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Supreme Court of California
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No. S262634

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN, AND STEPHEN CLAYTON,

Plaintiffs-Appellants,

v.

CITY OF OAKLAND,

Defendant-Respondent.

After a Published Opinion From the Court of Appeal,
First Appellate District, Division One, Case No. A154986,
Alameda County Superior Court Case No. RG16821376

APPLICATION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CITY OF OAKLAND; PROPOSED AMICUS CURIAE BRIEF

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to the California Rules of Court, Rule 8.520(f), the Legislature of the State of California respectfully requests leave to file the attached amicus curiae brief in support of defendant City of Oakland in the above-captioned case: *Zolly v. City of Oakland* ("*Zolly*").

INTEREST OF THE AMICUS CURIAE

The Legislature of the State of California is a defendant in a related case currently pending in this Court: *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. S263835 ("*HJTA v. BATA*" or "*BATA*").[1]

The *BATA* case involves a challenge to increases in the bridge tolls for nine Bay Area bridges enacted by the Legislature in 2017 and approved by voters in 2018. The plaintiffs argued that the bridge toll increases were taxes subject to a two-thirds vote in both houses of the Legislature because they constituted a tax under section 3 of article XIII A of the California Constitution. Both the trial court and the Court of Appeal agreed with the Legislature and its co-defendant, the Bay Area Toll Authority, that the bridge tolls fall within an exception to article XIII A's definition of a tax for a "charge imposed for entrance to or use of state property." (Cal. Const., art. XIII A, § 3, subd. (b), par. (4).) However, shortly before the Court of Appeal argument in *BATA*, the Court of Appeal in this case reached a different conclusion about nearly identical language in article XIII C, section 1(e)(4) regarding a charge for entrance to or use of

[1] On appeal, the *HJTA v. BATA* case was consolidated with the appeal in *Whitney v. Metropolitan Transportation Commission*, which challenged the bridge tolls on similar grounds. We will refer to the consolidated cases as "*BATA*."

local government property. After this Court granted review in *Zolly*, it also granted HJTA's petition for review in *HJTA v. BATA* and deferred further action "pending consideration and disposition of a related issue in *Zolly v. City of Oakland,* S262634," citing Rule 8.512(d)(2) of the California Rules of Court.

Although the challenge in *Zolly* is based on article XIII C, not article XIII A, of the California Constitution, the language of the provision at issue in each case is virtually the same. And although *Zolly* raises other issues specific to the facts in that case, if the Court were to interpret article XIII C's language regarding entrance to or use of local property, that interpretation could affect the interpretation of the same language in article XIII A. For that reason, the Legislature has a strong interest in the outcome of this case and its effect not only on the bridge tolls at issue in *HJTA v. BATA*, but on its ability to manage state property in general.

REASONS WHY THE REQUEST SHOULD BE GRANTED

Because of the way Proposition 26 was written, it is important for the Court to understand how the outcome in *Zolly* could affect the many other types of fees that fall within the measure's exception for charges involving government property. *Zolly* arose in the unique context of local franchise fees, a subject that has long been heavily regulated in California. (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 263-266.) Unlike a bridge toll or a fee for entrance to a state park, a franchise fee is not necessarily limited to the right to use *real property*. A franchise fee also includes consideration for the privilege of being, for example, the sole provider of waste and recycling services for Oakland residents. This right

is an intangible asset that both the parties and the lower courts have assumed constitutes purchase or use of local government property.[2]

As the accompanying amicus brief will show, however, any interpretation of Proposition 26 in the context of a franchise fee will necessarily affect the measure's application to other types of fees for entrance to, use of, or sale or lease of public property. That is because the drafters of Proposition 26 included fees for the sale or lease of government property in the same sentence as entrance and use fees. That choice has caused enormous difficulty for the plaintiffs in this case and in *BATA* as they try to argue that a fee is excessive in one context but not in the other. It will be important, therefore, for the Court to understand the degree to which the plaintiffs in each case have struggled to find a coherent theory that allows them to prevail without leading to absurd results when applied in other contexts involving public property.

