SUPREME COURT COPY

S225589

SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

CITY OF SANTA BARBARA,
Defendant and Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF HOWARD JARVIS TAXPAYERS ASSOCIATION AND THE CALIFORNIA TAXPAYERS ASSOCIATION

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

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

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INTRODUCTION

Like Appellants Rolland Jacks and Rove Enterprises, Inc. (collectively, "Jacks"); Amici Howard Jarvis Taxpayers Association and California Taxpayers Association (collectively, "Amici") ignore the language of the franchise agreement contested here to find a utility tax instead of an agreement to pay for the right to use City rights of way. Moreover, Amici argue from Proposition 218's liberal construction provision to assert their opposition to the City's constitutional power to negotiate a franchise fee in excess of the 1 percent to which general law cities and counties are limited.

However, they provide neither authority for their claims nor a serviceable test that can distinguish a tax requiring voter approval from a fee which a city council may establish in negotiation with a utility. Their brief is as empty of answers to the City's arguments as Jacks'. The result must be the same —; this Court should affirm the trial court judgment for the City and reverse the Court of Appeal's finding the franchise fee to be a tax based on its economic incidence.

I. LIKE JACKS, AMICI IGNORE THAT SCE CONTRACTED TO PAY A 2 PERCENT FRANCHISE FEE TO USE CITY RIGHTS OF WAY

Amici assert, without citation to the record — and with resolute refusal to engage the language of the franchise agreement in

issue — that Southern California Edison ("SCE") is a mere tax collector and that Ordinance No. 5135 imposes a tax on electricity customers in the City. (Amici Brief ("AB") at p. 2.) Similarly, they bravely assert — again without evidence — that Ordinance No. 5135 "expressly and directly obligates each and every ratepayer to pay the surcharge." (AB at p. 7.) This is simply wrong.

The City's principal briefs and the amicus brief of the League of California Cities lay out the evidence demonstrating that the parties agreed that SCE would pay 2 percent of the value of its sales in the City for use of the City's rights of way and that SCE would lose its 30-year franchise if it did not. (See Opening Brief (OB) at pp. 29–30, 41; Reply Brief (Reply) at pp. 9–12; Brief of Amicus Curiae League of California Cities (League Br.) at pp. 9–11.) Ignoring the evidence and the principal briefs' treatment of it does not persuade. Repeating an unsupported assertion is not persuasive, either.

II. PROPOSITION 218'S LIBERAL CONSTRUCTION INSTRUCTION IS OF NO AID HERE BECAUSE THE MEASURE DOES NOT DEFINE "TAX"

Amici recite Proposition 218's uncodified section 5 calling for liberal construction of the measure to achieve its purposes. (Amici Brief (AB) at pp. 3–4.) However, as this Court has observed, this rule is not license to add words to our Constitution or to overlook those included. (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los*

Angeles (2001) 24 Cal.4th 830, 844–845 [declining to rely on § 5 when plain language of article XIII D "unambiguously limited" to burdens on landowners].) Amici concede Proposition 218 provides no definition of the "taxes" subject to its voter approval requirement. (AB at p. 6.) Thus, the meaning of that term must be gleaned from earlier case law and can be inferred from Proposition 26's subsequent amendment of Article XIII C. (OB at pp. 33–34; Reply at p. 26.) No rule of strict or liberal construction can supply what Proposition 218 has entirely omitted.

III. AMICI'S POLICY ARGUMENTS DO NOT PERSUADE

Amici fear the established rule that franchise fees are not taxes — and Proposition 26's rule that fees for use of government property are not limited to cost — will jointly allow local governments to "outsource any governmental function they desire packaged with franchise fee agreements in any amount." (AB at pp. 9–10.) This fear is baseless.

