S225589

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ROLLAND JACKS and **ROVE ENTERPRISES, INC.**,

Plaintiffs and Appellants,

v.

CITY OF SANTA BARBARA

Defendant and Respondent,

HOWARD JARVIS TAXPAYERS ASSOCIATION AND CALIFORNIA TAXPAYERS ASSOCIATION'S JOINT APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

Review of a Published Decision of the
Second Appellate District, Division Six, Case No. B253474

Reversing a Judgment of the Superior Court of the State
of California for the County of Santa Barbara, Case No. 1383959
Honorable Thomas P. Anderle, Judge Presiding

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JOINT APPLICATION FOR LEAVE TO FILE

Howard Jarvis Taxpayers Association ("HJTA") is a California nonprofit public benefit corporation with over 200,000 members. The late Howard Jarvis, founder of HJTA, utilized the People's reserved power of initiative to sponsor Proposition 13 in 1978. Proposition 13 was overwhelmingly approved by California voters, and added article XIII A to the California Constitution. Proposition 13 has kept thousands of fixed-income Californians in their homes by limiting the rate and annual escalation of property taxes.

In 1996, HJTA authored and sponsored Proposition 218, the Right to Vote on Taxes Act. California voters passed Proposition 218, which added articles XIII C and XIII D to the California Constitution and placed strict limitations on local governmental entities' authority to levy taxes, fees, and charges for property-related services. As is specifically relevant to this case, Proposition 218 subjects tax hikes levied by local governments to a voter approval requirement. HJTA also participated in the drafting process of Proposition 26 prior to its passage in 2010. Since that time, HJTA has litigated dozens of Proposition 218 cases, some of which are directly relevant to the case at bar.

The California Taxpayers Association ("CalTax") is a nonprofit,

nonpartisan research and advocacy association founded in 1926 with a dual mission: to guard against unnecessary taxes and promote government efficiency. CalTax represents the interests of its members, and the state's taxpayers at large, in the areas of income and franchise, property, sales and use, and other state and local taxes, assessments, fees and penalties. CalTax's membership includes individuals and many businesses across all industries, ranging from small firms to Fortune 500 companies. CalTax is dedicated to the uniform and equitable administration of taxes and minimizing the cost of tax administration and compliance. In 1996, CalTax signed the ballot arguments supporting Proposition 218 stating that the measure would give "taxpayers the right to vote on taxes, and stop politicians' end-runs around Proposition 13." In 2010, CalTax co-sponsored Proposition 26 and wrote ballot arguments stating that the initiative will stop state and local policymakers from enacting hidden taxes on goods and services, such as electricity.

CalTax has a great interest in the Court's resolution of this matter, which will have a direct impact on CalTax, its members, and many other taxpayers across the state. Because of CalTax's broad-based membership and its expertise and experience, in addition to that of its members, concerning the legal and policy issues raised by this case, CalTax believes

that its perspective on the relevant issues will be of assistance to this Court.

On the general merits of this case, Amici HJTA and CalTax strongly support Plaintiffs and urge this Court to affirm the decision of the Second District, Division Six, Court of Appeal in every respect. The vast majority of issues herein are thoroughly and excellently briefed by Plaintiffs. Amici respectfully and jointly request leave from this Court to file the accompanying Brief of Amici Curiae in order to lend their expertise and perspective as tax- and ratepayer advocates. Specifically, Amici believe their involvement as authors and sponsors Propositions 13 and its progeny will be helpful to the Court, specifically regarding historical context and legislative intent of those ballot initiatives.

Amici staff attorneys authored the entirety of the proposed brief, and neither Amici made or received any monetary contributions intended to fund the preparation or submission of the brief.

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For these reasons, Amici respectfully requests this Court's permission to file the accompanying Brief of Amicus Curiae.

