, challenging the legality of those fees under the California Constitution, article XIII C (article XIII C).[1]

The City demurred, arguing the franchise fees were not subject to article XIII C, the Redesignated Fee challenge was time-barred, and the Redesignated Fee was properly imposed. The trial court granted the City's demurrer without leave to amend as to the franchise fees but with leave to

[1] Unspecified references to "article" are to the California Constitution.

amend as to future increases to the Redesignated Fee. Plaintiffs declined to amend, and judgment was entered. We affirm the judgment in part as to the Redesignated Fee and reverse in part as to the franchise fees.

I. BACKGROUND

Because this appeal challenges a trial court order sustaining a demurrer, we draw the relevant facts from the complaint and matters subject to judicial notice.[2] (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

A. *Factual Background*

The City initiated a request for proposal procurement process for three franchise contracts regarding garbage, mixed materials and organics, and residential recycling services. The initial procurement process resulted in the City's Public Works Department (PWD) receiving contract proposals from only two firms, WMAC and CWS. PWD recommended the City award all three contracts to WMAC, stating the structure "provided the lowest overall rate option for Oakland residents."

Rather than accept PWD's recommendation, the City directed PWD to solicit new best and final bids from WMAC and CWS. PWD again recommended the City award all three contracts to WMAC. The City instead awarded all three contracts to CWS. Following a lawsuit by WMAC regarding the procurement process, WMAC and CWS reached a settlement in which WMAC would receive the garbage and mixed materials and organics contracts, and CWS would receive the residential recycling contract, subject

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[2] On March 8, 2019, plaintiffs requested this court take judicial notice of an excerpt from the "2015–2016 Alameda County Grand Jury Final Report." We deny this request because the exhibit is unnecessary to resolve the issues raised in this appeal.

to the City's agreement. The City approved the settlement and amended the ordinance awarding the franchise contracts.

The City's ordinance approving the mixed materials and organics contract provided for an initial franchise fee of $25,034,000, with subsequent franchise fees " 'adjusted annually by the percentage change in the annual average of the Franchise Fee cost indicator.' " Similarly, the City's ordinance approving the residential recycling contract provided for an initial franchise fee of $3 million, with subsequent franchise fees " 'adjusted annually by the percentage change in the annual average of the Franchise Fee cost indicator.' "

Thereafter, the City passed an ordinance reducing WMAC's franchise fee by $3.24 million and designated that amount as the Redesignated Fee to compensate the City for the cost of "preparing, adopting, and implementing the Alameda County Integrated Waste Management Plan." The ordinance imposing the Redesignated Fee provides for a possible annual adjustment to reflect the impacts of inflation if certain criteria are met. In the event the Redesignated Fee is invalidated or the City is unable to collect that amount, then WMAC's franchise fee is increased by the amount left uncollected.

Based on "citizen complaints," an Alameda County grand jury "undertook a comprehensive investigation related to the solicitation and award of [the City's] Zero Waste contracts." The grand jury found the franchise fees paid by haulers were disproportionately higher than the franchise fees paid to other Bay Area municipalities and special districts. That grand jury also found the City's procurement process was mishandled and subject to political considerations.

B. *Procedural Background*

Plaintiffs filed an initial complaint, seeking declaratory and injunctive relief. The complaint alleged violations of article XIII D, section 6, subdivision (b)(1), (2), and (3). The complaint asserted both the rates charged for refuse, recycling, and disposal collection and the franchise fee were excessive, not representative of the actual service costs or otherwise supported by any legitimate cost justification, and amounted to an improperly imposed tax that should be subject to article XIII C.

The City filed a demurrer to the initial complaint. The demurrer alleged the complaint failed to state a cause of action, any claims regarding the Redesignated Fees were barred by the statute of limitations, and plaintiffs failed to exhaust their administrative remedies.

The trial court sustained the demurrer with leave to amend. The court concluded all three causes of action contained insufficient allegations "that the allegedly 'excessive and disproportional refuse, recycling and disposal collection charges . . . being imposed on Plaintiffs' multifamily dwelling ("MFD") properties' . . . are a 'fee or charge' as defined in article XIIID, section 6, or are being 'extended, imposed, or increased by any agency' within section 6, subdivision (b)." Specifically, the court emphasized the complaint does not allege the franchise fee or rates are " 'imposed by an agency'—i.e. by the City—as distinguished from being charged to ratepayers by the private entities who contracted with the City." The court also noted plaintiffs did not address the City's argument that the Redesignated Fee was untimely.

Plaintiffs subsequently filed a first amended complaint, again seeking declaratory relief and alleging violations of article XIII C and article XIII D, section 6, subdivision (b)(1), (2), and (3). The amended complaint asserted the City imposed an excessive franchise fee, failed to determine "how much

the franchise fees would need to be to solely offset the cost to the [City] of the waste haulers' operations," and passed those fees on to ratepayers to avoid the limitations of Proposition 218. The amended complaint contended the City imposed such increased rates "through the guise of negotiated contracts," fully knowing the franchisees would pass the charges on to ratepayers.

The City demurred to the amended complaint, arguing the franchise fees were beyond the purview of Proposition 218 and noting plaintiffs failed to cure the statute of limitations bar to the Redesignated Fee challenge.

