S262634

IN THE SUPREME COURT OF CALIFORNIA

ROBERT ZOLLY, *et al.*,

Plaintiffs and Appellants,

v.

CITY OF OAKLAND,

Defendant and Respondent.

Review of a Decision by the Court of Appeal,
First Appellate District - Case No. A154986

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS/APPELLANTS

Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Dougherty, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Attorneys for Amicus

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONS

RULES

MISCELLANEOUS

APPLICATION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 8.520(f), leave is hereby requested to file the attached Brief of Amicus Howard Jarvis Taxpayers Association supporting Appellants Robert Zolly, *et al.*, in this case.

INTEREST OF AMICUS

Howard Jarvis Taxpayers Association ("HJTA") helped draft and sponsor Proposition 26, which voters passed in 2010 to define "taxes" in the state constitution. In this case the Court will interpret a provision of Proposition 26 – article XIII C, section 1(e). At issue is whether section 1(e) gave franchise fees a new exemption, not just from the voter approval required for taxes, but also from all limitations that normally apply to fees.

HJTA is also the plaintiff, and its staff attorneys are counsel of record, in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, Supreme Court Case No. S263835. That case was granted review and is being held pending the outcome of this case because it involves similar issues.

HJTA therefore has a significant interest in this case, as a drafter, sponsor and frequent courtroom defender of Proposition 26, and as the plaintiff in a case that will be directly affected by the Court's decision in this case. The interest of amicus is to have the intent of the drafters and voters acknowledged and given effect.

AUTHORSHIP AND FUNDING

No party or attorney to this litigation authored the attached amicus brief or any part thereof. No one other than HJTA made a monetary contribution toward the preparation or submission of the brief.

POINTS TO BE ARGUED

Amicus will argue that the last paragraph of article XIII C, section 1(e) adds substantive requirements to the test for exempting fees from the definition of taxes, and that those requirements apply to every exemption on the list to the extent it would not produce absurd results. Since it would not produce absurd results to apply those requirements to franchise fees, the requirements apply.

Amicus will also argue that the Proposition 26 test for exempting franchise fees from the definition of taxes is different from the test fashioned by this Court in *Jacks v. City of Santa Barbara*. Under Proposition 26, franchise fees must be reasonably related to the local government's cost of accommodating and overseeing the franchise rather than the value of public property utilized by the franchisee.

HJTA is familiar with the questions involved in the case and the scope of their presentation and believes that, given the important constitutional issues of public interest involved, the court would benefit from additional argument on the points specified above.

DATED: March 24, 2021.

Respectfully submitted,

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Timothy A. Bittle
Timothy A. Bittle
Counsel for Amicus HJTA

BRIEF OF AMICUS CURIAE

FACTUAL SUMMARY

In a nutshell: After "negotiating" with companies that responded to its Request for Proposals, the City of Oakland granted exclusive franchises to two waste haulers, one for solid waste pickup, and one for recycling. Each franchise agreement included payment of an annual franchise fee to the City ($25 million from the solid waste hauler, and $3 million from the recycler). Plaintiffs Robert Zolly, *et al.* challenged the franchise fees as disguised taxes that needed voter approval under California Constitution, article XIII C, § 2 because the fees were unrelated to city costs or the value of city rights of way. The Court of Appeal agreed, rejecting the City's argument that franchise fees enjoy a carte blanche exemption from the article XIII C, § 1(e) definition of "tax," added by Proposition 26. (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 88.)

ARGUMENT
I
EVEN BEFORE PROP. 26, "USER FEES," SUCH AS FEES FOR USE OF PUBLIC PROPERTY, COULD NOT BE IMPOSED FOR GENERAL REVENUE, EXCEED THE GOVERNMENT'S COSTS, OR BE UNFAIRLY APPORTIONED

To appreciate how Proposition 26 *changed* the law in 2010, it is helpful to quickly review the law *prior to* Proposition 26. Prior to Proposition 26, article XIII C, section 2 already required voter approval of local general and special taxes. But the constitution provided no definition of the term "tax." The courts, however, had developed a substantial body of law explaining that properly calculated "fees" are not taxes requiring voter approval. (e.g., *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038.) The law

recognized three types of valid fees: regulatory fees, development fees, and "user fees." (*Weisblat*, 176 Cal.App.4th at 1038; *Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693-94; *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 595-97.)