Dated: October 21, 2105

Respectfully submitted,

TREVOR A. GRIMM
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BRIEF OF AMICI CURIAE

I

INTRODUCTION

Amici Howard Jarvis Taxpayers Association ("HJTA") and California Taxpayers Association ("CalTax") strongly support Appellants Rolland Jacks and Rove Enterprises, LLC (hereafter, "Jacks") and urge this Court to affirm the decision of the Second District, Division Six, Court of Appeal. While Appellant has more than sufficiently briefed the relevant issues presented, Amici write separately to share their expertise as taxpayer advocates concerned with public finance, particularly constitutional taxpayer protections, throughout California at both state and local levels. Moreover, Amicus HJTA seeks to share its expertise as drafter and sponsor of Propositions 13 and 218.

Proposition 218 was a response by the People of California to the unfair tactics used by local governmental entities seeking to circumvent Proposition 13. Specifically, the voters sought to rein in the proliferation of tax hikes imposed by local governments that followed the enactment of Proposition 13. But local governments remain undeterred, and continued to chip away at tax- and ratepayer protections even after the passage of Proposition 218. This often involves, as is the case here, mislabeling taxes

as fees in order to circumvent voter approval requirements.

Defendant / Respondent City of Santa Barbara (hereafter, the "City") engaged in precisely this sort of chicanery when it adopted the 1999 Franchise Agreement. This agreement imposed a one percent surcharge on all electrical bills paid by ratepayers of Southern California Edison (hereafter, "SCE") within the City's limits, in addition to the preexisting historical one percent franchise fee paid by SCE to the City. Because SCE merely serves as the tax collector and passes the surcharge directly onto the ratepayers, and because the surcharge is explicitly intended for general governmental revenue purposes, the surcharge is clearly a tax within the meaning of Proposition 218 and thus subject to our Constitution's voter approval requirement.

II

QUESTION PRESENTED

This Court certified the following question in this matter: "Is the City of Santa Barbara's 1 percent increase on its electricity bills (i.e., the 1 percent surcharge) a tax subject to Proposition 218's voter approval requirement or a franchise fee that may be imposed by the City without voter consent?" As will be shown below, the answer is that the surcharge is a tax for Proposition 218 purposes.

III

LEGISLATIVE HISTORY OF PROPOSITIONS 13 , 218, & 26

In 1978, California voters overwhelmingly passed Proposition 13, which was authored and sponsored by HJTA founder Howard Jarvis. In passing Proposition 13, the People of California intended to strictly limit the taxing authority of local governmental entities. (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 761-62.) One mechanism by which Proposition 13 accomplished this was to cap ad valorem property tax rates. (Cal. Const., art. XIII A, sec. 1, subdiv. (a).)[1]

In order to circumvent the restrictions imposed on their taxing authority by Proposition 13, many local government entities began charging new or higher taxes, fees, charges, and assessments. (See *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1072-74.) To remedy these and other abuses, HJTA authored and sponsored Proposition 218, which added articles XIII C and XIII D to our State Constitution:

> "In adopting this measure, the people found and declared that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to

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[1] Unless otherwise stated, all future references to "articles" refer to our State Constitution.

> excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."

(*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640 (internal quotation marks omitted); citing Historical Notes, 2A West's Annotated California Constitution (2002 supp.) following article XIII C, section 1, page 38 [emphasis added].)

Indeed, as this Court has noted,

> "Proposition 218 specifically states that '[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' (Ballot Pamp., supra, text of Prop. 218, § 5, p. 109; Historical Notes, supra, p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to: ... make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent."

(*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 (*Silicon Valley Taxpayers*) [emphasis added].) Proposition 218 limits the authority of local governmental entities to levy new taxes or increase existing taxes by

subjecting such efforts to voter approval. It specifically provides:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. ..."

(Art. XIII C, sec. 2, subdiv. (b).) The Constitution imposes a similar voter approval requirement for special taxes, albeit with an even higher voter threshold. (Art. XIII C, sec. 2, subdiv. (d).) For the purposes of this litigation, we need not determine whether the surcharge is a general or specific tax; we need only determine whether the surcharge is a tax or a fee.