As discussed in Santa Barbara's briefing on the merits and in the Brief of Amicus Curiae League of California Cities, chartered cities like Santa Barbara have statutory and constitutional authority to set franchise fees in excess of prevailing rates in a utility's service area. (See Pub. Util. Code, § 6205; see also Cal. Const., art. XI, § 5 [chartered cities not subject to general laws except on matters of

statewide concern]; *id.*, at art. XI, § 9, subd. (b) [permitting cities to prescribe terms and conditions for operation of utilities]; *id.*, at art. XII, § 8 [local control of terms and conditions of local franchises].) And, franchises have historically been awarded to the utility willing to pay the highest fee. (*Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670 (*City of Dinuba*).) Yet the mass outsourcing-for-profit Amici fear has not occurred.

Santa Barbara relies on long-established law that those who use public property in a private, for-profit enterprise can agree to pay for the privilege. (E.g., *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 950; *City of Dinuba, supra,* 188 Cal. at p. 670.) It does not seek to license its regulatory functions — like land use or building safety regulation — and earn a fee for the privilege. Proposition 26 would forbid fees that exceed the cost of these regulatory services, in any event. (Cal. Const., art. XIII C, § 1, subd. (e)(3) [regulatory fees limited to "reasonable costs"].)

Nor does the City seek to franchise its police and fire services; doing so would be an unlawful delegation of its police power. (E.g., *Kugler v. Yocum* (1968) 69 Cal.2d 371 ["the legislative body cannot delegate its power to make a law"].) Even if it did, no fee could be imposed under the "no free riders" provisions of Proposition 26, which allow fees for government benefits and services only if "a specified benefit [is] conferred or privilege granted directly to the

payor that is not provided to those not charged" or "a specified government service or product [is] provided directly to the payor that is not provided to those not charged." (Cal. Const., art. XIII C, § 1, subds. (e)(1) & (2).) Proposition 26 does, of course, does not limit fees for use of government property to cost. (*Id.*, at subd. (e)(4).) The City's claim here is limited and conceals no parade of horribles.

Amici also argue privatization makes good public policy only if costs to tax- and fee-payors are reduced. (AB at p. 10.) They cite no authority that makes this policy controlling here, and nothing in Proposition 218 or its ballot materials states such a rule.

While it is true that franchise fees increase the cost of utility service to customers, so do myriad other operational costs that affect utility rates. The mere fact that some municipal action has the eventual market result of increasing the prices a consumer pays for goods or services does not render that action a tax. (Cf. *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1329 [plastic bag ban requiring retailer to charge $0.10 for paper bags not subject to Prop. 26 because the fee did not fund government].) As discussed in Santa Barbara's briefing on the merits, a municipal action requiring payment by a utility may be a tax on the utility or its customers or it may be some other kind of charge not subject to constitutional limitation — like a franchise fee. (OB at pp. 28–32; Reply at pp. 13–14.) The bare fact a charge may increase consumer prices does not

render it a tax. (OB at pp. 28–29; Reply at pp. 20–21.) Amici cite no authority holding otherwise, nor does any appear.

Nor is there anything nefarious about the City's effort to maximize for taxpayers the price obtained for private use of public property, as Amici suggest. (AB at p. 10.) Indeed, it is not clear how the goals of fair return to tax- and fee-payors is served by allowing SCE to make private use of public rights of way — acquired and maintained at taxpayers' expense — for free or for less than it agreed to pay.

In any event, absent any language in Articles XIII C and XIII D to require privatization only when consumer costs are reduced, this Court need not impose Amici's policy preferences on California's local governments.

IV. AMICI, TOO, OFFER NO SERVICEABLE DISTINCTION OF TAXES AND FEES

Like Jacks, Amici suggest several ways to distinguish taxes from fees. Like Jacks' suggestions, none is workable.

A. A Distinction Based on Use of Revenues Is Over-Inclusive

Amici suggest a revenue measure is a tax if it "is explicitly intended for general government revenue purposes." (AB at pp. 2, 7.) The principal briefing demonstrates this test to be over-inclusive.

(OB at pp. 36–37.) Nor does it account for Jacks' proffered distinction between the historical 1 percent franchise fee — also used by the City for general revenue purposes and which Jacks claims is not a tax — and the 1 percent surcharge which Jacks claims **is** a tax. Moreover, many fees recognized as other than taxes under precedents old and new can be used for any lawful purpose of the City. (*Ibid.*; see also *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 372 [upholding under Prop. 218 reimbursement to general fund of costs incurred for benefit of sewer utility].)