It will also be important for the Court to understand the impact of its ruling on the wide variety of property fees set by state and local governments. The accompanying brief will provide that perspective by describing the scope of the State's real property holdings and transactions and why the voters did not intend to impose a reasonable cost requirement on fees for use or sale of government property.

No party or counsel for a party has authored any part of this brief, nor has any person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

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[2] Respondent City of Oakland's Opening Brief on the Merits ("OB") at 15, quoting ordinance granting franchise.

Dated: March 22, 2021

Respectfully submitted,

OLSON REMCHO, LLP

By: /S/ Robin B. Johansen
Attorneys for Proposed Amicus Curiae
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[PROPOSED] AMICUS CURIAE BRIEF

INTRODUCTION

The *Zolly* plaintiffs argue that in order to qualify as a fee rather than a tax, a franchise fee must reflect the "reasonable value" of the franchise. For this point, they rely almost exclusively on this Court's opinion in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 ("*Jacks*"), arguing that although *Jacks* dealt with a charge enacted prior to Proposition 26, the Court's reasoning in *Jacks* applies because Proposition 26 was meant to close loopholes in preexisting law.

Unfortunately for plaintiffs' theory, the language in Proposition 26 on which they rely covers far more than the franchise fee at issue here, and any construction of that language to cover franchise fees will necessarily have to cover much more. That is because, in a single sentence, Proposition 26 provides an exception from the definition of a tax for 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), par. (4).) Thus, Proposition 26 reaches beyond the limited context of the pass-through surcharge at issue in *Jacks* to include not only things like park entrance fees, but the purchase price or rent for lease of government property.

The *Zolly* plaintiffs' insistence on a reasonable value test is not only unworkable in these other contexts, but it delivers absurd results that the voters could not possibly have had in mind. No one can seriously argue that the voters would have wanted their city to have to justify why it accepted the highest bid for a piece of prime real estate. Yet that is the only way to apply plaintiffs' interpretation of article XIII C to the plain text of Proposition 26.

Proposition 26 marked a distinct change in California tax law. What the *Zolly* plaintiffs and groups like the Howard Jarvis Taxpayers Association miss is that Proposition 26 was meant to do more than close loopholes in Proposition 13 and Proposition 218. It was also meant to define, once and for all, the difference between a fee and a tax. (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 11.) By decreeing that an increase in any government charge is a tax unless it falls within one of five exceptions at the state level or seven exceptions at the local level, Proposition 26 attempted to resolve the endless legal battles over the difference between a fee and a tax. (See *Cal. Bldg. Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1045 [referring to the courts' "recurring chore" of determining whether a levy was a fee or a tax].)

The drafting choices made by the proponents of Proposition 26 may leave anti-tax advocates unhappy, but plaintiffs must take the language of the Constitution as they find it. Struggle as they might, they cannot come up with a rationale that will allow insertion of a "reasonable cost" or "reasonable value" measure into the government property exceptions of Proposition 26. As demonstrated below, the plaintiffs in *Zolly* and *BATA* have tried numerous approaches and never been able to settle on one. That is because none of their approaches can be made consistent with the plain language of the government property exception, which, unlike the previous exceptions, contains no reasonable cost or reasonable value requirement at all.

The brief that follows demonstrates why the many different attempts made by the *Zolly* and *BATA* plaintiffs to revise the plain language of Proposition 26 must fail as a matter of law. It also illustrates the sheer

scope of the types of public property to which plaintiffs' theories would apply and the problems that would be posed by application of plaintiffs' theories to the sale or use of such property. In light of all this, it cannot seriously be argued that the voters would have approved Proposition 26 if they thought it would result in the interpretations plaintiffs urge upon the Court in this case and in *BATA.*

ARGUMENT

I.

PLAINTIFFS' ARGUMENTS CONTRADICT THE PLAIN LANGUAGE OF PROPOSITION 26

In 2010, Proposition 26 added the following language to section 1 of article XIII C of the California Constitution:

> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (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.
>
> (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.
>
> (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.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> 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.

