

Case No. S262634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON,
Plaintiffs-Appellants,

v.

CITY OF OAKLAND,
Defendants-Respondents.

After a Published Decision by the Court of Appeal, First
Appellate District, Division 1 (Case No. A154986)

**APPLICATION FOR LEAVE TO FILE BRIEF OF
BAY AREA TOLL AUTHORITY AND
METROPOLITAN TRANSPORTATION
COMMISSION AS AMICI CURIAE IN SUPPORT
OF CITY OF OAKLAND,
AND BRIEF OF AMICI CURIAE**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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**APPLICATION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE**

Amici are the Metropolitan Transportation Commission (MTC) and the Bay Area Toll Authority (BATA). MTC is a public agency created by statute to provide regional transportation planning for the nine-county San Francisco Bay Area. (Gov. Code, § 66502.) The Legislature created BATA to administer toll revenues from the seven Bay Area bridges, among other purposes. (Sts. & Hy. Code, § 30950.)

Amici are respondents in *Howard Jarvis Taxpayers Association, et al. v. Bay Area Toll Authority, et al.*, No. S263835. This Court has granted the appellants’ petition for review in that case and deferred briefing pending its decision on a related question in this case. (See Order, dated October 14, 2020, Case No. S263835.) So Amici have a direct stake in the outcome of this case.

In Amici’s case, the Court of Appeal held—contrary to the Court of Appeal in this case—that charges imposed for the entrance to or use of government property are excepted from the definition of a “tax” enacted in Proposition 26, and that nothing in Proposition 26 narrows that exception by imposing a substantive reasonableness requirement. (*Howard Jarvis Taxpayers Assn. v. Bay Area Toll Auth.* (2020) 51 Cal.App.5th 435, 459-61 (*BATA*); see *id.* at p. 461, fn. 18 [“The *Zolly* court did not engage in the textual analysis that leads us to conclude [that Proposition 26’s burden of proof provision] does not impose a substantive requirement of reasonableness beyond that stated in

[Proposition 26’s enumerated exceptions].”.) The *BATA* court thus rejected a challenge to a recent toll increase that had been imposed by the Legislature and approved by regional voters. The court reasoned that a charge to cross a State-owned bridge is plainly a charge for entrance to or use of State property, which is not a “tax” under the express language of Proposition 26. (*Id.* at pp. 459-60.)

Amici submit this brief to illustrate how this question will affect the State’s authority over its bridges in the *BATA* case—and governments’ ability to regulate their own property more generally. Amici also seek to explain why the *BATA* court, rather than the Court of Appeal in this case, correctly interpreted the exception for charges for entering, using, purchasing, renting, or leasing government property under Proposition 26.

Amici therefore request leave to file the attached brief, under California Rule of Court 8.520(f), in support of Respondent City of Oakland. This application is filed within 30 days after the filing of the final brief on the merits and is therefore timely pursuant to Rule 8.520(f)(2). Amici state, under California Rule of Court 8.520(f)(4), that: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than Amici or their counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

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**BRIEF OF BAY AREA TOLL AUTHORITY AND
METROPOLITAN TRANSPORTATION COMMISSION AS
AMICI CURIAE IN SUPPORT OF CITY OF OAKLAND**

Proposition 26 pairs an expansive definition of a “tax” with carefully defined exceptions that prevent heightened voting requirements from applying every time people must pay money to the government. One exception covers charges “imposed for entrance to or use of,” or “purchase, rental, or lease” of State or local government property. (Cal. Const. art. XIII A, § 3, subd. (b)(4); art. XIII C, § 1, subd. (e)(4).) This case involves a charge that the decision below described as “arguably” fitting within that exception: a waste-collection franchise fee. (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 88 (*Zolly*).) Amici’s case, which is being held for this one, involves an even more clear example of such a charge: a toll imposed by the State for crossing a State-owned bridge.

The plaintiffs in both cases ask this Court to add an additional requirement before any charge for entering, using, purchasing, renting, or leasing government property is determined not to be a “tax”: that the charge be limited to the “reasonable costs” of the governmental activity and bear a “reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” But the government-property exception—unlike three other exceptions to Proposition 26’s definition of “tax”—contains no such reasonableness requirement.

The *Zolly* plaintiffs argued below—and the Court of Appeal in this case agreed—that a burden-of-proof provision applicable

to those three other exceptions should be grafted on to *all* of Proposition 26's exceptions. But plaintiffs now abandon that textually unsustainable argument. Instead, they now press a second argument to this Court: that the government-property exception implicitly incorporates that same "reasonable costs" requirement through the term "imposed for." That argument was not pressed to or passed upon by the court below, but the Court of Appeal in Amici's case squarely addressed and rejected it.

Both arguments require a tortured interpretation of the initiative's plain text; would render the "reasonable costs" limits expressly included in the other exceptions mere surplusage; would lead to absurd results like limiting criminal fines and penalties to "the reasonable costs of the governmental activity," whatever that might mean; and cannot be squared with Proposition 26's history or the information presented to the voters, which made clear that the newly expanded definition of a "tax" would be limited to *regulatory* fees, while exempting fees for entering or using government property. (*Infra* § I.)

Requiring the State and local governments to show that every charge for entering, using, purchasing, renting, or leasing government property is limited to "the reasonable costs of the governmental activity" will be arbitrary and unworkable in practice. (Is a \$3 toll increase that funds a portion of highway improvements on a nearby bridge corridor "reasonable" even if certain drivers do not use that particular stretch of highway? What if it funds improvements to public transit that drivers do not use, but that will lead to less traffic on the bridge?)

Governments undertaking the everyday business of charging for property access, or selling, renting, or leasing their property, will face burdensome litigation driven by speculative assessments of the value of minute property interests—litigation that will serve only to tie up much-needed funds derived from the government’s own property, just as the litigation in Amici’s case has. None of this is consistent with Proposition 26’s blanket exception for government property charges. (*Infra* § II.)