"User fees" are charged to individuals when they do business with the government in its capacity as a property owner or as a purveyor of goods and services. (*Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 950 ("user fees or charges are typically cost recovery charges imposed upon individual citizens for the specific, temporary use of public property"); *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597 ("user fees are those which are charged only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided").)

A charge imposed for the temporary use of public property, such as a parking space or bridge toll, is a "user fee." (*Surfrider Found. v. Cal. Coastal Com.* (1994) 26 Cal.App.4th 151, 154; *Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 950.) The fee at bar, then, for garbage trucks to operate on city streets, is a type of user fee.

Prior to Proposition 26, for a user fee to be exempt from the requirement of voter approval applicable to taxes, it could not be imposed to produce general revenue, but had to be limited to recovering the government's actual, reasonable cost of providing the service. Moreover, costs had to be apportioned so that individual fees were reasonably related to the payer's own burden on, or benefit from the public service. (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234 ("exclude[d] from the definition of 'special tax' [is] any 'user fee,' i.e., 'any fee which does not

exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes'"); *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 162 ("a usage fee typically is charged only to those who use the goods or services. The amount of the charge is related to the actual goods or services provided to the payer"); *Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors*, 209 Cal.App.3d at 950 ("user fees or charges are typically cost recovery charges imposed upon individual citizens for the specific, temporary use of public property"); *Isaac v. City of L.A.*, 66 Cal.App.4th at 597 ("fees can become special taxes subject to the two-thirds vote requirement [if] (1) the fee exceeds the reasonable cost of providing the service or the regulatory activity, or (2) the fee is levied for general revenue purposes").)

II

PROPOSITION 26 EXPANDED THE UNIVERSE OF PAYMENTS PRESUMED TO BE TAXES, WHICH NOW INCLUDES FRANCHISE FEES

Proposition 26 amended article XIII C to provide the missing definition of "tax." "[T]he language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes ... on the one hand, and regulatory and other fees, on the other. We described this distinction in *Sinclair Paint* ... that, '[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.'" (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210 (citations omitted); *Cal. Bldg. Indus. Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1050 (the distinctions between taxes and fees "described in *Sinclair Paint* [were] subsequently codified ... by Proposition 26").)

While Proposition 26 in large part preserved the existing test for distinguishing legitimate fees from taxes, it also *expanded* the universe of charges that are *presumed* to be taxes unless proved otherwise. (*Schmeer v. County of L.A.* (2013) 213 Cal.App.4th 1310, 1322 ("Proposition 26 *expanded* the definition of taxes so as to include fees and charges, with specified exceptions ... and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax").)[1]

Voters were informed in their ballot by the Legislative Analyst that this was one of the "major provisions of Proposition 26." It "expands the definition of a tax and a tax increase so that *more proposals* would require approval by ... local voters." (Voter Information Guide for 2010 General Election, https://repository.uchastings.edu/ca_ballot_props/1305, Prop. 26, Analysis by Leg. Analyst at 57.)

Under Proposition 26's definition of "tax," the things that are *presumed* to be taxes now include "*any* levy, charge, or exaction *of any kind*." (Cal. Const., art. XIII C, § 1(e).) Thus, the City of Oakland's repeated recital of this Court's pre-Proposition 26 observation that "*historically*, franchise fees have not been considered taxes," is irrelevant. (City's Opening Brief at 12, 16, 17, 23 (quoting *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262).)

Regardless of how franchise fees were treated historically, today they are included within the scope of "any levy, charge, or exaction of any kind." Therefore, they are taxes needing voter approval unless they squarely fit one of the specific exceptions enumerated in Proposition 26.

---

[1] Unless noted otherwise, all emphasis is added.

III

PROPOSITION 26 WAS INTENDED TO *CLOSE* LOOPHOLES, NOT OPEN NEW ONES

In *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, this Court, applying pre-Proposition 26 law, held that franchise fees must be limited to the value of any special property rights conferred through the franchise, and to the extent they exceed that limitation, they are taxes that need voter approval: "*Consistent with the principles that govern other fees*, we hold that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred." (*Jacks*, 3 Cal.5th at 270.) "[F]ees imposed in exchange for a property interest must bear a reasonable relationship to the value received from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the excessive portion is a tax." (*Id.* at 269.)