Under Amici's theory, use of franchise fee revenues only for street maintenance would make a franchise fee not a tax but use for general fund purposes would make it a tax. Such a theory would significantly change California law and require public votes on many municipal revenues, far beyond those Proposition 218 and its ballot materials implicate. For example, suppose a city developed a park that included a museum and a live music venue and charged admission to the museum and rented out the music venue. If the city directed the revenue from the admission fees and rental charges to its general fund (in which accounting principles require all discretionary revenues of a government to be accounted), then Amici's test would make taxes of these fees and charges. But if the city used that revenue solely for park purposes (or, perhaps, only for museum or music venue purposes), it would remain a fee. So, too, would profits from the sale of souvenirs and concessions at the

museum and music venue be considered taxes if they were directed to the general fund. And the status of a revenue measure would depend not on the legislation which imposes it, but subsequent decisions on how to spend the proceeds. Conceivably, a revenue measure could be a tax in one fiscal year and a fee in another. Nothing in Proposition 218 compels such an impractical rule.

B. A Distinction Based on Economic Incidence Is Belied by the Terms of the Franchise Agreement

Amici also reduce *Sinclair Paint*'s "primary purpose" test to a two-prong inquiry as to "(i) who is paying the tax, and (2) what is that person receiving in return (i.e., for what purpose is the revenue used)?" (AB at p. 7.) Even were this a faithful summary of *Sinclair Paint* (which it is not), it does not make a tax of the City's franchise fee — SCE pays the franchise fee for use of public rights of way in its search for profits. The evidence for this — which Amici do not engage — lies in the stipulated facts and the terms of Ordinance No. 5135 (the franchise agreement). (OB at pp. 15–18, 28–29; Reply at pp. 14–17; League Br. at pp. 9–11.) A fuller accounting of the *Sinclair Paint* rule demonstrating that the franchise fee here complies with that test appears in the principal briefs and the League of California Cities Brief. (OB at pp. 42–44; Reply at p. 10; League Br. at pp. 9–11.) We need not repeat it here.

C. A Distinction Based on Historical Franchise Fees Disregards Inflation and the Consideration to SCE

Amici suggest the franchise fee is a tax because the City and SCE agreed to increase it from 1 percent to 2 percent without providing SCE any greater consideration for the new franchise than did prior franchises agreed at the 1 percent rate. (AB at p. 8.) Thus, they imply that any increase in a revenue measure which does not provide "any greater service" is a tax. The point, obviously, proves too much.

The City **did** grant consideration for the surcharge — a 30-year franchise it would not have granted for less than a 2-percent franchise fee rate. SCE could have refused this offer but did not, demonstrating that the correct price of the right to operate this chartered city's electricity franchise for 30 years is 2 percent of SCE's revenues from customers in the City.

Further, the reality of inflation is a matter of such common knowledge that it can be judicially noticed as a legitimate basis for the change in the City's fee over time. As has been true of every fiat currency known to history, money loses value over time. The pennies-per-gallon cost of gasoline of an earlier era is no more. Prices rise while service remains the same; fees must, too. No one would argue that the value of the land underlying the City's streets

and rights of way is now worth less than 59 years ago when the City conferred the earlier franchise.

V. AMICI'S ANSWER TO THE CITY'S PROPOSITION 26 ARGUMENT DOES NOT PERSUADE

Amici answer the City's Proposition 26 argument, as Jacks did not. (AB at pp. 11–12.) However, they misstate it. The City does not argue that Proposition 26 "transformed some taxes into fees." (*Id.* at p. 11, fn. 2.) The City argued the reverse — it made taxes of what had previously been fees.

Proposition 26 confirmed that franchise fees, rents and other charges for the use of public property are not taxes and thus are not limited to cost. Like other landowners, a city's charge for use of property is limited only by what the market will bear. The City noted in its principal briefs that it seems unlikely voters would amend article XIII C in 2010 to make a fee of what had previously been a tax under that same article, given— as Amici concede — that Proposition 26 was intended to narrow, not broaden, local revenue authority. (AB at p. 5, citing *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322.) If Proposition 26 allows franchise fees not limited to cost, and it narrows the revenue authority local governments had under Proposition 218, then Proposition 218 allows such franchise fees, too. (OB at pp. 33–34.)