This Court should reverse.

BACKGROUND

A. Amici MTC and BATA

The Metropolitan Transportation Commission (MTC) is the regional transportation planning agency for the Bay Area, including the City and County of San Francisco, and Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma Counties. (Gov. Code, § 66502.) The Bay Area Toll Authority (BATA) is a public instrumentality of the State, created by the Legislature and governed by the same board as MTC. (Sts. & Hy. Code, § 30950.) BATA was established to administer toll revenues from the State-owned bridges in MTC’s geographic jurisdiction. (*Id.* § 30950.2, subd. (a).) BATA administers tolls on seven State-owned toll bridges: the Antioch Bridge, Benicia-Martinez Bridge, Carquinez Bridge, Dumbarton Bridge, Richmond-San Rafael Bridge, San Mateo-Hayward Bridge, and San Francisco-Oakland Bay Bridge. (*Id.* § 30910.)

B. Senate Bill No. 595 and Regional Measure 3

In 2017, the Legislature enacted, and Governor Brown signed, Senate Bill No. 595 (SB 595) to address traffic congestion on and leading to the seven State-owned bridges in the Bay Area. (See *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Auth.* (2020) 51 Cal.App.5th 435, 442-43 (*BATA*.) SB 595 directed Bay Area counties to call a special election in which voters would consider a toll increase on the State-owned bridges. If the voters approved the measure, SB 595 directed BATA to increase the toll accordingly, and to apply revenue from the tolls to fund 35 specified projects, including improvements to bridges, highways, and public transportation. (*Id.*; see also Sts. & Hy. Code, § 30914.7, subd. (a) [designating specific amounts of funds for each project], §§ 30915-16, 30918, 30920, 30922, 30923 [describing the voter approval process]; Stats. 2017, ch. 650, §§ 4-14.) SB 595 passed with 67% support of the Senate and 54% of the Assembly. (*BATA, supra*, at p. 442.)

As required by SB 595, the Bay Area counties then placed Regional Measure 3 (RM3) on the ballot in 2018. RM3 asked whether voters would approve \$1 toll increases on the bridges effective in 2019, 2022, and 2025. Bay Area voters approved RM3 with more than 55 percent in support. (*BATA, supra*, 51 Cal.App.5th at p. 443.)

C. *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*

The Howard Jarvis Taxpayers Association and four individuals (collectively, “HJTA”), sued the Legislature, BATA,

and MTC in two actions that were later consolidated on appeal. (*BATA, supra*, 51 Cal.App.5th at pp. 444-45.) HJTA claimed that the toll increase was unconstitutional. As relevant here, HJTA argued that the toll increase was an unlawful “tax” under Proposition 26, and thus SB 595 was invalidly passed with less than a two-thirds vote of the Assembly, in violation of article XIII A of the California Constitution. (*Id.* at p. 446.)

The San Francisco Superior Court (Schulman, J.) granted the defendants’ motions for judgment on the pleadings in both cases. (See *Howard Jarvis Taxpayers Assn. v. The Bay Area Toll Auth.* (Cal. Super., Apr. 3, 2019, CGC-18-567860) 2019 WL 10984287, at *1 (*Howard Jarvis Taxpayers Assn.*); *BATA, supra*, 51 Cal.App.5th at p. 442.) The trial court held that the toll increase fell under Proposition 26’s exception from the definition of “tax” covering charges for “entrance to or use of state property,” known as “exception 4” or the “state-property exception.” (*Howard Jarvis Taxpayers Assn.*, 2019 WL 10984287, at *1; *BATA, supra*, 51 Cal.App.5th at p. 442; see also Cal. Const. art. XIII A, § 3, subd. (b)(4).) The court further rejected HJTA’s argument that article XIII A, section 3, subdivision (d) imposed an independent substantive “reasonable costs” requirement on charges for entrance to or use of State property, rather than operating as a burden-of-proof provision. (*Howard Jarvis Taxpayers Assn., supra*, 2019 WL 10984287, at *1-2.)

The Court of Appeal affirmed in a unanimous decision. (*BATA, supra*, 51 Cal.App.5th at p. 462.) For reasons discussed in more detail below, the Court of Appeal agreed with the trial

court that the toll increase is a “charge imposed for entrance to or use of state property” and thus not a “tax” under article XIII A, section 3, subdivision (b). (*Id.* at pp. 458-460.) The Court of Appeal also addressed this case, observing that the *Zolly* Court of Appeal “came to a different conclusion in construing analogous constitutional provisions applicable to local government” under article XIII C. (*Id.* at p. 461, fn. 18.) The *BATA* court further explained that the Court of Appeal in this case “did not engage in the textual analysis” that led to the court’s result in *BATA*. (*Id.*) The court, however, “express[ed] no opinion on [*Zolly*’s] ultimate conclusion as to whether and when a franchise fee constitutes a tax”—a question that was not at issue in *BATA*, which instead involves a typical property entrance fee. (*Id.*)

HJTA petitioned this Court for review. Shortly after, the Court granted the City of Oakland’s petition in this case. (*Zolly v. City of Oakland* (2020) 267 Cal.Rptr.3d 202.) This Court subsequently granted HJTA’s petition and deferred further action. (*Howard Jarvis Taxpayers Assn. v. Bay Area Toll Auth.* (2020) 269 Cal.Rptr.3d 787.)

ARGUMENT

I. Charges For Entering Or Using State Or Local Government Property Are Categorically Not “Taxes” Under Proposition 26.

A. Proposition 26’s government-property exception imposes no “reasonable costs” requirement.

When the voters amend the law by initiative, what they say and what they mean are one and the same. So, when

interpreting an initiative, the Court “begin[s] with the text as the best guide to voter intent.” (*In re C.B.* (2018) 6 Cal.5th 118, 125.) And, as a corollary, this Court refuses to “add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.” (*People ex rel. Lungren v. Super. Ct.* (1996) 14 Cal.4th 294, 301 [quoting *Leshar Comms., Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543].)