In light of Proposition 218's new restrictions on taxes, fees, charges, and assessments, local governments again sought to circumvent constitutional restrictions on revenue generation and began broadening the scope of fees. The consequence of this trend, as well as this Court's decision in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 (*Sinclair*), was that the voters enacted Proposition 26 in 2010. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322.) "Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions; required a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers; and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax." (*Id.*)

IV

THE SURCHARGE IS A "TAX," AND NOT A "FEE," FOR CONSTITUTIONAL PURPOSES

The City is correct when it notes that prior to Proposition 26 our Constitution did not expressly define "tax" as that term is used in Articles XIII C and D; instead, we relied on the common law interpretations. (Opening Brief at p. 22.) However, the common law must be considered in light of the fact that "Proposition 218 was designed to prevent a local legislative body from imposing a special tax disguised as an assessment. ... The ballot arguments identify what was perhaps the drafter's main concern: tax increases disguised via euphemistic relabeling as 'fees,' 'charges,' or 'assessments '." (*Silicon Valley Taxpayers*, *supra*, 44 Cal.4th 431, 449 [internal quotation marks and citations omitted]; citing *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839.) Under this logic, such suspicion of "euphemistic relabeling" applies equally well to "illegal taxes masquerading as a franchise fee." (*Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925, 927 (*Jacks*).)

A. Under the "Primary Purpose Test" Enunciated in *Sinclair*, the Surcharge is a Tax, Not a Fee.

This Court summarized the legal distinction between taxes and fees in *Sinclair*:

> "The cases recognize that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. But compulsory fees may be deemed legitimate fees rather than taxes."

(*Sinclair*, *supra*, 15 Cal.4th at 874.) In applying this analysis, the Second District referred to this as the "primary purpose test." (*Jacks*, *supra*, 234 Cal.App.4th at 931.) Under this analysis, there are two primary questions: (1) who is paying the tax, and (2) what is that person receiving in return (i.e., for what purpose is the revenue used)?

First, SCE's duty to collect and remit the surcharge is purely ministerial. (*Jacks*, *supra*, 234 Cal.App.4th at 935.) Indeed, the tax is passed directly on to the customer, as Ordinance 5135 expressly and directly obligates each and every ratepayer to pay the surcharge. Therefore, for the purposes of the primary purpose test, the utility consumers are most appropriately considered to be the taxpayer.

Second, the record shows that the City was quite explicit that the purpose of the surcharge was to raise "revenues for use by the City Council for general City governmental purposes." (*Id.* at 932.) And neither the

ratepayers nor the utility received any greater service than they did prior to the enactment of the surcharge. Indeed, there have never been allegations that SCE presently imposes greater wear and tear on municipal property justifying the increased "franchise fee" revenue.

As both trial and appellate courts in this matter concluded, "[f]rom the perspective of the utility consumer, there is no functional difference between the [1% surcharge] and a utility user[] tax." (*Ibid.*) Any contrary conclusion places rigid formalism before common sense and unambiguous legislative intent. The conclusion of the Second District was entirely correct; under the primary purpose test, the surcharge is obviously a tax and not a fee for the purposes of Proposition 218. The City expressly and unabashedly sought to increase its general revenue. It did so by enacting the functional equivalent of a utility user tax (hereafter, sometimes "UUT"). The resulting surcharge uses SCE as a mere tax collector, as well as a cloak to accomplish that which it cannot do on its own: the imposition of a UUT without first submitting the matter to voter approval.

The legislative intent of the People is clear: Proposition 218 should be broadly construed to enhance taxpayer consent and to eliminate "euphemistic relabeling" designed by local governments to evade constitutional tax- and ratepayer protections. This is precisely what the City

urges this Court to accept here. For the reasons discussed herein, this Court should reject the City's arguments and affirm the decision of the Court of Appeal in its entirety.