The measure added nearly identical language to article XIII A, which covers state taxes. For purposes at issue here and in the *BATA* case, section (3)(b)(4) of article XIII A contains an express exception from the definition of a tax for "[a] charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property . . . ."

These exceptions are straightforward and unambiguous. The fourth exception covers everything from entrance fees to state or local parks

to charges for the use, purchase, or lease of government property. None of the parties either in this case or in *BATA* has questioned whether the exceptions apply to franchise fees or bridge tolls.[3] Instead, they have focused their arguments on the meaning of those exceptions and the burden of proof requirements in the last paragraph of the measure. Plaintiffs' approaches to that task in both cases can best be described as shape-shifting.

A. Neither Set Of Plaintiffs Has Been Able To Settle On A Workable Interpretation Of Proposition 26

As is clear from the record in this case, the *Zolly* plaintiffs have leapt from one position to the next in their challenge to Oakland's franchise fee. Their original complaint did not even allege violations of Proposition 26 but focused on alleged violations of article XIII D. (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 79-80 ["*Zolly*"]; Request for Jud. Notice of the Legislature of the State of Cal. ["RJN"], Exh. A at 40-51.) Plaintiffs opposed the City of Oakland's demurrer on the ground that the City had violated Proposition 218, not Proposition 26. (RJN, Exh. B at 3, 6.)

It was not until their opening brief in the Court of Appeal that the *Zolly* plaintiffs also began to argue that the franchise fee could not survive what they described as Proposition 26's "reasonable-relationship test" – the language found in both articles XIII A and XIII C that the *BATA* parties describe as the reasonable cost requirement. (RJN, Exh. C at 7.) After the Court of Appeal adopted the *Zolly* plaintiffs' construction of

[3] The *BATA* plaintiffs initially argued that the bridge tolls at issue in that case were imposed by a local government, not the State, but they have since abandoned that argument. (RJN, Exh. K at 10, fn. 1.)

article XIII C, plaintiffs initially defended the court's decision in their Answer to the City of Oakland's Petition for Review. (*Id.*, Exh. D at 3.) But once this Court granted review and the *Zolly* plaintiffs had to defend the Court of Appeal's strained construction of article XIII C on the merits, they apparently could not bring themselves to do so. Instead, the *Zolly* plaintiffs now offer a brand-new theory after four and one-half years of litigating based on other theories. The *Zolly* plaintiffs now rely on the use of the phrase "imposed for" in section 1(e)(4) to argue that a franchise fee cannot exceed the reasonable value of the franchise. (*Zolly* Appellants' Answer Brief on the Merits ("AB") at 33-36.)

The *BATA* plaintiffs found it equally difficult to settle on an interpretation of Proposition 26. In their complaint, the *BATA* plaintiffs alleged that the RM3 toll increase was a tax because it did not meet the "reasonable cost" requirement in the burden-shifting provision of article XIII A and so did not fit within section 3(b)(4)'s exception for "[a] charge imposed for entrance to or use of state property . . . ." (RJN, Exh. E at 4.) In opposing defendants' motions for judgment on the pleadings in the trial court, plaintiffs argued that the reasonable cost requirement applied only to the first half of the sentence containing the exception for charges "imposed for entrance to or use of state property," but not the second half for charges for the "purchase, rental, or lease of state property . . . ." (*Id.*, Exh. F at 14.)

After the trial court rejected plaintiffs' arguments,[4] plaintiffs embraced an altogether new theory on appeal. Declaring that they no longer claimed that the reasonable cost requirement applied to any part of

[4] RJN, Exh. G at 2-3.

the fourth exception, the *BATA* plaintiffs instead argued for the first time, like the *Zolly* plaintiffs here, that the phrase "imposed for" in section 3(b)(4) meant that the Legislature must show that the increased toll is "for" entrance to or use of state property, and not "for" some other purpose. (RJN, Exh. H at 43; *id.*, Exh. I at 26.) After the Court of Appeal rejected both plaintiffs' original and new arguments (*Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, 459-461 ["*BATA*"]), plaintiffs reversed themselves again, this time pushing a modified version of their original position. Plaintiffs have now argued in their petition for rehearing before the Court of Appeal and their petition for review in this Court that the reasonable cost requirement should apply to section (b) in its entirety, including to both parts of the section 3(b)(4) exception. (RJN, Exh. J at 10-11; *id.*, Exh. K at 20-21.)