The voters spoke clearly in Proposition 26. They began by codifying a capacious definition of a “tax”: “*any* levy, charge, or exaction of *any* kind imposed by the State” or “by a local government.” (Cal. Const. art. XIII A, § 3, subd. (b), italics added; art. XIII C, § 1, subd. (e).) Previously, what counted as a “tax” versus a “fee” had been determined under a multifactor test that often led to “blurred” results. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874; see *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 (*City of San Buenaventura*); *Cal. Bldg. Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048 (*CBIA*).) Proposition 26 replaced that approach with a bright-line default rule by making *all* payments to the government presumptively a “tax,” and thus subject to heightened voting requirements.

But because that broad new definition would sweep in all manner of financial transactions with the government that should not be subject to the voting requirements for a “tax,” the voters then expressly exempted several types of charges imposed by state and local governments. (See Cal. Const. art. XIII A, § 3,

subd. (b)(1)-(5); art. XIII C, § 1, subd. (e)(1)-(7).) Those exceptions take two different forms.

The first three exceptions all cover charges for government benefits, services, or permits—but only if those charges are limited to “the reasonable costs” that the State or local government incurred in providing those benefits. Article XIII A (governing state charges) and article XIII C (governing local government charges) thus exempt:

(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 [State or local government] of conferring the benefit or granting the privilege to the payor.

(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 [State or local government] of providing the service or product to the payor.

(3) A charge imposed for *the reasonable regulatory costs* to [the State or a local government for] issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(Cal. Const. art. XIII A, § 3, subd. (b)(1)-(3), italics added; see art. XIII C, § 1, subd. (e)(1)-(3).)

A second category of exceptions covers charges relating to certain essential government functions. These exceptions are categorical; they do not include any mention of the “reasonable costs” of the government activity. This category includes the fourth and fifth exceptions under articles XIII A and XIII C (for entering, using, purchasing, renting, or leasing government property; and for criminal fines and penalties), and the additional sixth and seventh exceptions under article XIII C (for property development charges and assessments). (Cal. Const. art. XIII A, § 3, subd. (b)(4)-(5); art. XIII C, § 1, subd. (e)(4)-(7)).

The fourth exception—raised here by the City of Oakland (under article XIII C) and by Amici in our pending case (under article XIII A)—applies to “[a] charge imposed for entrance to or use of [state or] local government property, or the purchase, rental, or lease of [state or] local government property.” (Cal. Const. art. XIII C, § 1, subd. (e)(4); Art. XIII A; § 3, subd. (b)(4).) Any “charge that satisfies [that] exception”—by being (1) imposed by the government (2) for entrance to or use of (3) its property—“is, by definition, not a tax.” (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 11.).

The absence of reasonable-costs requirement in the fourth exception should be given meaning. As the *BATA* court put it, because “[t]he first three exceptions to the general definition of ‘tax’ contain language limiting the charge to reasonable costs, and the fourth and fifth exceptions [under article XIII A] do not,”

that “absence” of the “reasonable costs” language from the fourth exception “strongly suggests the limitation does not apply where it is not stated.” (*BATA, supra*, 51 Cal.App.5th at pp. 459-60; see *Tuolumne Jobs & Small Bus. All. v. Super. Ct.* (2014) 59 Cal.4th 1029, 1037 [when a law’s text “makes no mention” of a limitation, the plain “language does not support imposing” that requirement].)

B. The burden-of-proof provision does not create a “reasonable costs” requirement.

The decision below nevertheless held that a “reasonable costs” requirement applies to the local-government-property exception in article XIII C. That theory relies not on the text of the exception itself, but instead on a burden-of-proof provision in article XIII C, section 1, subdivision (e). (*Zolly, supra*, 47 Cal.App.5th at p. 87.) The burden-of-proof provision states that “[t]he local government bears the burden of proving by a preponderance of the evidence [1] that a levy, charge, or other exaction is not a tax, [2] that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and [3] 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).) Article XIII A contains a parallel burden-of-proof provision applicable to the State. (Cal. Const. art. XIII A, § 3, subd. (d).) According to the decision below, the reasonableness language applies not “only to the first three exemptions that explicitly include a

reasonableness requirement,” but rather “to all seven exemptions,” including the four that omit any reasonableness requirement. (*Zolly, supra*, 47 Cal.App.5th at p. 87.)

Plaintiffs now abandon that argument before this Court. They instead “agree with *Bay Area Toll* and Oakland that the reasonable-cost burden of proof applies only to the first three exceptions.” (Answer Br. at p. 34; see *id.* at p. 35, fn. 11.) Because this was the sole basis for the decision below, however, we address it briefly.

The decision below erred in mistaking subdivision (e)’s assignment of the burden of proof for a generally applicable substantive requirement. The burden-of-proof provision dictates *who* must establish the reasonable-costs requirement *when it applies* under a given exception; it does not impose a separate substantive reasonable-costs requirement *independent* of the enumerated exceptions. As the *BATA* court recognized, this allocation of the burden of proof was one of Proposition 26’s main objectives. (*BATA, supra*, 51 Cal.App.5th at p. 461.) Previously, under *Sinclair Paint*, a challenger bore the burden to show that a fee was invalid. (*Sinclair Paint, supra*, 15 Cal.4th at p. 881.) After Proposition 26, “[t]he state, not the challenger, must now prove all facts necessary to show that a levy satisfies an exception to the definition of the term ‘tax.’” (*CBIA, supra*, 4 Cal.5th at p. 1048.)