B. The City's Proposed Exception to Proposition 218 Would Swallow the Rule and Constitutes Bad Public Policy.

As discussed herein, the legislative intent of Proposition 218 was to enhance taxpayer consent and to eliminate euphemistic labels used by local government to circumvent taxpayer consent requirements. As the court of appeal noted, the surcharge "bears all the hallmarks of a utility user tax." (*Jacks*, *supra*, 234 Cal.App.4th at 933.) Nevertheless, the City argues that because the surcharge was part of a negotiated contract and because it is SCE that directly remits the funds to the City (despite this surcharge clearly being a passthrough to the consumers), the surcharge is not a tax for Proposition 218 purposes.

In essence, the City is arguing that while Proposition 218 does not permit it to impose a tax on its residents without voter approval, it does permit the City to impose the functional equivalent of a tax provided it does so with a third party accomplice who launders the tax into a franchise fee. Aside from exemplifying exactly the sort of behavior Proposition 218 was meant to stop in the first place, this proposed exception would provide an easily exploitable loophole. Local governments could outsource any

governmental function they desire packaged with franchise fee agreements in any amount. Under such a system, one wonders why a local government would ever seek taxpayer approval of a tax if they can just contract the work out and let the franchisees collect on its behalf.

Finally, the result urged by the City constitutes terrible public policy. The entire concept of privatization is premised on the notion that private entities are sometimes be able to provide limited governmental services more cost efficiently than the public sector. (See generally Leonard Gilroy and Lisa Snell, *Annual Privatization Report 2015, State Government Privatization* (Reason Foundation, May 2015) <http://reason.org/files/apr-2015-state-privatization.pdf> [as of October 20, 2015].) The outcome desired by the City here inverts this paradigm: rather than providing electrical service at a lower rate, the surcharge increases the cost of electrical service by artificially inflating rates. And that inflation was directly and intentionally caused by the City "negotiating" for a larger "franchise fee." Sound public policy dictates that any increase of a "franchise fee" in excess of its historical amount and functionally indistinguishable from an otherwise illegal tax must be subject to Proposition 218's voter approval.

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V

PROPOSITION 26 IS INAPPOSITE TO THE CASE AT BAR

In its Opening Brief, the City argues that Proposition 26 broadens certain aspects of earlier definitions of "taxes" such that "what is a tax under Proposition 26 is not a tax under earlier law, though the reverse is not always true." (Opening Brief at p. 33.) In subsequent briefing, the City claims that Jacks has no answer to its Proposition 26 arguments, and that Jacks's silence on the matter is "telling." (Reply Brief at p. 26.)

Amici suggest that Jacks is silent on the matter because the City's argument is without merit. Even assuming the City's characterization of Proposition 26's retroactivity is accurate,[2] it adds nothing to the analysis. Specifically, the City notes that Proposition 26 excludes from its definition of taxes "a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property."

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[2] It should be noted that the City's thesis that Proposition 26 may have transformed some taxes into fees expressly contradicts the legislative intent that Proposition 26 be construed to inure to the benefit of the taxpayer and to limit the abusive practice of mislabeling taxes as fees. (*Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 203 ["Proposition 26, which, as relevant here, **expanded** 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."][emphasis added].)

(Art. XIII A, sec. 1, subdiv. (e)(4).) In arguing the relevance of this passage, the City assumes what it must prove: that the surcharge is a legitimate franchise fee intended to compensate the City for the use of its infrastructure, rather than a poorly disguised UUT meant only to generate general purpose revenue. If one accepts this characterization of the surcharge, it passes muster under Proposition 218. In other words, this is exactly the question this Court has certified for review. Therefore, the City's Proposition 26 argument is entirely superfluous. Jacks's silence on this matter is not telling; it is appropriate.

VI

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the decision of the Court of Appeal in its entirety.

Dated: October 21, 2015

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption pages, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 2,506 words.

Dated: October 21, 2015

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PROOF OF SERVICE

CALIFORNIA SUPREME COURT

I, Lorice Strem, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On October 21, 2015 I served the foregoing document described as: **HOWARD JARVIS TAXPAYERS ASSOCIATION AND CALIFORNIA TAXPAYERS ASSOCIATION'S JOINT APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS** on the interested parties below, using the following means:

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