The trial court again granted the City's demurrer with leave to amend. The court noted the Supreme Court's recent decision in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (*Jacks*), and stated in part, "To properly state a claim that a franchise fee violates Proposition 218, a party challenging the fee must establish that the fee bears no rational relationship to the value of the property interest conveyed by the city to the franchisee." The court noted the amended complaint "erroneously focuses on whether the franchise fee charged by [the City] exceeds the 'proportional cost of the service attributable' to each individual parcel, rather than . . . the 'value of the franchise' itself." The court also held, in accordance with its prior decision, plaintiffs' challenge to the Redesignated Fee was barred by the statute of limitations.

Plaintiffs filed a second amended complaint (SAC) for declaratory relief, alleging the franchise fee and Redesignated Fee violated article XIII C. Specifically, the SAC alleged "[n]either of the franchise fees bears a reasonable relationship to the value received from the government and they are not based on the value of the franchises conveyed . . . ." The SAC

challenged the validity of the Redesignated Fee, and further claimed the challenge was timely as to all future increases to the Redesignated Fee.

The City again demurred, restating its prior arguments and asserting *Jacks*, *supra*, 3 Cal.5th 248 is distinguishable from the current situation and does not apply. It further argued plaintiffs' challenge to any annual increases to the Redesignated Fee failed to state a claim and was time-barred.

The trial court sustained the demurrer with leave to amend as to the Redesignated Fee increases, but "only to the extent Plaintiffs can legitimately allege . . . that the [Redesignated Fee] in fact was increased as of July 1, 2016 or thereafter." The court denied leave to amend all other aspects of the SAC. Notably, the court concluded the lack of a direct pass-through of the franchise fees to the customers distinguished the franchise fee in *Jacks* from that charged by the City.

Plaintiffs declined to amend. The court subsequently entered judgment against plaintiffs and dismissed the matter with prejudice. Plaintiffs timely appealed.

II. DISCUSSION

A. *Standard of Review*

We independently review a trial court's order sustaining a demurrer. (*Brown v. Deutsche Bank National Trust Co*. (2016) 247 Cal.App.4th 275, 279.) "In doing so, this court's only task is to determine whether the complaint states a cause of action. [Citation.] We accept as true all well-pleaded allegations in the operative complaint, and we will reverse the trial court's order of dismissal if the factual allegations state a cause of action on any available legal theory. [Citation.] We treat defendants' demurrer as admitting all properly pleaded material facts, but not contentions,

deductions, or conclusions of fact or law." (*Ibid.*) " 'We also consider matters which may be judicially noticed.' [Citation.] . . . [and] give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"[W]hen a demurrer is sustained with leave to amend, but the plaintiff elects not to amend, it is presumed on appeal that the complaint states the strongest case possible." (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10.)

A. *Article XIII C*

In *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, the California Supreme Court summarized the scope and application of article XIII C: "California voters have, over the past four decades, adopted a series of initiatives designed to limit the authority of state and local governments to impose taxes without voter approval. (*Jacks*, [*supra*, 3 Cal.5th] at p. 257.) [¶] The first of these initiatives was Proposition 13, adopted in 1978. It added article XIII A to the state Constitution 'to assure effective real property tax relief by means of an "interlocking 'package' " ' of four provisions. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872 (*Sinclair Paint*).) The first provision capped the ad valorem real property tax rate at 1 percent (art. XIII A, § 1); the second limited annual increases in real property assessments to 2 percent (art. XIII A, § 2); the third required that any increase in statewide taxes be approved by two-thirds of both houses of the Legislature (art. XIII A, § 3); and the fourth required that any special tax imposed by a local government entity be approved by two-thirds of the qualified electors (art. XIII A, § 4). Thus, with its first two provisions, Proposition 13 limited local government authority to increase property taxes. Further, 'since any tax savings

resulting from the operation of [the first two provisions] could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes.' (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231.)

"In 1996, the voters adopted Proposition 218, known as the ' "Right to Vote on Taxes Act." ' (*Jacks*, *supra*, 3 Cal.5th at p. 259.) It added articles XIII C and XIII D to the state Constitution. Article XIII D, like the first two provisions of article XIII A, limits the authority of local governments to assess taxes and other charges on real property. (See [*City of*] *San Buenaventura* [*v. United Water Conservation Dist*. (2017)] 3 Cal.5th [1191,] 1203–1204.) Article XIII C buttresses article XIII D by limiting the other methods by which local governments can exact revenue using fees and taxes not based on real property value or ownership. As enacted, article XIII C provided that '[a]ll taxes imposed by any local government shall be deemed to be either general taxes or special taxes.' (Art. XIII C, § 2, subd. (a).) Local governments may not impose, increase, or extend: (1) any general tax, unless approved by a majority vote at a general election; or (2) any special tax, unless approved by a two-thirds vote. (Art. XIII C, § 2, subds. (b), (d).)

"Significantly, Proposition 218 did not define the term 'tax.' That definition was provided 14 years later, with the passage of Proposition 26 in November 2010. Proposition 26's findings stated that, despite the adoption of Propositions 13 and 218, 'California taxes have continued to escalate.' (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Proposition 26, § 1, subd. (c), p. 114.) The findings also took note of a 'recent phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" in order to extract even more revenue from California taxpayers

without having to abide by [the] constitutional voting requirements.' (*Id.*, subd. (e), p. 114.)" (*Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th at pp. 10–11.)

"To ensure the effectiveness of Propositions 13 and 218, Proposition 26 made two changes to article XIII C. First, it specifically defined ' "tax," ' and did so broadly, to include 'any levy, charge, or exaction of any kind imposed by a local government.' (Art. XIII C, § 1, subd. (e).) However, the new definition has seven exceptions. A charge that satisfies an exception is, by definition, not a tax." (*Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th at p. 11.) As relevant here, one exception involves charges "imposed for entrance to or use of local government property . . . ." (Art. XIII C, § 1, subd. (e)(4).)