In other words, the burden-of-proof provision requires the State or local government to be the party who shows that a charge is not a tax—meaning that it satisfies each requirement of

whichever exception the government is invoking—unlike before Proposition 26, when the challenger had the burden of showing that the charge was a tax. (*Sinclair Paint, supra*, 15 Cal.4th at pp. 876, 881.) So, where the applicable exception requires that a charge be “no more than necessary to cover the reasonable costs of the governmental activity” in relation to a government benefit or service, the government now bears the burden of showing as much. But the provision does not impose a freestanding reasonable-cost requirement of its own, separate from the substantive requirements imposed within each exception. As the *BATA* court explained, the contrary reading would “render the express reasonableness language in the first three exceptions surplusage”—a “construction ... to be avoided.” (51 Cal.App.5th at pp. 459-60, quoting *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 (*McCarther*).

It would also lead to absurd results. The fourth and fifth exceptions cover charges that have never been tethered to any cost to the State or local government, like charges imposed for “the purchase, rental, or lease of state [or local government] property,” (Cal. Const. art. XIII A, § 3, subd. (b)(4); art. XIII C, § 1, subd. (e)(4)), and any “fine, penalty, or other monetary charge imposed by the judicial branch of government” or the State or local government, as “a result of a violation of law,” (art. XIII A, § 3, subd. (b)(5); art. XIII C, § 1, subd. (e)(5)). There is no reason to think the voters meant to suddenly—and silently—bar governments from charging fair-market value in property transactions or from setting fines and penalties designed to deter

and restore. Yet the *Zolly* Court of Appeal’s interpretation would limit those charges to “the reasonable costs of the governmental activity,” absent supermajority votes.

Unlike the *BATA* decision, the decision below “did not engage in th[is] textual analysis,” and it erred as a result. (*BATA*, *supra*, 51 Cal.App.5th at p. 461, fn. 18.)

C. The phrase “imposed for” similarly does not create a reasonable costs requirement.

Plaintiffs now advance a different argument—one that the decision below did not address at all, and that the Court of Appeal in *BATA* swiftly rejected when it was pressed there. This Court should not become the first to adopt it.

Plaintiffs contend that the phrase “imposed for” in the fourth exception implies that a charge may not “exceed[] any reasonable estimate” of the value of “the use of city [or state] property.” (Answer Br. at pp. 33-34.) In their view, such a “charge is not ‘imposed for’ the utility’s use of city property but rather ‘for generating revenue independent of the purpose of the fees.’” (Answer Br. at p. 33.) But that is not how the phrase “A charge imposed for” parses in the first four exceptions. As the *BATA* court explained, the “direct referent of ‘for’ is the action of the state, not the use to which revenues will be put.” (*BATA*, *supra*, 51 Cal.App.5th at p. 460.)

That is, “A charge imposed for” X means that X is the *triggering condition* for the charge, not the *motivation* for it. A customer who asks her bank, “What was this charge imposed for?” is asking what she did to incur the charge, not how the bank

will spend the proceeds. Likewise, “A charge imposed for entrance to or use of [state or local] property” means simply that entering or using the property is what triggers imposition of the charge—like a toll to cross a bridge.

Moreover, as the *BATA* court recognized, even though “[a]ppellants say their ‘for’ argument does not seek to apply the reasonable cost burdens,” that “in effect ... is just what it does.” (*BATA, supra*, 51 Cal.App.5th at p. 460.) By arguing that the franchise fee here is “not ‘imposed for’ the utility’s use of city property but rather ‘for generating revenue independent of the purpose of the fees,’” plaintiffs are just saying that the franchise fee is not limited to the “reasonable cost” to the government of the use of its property. (Answer Br. at p. 33.)

Transplanting their “reasonable costs” argument into the “imposed for” text suffers from the same flaws as the argument plaintiffs made (and the Court of Appeal adopted) below: It ignores that “[t]he first three exceptions expressly limit the amount of the charge” while the fourth exception “do[es] not.” (*BATA, supra*, 51 Cal.App.5th at p. 460.) All four exceptions use the same “imposed for” language—a “charge imposed for” a benefit or privilege, a service or product, regulatory costs, and entrance to or use of state or local government property or purchase, rental, or lease of that property. (See Cal. Const. art. XIII A, § 3, subd. (b)(1)-(4); art. XIII C, § 1, subd. (e)(1)-(4).) The first three also impose express reasonableness limitations. If “imposed for” connoted a reasonable-relation requirement, as plaintiffs contend, then the explicit “reasonable costs” language

in the first three exceptions would be surplusage—a construction “to be avoided.” (*McCarther, supra*, 48 Cal.4th at p. 110.) In the first and second exceptions, for example, the “and which does not exceed the reasonable costs to the [government of providing a benefit or service]” clauses would be entirely unnecessary if “A charge imposed for [a benefit or service]” already contained that limitation.

Plaintiffs nevertheless insist that “imposed for” must limit the fourth exception because they believe that *something* in the fourth exception must restrict the government-property charges that can be excepted from the definition of a “tax.” (Answer Br. at pp. 30-31, 35-36.) But several other Proposition 26’s exceptions—the fifth, sixth, and seventh—contain no reasonableness limitation either. Plaintiffs acknowledge that the fourth through seventh exceptions “do not include express limits.” (Answer Br. at p. 31.) They observe that the fifth, sixth, and seventh are at least limited by “background constitutional principles,” and so they suggest that the fourth exception should be read to contain some other unspoken limit as well. (Answer Br. at pp. 30-32.) Plaintiffs point, for example, to the excessive fines clauses of the United States and California Constitutions, which limit penalties and fines of the sort covered by the fifth exception (Cal. Const. art. XIII C, § 1, subd. (e)(5); art. XIII A, § 3, subd. (b)(5)), and the state and federal constitutional limitations on conditions imposed on property development plans and special assessments of the sort covered by the sixth and seventh

exceptions (Cal. Const. art. XIII C, § 1, subd. (e)(6)-(7)). (Answer Br. at pp. 31-32.)