According to the City of Oakland, voters enacted Proposition 26 for the express purpose of freeing franchise fees not only from the "value of the property interests" test articulated in *Jacks*, but also from *all* of "the principles that govern other fees." The City contends that franchise fees (and other fees imposed for the use of public property) are now a unique breed of exempt, tax-like mechanisms that local governments can levy to generate unlimited General Fund revenue without seeking voter approval. (City's Opening Brief at 9, 20, 21 ("There is no limitation on the scope of this exemption. In particular, this exemption contains no requirement that the exempted charge must not exceed, or must be related to, the reasonable cost or value of the property rights conveyed."))

Thus, according to the City, the effect of Proposition 26 was to open a new loophole (compared to pre-Proposition 26 law) that local governments can utilize to evade the requirement of voter approval. As the Court of Appeal found, however, this claim flies in the face of the "extensive evidence regarding the voters' intent in passing Proposition 26." (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 88.).

"Proposition 26 expanded the definition of taxes ... to *close perceived loopholes* in Propositions 13 [art. XIII A] and 218 [art. XIII C]." (*Schmeer v. County of L.A.* (2013) 213 Cal.App.4th 1310, 1322.)

"Proposition 26 thus addressed the problem of state and local governments *disguising taxes as fees*, with the burden on the government to prove that the so-called fee is not in fact a tax." (*Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1033.)

"In November 2010, Proposition 26 amended section 3 of article XIII A to *'close perceived loopholes'* in Proposition 13." (*Cal. Bldg. Indus. Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1047.)

Proposition 26, in its findings and declarations, made clear its purpose of subjecting more fees to voter approval, not fewer. It stated, "Since the people overwhelmingly approved Proposition 13 in 1978 [and] Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters. Despite these limitations, California taxes have continued to escalate. ... [T]he Legislature and local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. ... In order to ensure the effectiveness of these constitutional limitations, this measure also defines a 'tax' for state and local purposes so that

neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.'" (West's Ann. Cal. Const., art. XIII A, § 3 Hist. Notes, Prop. 26, § 1.)

The Ballot Argument in Favor of Proposition 26 similarly informed voters that "State and local politicians are using a loophole to impose Hidden Taxes on many products and services by calling them 'fees' instead of taxes. ... PROPOSITION 26 CLOSES THIS LOOPHOLE." (Voter Information Guide for 2010 General Election, https://repository.uchastings.edu/ca_ballot_props/1305, Prop. 26, at 60.)

The ballot also contained the Analysis of the Legislative Analyst which stated that Proposition 26 "expands the scope of what is considered a tax [to] make it *more difficult* for state and local governments to pass new laws that raise revenues." (*Id.* at 59.)

Thus the courts, the ballot materials, and Proposition 26's own findings and declarations indicate that the intent of Proposition 26 was to expand the definition of "tax" in order to capture tax-like fees and make them subject to voter approval requirements – thus closing a perceived loophole where "state and local governments disguis[e] taxes as fees."

It would be incongruous for this Court to rule that Proposition 26 had the opposite effect. Yet that is what the City urges. It argues that Proposition 26 provides a free pass for franchise fees and other fees collected from users of public property. The charge can be for any amount, and for any purpose, or no purpose. In other words, according to the City, Proposition 26 accomplished the reverse of what the Ballot Argument and the Legislative Analyst assured voters it would do. Instead of *"closing* loopholes," it opened a new one.

Instead of "mak[ing] it *more difficult* for state and local governments to pass new laws that raise revenues," it made it easier.

The City argues that voters were not misled because "*nowhere* does the Proposition 26 Voter Guide manifest any intent to impose limitations on franchise fees." (City's Opening Brief at 38 (emphasis in orig.).) But this is an unreasonable test. Arguments and summaries in the Voter Guide cannot be expected, in their statutorily limited number of words, to list every fee affected. It could also be said that "*nowhere* does the Proposition 26 Voter Guide manifest any intent to impose limitations on plan check fees, marriage license fees, public record copying fees, dog tag fees, sports team registration fees," etc. Does that mean every fee not specifically listed is free from limits? Of course not. Proposition 26 applies to "*any* levy, charge, or exaction *of any kind*." (Cal. Const., art. XIII C, § 1(e).)