In sum, the plaintiffs in these two cases have cumulatively changed their legal theories *six times* while trying to convince the courts to ignore the plain language in article XIII A, section 3(b)(4) and article XIII C, section 1(e)(4). These constantly shifting arguments reveal the weakness at the heart of both lawsuits. If the *Zolly* and *BATA* plaintiffs cannot even convince themselves of a reason to believe the voters wanted the same limitations on franchise fees and bridge tolls that plaintiffs want, there is no reason to believe that the voters wanted any such thing.

B. The Court Of Appeal Failed To Adhere To The Plain Meaning Of Proposition 26's Text

There is a good reason why the *Zolly* plaintiffs abandoned the Court of Appeal's construction of Proposition 26: It does not come close to adhering to the rules of statutory construction.

The first – and often only – step in interpreting the Constitution is to ascertain voter intent by focusing on the plain meaning of the statute. "To determine that intent, [courts] 'look first to the language of the constitutional text, giving the words their ordinary meaning. If the language is clear, there is no need for construction." (*Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016,1037, quoting *Thompson v. Dept. of Corrections* (2001) 25 Cal.4th 117, 122, citations omitted.)

Such is the case here. The first three exceptions to article XIII C's definition of "tax" include language limiting the charge to its "reasonable costs" or "reasonable regulatory costs." (Cal. Const., art. XIII C, § 1, subd. (e), paras. (1)-(3).) The last four exceptions do not. (*Id*., § 1, subd. (e), paras. (4)-(7).) As the *BATA* court concluded when interpreting nearly identical language in section 3 of article XIII A, "[t]he absence of 'reasonable cost' language in the latter exceptions, when it is present in the first three, strongly suggests the limitation does not apply where it is not stated." (*BATA*, *supra*, 51 Cal.App.5th at pp. 459-460.) Moreover, as the *BATA* court further concluded, reading the burden of proof requirement at the end of the provision as applicable to all of the exceptions "would render the express reasonableness language in the first three exceptions surplusage. '"A construction making some words surplusage is to be avoided."' (*Id.* at 460, quoting *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 and *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Even the *Zolly* plaintiffs now agree, declaring "that the reasonable-cost burden of proof applies only to the first three exceptions." (AB at 34.)

Nevertheless, the *Zolly* court reached a different conclusion. It found subdivision (e) ambiguous because its burden of proof provision "is silent as to whether this [reasonable cost] requirement applies to all seven exemptions, or only to the first three exemptions that explicitly include a reasonableness requirement." (*Zolly*, *supra*, 47 Cal.App.5th at p. 87.)

The court stumbled because it failed to take into account indicia of intent that are far from "silent." The drafters clearly signaled that the reasonable cost requirement applies to some exceptions but not others by expressly including the requirement in some exceptions but not others. And while it is true that the burden of proof language at the end of subdivision (e) reiterates the reasonable cost requirement without reiterating that this requirement applies only to the first three exceptions, that should be no cause for confusion.

The provision begins by declaring that "[t]he local government bears the burden of proving" certain facts, thus announcing in its introductory clause that it sets forth burden of proof requirements to help courts apply the exceptions. The issue of which party should bear the burden of proof was an important issue because this Court has held that prior to Proposition 26, the burden of proving that a fee was invalid remained with the plaintiff, even though the burden of production might shift to the government once the plaintiff had made a prima facie showing of invalidity.[5] Proposition 26 shifted that burden to the government. (*Templo v. State of Cal.* (2018) 24 Cal.App.5th 730, 738.) Nothing in the

[5] *California Farm Bur. Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436.

text suggests the provision was also intended to announce substantive requirements. To the contrary, as noted above, if the provision were read to impose substantive requirements on each of the exceptions, it would make the "reasonable costs" language in the first three exceptions surplusage. (*McCarther v. Pacific Telesis Group*, *supra*, 48 Cal.4th at p. 115.)