"Second, Proposition 26 requires the local government to prove 'by a preponderance of the evidence that . . . [an] exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.' (Art. XIII C, § 1, subd. (e).)" (*Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th at p. 11.)

B. *Whether the Franchise Fee is a Tax*

Plaintiffs contend whether the SAC alleged an adequate cause of action is governed by *Jacks*, *supra*, 3 Cal.5th 248. Plaintiffs argue, pursuant to *Jacks*, a franchise fee is valid only if it is reasonably related to the value of the property interests transferred, and its validity is not impacted by whether it is directly or indirectly imposed on ratepayers. Because the SAC asserts the City's franchise fee bears no reasonable relationship to the

franchises' values and was indirectly imposed by the City, plaintiffs contend they adequately alleged a valid cause of action.

1. *Whether Franchise Fees Are Subject to Article XIII C*

In *Jacks*, the City of Santa Barbara and Southern California Edison (SCE) entered into an agreement to include a charge on SCE's electricity bills equal to 1 percent of SCE's gross receipts from the sale of electricity within Santa Barbara, which SCE would then transfer to Santa Barbara (the surcharge). (*Jacks*, *supra*, 3 Cal.5th. at p. 254.) This charge, along with another 1 percent charge, constituted the fee SCE paid for the privilege of using city property to deliver electricity. (*Ibid.*) Utility consumers filed a class action challenging the surcharge as an illegal tax under Proposition 218. (*Jacks*, at p. 256.) The trial court held a franchise fee is not a tax under Proposition 218 and thus the surcharge was not subject to voter approval. (*Jacks*, at p. 256.) The Court of Appeal reversed, concluding the surcharge was a tax requiring voter approval under Proposition 218 because its " 'primary purpose is for the City to raise revenue from electricity users for general spending purposes.' " (*Jacks*, at p. 257.)

The California Supreme Court affirmed in part and reversed in part. (*Jacks*, *supra*, 3 Cal.5th at p. 274.) It explained "following the enactment of Proposition 13, the Legislature and courts viewed various fees as outside the scope of the initiative." (*Id.* at p. 260.) The court noted "[t]he commonality among these categories of charges [that are fees rather than taxes] is the relationship between the charge imposed and a benefit or cost related to the payor." (*Id.* at p. 261.) "However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes." (*Ibid.*, citing *Sinclair Paint*, *supra*, 15 Cal.4th at pp. 874, 881.) The court noted such a relationship

"serves Proposition 13's purpose of limiting taxes." (*Jacks*, at p. 261.) The court further explained "[a]lthough *Sinclair Paint* . . . focused on restrictions imposed by Proposition 13, its analysis of the characteristics of fees that may be imposed without voter approval remains sound." (*Jacks*, at p. 261.)

In analyzing how franchise fees fit within this framework, the Supreme Court noted "[h]istorically, franchise fees have not been considered taxes," and neither Proposition 218 nor Proposition 26 evidence an intent to change that historical characterization. (*Jacks*, *supra*, 3 Cal.5th at pp. 262–263.) It explained, however, while "sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. . . . , to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise." (*Id*. at p. 267.) The Supreme Court further explained "fees imposed in exchange for a property interest must bear a reasonable relationship to the value received from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the excessive portion is a tax. If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees." (*Id.* at p. 269.) The court thus held "a franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters." (*Id.* at p. 270.)

The City argues *Jacks* is inapposite because the court adjudicated the surcharge—a fee placed directly on the customers' bills—rather than the other 1 percent fee encompassed in SCE's electricity rates. We disagree. The structure of the fee at issue—whether the surcharge in *Jacks* or the franchise fee in the instant matter—does not alter the key question: whether a charge

constitutes a legitimate fee or an unlawful tax. Both *Jacks* and the present case raise this same question. And *Jacks* thus guides our analysis.

While a true franchise fee is indisputably a nontax, *Jacks* instructs us to look beyond any label and determine whether such a fee "reflect[s] a reasonable estimate of the value of the franchise." (*Jacks*, *supra*, 3 Cal.5th at p. 267.) The Supreme Court did not limit this analysis to the surcharge, but rather addressed all "charges that constitute compensation for the use of government property." (*Id.* at p. 254.) The Supreme Court explained while compensation for use of government property is exempt from Proposition 218's requirements, imposed charges only constitute such compensation if there is "a reasonable relationship to the value of the property interest." (*Jacks*, at p. 254.) Any imposed charge beyond such an amount constitutes a tax and requires voter approval. (*Ibid.*)

The City next contends *Jacks* is inapposite because it analyzes franchise fees under Proposition 218 rather than under the later-adopted Proposition 26. The City argues the status of the franchise fees instead are controlled by article XIII C, which expressly exempts franchise fees from the definition of taxes.

"The interpretation of constitutional or statutory provisions presents a legal question, which we decide de novo." (*Wunderlich v. County of Santa Cruz* (2009) 178 Cal.App.4th 680, 694.) "The aim of constitutional interpretation is to determine and effectuate the intent of those who enacted the constitutional provision at issue. [Citations.] When the constitutional provision was enacted by initiative, the intent of the voters is the paramount consideration. [Citation.] To determine the voters' intent, courts look first to the constitutional text, giving words their ordinary meanings. [Citations.] But where a provision in the Constitution is ambiguous, a court ordinarily

must adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was enacted. [Citations.] New provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for." (*League of Women Voters of California v. McPherson* (2006) 145 Cal.App.4th 1469, 1481; see also *Persky v. Bushey* (2018) 21 Cal.App.5th 810, 819 ["If necessary, extrinsic evidence of the voters' intent may include the analysis by the Legislative Analyst and the ballot arguments for and against the initiative."].)