The Analysis by the Legislative Analyst may not have listed franchise fees by name, but it listed examples of "user fees" that would be subject to Proposition 26, including "park entrance fees," which are a fee for entrance to or use of public property, and "garbage fees," the very thing at issue in this case.

Voters were informed by the Legislative Analyst that, under existing law, such user fees are not deemed "taxes" as long as they are limited to recovering the government's cost of providing the service. Under existing law, the Analyst said, "taxes" do not include "user fees – such as *state park entrance fees* and *garbage fees*, where the user *pays for the cost* of a specific service or program." (Voter Information Guide for 2010 General Election, https://repository.uchastings.edu/ca_ballot_props/1305, Analysis by Leg. Analyst at 57.) The Legislative Analyst then explained that "most user fees" would not

be considered taxes under Proposition 26 "because these fees and charges generally comply with Proposition 26's requirements already." (*Id.* at 58.)

Oakland's franchise fee, however, does not fall within this category of fees that "comply with Proposition 26's requirements already." Granted, it is a "user fee" like a "state park entrance fee" (because the City contends it is for the use of public property). And granted, it is bundled into "garbage fees." But it is *not* calculated so that "the user *pays for the cost* of a specific service or program." Therefore, according to the Legislative Analyst, Oakland's franchise fee did not "comply with Proposition 26's requirements already." It did not comply before Proposition 26, and it does not comply now.

IV

THE LAST PARAGRAPH OF ARTICLE XIII C, SECTION 1(e) IS NOT MERELY A "BURDEN SHIFTING" PROVISION; IT CONTAINS SUBSTANTIVE REQUIREMENTS

The City does not claim that its franchise fee is limited to city costs or the value of special property rights conferred through the franchise. It argues that franchise fees are "a charge imposed for entrance to or use of local government property" under article XIII C, section 1(e), Exception 4, and that Exception 4 is a "categorical exemption" from the Proposition 26 definition of "taxes." In other words, the City argues, if a fee can be characterized as "a charge imposed for entrance to or use of local government property," that is the end of the inquiry. It is *per se* not a tax.

The last paragraph of section 1(e) reads as a blanket requirement that, for any claimed exception, "[t]he local government bears the burden of proving by a preponderance of the evidence that [it] is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity,

and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1(e).)

The City argues, however, that the last paragraph does not apply to fees for use of public property. The argument is based on one way that the text of section 1(e) could be read. The City points out that the first three exceptions mention "reasonable costs" in their description. The fourth and fifth exceptions do not. Because the last paragraph also mentions "reasonable costs," the City concludes that it refers only to the first three exceptions.

However, since the ballot materials, Proposition 26's own findings, and the cases interpreting Proposition 26 unanimously agree that it broadly defined "tax" to include "*any* levy, charge, or exaction *of any kind*" and shifted the burden to the government to prove otherwise, the City argues that the last paragraph is merely "a burden shifting provision; it does not impose substantive requirements in addition to those stated in the preceding exemptions." (City's Opening Brief at 28 (quoting *HJTA v. BATA* (2020) 51 Cal.App.5th 435, 465).)[2]

It is obvious, however, that the last paragraph *does* impose additional substantive requirements beyond just reinforcing the reasonable cost limitation. The last paragraph provides: "The State 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

---

[2] The City relies heavily on *HJTA v. BATA*, citing and quoting it throughout its briefs. This is improper because *BATA* was granted review. "Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review can be cited for its precedential value." (*Liggett v. Superior Court* (1989) 224 Cal.App.3d 426; Cal. Rules of Court, rule 8.1115(e)(1).)

are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

The last paragraph thus contains all three elements of the pre-Proposition 26 test for distinguishing a valid fee from a tax: (1) that the fee is not a tax; in other words, that it is not imposed for revenue purposes, (2) that the amount is no more than necessary to recover the reasonable costs of the governmental activity, and (3) that those costs are allocated in a manner that fairly or reasonably relates to the payor's burdens on, or benefits received from, the governmental activity.