Having erred in finding subdivision (e) ambiguous, the *Zolly* court proceeded to err in its efforts to resolve that perceived ambiguity. The court began with the uncontroversial fact that the voters who approved Proposition 26 wanted to expand the definition of "tax" and close loopholes. But it then leapt to the conclusion that this ambiguity must necessarily be resolved in favor of that goal. (*Zolly*, *supra*, 47 Cal.App.5th at pp. 87-88.)

There are various problems with this approach, many of which Oakland has already addressed. (OB at 34-39; Respondent City of Oakland's Reply Brief on the Merits at 24-28.) Additionally, by focusing exclusively on the voters' desire to expand the definition of tax, the *Zolly* court ignored the fact that Proposition 26, like most ballot measures, sought to advance its primary goal while simultaneously balancing other policy priorities. Specifically, Proposition 26 sought not only to clarify the meaning of "tax," but also to clarify which charges and fees are *not* taxes by setting forth seven exceptions from local taxes and five exceptions from state taxes. Indeed, the proponents of the measure emphasized this balanced approach in both of their arguments when they assured voters that "Prop. 26 protects legitimate fees . . . ." (Ballot Pamp., Gen. Elec. (Nov. 2, 2010) rebuttal to argument against Prop. 26, p. 61, argument in favor of Prop. 26, p. 60.) Yet the *Zolly* court's opinion never addresses whether the decision to include the fourth exception signaled that voters' intended to

refrain from closing "loopholes" around charges like franchise fees and bridge tolls. After all, that is exactly what the text indicates, given that the exception is drafted in absolute terms without any caveats.

C. Plaintiffs' New Construction Is Equally Flawed

Plaintiffs struggle mightily to defend the result below with different reasoning than that of the Court of Appeal. They do not succeed.

As a threshold matter, plaintiffs inadvertently signal the weakness of their approach through the structure of their brief. Although the case law is clear that constitutional interpretation must necessarily begin with the text of the provision at issue,[6] plaintiffs do not even try to relate the text of subdivision (e) to their new theory until halfway through their argument.[7] They instead dedicate much of the first half of that argument to a case that construed constitutional provisions that pre-date Proposition 26 – *Jacks*, *supra*, 3 Cal.5th 248 – and the treatment of franchise fees before Proposition 26. (AB at 23-27, 29-31.) Along the way, they even concede that the plain meaning of the fourth exception is more supportive of Oakland's position than their own. (*Id.* at 29.)

Oakland has already articulated many of the problems with plaintiffs' approach, and the Legislature does not repeat those points here. Oakland understandably focused on why subdivision (e) does not require courts to determine whether a franchise fee exceeds the reasonable value of

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[6] *Prof. Engineers in Cal. Government v. Kempton*, *supra*, 40 Cal.4th at p. 1037.

[7] AB at 33. Plaintiffs begin the merits of their argument on page 22 of their Answer Brief and focus on the scope of the limitations on franchise fees through page 44.

the franchise. The flaws in plaintiffs' argument, however, are even more pronounced when applied to other charges encompassed by the fourth exception, as it exists in both article XIII A and article XIII C. After all, the word "for" in that exception modifies the first part of the exception (for entrance to or use of government property) as well as the second part (the purchase, rental, or lease of government property). That means that if the voters had truly wanted to restrict franchise fees to the reasonable value of the franchise (they did not), they also wanted to restrict bridge tolls to the reasonable value of a drive across the bridge in question.

Such a requirement makes no sense in the context of a bridge toll. What is the value, for example, of driving across the Bay Bridge? The value almost certainly differs from one car to the next, since the drive presumably would be more valuable for the car containing three commuters relying on the bridge to get them to work, than for a single driver heading into the City to visit a friend. Is the drive more valuable if it takes less time since that is a more pleasant experience for the driver, or is it more valuable if it takes more time since that indicates the bridge is in greater demand? Similar questions arise with other charges that fall within the fourth exception. For example, does the value of the use of a park differ for a picnicker, a dogwalker, and a mountain biker? And how does the government determine, and then prove, any of these values? It is unlikely that voters wanted Proposition 26 to mandate that bridge tolls and park entry fees correlate with something that is impossible to quantify. (See *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 533 [a statute should be construed to "avoid anomalous or absurd results," citation omitted].)