But the fact that independent constitutional restrictions limit those governmental charges says nothing about whether Proposition 26 does. If anything, plaintiffs' argument proves too much, because it would have Proposition 26 "imposed for" limitation *eclipse* those constitutional protections. Under California's excessive fines clause, for example, sentencing courts must weigh "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Yet under plaintiffs' reading, courts would also have to consider whether a criminal penalty was "more than necessary to cover the reasonable costs of the *governmental activity*." (Art. XIII A, § 3, subd. (d), italics added; Art. XIII C § 1, subd. (e).) So too for the property development and assessment exceptions.¹

¹ Under the Due Process Clause of the Fifth Amendment of the United States Constitution, courts look at whether there is a "nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." (*Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 605-06.) Property assessments and related fees are also limited by carefully defined substantive and procedural rules in the California Constitution. (Cal. Const. art. XIII D, § 4, subd. (a) & § 6, subd. (b)(3).) None of these tests, however, include whether the charge exceeds the "reasonable costs" of the "governmental activity" involved.

D. The history of Proposition 26 shows that California voters intended to apply a “reasonable costs” requirement only to those exceptions that explicitly include one.

Plaintiffs concede that “the fourth exception can be read” to “support Oakland’s view,” but they urge the Court to instead adopt “a contextual reading” that “elucidates an alternative meaning better aligned with the voters’ stated intent.” (Answer Br. at p. 29.) Even setting aside that the language of the initiative is “the first and best indicator of [the voters’] intent” (*Kwikset Corp. v. Super. Ct.* (2011) 51 Cal.4th 310, 321), plaintiffs’ “contextual” argument fails on its own terms because plaintiffs have misread Proposition 26’s context, purpose, and history.

As noted above (at p. 18), Proposition 26 was largely a response to this Court’s decision in *Sinclair Paint*. (*City of San Buenaventura, supra*, 3 Cal.5th at p. 1200.) *Sinclair Paint* concerned a charge imposed on manufacturers of lead products to fund a health program for children with lead poisoning. (*Sinclair Paint, supra*, 15 Cal.4th at pp. 872-73.) This Court concluded that such charges were permissible “regulatory fees, not taxes” because the amount was reasonably related to the societal harm caused by those paying the fee. (*Id.* at p. 870.)

The Court observed that the term “tax” “ha[d] no fixed meaning” at the time, and the line between taxes and fees “[wa]s frequently ‘blurred.’” (*Sinclair Paint, supra*, 15 Cal.4th at p. 874.) So this Court surveyed post-Proposition 13 case law and concluded that courts had found three categories of “fees or

assessments” that were not taxes. (*Ibid.*) Those categories included: (1) “special assessments, based on the value of benefits conferred on property”; (2) “development fees, exacted in return for permits or other government privileges”; and (3) “regulatory fees, imposed under the police power.” (*Ibid.*) But all three types of fees had to be limited to an amount that bore “a reasonable relation” to the benefit conferred on (or harm caused to) the community by the payor’s activity. (*Id.* at pp. 874-75.) And the challenger bore the burden of showing that a fee exceeded that amount. (*Id.* at p. 881.) Because the plaintiff challenging the fee in *Sinclair Paint* had failed to “contend that the fees exceed[ed] in amount the reasonable cost of providing the protective services for which the fees [we]re charged,” the charge was held to be a regulatory fee, not a tax. (*Id.* at pp. 876, 881.)

Proposition 26 “codifie[d] *Sinclair Paint* in significant part,” (*City of San Buenaventura, supra*, 3 Cal.5th at p. 1210, fn. 7), but it “d[id] not mirror [this Court’s] discussion.” (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262, fn. 5 (*Jacks*)). Rather, Proposition 26 also superseded *Sinclair Paint* in three targeted but significant ways.

First, Proposition 26 reclassified many “health” and “environmental” regulatory fees—like the lead-paint remediation fee at issue in *Sinclair Paint* itself—as *taxes* subject to heightened voting requirements rather than fees. (Voter Information Guide for 2010, General Election (Aug. 10, 2010) pp. 57-58 (Voter Guide).) Whereas *Sinclair Paint* treated such charges as non-tax fees so long as they were *proportionate to the*

societal harm they aimed to address, under Proposition 26, regulatory “fees [that] pay for many services that benefit the public broadly” would now be treated as taxes, unless they were *proportionate to the cost of “providing services directly to the fee payer.”* (*Id.* at p. 58, italics added.) The Voter Guide provided a list of examples of those sorts of general health-and-public-welfare regulatory fees that would now be classified as taxes, including an “oil recycling fee,” a “hazardous materials fee,” and “fees on alcohol retailers.” (*Id.*, capitalization omitted.)

Second, Proposition 26 codified a definition of “tax” for the first time. From Proposition 13 through *Sinclair Paint*, “determining whether a levy was a fee or a tax [had] bec[o]me ‘a recurring chore’ for California courts” because Proposition 13 had not defined the term. (*CBIA, supra*, 4 Cal.5th at p. 1045.) So Proposition 26 set out a broad definition—“*any* levy, charge, or exaction of *any* kind imposed by the State” or local governments (Cal. Const. art. XIII A, § 3, subd. (b), italics added)—and provided clear, categorical exceptions to that definition.