Section 1, subdivision (e) of article XIII C defines " 'tax' " as "any levy, charge, or exaction of any kind imposed by a local government, except for" seven exemptions. Relevant here is the fourth exemption, which applies to "A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).) The fourth exemption does not expressly state the charge for entrance to or use of local government property must be reasonable. This absence contrasts with the first three exemptions, which do explicitly include such a requirement. (See *id.*, § 1, subd. (e)(1) ["A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege."]; *id.*, subd. (e)(2) ["A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."]; *id.*, subd. (e)(3) ["A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and

audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof."].) However, subdivision (e) also contains a broad statement regarding the government's burden of proof: "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).) This provision requires that a charge be "no more than necessary to cover the reasonable costs of the governmental activity" in order to be exempt from the "tax" definition. (*Ibid.*) However, the subdivision is silent as to whether this requirement applies to all seven exemptions, or only to the first three exemptions that explicitly include a reasonableness requirement. On this question, we find the provision ambiguous and look to the intent and objective of the voters in enacting the provision to guide our interpretation.

The ballot materials uniformly indicate a desire to expand the definition of what constituted a "tax" for purposes of article XIII C. "One of the declared purposes of Proposition 26 was to halt evasions of Proposition 218." (*Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 203; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 [Proposition 26 "was an effort to close perceived loopholes in Propositions 13 and 218"].) The Findings and Declarations of Purpose for Proposition 26 state: "Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters. [¶] . . . Despite these limitations, California taxes have continued to

escalate. Rates for . . . a myriad of state and local business taxes are at all-time highs. Californians are taxed at one of the highest levels of any state in the nation. [¶] . . . [¶] . . . This escalation in taxation does not account for the recent phenomenon whereby . . . local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. . . . [¶] . . . In order to ensure the effectiveness of these constitutional limitations, this measure . . . defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.' " (Voter Info. Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subds. (b), (c), (e), (f), p. 114.)

Likewise, the analysis by the Legislative Analyst explained Proposition 26 "expands the definition of a tax and a tax increase so that more proposals would require approval by two-thirds of the Legislature or by local voters." (Voter Info. Guide, Gen. Elec. (Nov. 2, 2010) analysis of Prop. 26 by the Legislative Analyst, p. 57.) It further states: "This measure broadens the definition of a state or local tax to include many payments currently considered to be fees or charges," while noting other fees and charges "Are Not Affected." (*Id.* at p. 58.) Nowhere does the analysis identify any narrowing of the definition of a state or local tax.

Here, the intent and objective of the voters in passing Proposition 26 is clear. The purpose was to expand the definition of "tax" to require more types of fees and charges be approved by two-thirds of the Legislature or by local voters. Proposition 26's Findings and Declarations of Purpose expressly note it was passed in response to "the recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees' in order

to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements." (Voter Info. Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (e), p. 114.) As noted by the California Supreme Court, the purpose of Proposition 26 "was to *reinforce* the voter approval requirements set forth in Propositions 13 and 218." (*Jacks*, *supra*, 3 Cal.5th at pp. 262–263.)

In light of this extensive evidence regarding the voters' intent in passing Proposition 26, we conclude a franchise fee, arguably subject to the fourth exemption in article XIII C, section 1, subdivision (e), must still be reasonably related to the value of the franchise. (*Jacks*, *supra*, 3 Cal.5th at p. 267.) Only that portion with a reasonable relationship may be exempt from the "tax" definition. (See *City of San Buenaventura v. United Water Conservation Dist.*, *supra*, 3 Cal.5th at p. 1214 ["it is clear from the text [of Proposition 26] itself that voters intended to adopt two separate requirements: To qualify as a nontax 'fee' under article XIII C, as amended, a charge *must satisfy both the requirement that it be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity*,' and the requirement that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.' " (italics added, italics omitted)].)

Finally, the City contends the franchise fee does not qualify as a "tax" under article XIII C because it was not " 'imposed by local government.' " Specifically, the City asserts the franchise fee constitutes contract consideration and is not imposed merely because it is passed on to ratepayers. However, if we accept the City's reasoning, any local government could avoid running afoul of article XIII C by merely contracting with a third

party to impose the desired tax on residents rather than enacting it directly. This result would directly conflict with the purpose of Propositions 218 and 26. (See *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 394 [purpose of Prop. 218 is to " 'protect[ ] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent' "]; *Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th at p. 11 [Prop. 26 adopted "To ensure the effectiveness of Propositions 13 and 218"].) Moreover, the California Supreme Court implicitly rejected this argument in *Jacks*. There, the charge at issue was established "[p]ursuant to an agreement between [SCE] and defendant City of Santa Barbara." (*Jacks*, *supra*, 3 Cal.5th at p. 254.) Nonetheless, its contractual formation did not automatically exempt the charge from being defined as a "tax." Rather, the court held "fees imposed in exchange for a property interest must bear a reasonable relationship to the value received from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, ... the excessive portion is a tax." (*Id.* at p. 269.)