Plaintiffs also argue that the fourth exception must be construed to contain the limitation they want because all of the other exceptions in article XIII C, section 1(e) contain limitations. According to plaintiffs, the first three exceptions are limited by article XIII C's reasonable costs requirement while the last three exceptions are limited by other legal doctrines, like the constitutional prohibition on excessive fines, which would apply to the fines and penalties in the fifth exception. (AB 31-32.) Thus, plaintiffs argue, the fourth exception must contain some kind of limitation too, because under the canon of statutory construction *noscitur a sociis*, "courts may conclude that [voters] would not intend one subsection of a subdivision of a [provision] to operate in a manner markedly dissimilar from other provisions in the same list or subdivision." (*Id*. at 32, internal quotations and citation omitted.)

The argument does not help plaintiffs. If it were true, as plaintiffs suggest, that each exception was intended to operate in a manner that is markedly *similar* to each of the other exceptions, then the last four exceptions would have been drafted to include the same "reasonable costs" limitation as the first three exceptions. The fact that they were drafted with different language signals a different intent. (*Western States Newspapers, Inc. v. Gehringer* (1962) 203 Cal.App.2d 793, 799-800.)

Moreover, plaintiffs seem to forget that they are ultimately arguing that the exceptions should operate *differently*. Although they claim all seven exceptions must include limitations, plaintiffs have cobbled together different limitations for various exceptions: a reasonable costs limitation for the first three exceptions; an "imposed for" limitation for the fourth exception; and limitations that fines, charges and assessments must be "proportional" to the offense (fifth exception), "to the projected impact

of the proposed development" (sixth exception), or to the cost or benefit associated with each parcel (seventh exception). (AB 31-32.) Given these differences, the canon of construction plaintiffs cite does more to undermine than support their own interpretation.

Finally, plaintiffs insert a policy argument into their brief. They suggest that if Proposition 26's supermajority vote requirement is not applied to limit charges that fit within the fourth exception, the Constitution will be left with a "limitless" loophole that politicians could exploit with "exorbitant franchise fees" and "hidden taxes." (AB at 9, 24, 30-31, 49.) Yet the supermajority requirement is only one of several checks and balances that exist for voters who want to limit the charges their elected officials adopt.

If a city council approves an "exorbitant" franchise fee that is passed on to local ratepayers, the electorate could vote out the responsible councilmembers, while electing new members who favor lower fees. It could also initiate a recall against councilmembers who approved the fee. (Cal. Const., art. II, § 19.) The electorate could pass an initiative to address any resulting rate increases, or refer the ordinance, thereby staying it from going into effect until a vote of the people had occurred. (Cal. Const., art. II, § 11.) Indeed, plaintiffs illustrated this very point when they noted that Waste Management of Alameda County, one of the franchisees at issue here, "began collecting signatures for a ballot referendum that asked city voters to invalidate the ordinances awarding the franchise contracts to" the other franchisee at issue here. (AB at 13, quoting 2 JA 280:18-20.)

Consequently, the suggestion that Proposition 26's two-thirds vote requirement is the only mechanism available to stop local governments from adopting excessive fees or charges is simply not credible. The voters

understood their power when they approved Proposition 26. (*Prof. Engineers in Cal. Government v. Kempton*, *supra*, 40 Cal.4th at p. 1048 ["The voters are presumed to have been aware of existing laws at the time the initiative was enacted."].) There is therefore no basis to assume they would have objected to Proposition 26's unqualified exceptions for charges like bridge tolls and franchise fees.

D. Summary Of Plain Text Analysis

To summarize, Oakland and the Legislature both contend that subdivision (e) of article XIII C and section 3 of article XIII A mean what they say. The *BATA* court agrees.