The City does not dispute that it must establish that its franchise fee is not a tax. However, it claims that its burden is satisfied when it simply points to Exception 4 and says, "we charge franchise fees in exchange for use of city streets." (City's Opening Brief at 25-26.) The main point of disagreement is whether the balance of the last paragraph adds anything more than the "reasonable cost" requirement already included in the descriptions of the first three exceptions. The City argues:

> "[S]ubdivision (e)'s burden of proof language merely allocates the burden of proving the requirements of each exemption but does not add any substantive requirements. Accordingly, a local government would have the burden of establishing that a charge is 'not a tax' in the first instance (*i.e.*, that it falls under one of the enumerated exemptions), and then that the charge is limited to the 'reasonable costs' of an activity or service where an exemption so requires (*i.e.*, the first three exemptions). Nothing in the text suggests, however, that this procedural burden- shifting

clause is meant to add substantive requirements to any exemption." (City's Opening Brief at 25-26.)

The City's position, however, is contrary to the holding in *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191. In that case, this Court held that, besides just identifying which exception the agency claims, it must also separately show: (2) that the amount collected is no more than necessary to recover the reasonable costs of the governmental activity; and (3) that those costs are allocated in a manner that fairly relates to the payor's burdens on, or benefits received from, the governmental activity.

> "[I]t is clear from the text itself that voters intended to adopt two separate requirements: To qualify as a nontax 'fee' under article XIII C, as amended, a charge must satisfy both the requirement that it be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity,' and the requirement 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.' *We must presume the [voters] intended each requirement to have independent effect*. (*Buenaventura*, 3 Cal.5th at 1214 (citations omitted).)

Had the last paragraph not contained all three substantive elements of the pre-Proposition 26 "tax" versus "fee" test, it would have been impossible for this Court to observe that "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A ... on the one hand, and regulatory and other fees, on the other." (*Buenaventura*, 3 Cal.5th at 1210.)

Nothing in the wording of the first three exceptions suggests that the last paragraph is toothless. Nor does anything in the wording of the last paragraph suggest that its limitations are activated as to exceptions 1, 2 and 3, but go dormant upon reaching exception 4 because it is meant to be a new categorical exemption that escapes all three facets of the age-old "tax" versus "fee" test.

V

IGNORING THE LAST PARAGRAPH CREATES A WORSE SURPLUSAGE PROBLEM

The City argues that its interpretation of section 1(e) must be accepted because construing the last paragraph as containing separate substantive tests " renders the specific 'reasonability' language in Exemptions 1 through 3 mere surplusage." (City's Opening Brief at 26.)

Since the last paragraph does *not* mirror the first three exceptions of subdivision (e), but rather contains obvious additional substantive requirements, it would *not* render the reasonableness language in the first three exceptions surplusage. If the last paragraph were the same, then applying one might render the other surplusage. But they are substantially different.

Because the last paragraph contains the full pre-Proposition 26 "tax" versus "fee" test, while the first three exceptions contain barely a third of it, a much more serious surplusage problem is created by the City severing the substantive requirements from the last paragraph and treating it as merely a procedural "burden shifting provision [that] does not impose substantive requirements." Doing so turns the other two-thirds of the last paragraph test into impotent surplusage.

The City has misapplied the canon of construction disfavoring surplusage. The rule can tolerate a little repetition, especially in voter initiatives.

While it may be justifiable for courts to impose high expectations on the syntax of statutes and legislative ballot measures that have been drafted by Legislative Counsel, courts generally do not demand the same precision and efficiency in the wording of voter initiatives, which are often drafted by non-lawyers.

Even as to statutes, "there is no rule prohibiting the Legislature from emphasizing a particular point notwithstanding the rule against surplusage." (*River Garden Ret. Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 942; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 858.) "Nor is there a rule of statutory construction requiring courts 'to assume that the Legislature has used the most economical means of expression in drafting a statute.'" (*River Garden*, 186 Cal.App.4th at 942; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772–73.) "Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782 (citations omitted).)

Here, the first three exceptions admittedly contain a small bit of redundancy when compared to the last paragraph. But, for the sake of avoiding a little repetition, the City would sacrifice two-thirds of the last paragraph test for distinguishing a valid fee from a tax needing voter approval. That is a misapplication of the rule against surplusage which will produce a serious corruption of voter intent if not rejected. Courts must "*give significance to every word*, avoiding an interpretation that renders any word surplusage." (*Regents of Univ. of Cal. v. Pub. Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 177; *Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.)