Neither of the two cases cited by the City, *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664 and *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, alter our analysis. In *County of Tulare*, the court addressed in part whether a subsequent constitutional amendment could void a preexisting statutory charge imposed on franchises. (*County of Tulare*, at p. 667.) While the court noted the fee was "not imposed by law but by his acceptance of the franchise," it did not conclude the fee was not "imposed" under article XIII C but merely that it was "imposed . . . by his acceptance of the franchise." (*County of Tulare*, at p. 670.) Likewise, *Citizens Association of Sunset Beach*, involved

the extension of preexisting taxes, rather than a creation of new taxes. (*Citizens Assn. of Sunset Beach*, at pp. 1185–1186.) In assessing whether the preexisting taxes had to be approved by a two-thirds vote under Proposition 218, the court noted "[t]he word 'impose' usually refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation." (*Citizens Assn. of Sunset Beach*, at p. 1194; accord *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 ["impose" construed as synonymous to enacted, created, or established].) In the present matter, however, no one asserts the franchise fee is not "the first enactment" of the charge.

2. *Whether the SAC Adequately Alleged a Cause of Action*

As we conclude in the prior section, a franchise fee may constitute a tax subject to article XIII C to the extent it is not reasonably related to the value received from the government. The SAC adequately raises such allegations. First, the SAC recounts the manner in which the contracts were awarded and notes the ordinance approving the final contracts provided for the following franchise fees: (1) an initial franchise fee of $25,034,000 for the mixed materials and organics contract, with subsequent franchise fees " 'adjusted annually by the percentage change in the annual average of the Franchise Fee cost indicator' "; (2) an initial franchise fee of $3 million for the residential recycling services contract, with subsequent franchise fees " 'adjusted annually by the percentage change in the annual average of the Franchise Fee cost indicator.' " Next, the SAC asserts these contracts "were not the product of bona fide negotiations" and, as a result, various financial analyses were not performed. The SAC further states the City "did not complete a value analysis of the government property interests conveyed." As a result, alleges the SAC, a grand jury found these franchise fees "are

disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts," and the City's procurement process was mishandled and subject to political considerations. The SAC supports these allegations by noting the plaintiffs' rate increases ranged from 79.76 percent to 155.37 percent. The SAC also states no evidence was presented to the grand jury that the City analyzed service or disposal costs. The SAC thus claims the franchise fees do not "bear[ ] a reasonable relationship to the value received from the government," "are not based on the value of the franchises conveyed," and were set based on the prior franchise fee "without any analysis or determination of the value of the prior franchise." These allegations sufficiently state a claim under the standard set forth in *Jacks*.

C. *Redesignated Fee*

The City passed an ordinance creating the Redesignated Fee, pursuant to Public Resources Code section 41901, to redesignate part of WMAC's franchise fee as a fee to compensate the City for the cost of "preparing, adopting, and implementing the Alameda County Integrated Waste Management Plan." While plaintiffs are not challenging the initial creation of the Redesignated Fee, the ordinance also provided for possible annual increases to the Redesignated Fee. Plaintiffs contend the SAC adequately sought declaratory relief as to the validity of those future Redesignated Fee increases. While the SAC does not contend any Redesignated Fee increases have occurred and plaintiffs acknowledge such increases are not guaranteed to happen every year, plaintiffs contend declaratory relief is appropriate because the parties have an actual controversy about the validity of the "automatic" Redesignated Fee increases.

"The 'actual controversy' language in Code of Civil Procedure section 1060 encompasses a probable future controversy relating to the legal rights

and duties of the parties. [Citation.] For a probable future controversy to constitute an 'actual controversy,' however, the probable future controversy must be ripe. [Citation.] A 'controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885.) "It does not embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.' " (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.) " ' "Whether a claim presents an 'actual controversy' within the meaning of Code of Civil Procedure section 1060 is a question of law that we review de novo." ' " (*Ibid.*)

"A ripeness inquiry involves a two-step analysis: First, whether the issue is appropriate for immediate judicial resolution; and second, whether the complaining party will suffer a hardship from a refusal to entertain its legal challenge. [Citation.] [¶] Under the first test, ' "courts will decline to adjudicate a dispute if 'the abstract posture of the proceeding makes it difficult to evaluate . . . the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a 'contrived inquiry' [citation]." [Citation.]' [Citation.] [¶] Under the second test, courts generally will not consider issues based on speculative future harm. [Citation.] This is particularly true where the complaining party will have the opportunity to pursue appropriate legal remedies should the anticipated harm ever materialize." (*Metropolitan Water Dist. of Southern California v. Winograd* (2018) 24 Cal.App.5th 881, 892–893.)

Here, the record indicates plaintiffs' challenge to future Redesignated Fee increases does not present an actual controversy proper for adjudication.

Any future Redesignated Fee increase is based on the percentage change in the annual "Consumer Price Index—All Urban Consumers, Series ID cuura422sa0, Not Seasonally adjusted, San Francisco-Oakland-San Jose." That potential increase, however, is not implemented for any particular year if WMAC's gross receipts for the prior calendar year were less than the calendar year before that. Thus, while the ordinance imposing the Redesignated Fee provides for fee increases, it is uncertain whether or when those will occur and, if they do, the actual amount of such an increase. Nor do plaintiffs explain how the court could assess whether those future unknown increases exceed the City's future costs for "preparing, adopting, and implementing the plan, as well as in setting and collecting the local fees." (See Pub. Resource Code, § 41901.)