Contrast this simple, straightforward construction with plaintiffs' current approach, *i.e.*, their third theory in this case. Although plaintiffs concede that the plain language favors Oakland's interpretation (AB at 29, 34), they ask this Court to look past that language to the ballot pamphlet materials and decide the case based on the general anti-tax sentiments expressed therein. They insist the voters' intent with respect to Proposition 26 must be informed by this Court's ruling on the pass-through surcharge at issue in *Jacks*, *supra*, 3 Cal.5th 248, despite the fact that *Jacks* was decided not only seven years *after* the electorate cast their votes on Proposition 26, but dealt with a charge enacted prior to that. And they effectively urge this Court to ignore many of the canons of statutory construction, from the plain meaning rule, to the rule against interpretations that render statutory text surplusage, to the rule disfavoring absurd constructions.

It is therefore worth remembering what this Court has said in other contexts: "[t]he principle of Occam's razor – that the simplest of

competing theories should be preferred over more complex and subtle ones – is as valid juridically as it is scientifically." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328, fn. 10, quoting *Swann v. Olivier* (1994) 22 Cal.App.4th 1324, 1329, citation omitted.) Oakland has offered a construction that adheres in every way to the plain text of the Constitution. Plaintiffs have offered only leaps of faith and logic.

II.

PLAINTIFFS' INTERPRETATION OF PROPOSITION 26 WOULD HAVE CONSEQUENCES THE VOTERS NEVER INTENDED

As its text makes clear, Proposition 26 made two major changes to article XIII C and article XIII A. The first change was to provide that any new or increased government charge is a tax unless it meets one of several exceptions, in which case it is, by definition, not a tax. The second, as discussed above, was to shift the burden of proof from the plaintiffs to the government to prove that the charge is not a tax because it falls within one of the specified exceptions.

Although it has not received nearly as much attention in the case law as the first change, Proposition 26's shift in the burden of proof from the plaintiff to the defendant may turn out to be at least as important as the definitional change enacted by Proposition 26. As every first-year law student is taught, the allocation of the burden of proof can be and often is the deciding factor in the outcome of a case.

It is critical, therefore, that the measure be interpreted to reflect the will of the voters regarding just what it is that the government must prove. As this Court said in *Hodges v Superior Court* (1999)

21 Cal.4th 109, 114: "In the case of a voters' initiative statute . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."

The question becomes then whether the voters would have wanted state and local government to bear the burden of proof to show that charges for the sale or use of public property satisfy some kind of reasonableness standard, whether it is that the charge reflects the reasonable value of the property or the reasonable cost of maintaining it. Even the *BATA* plaintiffs have admitted that it would be absurd to include a reasonable cost requirement for sale or lease of government property. (RJN, Exh. I at 26-27.) For their part, the *Zolly* plaintiffs have disavowed the Court of Appeal's application of such a requirement to franchise fees as well. (AB at 34.) Both sets of plaintiffs, however, insist that the state or local government must show that the fees at issue in their cases meet some kind of reasonableness standard based on what the fee is imposed "for."

In order to understand the ramifications of such a requirement, it is important to have a sense of how much real property is held and managed by governmental bodies in California. The amount of state-owned property alone is staggering. The Department of Parks and Recreation manages 280 state parks, totaling 1.5 million acres and over 340 miles of coastline, 970 miles of lake and river frontage, 15,000 campsites, and 4,500 miles of trails.[8] More than 75 million people

[8] Cal. Dept. of Parks and Rec., <https://www.parks.ca.gov/?page_id=91> (as of Feb. 24, 2021).

visit the state parks every year (*id.*), and many of them pay fees for entrance to or use of state park property.[9]

In addition to our state parks, the State Lands Commission manages 4 million acres of tide and submerged lands and the beds of natural navigable rivers, streams, lakes, bays, estuaries, inlets, and straits.[10] According to its website, the State Lands Commission also monitors sovereign land granted in trust by the California Legislature to approximately 70 local jurisdictions that generally consist of prime waterfront lands and coastal waters. "The Commission protects and enhances these lands and natural resources by issuing leases for use or development, providing public access, [and] resolving boundaries between public and private lands." (*Ibid.*) The State and its local partners charge for the leases, of course, as well as for access to and use of port facilities up and down the coast. In addition to state parks and ports, the Department of Fish and Wildlife manages over 1.1 million acres of fish and wildlife habitat, for which it issues hunting and fishing licenses.[11]

Then there is the California Department of Transportation, known as CalTrans. The Department manages more than 50,000 miles of California's highway and freeway lanes, provides inter-city rail services

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[9] See Cal. Dept. of Parks and Rec., <https://www.parks.ca.gov/?page_id=737> (as of March 19, 2021).

