IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITIZENS FOR FAIR REU RATES, et al

Plaintiffs and Appellants,

vs.

CITY OF REDDING, et al

Defendants and Respondents.

S224779

3rd Civil No. C071906

Shasta S.C. Nos. 171377 and 172960

APPLICATION OF GLENDALE COALITION FOR BETTER GOVERNMENT FOR AMICUS CURAIE AND AMICUS CURAIE BRIEF

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APPLICATION OF GLENDALE COALITION FOR BETTER GOVERNMENT TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF CITIZENS FOR FAIR REU RATES

To: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Your applicant is the Glendale Coalition for Better Government, a nonprofit corporation (hereinafter "Glendale Coalition"). It is the Petitioner in the case of *Glendale Coalition for Better Government v City of Glendale*, Los Angeles Superior Court Case No. BS147376.

The proposed amicus curaie brief was authored by Harry Zavos, attorney at law, and Arthur Jarvis Cohen, attorney at law, both of whom represent the Glendale Coalition in the aforementioned case. The amicus curaie brief was prepared without a monetary contribution from any party.

The instant case entails an interpretation of Proposition 26. The ruling of this Supreme Court will directly impact the *Glendale Coalition* case which also pertains to an interpretation of Proposition 26. It should be noted that counsel for the city of Redding in the case at bar is also counsel for the city of Glendale in the *Glendale Coalition* case.

The instant case has reached this Supreme Court on the unexamined assumption that "tax" as used in California Constitution, Article XIIIC (1)(e) refers to the PILOT. It is the position of the Glendale Coalition that this assumption is **simply wrong**. The Glendale Coalition submits that "tax" refers to the fees **charged** to rate payers for providing electric services and **not** how those fees are ultimately expended.

The Glendale Coalition recognizes that this court has requested briefing on three issues. This amicus curaie brief primarily addresses the first of those three issues which asks if the transfer of funds from the city utility to the general fund is a "tax."

The purpose of this amicus curaie brief is to encourage this Supreme Court to take a fresh look at the actual language and intent of Proposition 26. The Glendale Coalition submits that once that is done, this court will find that the position of the Glendale Coalition stated above is correct and that the parties to the instant case as well as the courts below have misconstrued Proposition 26. The Glendale Coalition submits that this Supreme Court will find that when California Constitution, Article XIIIC (1)(e) refers to "tax," it refers to the charges paid by ratepayers and not to the transfer of funds.

July 29, 2015

Harry Zavos, Attorney at Law
Arthur Jarvis Cohen, Attorney at Law

By _____
Arthur Jarvis Cohen, Attorney at Law

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I. INTRODUCTION

The City of Redding transfers a portion of the monies received from electric ratepayers from its electric utility fund (hereinafter "REU") to the city general fund. This transfer is in lieu of property taxes and is referred to as the PILOT. The parties and courts below have proceeded upon the assumption that the PILOT is what may be the "tax" as defined in California Constitution, Article XIIIC (1)(e). The following is from the majority opinion of the Court of Appeal in *Citizens for Fair REU Rates v. City of Redding* (2015) 233 Cal.App.4th 402, 414, 182 Cal.Rptr.4th 722, 732:

> **Accordingly, we conclude the PILOT constitutes a tax under Proposition 26 unless Redding proves the amount collected is necessary to cover the reasonable costs to the city to provide electric service. (Art. XIII C, § 1, subd. (e).)**

The Glendale Coalition submits that the above conclusion is wrong as a matter law. **It is the rate charged, not the PILOT, which may constitute the tax.** This is consistent with the following from the dissenting opinion in the *City of Redding* case at page 425, (740):

> **The electric rates set by Redding may be increased by the PILOT transfer, but that is only one factor the city council considers in setting rates. That is, an increase in the amount of the PILOT (e.g.,**

through acquisition of new property by the utility) does not raise rates; rates are set by the city council. (See *American Microsystems, supra,* 137 Cal.App.3d at pp. 1042–1043, 187 Cal.Rptr. 550.) Thus, the PILOT is not of itself a "levy, charge, or other exaction" (Cal. Const., art. XIII C, § 1, subd. (e)) *imposed on ratepayers.*

The Glendale Coalition will now address this issue in detail. All references to Articles and Sections are to the California Constitution Article XIIIC unless otherwise indicated.

II. THE TAX IS THE ELECTRIC RATES CHARGED TO RATEPAYERS; IT IS NOT THE PILOT (Supreme Court Issue #1)

A. THE MEANING OF THE WORD "TAX"

The answer to the following question is the very foundation upon which the resolution of the instant case rests: *To what does the word "tax" refer as used in Article XIIIC, Section 1(e)?* Is the answer the rates charged to the ratepayers in exchange for electric service subject to a stated exception or is the answer how those rates, once collected, are used? Put another way: within the meaning of Section 1(e), is the PILOT only evidentiary in determining whether the fees charged is the tax or is the PILOT, itself, the tax.