Plaintiffs contend if the current Redesignated Fee exceeds the City's current costs, as alleged in the complaint, then any future Redesignated Fee increase would also exceed the City's costs. But this presumes the City's costs remain static, and the SAC contains no such allegations. Rather, it is reasonable to assume the City's costs may increase by the time of any Redesignated Fee increase. The degree of any such cost increase, however, is unknown, and the SAC is entirely silent regarding this issue.

Nor are plaintiffs' arguments regarding hardship persuasive. Plaintiffs contend they incur such hardship because they are currently paying a Redesignated Fee that exceeds the amount allowable by law. But the trial court concluded plaintiffs' challenge to the current Redesignated Fee was time-barred, and plaintiffs have not challenged that ruling on appeal. Instead, plaintiffs only contend the SAC "adequately alleges a claim for declaratory relief as to the automatic increases." Accordingly, any harm plaintiffs currently are incurring is based on their own failure to timely

challenge the Redesignated Fee. As discussed above, what, if any, harm plaintiffs may incur from future fee increases is uncertain at this time, and plaintiffs have not demonstrated they will be unable "to pursue appropriate legal remedies should the anticipated harm ever materialize."[3] (*Metropolitan Water Dist. of Southern California v. Winograd*, *supra*, 24 Cal.App.5th at p. 893.) Accordingly, plaintiffs' challenge to future Redesignated Fee increases is not ripe for adjudication.

III. DISPOSITION

The trial court's judgment is affirmed in part and reversed in part. We affirm the court's order sustaining the City's demurrer as to the Redesignated Fee increase. However, we reverse the trial court's order sustaining the City's demurrer as to the validity of the franchise fee. The parties shall bear their own costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(5).)

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[3] The trial court rejected the City's argument that plaintiffs' challenge to the future Redesignated Fee increases are also time-barred, and the City did not contest that ruling. We do not independently opine on that holding or whether other legal arguments may bar such a claim in the future as neither party has raised such arguments in this appeal.

_____
Margulies, J.

We concur:

_____
Humes, P. J.

_____
Banke, J.

A154986
Zolly v. City of Oakland

Trial Court: Superior Court of Alameda County

Trial Judge: Hon. Paul D. Herbert

Counsel:

Zacks, Freedman & Patterson and Andrew M. Zacks; Katz Appellate Law and Paul J. Katz for Plaintiffs and Appellants.

Barbara Parker, Doryanna Moreno, Maria Bee, David Pereda and Celso Ortiz, City Attorney; Chao ADR, PC and Cedric C. Chao; DLA Piper LLP, Tamara Shepard and Mauricio Gonzalez, for Defendant and Respondent.

Filed 4/17/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROBERT ZOLLY et al., Plaintiffs and Appellants, v. CITY OF OAKLAND, Defendant and Respondent.	A154986 (Alameda County Super. Ct. No. RG16821376) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on March 30, 2020, be modified as follows:

1. On page 2, at the end of footnote 2, add the following sentence:

> On February 20, 2020, the City filed an unopposed request for judicial notice of (1) a March 2014 report by the California Legislative Analyst's Office entitled "A Look at Voter-Approval Requirements for Local Taxes," and (2) excerpts from the Voter Information Guide, General Election (Nov. 2, 2010). We grant the request. (Evid. Code, § 452, subd. (c).)

There is no change in judgment.

Respondent's petition for rehearing is denied.

Dated: 04/17/2020

Humes, P. J.
Humes, P.J.
PRESIDING JUSTICE

APPENDIX B

[redacted]
20666193

FILED
ALAMEDA COUNTY
MAY 29 2018
CLERK OF THE SUPERIOR COURT
BY: _____ Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON,

Plaintiffs,

vs.

CITY OF OAKLAND; and DOES 1-50, inclusive,

Defendants.

Case No. RG16 821376

ORDER SUSTAINING DEMURRER IN PART WITHOUT LEAVE TO AMEND AND IN PART WITH LEAVE TO AMEND

The Demurrer of Defendant City of Oakland (the "City") to Plaintiffs' Second Amended Complaint ("SAC"), filed on September 29, 2017, came on regularly for hearing on March 1, 2018, in Department 20 of the court, the Judge Paul D. Herbert presiding. The City appeared by counsel Cedric C. Chao and Celso Ortiz. Plaintiffs Robert Zolly, Ray McFadden and Stephen Clayton ("Plaintiffs") appeared by counsel Andrew M. Zacks and James Kraus.

The court has considered all of the papers filed on behalf of the parties, and the arguments of counsel at the hearing, and good cause appearing, HEREBY ORDERS that

the City's demurrer to the sole cause of action for declaratory relief on the ground that it fails to state facts constituting a cause of action against City is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to seek declaratory relief as to the asserted invalidity of the franchise fee solely as to the part of the franchise fee ostensibly to fund Oakland's AB 939 obligation, but only to the extent Plaintiffs can legitimately allege in a Third Amended Complaint that the $3,240,000 portion of the franchise fee earmarked as an "AB 939" fee in fact was increased as of July 1, 2016 or thereafter. As discussed below, since the other aspect of the declaratory relief cause of action is barred as a matter of law, the court denies leave to amend as to the portion of the cause of action other than as to the challenge to the part of the franchise fee ostensibly to fund Oakland's AB 939 obligation that was automatically increased as of July 1, 2016 or thereafter.