The Voter Guide thus distinguished among three different types of fees and charges: “user fees” for things like “state park entrance fees” where the “user pays for the cost of a specific service or program”; “[r]egulatory fees”—like the fee in *Sinclair Paint*—that “achieve particular public goals or help offset the public or environmental impact of certain activities”; and “[p]roperty charges” like those “imposed on property developers ... that pay for improvements and services that benefit the property owner.” (Voter Guide, *supra*, at p. 56.) Importantly, under the

heading “Some Fees and Charges Are Not Affected,” the Voter Guide explained that “[t]he change in the definition of taxes *would not affect* most user fees, property development charges, and property assessments.” (Voter Guide, *supra*, at p. 58, italics added.) That is because “these fees and charges generally comply with Proposition 26’s requirements already, *or are exempt from its provisions.*” (*Id.*, italics added.)

Instead, “the types of fees and charges that would become taxes ... are ones that [the State or local] government imposes to address health, environmental, or other societal or economic concerns”—that is, *regulatory* fees like the remediation fee in *Sinclair Paint*. (Voter Guide at p. 58.) This is confirmed by Proposition 26’s own statement of purpose, which focused on “[f]ees couched as ‘regulatory’ but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program” and thus would now be treated as taxes. (Prop. 26, § 1, subd. (e), reprinted at Historical Notes, 2B West’s Ann. Cal. Const. (2013) foll. art. XIII A, § 3, p. 114.) Far from being merely “illustrative example[s],” (Answer Br. at p. 42) the history of Proposition 26 shows that these categories of fees were the central focus of the proposition.

The result was a new, bright-line set of definitions that had not existed in the prior case law. Now, some fees (like environmental fees) are clearly included within the definition of “tax,” while other fees (like those for entering or using government property) are clearly excluded. The regulatory fees that the Voter Guide said “would become taxes,” (Voter Guide,

supra, at p. 58), are reflected in the first three exceptions. Those no longer treat charges designed to benefit *the public at large* as non-tax fees, but only those charges for benefits, services, licenses, and permits that are limited to the government’s reasonable cost of providing those activities *to the payor*. (Cal. Const. art. XIII A, § 3, subd. (b)(1)-(3); art. XIII C, § 1, subd. (e)(1)-(3).) And those charges that Proposition 26 did “not affect” because they are “exempt from its provisions” maps onto the list included in the Voter Guide: state and local government charges for the “entrance to or use of [state or local] government property” (user fees); charges “imposed as a condition of property development” (property development charges); and local government “[a]ssessments and property-related fees” (property assessments). (Cal. Const. art. XIII A, § 3, subd. (b)(4); art. XIII C, § 1, subd. (e)(4), (6)-(7).)

Third, as noted above, Proposition 26 flipped the burden of proof from the challenger to the government to show that the charge at issue is a fee rather than a tax. (See *supra*, at pp. 22-23.) Before Proposition 26 (and Proposition 218), courts presumed that fees were valid and required plaintiffs challenging those fees to show that the “record before the legislative body ‘clearly’ did not support the underlying determinations.” (*Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara Cty. Open Space Auth.* (2008) 44 Cal.4th 431, 444; see also *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 914.) Under Proposition 26, state or local governments “now have the burden to demonstrate that their assessments, fees, and other charges

satisfy the requirements of applicable constitutional provisions.” (League of California Cities, Propositions 26 and 218 Implementation Guide (May 2019) p. 118.)

Plaintiffs, and the decision below, derive a different lesson from this history: “The ballot materials uniformly indicate a desire to expand the definition of what constitutes a ‘tax’ for purposes of article XIII C.” (*Zolly, supra*, 47 Cal.App.5th at p. 87; see also Answer Br. at pp. 28-30, 40-44.) Drawing on Proposition 26’s “Findings and Declarations of Purpose,” and the analysis published by the Legislative Analyst, the Court of Appeal concluded that there was “extensive evidence regarding the voters’ intent in passing Proposition 26” to “require more types of fees and charges be approved by two-thirds of the Legislature or by local voters” and to prevent governments from “disguis[ing] new taxes as ‘fees’.” (*Zolly, supra*, 47 Cal.App.5th at pp. 87-88.) Plaintiffs likewise argue that Proposition 26 closed an existing “loophole” by “defin[ing] the distinction between taxes and fees” to prevent “mislabel[led]” fees that were really “hidden taxes.” (Answer Br. at p. 41.)

That analysis is too simplistic. Plaintiffs and the decision below fail to account for the different categories of fees and how the Voter Information Guide expressly addressed those that would *not* be affected by Proposition 26. Yet this history confirms that Proposition 26 did not act indiscriminately to convert fees to taxes across the board. Rather, the “loopholes” Proposition 26 sought to close involved *regulatory fees*. Most significantly, at the same time that the voters expanded the definition of “tax” to

include more regulatory fees and placed the burden on the State and local governments to demonstrate that a fee was *not* a “tax,” they also carefully *exempted* from heightened voting requirements several situations in which the State or local government charges people money in connection with basic, essential governmental powers—like imposing criminal fines and managing State or local government property. Not saddling those kinds of charges with an ill-fitting “reasonable costs to the government” requirement is fully consistent with Proposition 26’s history and purpose.

Finally, plaintiffs repeatedly claim that the fourth exception *must* be limited because they see no reason “why voters who intended to reinforce Proposition 218’s voter-approval limits would want to single out franchise fees,” or would “convert some taxes into fees” given Proposition 26 and its predecessor amendments’ “anti-tax” goal. (Answer Br. at pp. 32, 37, 43, italics omitted.) And plaintiffs warn that, if this Court disagrees with their simplified vision of Proposition 26’s history, the Court would be creating a “loophole” that cities and states “would rely heavily on ... to make money without obtaining voter consent.” (Answer Br. at p. 32.)

But Proposition 26 neither states nor reflects any sweeping “anti-tax” goal. Proposition 26 did not, for example, include Proposition 218’s requirement that its provisions “be liberally construed” to “limit[]” government revenue and “enhance[e] taxpayer consent.” (Prop. 218, § 5, reprinted at Historical Notes, 2B West’s Ann. Cal. Const. (2013) foll. art. XIII C, § 1, p. 363.)