In spite of how basic the resolution of this question is to this case, the majority opinion below did not address it. Rather, the Court of Appeal merely proceeded on the unexamined assumption that the word "tax" as defined by Section 1(e) refers to the transfer of REU receipts to the general fund; it did not consider whether "tax" refers to the charge to ratepayers' for electric service. Amicus submits that the latter is correct.

That this is not a mere esoteric quibble is illustrated by the following hypothetical:

There are two cities, Alpha and Omega. Each owns its utilities. Both cities have the same number of customers who, on a monthly basis, use the same amount of electricity and are charged $100 a month. Both cities transfer $15 of the $100 to the general fund. The $15 is not reasonably necessary to provide electric service. Upon the effective date of Proposition 26, these charges constitute a tax.

Acknowledging that Proposition 26 is prospective, not retroactive, this tax would not require a vote of the electorate to be valid. It would be "grandfathered in." However, an increase in the tax subsequent to the effective date of Proposition 26 would require a vote.

Now assume that subsequent to the effective date of Proposition 26, Alpha increases the fee charged for electric service from $100 to $120 a month, but leaves the transfer to the general fund unchanged. Omega retains the $100 per month fee, but increases the transfer from $15 to $20. Which city is required to submit its action to a vote of the electorate? Under the majority opinion in the instant case, it would be only Omega, not Alpha. Amicus submits, contra, that a "tax" within the meaning of Article XIIIC would require a vote of only Alpha, not of Omega.

B. THE HISTORY OF PROPOSITION 26

In Section 2 of Proposition 218, the people declared that Proposition 13 (passed in 1978) was intended to require voter approval of tax increases by local government, but that local governments have subjected taxpayers to excessive taxes, assessments, fees and charge increases that frustrated the purposes of voter approval.

For that reason, Proposition 218 added Article XIIIC to the State Constitution. It requires local government to submit the imposition, extension or increase of any general tax to the electorate for approval by a majority vote. However, as added by Proposition 218, Article XIIIC did not define the word "tax."

In 2010, the people passed Proposition 26. In section1(e) of Proposition 26, the people declared that local governments have disguised new taxes as fees in order to extract even more revenue from taxpayers without having to abide with the constitutional voting requirements. In Section 1(f) the people declared they were defining "tax" in order that local governments may not circumvent voting requirements by simply defining new or expanded taxes as fees.

In addition, Proposition 26 expressly shifted the burden of proof to local government on whether a levy, charge or other extraction by local government is a tax

Beginning with Proposition 13 and ending with Proposition 26, we have a history of struggle between the people seeking a voice in local government's passage of revenue raising measures and local government inventing devices to silence that voice. It is against this backdrop that this Supreme Court must resolve this case.

C. IT IS THE RATE CHARGED, NOT THE TRANSFER, WHICH CONSTITUTES THE TAX

It is the rate charged to ratepayers for electric service that can be a tax under Article XIIIC, as amended by Proposition 26; that portion of those rates that are collected and transferred to the general fund is not a tax.

Section1(e) unmistakably equates the word "tax" with the word "charge." Section 1(e) begins *"...**'tax'** means any levy, **charge** or extraction of any kind imposed by local government except...[seven listed exceptions]"* The last paragraph of Section 1(e) reads *"...local government bears the burden of proving...that a levy, **charge** or other extraction is not a **tax.**"*

The three nouns, "levy," "charge" and "extraction," do **not** describe how a government decides to employ its funds, once collected. Rather, the three nouns describe how a government collects the funds which it subsequently employs. In the instant case, it is the REU that **collects** the funds, i.e., the charges paid by ratepayers.

When we look at the second exception to the word "tax" (the one on which the city relies), it is evident that "tax" refers to the fees paid by ratepayers. The exception states, in pertinent part:

> ...**'tax'** means any...**charge**... imposed by a local government, except the following:...
>
> (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."

At bar, the only charge imposed for a specific governmental service or product provided directly to payors is that of the electric rates charged in exchange for providing electric power and service. Once collected, the city determines how to allocate those funds. It is transfering a portion to the general fund just as it uses a portion of the funds to pay salaries, for equipment, for electric power, and other electric needs.

It should be noted that all seven listed exceptions, except the last, use the word "charge." All seven of the exceptions refer to the fees imposed upon the payor. None of the exceptions refer to the transfer of monies.

In sum, the tax is the fee charged to and paid by the ratepayer. The transfer is not the tax. Under the exception of Section 1(e)(2), the city has the burden to show that the amount charged does not exceed the reasonable costs of providing the electric service or product. Thus, the city must prove how that portion of the funds it transfers to the general fund is used. The transfer is simply evidentiary; it is not, in and of itself, a tax.