First, the court agrees with the City's position that nothing in the language or legislative history of Proposition 218, or the appellate cases interpreting it, prohibit California cities' charging of franchise fees for the use of a city's property assets. In this instance, based on the allegations within plaintiffs' successive pleadings,[1] the franchise fees were negotiated between the respective contracting parties, with the contractual obligation to pay those fees resting directly upon the franchisees, rather than as part of a negotiated pass-through to the taxpayers. (*See, e.g., County of Contra Costa v. American Toll Bridge Co.* (1937) 10 Cal.2d. 359, 363; *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670.) Indeed, the franchisees remain responsible to pay the franchise fees to the City regardless of whether or not their customers utilize their waste collection and recycling services. Here, the agreement between the City and WMAC acknowledges that

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[1] See Complaint at ¶¶ 20-121; FAC at ¶ 21 (incorporating the prior allegations by reference); and SAC at ¶¶ 15-35. The court hereby takes judicial notice of Plaintiffs' allegations within its earlier pleadings. (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151.) (Evid. Code § 452(d).)

consumers may decline collection services at the consumer's discretion: "Customers may voluntarily subscribe to and cancel such Collection Services from CONTRACTOR, provided Customer otherwise obtains a permit to self-haul waste in compliance with the CITY'S self-haul permit provisions.[2] Hence, unlike the stipulated facts in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, the franchise fees here are not being imposed by the City on its residents.

The possibility that some portion of the franchise fee may later be used by the franchisee as a cost factor in setting rates to its customers is not material to the legality of the franchise fees where, as here, there is no direct pass-through of the fees to the customers. (*Cf. Jacks, supra*, 3 Cal.5th at pp. 270-271.) This is a key distinction between the facts alleged in this case and the stipulated facts underlying our Supreme Court's recent decision in the *Jacks* case. As City observes, the imposition of the franchise fee in the instant case differs fundamentally from that in *Jacks* because the surcharge in *Jacks* was (a) itemized as a "separate charge" on consumer electricity bills; (b) mandatorily collected by the franchisee, SCE; and (c) remitted by SCE, dollar for dollar, to the City of Santa Barbara, pursuant to the agreement with the city. (*Jacks, supra*, 3 Cal.5th at pp. 270-271 [agreement stated that SCE "shall collect" the surcharge from customers, that SCE was "obligat[ed] ... to levy, collect and deliver to City" the surcharge, and that this was "required by Santa Barbara Ordinance 5135."])

By contrast, Plaintiffs do not include similar allegations that the agreements in this case require a similarly direct "pass-through" of the franchise fee to the ratepayers, alleging only that the high franchise fees are passed along indirectly to ratepayers through higher rates that the franchisees decide to charge. (See SAC, ¶¶ 36 and 57.) Based on

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[2] See MM&O Collection Services Contract between the City and WMAC, dated July 1, 2015, p. 2, attached as Exhibit D to the City's Request for Judicial Notice. The court hereby takes judicial notice of same. (Evid. Code § 452 (b) and (c).)

the allegations and matters of judicial notice (including relevant terms of the waste and recycling agreements, attached as Exhibits D and E to the City's Request for Judicial Notice), it appears that, as private entities, the franchisees in the instant case are at liberty to set their rates as they determine are appropriate to cover their costs of doing business and to provide a reasonable rate of return to their investors with the full understanding that each of their individual customers likewise remains at liberty to decline their services if any customer determines that the rates being charged are excessive. (*Cf. Southern Cal. Gas Co. v. Public Utilities Comm'n* (1979) 23 Cal.3d 470, 474.)

Thus, the court determines that Plaintiffs have not alleged circumstances sufficient to bring the franchise fees in the instant case within the narrow exception, recognized in *Jacks*, to the general principle, also set forth in *Jacks*, that "[h]istorically, franchise fees have not been considered taxes" and that "[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses." (*Jacks, supra*, 3 Cal.5th at p. 262, citing Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C.) To conclude otherwise would subject municipalities to potential taxpayer-challenge lawsuits over every franchise agreement into which they enter regardless of whether the fees are imposed on the franchisee rather than the consumer and regardless of how small the amount of the franchise fees negotiated by the parties may be. Such an outcome is beyond the facts of the Jacks decision and, therefore, is also beyond its holding. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) If our Supreme Court intended such a sweeping and burdensome change in the long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities, it will need to say so directly in a case alleging facts equivalent to those alleged by Plaintiffs herein. This court declines to interpret the holding of the *Jacks*

decision beyond its atypical facts. Hence, Plaintiffs' reliance on the analytical framework stated in the Jacks decision is misplaced.

The City's demurrer to the declaratory relief cause of action on the ground that the challenge to the "AB 939" fees is barred by the statute of limitations is SUSTAINED IN PART AND OVERRULED IN PART. Plaintiffs have conceded that their challenge to the original enactment of Ordinance No. 13272 ("the AB 939 Ordinance") is time-barred because they failed to challenge the fee within 120 days of when it was enacted. (Gov. Code §§ 60016 and 60022.) Thus, to the extent the declaratory relief cause of action seeks to separately challenge the $3,240,000 fee adopted on December 9, 2014, but not imposed until July 1, 2015, any such challenge to the initial fee is untimely as a matter of law.

Recognizing this, Plaintiffs allege in the SAC that "[w]hile Government Code § 66022 creates a 120-day limitations period for challenges," it has an exception for automatic adjustments, so "this challenge is timely as to all future increases from the date of the filing of the original complaint." (SAC, ¶ 44.) Plaintiffs also allege "the AB-939 fee automatically adjusts annually according to the ordinance." (Id.) The AB 939 Ordinance expressly provides for increases that may occur annually each July 1, with the earliest such potential increase beginning July 1, 2016, subject to certain limitations based on WMAC's gross receipts. (AB 939 Ordinance, §3.) Consequently, all members of the public (including Plaintiffs) were on notice that the first such increase could potentially come into effect on July 1, 2016.