That is because the voters did not intend to adopt a broad rule that indiscriminately swept in charges, like those involving State property, that had traditionally been considered fees. Rather, as the text and history of Proposition 26 show, the voters instead sought to restrict regulatory fees, and otherwise to more clearly distinguish between taxes and fees by creating a bright-line rule that charges are taxes, subject to several express categories of exceptions.

There is similarly no basis for plaintiffs' argument that adhering to Proposition 26's text and history will lead to an expansion of unreasonable charges adopted by the State and local governments. The political process operates as a significant independent check against adoption of arbitrary fees on government property for wholly unrelated purposes. The bridge toll increase in *BATA* is a case in point: Although the Legislature could have simply imposed the toll increase on the State-owned bridges in the Bay Area and made it immediately effective, the Legislature decided instead to condition it on Bay Area voters expressing their support of the increase and the purposes to which the toll proceeds would be applied. (*BATA, supra*, 51 Cal.App.5th at p. 442; see Sts. & Hy. Code, § 30923, subd. (e).) The toll increase ultimately went into effect only because the majority of voters in the region approved it. (*BATA, supra*, 51 Cal.App.5th at p. 442.)

E. *Jacks* does not bear on the interpretation of exception four.

Plaintiffs place considerable weight on this Court's decision in *Jacks*. That reliance is misplaced for two reasons.

First, *Jacks* did not interpret Proposition 26. Although Proposition 26's new definition of "tax" had been enacted by the time *Jacks* was decided, the dispute there predated Proposition 26, and the parties agreed that it did not apply. (3 Cal.5th at p. 260, fn. 4.) This Court therefore explained that it was "concerned only with the validity of the surcharge under Proposition 218," and that "Proposition 26's exception from its definition of 'tax' with respect to local government property is not before us." (*Id.* at p. 263, fn. 6.) In this case (and Amici's), in contrast, it is undisputed that Proposition 26 does apply. And it is Proposition 26's plain text, not *Jacks*'s construction of Proposition 218, that should control.

Plaintiffs nevertheless contend that because *Jacks* held that the part of a franchise fee that exceeds the franchise value is a tax, "Proposition 26 would have had to *remove*" that "existing limit" for Oakland and Amici to prevail. (Answer Br. at p. 42; *see id.* at pp. 9, 30.) In Plaintiffs' view, "Oakland's construction would mean that Proposition 26 *opened* a giant loophole," contrary to "the evident purpose of Proposition 26." (Answer Br. at p. 30, internal quotation marks omitted). But plaintiffs misunderstand the chronology: *Jacks* *post-dated* Proposition 26. (*Jacks, supra*, 3 Cal.5th at p. 260 fn. 4.) So plaintiffs' suggestion that Proposition 26 was enacted against the backdrop of *Jacks*—

and thus must be understood to embrace its holding—is simply mistaken.

Besides, as noted above, one of the major changes Proposition 26 worked was to replace the “frequently ‘blurred’” (and much-litigated) line between fees and taxes with an express, bright-line definition. (*Sinclair Paint, supra*, 15 Cal. 4th at p. 874.) Drawing that line would naturally cause a few former “taxes” to be reclassified as “fees” under Proposition 26’s clear exceptions, even as many more former “fees” were reclassified as “taxes” on balance.

Second, *Jacks* reached its holding in the specific context of local government franchise fees. But little of *Jacks*’s analysis applies to the much broader set of property interests governed by exception four, and so accepting plaintiffs’ position would require a sweeping and unwarranted extension of *Jacks*.

Jacks relied heavily, for example, on the history of enactments meant to regulate “perceived abuses by local governments” in demanding “compensation ... in exchange for rights-of-way over the jurisdictions’ land relating to the provision of services such as electricity.” (*Jacks, supra*, 3 Cal.5th at p. 263; see *id.* at pp. 264-67 [recounting the legal history of franchise fees since 1879].) But none of that legal background applies to prototypical charges for entering, using, purchasing, renting, or leasing government property. Whereas *Jacks* emphasized the history of “investigation[s] of local governments’ attempts to produce revenue through charges imposed” through franchise fees (3 Cal.5th at p. 269), standard property entrance fees (like

the bridge tolls at issue in *BATA*) are imposed by the State under its well-established power over state property. (E.g., *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184 [observing that the State has superior authority over its “own property” and in its “control and management”]; *Baltimore & O.R. Co. v. Maryland* (1874) 88 U.S. 456, 472.) And no case has ever subjected tolls or typical fees for entering, using, purchasing, renting, or leasing government property to a “reasonable costs” limitation, which would be vague and uncertain.

Jacks also invoked Proposition 218’s “liberal construction” provision, which mandated that the proposition be “liberally construed to effectuate its purpose of limiting local government revenue and enhancing taxpayer consent.” (Prop. 218, § 5; see *Jacks, supra*, 3 Cal.5th at pp. 267.) But Proposition 26 contains no such provision. And unlike Proposition 26, Proposition 218 applies only to local governments; it does not address charges imposed by the State, and its liberal construction provision does not apply to State charges governed by article XIII A. (See *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 258.) In short, extending *Jacks* to Proposition 26 would require expanding both who it regulates (from local governments alone, to the State as well) and its scope (from franchise fees to all property transactions) far beyond the rationales underpinning that decision.