While Amicus respectfully submits the word "tax" in Article XIIIC unambiguously refers to rates charged to ratepayers, should there be any ambiguity, our courts will look to the official ballot pamphlet. *(Legislature v. Eu* (1991) 54 Cal. 3d 492,504)

The official ballot pamphlet for Proposition 26 contains a legislative analyst section on the definition of State or Local Tax. It makes it clear that "tax" is the fee paid by ratepayers; it is not how that fee, once collected, is used. The legislative analyst states:

> This measure broadens the definition of...local **tax** to include many **payments** currently considered to be **fees or charges.**
>
> ...
>
> The **change** in the definition of **taxes** would not affect most **user fees**,...This is because these **fees and charges** generally comply with Proposition 26's requirements already,
> or are exempt from its provisions. In addition, most other **fees or charges** in existence at the time of the November 2, 2010 election would not be affected unless: The...local government later increases or extends the **fees or charges.** (In this case, the ...local government would have to comply with the approval requirements of proposition 26) [see Ballot Pamphlet, General Election (November 2, 2010), Analysis of Proposition 26 by Legislative Analyst, p. 58]

In the instant case, the only **user fee** is the fee paid by REU ratepayers for the use of REU electric power and service. A transfer is not a user fee. The April 2011 Proposition 26 Implementation Guide of the League of California Cities is instructive on this issue. It states at page 24:

> **Accordingly, gas and electric service fees imposed by public utilities constitute taxes under Proposition 26** unless they:

• Are imposed pursuant to legislation which predates its adoption; or

• Comply with one of its exceptions, such as the exception of § 1(e)(2) for "[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."

Arguably, transferring funds from a gas or electric utility to a local government's general fund without a cost justification to do so is evidence the fees exceed the reasonable cost to provide service and therefore constitute taxes under Proposition 26's definition of the term.

Based upon the foregoing, Amicus asserts that, as a matter of law, by the enactment of Proposition 26, the people intended that it is the rate charged that is the tax, not the transfer of the fees collected. The people passed Proposition 26 to ensure they would have a voice when government imposes, extends or increases **charges they must pay** when such charges are a vehicle for raising revenue rather than being restricted to defraying costs.

III. REASONABLE COST EXCEPTION (Supreme Court Issue #2)

Amicus concurs that the reasonable cost of service exception in Section 1(e)(2) is a question of fact and that the burden is upon the city. The parties before this court have fully briefed this issue. Amicus agrees with the position of the plaintiff. Amicus will address one particular argument put forth by the city in its opening brief.

The city argues that the PILOT is a compelled cost like the costs associated with the greenhouse mandate of 2000's A.B.32 or with the safety requirements of the Federal Occupational Safety and Health Administration. The comparison is not apt. The costs associated with greenhouse mandates and safety requirements are impositions

external to the city. They are imposed to achieve regulatory ends. The city has no say in their imposition. The PILOT, on the other hand, is self-imposed by the city for the purpose of utilizing revenue for general purposes. It has no regulatory basis. It is the very purpose of Proposition 26 to insure that when a city increases fees to be used for general purposes, the electorate is to have a voice.

IV. PROPOSITION 26 AND RETROACTIVITY (Supreme Court Issue #3)

Amicus submits that the issue of retroactivity is irrelevant to the PILOT in the case at bar. As set forth hereinabove, Amicus contends that it is the charge that constitutes the tax; it is not the transfer.

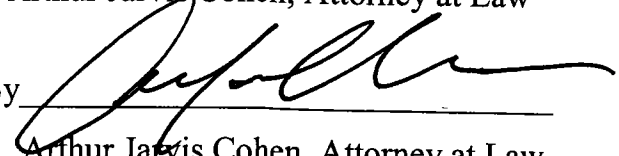
V. CONCLUSION

This is the first Supreme Court decision considering Proposition 26. It will be the foundation upon which the law shall evolve. A sound foundation requires this court to critically examine what the word "tax" means as used in California Constitution, Article XIIIC. Amicus respectfully submits that the Courts below have not yet done so and have proceeded upon an unexamined assumption.

Respectfully submitted,

July 29, 2015

Harry Zavos, Attorney at Law
Arthur Jarvis Cohen, Attorney at Law

By 

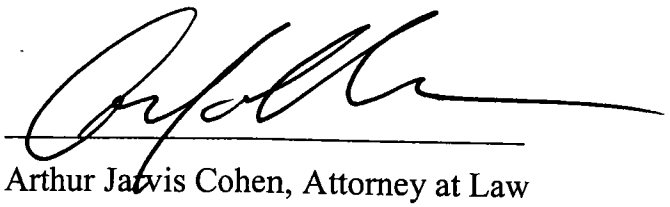
Arthur Jarvis Cohen, Attorney at Law

CERTIFICATE OF LENGTH

[RULE 8.504(d)(1)]

I, Arthur Jarvis Cohen, amicus counsel for Glendale Coalition for Better Government, hereby certifies that this brief was produced on a computer and that the number of words in the brief is 2,223.

July 29, 2015



Arthur Jarvis Cohen, Attorney at Law

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing _____ and know its contents.

CHECK APPLICABLE PARAGRAPHS

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner ☐ a Board Member of GLENDALE COALITION FOR A BETTER GOVERNMENT., a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☒ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing documents are true.

Executed on July _____, 2015, at Glendale, California.

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

_____ _____

Printed Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2 Venture, Suite 120, Irvine, California 92618.

On, July 30, 2015, I served the foregoing document described as **APPLICATION OF GLENDALE COALITION FOR BETTER GOVERNMENT FOR AMICUS CURAIE AND AMICUS CURAIE BRIEF** on interested parties in this action

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