[10] Cal. State Lands Commission, <https://slc.ca.gov/about/#:~:text=Established%20in%201938%2C%20the%20Commission,estuaries%2C%20inlets%2C%20and%20straits> (as of Feb. 24, 2021).

[11] See Cal. Dept. of Fish & Wildlife, <https://wildlife.ca.gov/Licensing/Fishing> (as of March 19, 2021); <https://wildlife.ca.gov/Licensing/Hunting> (as of March 19, 2021).

and permits for more than 400 public-use airports and special-use hospital heliports.[12] Many of these activities include charges for use of the State's property, including not only the bridge tolls at issue in the *BATA* case but also toll roads and permit fees for things like use of oversize or overweight vehicles on state roads.[13]

The Department of General Services also manages over 24 million square feet of space in state owned or managed facilities.[14] Although most of this space is used for state purposes, its Asset Management Branch is responsible for managing and disposing of surplus real property, which includes leasing and selling state real estate to others, including private parties.[15] Under Government Code section 11011, unless otherwise specified by law, money from the sale of surplus real property is to be used to repay bonds approved by the voters in 2004, and once the bonds are repaid, it is to go into the State's Special Fund for Economic Uncertainties. It is not used "for" state real property in the sense that either set of plaintiffs argue is required by Proposition 26.

This description gives some sense of the State's real property interests that would be affected by plaintiffs' interpretation of

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[12] Cal. Dept. of Transportation, <https://dot.ca.gov/about-caltrans> (as of March 19, 2021).

[13] *Id.* at <https://dot.ca.gov/programs/traffic-operations/legal-truck-access/tolls> (as of March 19, 2021); <https://dot.ca.gov/programs/traffic-operations/transportation-permits> (as of March 19, 2021).

[14] Cal. Dept. of General Services, <https://www.dgs.ca.gov/RESD/About> (as of Feb. 24, 2021).

[15] *Id.*, <https://www.dgs.ca.gov/RESD/About/Asset-Management-Branch> (as of Feb. 24, 2021).

Proposition 26. Local cities and counties, of course, operate zoos and parks and museums and golf courses as well, and they too sell and lease public property. It simply makes no sense to suggest that the City of Oakland would bear the burden of proving that an increase in the cost of admission to its zoo reflects the reasonable cost or the reasonable value of that ticket.[16] The voters would not have wanted that, and plaintiffs cannot come up with a coherent theory that would prevent it if they were to prevail in this case.

CONCLUSION

The Court of Appeal's decision should be reversed. Similarly, the Petition for Review in the related *BATA* case should be dismissed because reversal in this case will resolve any purported conflict between the two decisions below.

Dated: March 22, 2021

Respectfully submitted,

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[16] See City of Oakland, <https://www.oaklandzoo.org/admission#Admission-Fees> (as of March 19, 2021).

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Pursuant to Rule 8.204 of the California Rules of Court, I certify that the [Proposed] Amicus Brief is proportionately spaced, has a typeface of 13 points or more and contains 5,481 words as counted by the Microsoft Word 365 word processing program used to generate the brief.

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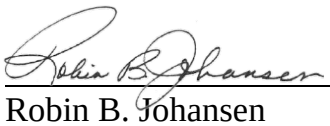

Robin B. Johansen

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

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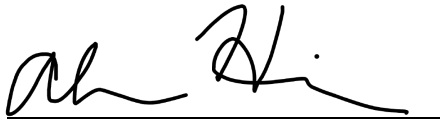

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(00432119-13)