For these reasons, the Court should hold that *Jacks* has no bearing on a case involving Proposition 26’s fourth exception. If, however, the Court disagrees and concludes that *Jacks* governs

local government franchise fees despite Proposition 26, then the reason should be that franchise fees, unlike prototypical property charges, simply fall outside Proposition 26’s exception for “charge[s] imposed for entrance to or use of,” or “the purchase, rental, or lease of” government property. As the decision below stated, franchise fees are “*arguably* subject to the fourth exemption in article XIII C”—a question the court did not need to resolve given its (erroneous) holding that the fourth exception imposes a reasonableness requirement even if it does apply. (*Zolly, supra*, 47 Cal.App.5th at p. 88, italics added.)²

In other words, if the Court rejects Oakland and Amici’s principal argument that exception four rather than *Jacks* controls here, the Court still should not extend *Jacks*’s rationale to apply to the wide array of State and local government property charges covered by Proposition 26’s fourth exception. Instead, the Court should construe “property” charges under the fourth exception to exclude franchise fees altogether, so that *Jacks*

² Likewise, as the *BATA* court explained, its disagreement with the Court of Appeal’s “interpretation of the burden of proof provision” in this case did not necessarily conflict with “the court’s ultimate conclusion as to whether and when a franchise fee constitutes a tax.” (*BATA, supra*, 51 Cal.App.5th at p. 461, fn.18.) As plaintiffs themselves recognize, *BATA* “d[id] not involve franchise fees”—but rather a traditional property charge—and so it “did not discuss *Jacks* or how it informs the interpretation of the fourth exception” as applied to franchise fees. (See Answer Br. at p. 36.)

would apply only to the limited context of franchise fees, whose specific nature and history the Court relied on in that decision.³

Whether by accepting our principal argument or going that alternative route, the Court should hold that there is no support in the text or history of Proposition 26, or in *Jacks* itself, for importing wholesale a “reasonable costs” limitation into the analysis of all government property transactions under Proposition 26’s exception four.

II. Adding A “Reasonable Costs” Requirement To The Government-Property Exception Would Place Onerous Burdens On State And Local Government Decisions Regarding Their Own Property.

Proposition 26 exempted charges that governments impose on the use of their own property—unlike charges that they impose in a regulatory capacity—so that governments could manage the use, rental, and sale of their property without being subject to heightened voting requirements. But the plaintiffs’ position here and in *BATA* would deny governments that important prerogative. State and local governments would either have to satisfy the heightened voting requirements for a “tax” or make a record-intensive showing of “reasonable costs” in connection with every property transaction.

³ Oakland has separately argued that its franchise fee is distinguishable from the pass-through surcharge at issue in *Jacks*. (Opening Br. at pp. 42-44; Reply Br. at pp. 23-24, 29.) Amici take no position on whether *Jacks* should not control this case for that independent reason.

Such a showing will often be onerous and its outcome unpredictable. This Court in *Jacks* “recognize[d] that determining the value of a franchise”—or any use of government property—“may present difficulties.” (3 Cal.5th at p. 269.) That is because, “[u]nlike the cost of providing a government improvement or program, which may be calculated based on the expense of the personnel and materials used to perform the service or regulation, the value of property may vary greatly, depending on market forces and negotiations.” (*Ibid.*; see, e.g., *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681, 720 [concluding city’s undergrounding surcharge bore a reasonable relationship to the value of franchise rights only after it offered “extensive and undisputed evidence” of bona fide negotiations].)

Plaintiffs suggest that this kind of valuation would be straightforward in the context of franchise fees because “franchise value ... is dictated largely by ‘market forces’ outside cities’ control.” (Answer Br. at p. 37., italics omitted.) But most charges for entrance to or use of State or local property defy valuation. Consider the charge in *BATA*: a \$3 toll increase over the course of six years, imposed by the State so it can fund 35 specified highway improvement projects and public transportation projects that take more people off the bridges and reduce congestion, improving toll payors’ drives over the bridges. (See Sts. & Hy. Code, § 30914.7, subd. (a); Stats. 2017, ch. 650, § 7.) A trial court would face a daunting task in evaluating whether that toll increase is “no more than necessary to cover the reasonable costs of the governmental activity”: First, what is

“the governmental activity”—management of the regional transportation system, or just upkeep of the particular bridge being crossed? Second, what “cost” of that activity is incurred on account of a single bridge crossing? Third, is that amount “reasonable?”⁴

How to answer these questions in the context of a government property interest was an issue that *Jacks* “le[ft] ... to be addressed by expert opinion and subsequent case law.” (*Jacks, supra*, 3 Cal.5th at p. 270, fn. 11.) But Proposition 26 did not apply in *Jacks*, and voters have supplied a much simpler answer via that proposition: There is no “reasonable costs” limitation on charges for use of a government’s own property—a limitation that, as the *BATA* court recognized, had no “self-defining reference point” the way the “reasonable costs” of a “benefit offered, service provided, or administrative action taken” do. (*BATA, supra*, 51 Cal.App.5th at p. 461.)

And even if these questions could be answered by economic experts using established, reliable methods, they would be hotly contested and unlikely to be resolved until summary judgment or trial. That would substantially impair governments’ ability to administer and make use of the value derived from their own property, contrary to the public interest. Even the *BATA*

⁴ Consider as well charges for the rent or sale of government property, which the fourth exception also addresses. If the State or a local government is able to sell or rent a building for market value, but that amount is more than the “cost” to the State or local government of acquiring or building it, what portion of the additional amount would be a “tax”?

litigation—which was decided on the pleadings as a matter of law—has led to a two-year (and counting) delay in putting about \$245 million in toll proceeds to work on the projects the Legislature specified and voters overwhelmingly approved, because they have been held in escrow pending the outcome of litigation.

Such delays would be commonplace, and only more extreme, if a “reasonable costs” limitation were imported into the fourth exception. Because the voters did not include that limitation with respect to governments’ use of their own property, this Court should decline to read it in.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeal in *Zolly* and affirm the decision of the Court of Appeal in *BATA*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520 of the California Rules of Court, the foregoing is proportionally spaced and contains 8,006 words, according to the word processing program used to prepare it.

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