Amici's claim also suggests that negotiated compensation for the use of public property in private, for-profit activity must be limited to the cost of some service. What service is provided to one who uses public property? None need be provided for the licensee or franchisee to receive value for which they willingly pay. Use of property is not a service. It does not have a cost, although it certainly has a value. It is likely for this reason — as well as a desire to protect the public fisc — that Proposition 26 imposes no cost-of-service limit on fees for use of government property, as it does for service and regulatory fees. (Compare Cal. Const., art. XIII C, § 1, subd. (e)(4) [no cost-of-service limit for fees for use of property] with *id.*, at subds. (e)(2) and (3) [service and regulatory fees limited to cost of service].) For this same reason, such fees are not taxes under Proposition 13. (*Santa Barbara County Taxpayer Assn., supra,* 209 Cal.App.3d at p. 950.) Nor under Proposition 218, as that measure maintains Proposition 13 precedents it does not overrule. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194–1195.)

In reply, Amici suggest the City assumes rather than proves the franchise fee is negotiated consideration for use of public property. (AB at p. 12.) The suggestion simply overlooks much of the City's principal briefs, which quote the franchise agreement and stipulated facts to prove the point. (OB at pp. 15–18, 28–29; Reply at

pp. 14–17.) Thus, Amici purport to answer the City's arguments by ignoring them. Obviously, such an answer is not persuasive.

Indeed, Amici concede this case by writing: "If one accepts this characterization of the surcharge [as "intended to compensate the City for the use of its infrastructure"], it passes muster under Proposition 218." (AB at p. 12.) Precisely so.

CONCLUSION

Thus, like Jacks, Amici ignore the language of the franchise agreement and the stipulated facts to find what they wish to see — a non-voter-approved tax. Attention to that language, and to the other evidence marshalled by the City's principal briefs, however, demonstrates the franchise fee is what it purports to be — a negotiated payment for the right to use City rights of way. It does not lose that character due to subsequent decisions of SCE and the Public Utilities Commission to require SCE to recover that cost of its business from its customers in the City.

Amici add little here that can persuade. The City respectfully urges this Court to affirm the trial court judgment for the City and to reverse the Court of Appeals' decision to set it aside.

DATED: Nov. 24, 2015

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.520(C)(1) & 8.204(C)(1)

Pursuant to California Rules of Court, rules 8.520(b), 8.520(c)(1), and 8.204(c)(1), the foregoing Reply Brief by Respondent and Appellant City of Santa Barbara contains 2,856 words (including footnotes, but excluding the tables and this Certificate) and is within the 14,000 word limit set by California Rules of Court, rule 8.520(c)(1). In preparing this certificate, I relied on the word count generated by Word 2013 version 15, included in Microsoft Office 365 Pro Plus.

DATED: Nov. 24, 2015

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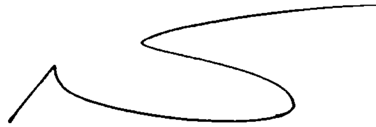

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Rolland Jacks, et al. v. City of Santa Barbara
California Supreme Court Case No. S225589

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On November 24, 2015, I served the document(s) described as **ANSWER TO AMICUS CURIAE BRIEF OF HOWARD JARVIS TAXPAYERS ASSOCIATION AND THE CALIFORNIA TAXPAYERS ASSOCIATION** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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

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

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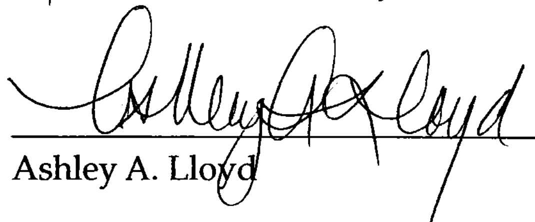

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