Government Code section 66022 states, in pertinent part: "If an ordinance, resolution, or motion provides for an automatic adjustment in a fee or service charge, and the automatic adjustment results in an increase in the amount of a fee or service charge,

any action or proceeding to attack, review, set aside, void, or annul the increase shall be commenced within 120 days of the effective date of the increase."

Here, the record establishes Plaintiffs initiated their challenge to the AB 939 Ordinance on June 29, 2016, one day before the first potential increase in the fee could possibly have taken effect. Thus, a potential challenge to any increase that became effective on July 1, 2016 or thereafter would not be time-barred. The court is not persuaded by City's argument that Plaintiffs' challenge to such "automatic adjustments" is also time-barred because Plaintiffs had notice of such automatic adjustments at the time the ordinance was passed. (Opp. Memo., pp. 16-17, and cases cited therein.) This argument cannot be reconciled with the explicit language of section 66022(a) (quoted above) stating that where an automatic adjustment results in an increase in the fee, "any action or proceeding to attack ... the increase shall be commenced within 120 days of the effective date of the increase." None of City's cited cases address this language, as distinguished from the preceding sentence of section 66022 that applies in other instances. (*See, e.g., Regents of University of California v. City and County of San Francisco* (2004) 115 Cal.App.4th 1109, 1115.)

Nevertheless, the SAC fails to include any allegations that an increase in the AB 939 fee actually became effective on July 1, 2016 or thereafter. Absent such allegations, the SAC again fails to state a viable cause of action arising from the AB 939 Ordinance. Accordingly, the court grants Plaintiffs LEAVE TO AMEND to file and serve a Third Amended Complaint by June 29, 2018, only to the extent Plaintiffs can legitimately allege that the AB 939 fee, in fact, was increased as of July 1, 2016 or thereafter, and (to the extent the challenged is based on Proposition 218) that it was imposed for property-related services. Since all other claims asserted in the SAC are barred as a matter of law,

the court denies leave to amend to seek declaratory relief as to any other fees challenged in the cause of action.

The City's Request for Judicial Notice, filed on September 29, 2017, is GRANTED, but the court does not take judicial notice of the truth of matters asserted in the attached exhibits. (Evid. Code §452, subdivisions (b) and (c).)

Plaintiffs' Request for Judicial Notice, filed on December 1, 2017, is DENIED as to Exhibits A and B, which the court does not find material to the demurrer. The request is GRANTED as to Exhibit C.

The clerk is directed to serve copies of this order, with proof of service, to counsel and self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

IT IS SO ORDERED.

Date: 05/29/2018

Paul D. Herbert
Judge of the Superior Court

I, Dawn Bierman, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, California 94105-2933. On July 17, 2018, I served a copy of the within document(s):

[PROPOSED] JUDGMENT OF DISMISSAL WITH PREJUDICE

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ by causing a messenger to personally deliver the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Andrew M. Zacks, Esq. (az@zfplaw.com) James B. Kraus, Esq. (james@zfplaw.com) Zacks, Freedman & Patterson, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: (415) 956-8100 Facsimile: (415) 288-9755	Attorneys for Plaintiffs ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 17, 2018, at San Francisco, California.

Dawn Bierman

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG16821376
Case name: Robert Zolly, Ray McFadden, and Stephen Clayton VS City of Oakland; and Does 1-50 inclusive

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document, **ORDER SUSTAINING DEMURRER IN PART WITHOUR LEAVE TO AMEND AND IN PART WITH LEAVE TO AMEND** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 29, 2018.

Chad Finke, Executive Officer/Clerk of the Superior Court

By: _____
Maya Walker
Deputy Clerk

Zacks, Freedman & Patterson, PC
Attn: Andrew M. Zacks
235 Montgomery Street
Suite 400
San Francisco, CA 94105

DLA Piper LLP
Attn: Cedric C. Chao
555 Mission Street
Suite 2400
San Francisco, CA 94105

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I served the following document(s) described as:

PETITION FOR REVIEW

by providing a true and correct copy of the aforementioned document(s) on the interested parties in this action identified as follows and by the means designated below:

Service List

Andrew M. Zacks	az@zpflaw.com
Paul J. Katz	paul@katzappellatelaw.com
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Laura Dougherty	laura@hjta.org

California Court of Appeal, 1st District
(Per Cal. R. Court 8.500(f)(1))

BY ELECTRONIC SERVICE – [L.R. 5[II](i)] A TrueFiling user's registration to participate in electronic filing pursuant to this rule constitutes consent to electronic service or delivery of all documents by any other TrueFiling user in the Proceeding or by the court. (Cal. R. 8.71.)

Honorable Paul D. Herbert	Alameda County Superior Court 1221 Oak Street, Oakland, CA 94612
Clerk of the Court	Alameda County Superior Court 1221 Oak Street, Oakland, CA 94612

BY MAIL – By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

Executed this 8th day of June 2020.

/s/ Cedric Chao
Cedric Chao
CHAO ADR, PC

Attorneys for Petitioner
CITY OF OAKLAND

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Zolly et al. v. City of Oakland**
Case Number: **TEMP-O2NXL1YG**
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: **cedric.chao@chao-adr.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	Zolly - Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
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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.

6/8/2020
Date

/s/Cedric Chao

Signature

Chao, Cedric (76045)

Last Name, First Name (PNum)

Chao ADR, PC

Law Firm