Giving significance to every word in the last paragraph compels the conclusion that it is more than just a procedural burden-shifting provision. It

contains a three-part substantive test for determining whether any of the fees listed above it qualify for an exemption from the "tax" definition. An interpretation that limits the application of the last paragraph to just the first three fees renders most of the last paragraph surplusage, a much more serious surplusage problem than the minor redundancy issue upon which the City's interpretation is predicated.

VI

APPLYING THE LAST PARAGRAPH TO FRANCHISE FEES DOES NOT CREATE ABSURD RESULTS

The City argues that applying the last paragraph's "tax" versus "fee" test to subdivision (e)'s fourth or fifth exception would produce absurd results. To understand the argument, it will be helpful to quote the fourth and fifth exceptions:

> "(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law." (Cal. Const., art. XIII C, § 1(e)(4)-(5).)

It would be "nonsensical," the City argues, to apply a "reasonable cost" test to the sale or rental price of government property or to criminal fines.

Amicus agrees that sale and rental prices should be based on fair market value, not the agency's costs, and that criminal fines should be based on deterrence and punishment, not the agency's costs. However, *not* applying the last paragraph to fees for entrance to or use of public property would be equally

absurd, because it would mean, for starters, that there is no legal limit on the amount cities can demand from private utility providers as franchise fees.

Cities award franchises through a competitive bidding process. The process is essentially an auction. The city publishes a Request for Proposals which requires each bidder's proposal to include an annual franchise fee to be paid to the city. If the city likes everything else about a company's bid, but the proposed franchise fee is not big enough for the city's appetite, it "negotiates" a higher fee. This is a "pay to play" shakedown, pure and simple. But the private companies providing the service don't really care how much they pay to the city because it's other people's money – the franchise fee is simply passed through to the customers.

Private trash haulers are not the only private utility providers that use city streets. Private infrastructure for water, gas, electric, cable television, fiber optic internet, and/or landline telephone service lies beneath the streets of every city in California. Cities impose franchise fees on all of those utilities when they are provided by private companies. Many of those utilities are literally essential for life and health. It would be absurd, or "nonsensical" in the City's words, to assume that the voters who passed Proposition 26 intended to jeopardize their ability to afford basic utilities that are essential for life and health by creating a carte blanche exemption for franchise fees.

But the absurdity does not stop there. When one pauses to consider how often California residents and businesses use public property, this case's potential for the government to siphon money from the private economy is frightening. Franchise fees are just the tip of the iceberg. If fees for entrance to or use of public property had no rules, then local governments (and the State under the parallel section in article XIII A, § 3) could impose fees of any

amount to use bridges and tunnels, to bring shipments into public ports, to transport goods or passengers on public roads, to purchase water that was stored in public reservoirs, to relay cell phone calls via towers on public ridges, to access the Internet over public wifi networks, to access public records, to hold political rallies and protests on public property, etc., etc. The revenue from such charges could go straight to the General Fund for tax-like expenditure, with no special approvals required. It is absurd to think that the voters passed Proposition 26 intending such a result.

Defendants' absurdity argument is not good grounds for creating a new categorical exemption for fees to enter or use public property. First, sales and criminal fines are not at issue in this case and courts should not let speculation about a possible "next" case produce an unjust decision in the case at bar. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 947 (responding to a city's hypothetical "next" case if the Court ruled against it in the case at bar, the Court said, "These facts are not presented here, and we decline to take up what would happen should they arise.").)

Second, should defendants' hypothetical "next" case arise, the Court could apply the absurdity rule in that case. Courts are to avoid "interpretations that lead to absurd *results*." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) But here, absurd results are not reached. They won't be reached until someone claims, for example, that the sale price of a building or the fine for running a red light must be limited to the government's reasonable costs.

Finally, while a literal application of the last paragraph may not fit sales and fines, it is possible to harmonize the spirit of public protection contained in the last paragraph's "reasonableness" requirements with other provisions of

the constitution that protect the public when property is sold or when crimes are punished. (See *Capistrano Taxpayers Assn. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1508 (under court's duty to harmonize provisions of state constitution, article X, section 2's requirement that government promote water conservation can be harmonized with Proposition 218's requirement that water rates be based on government's reasonable costs).)

For example, the last paragraph's requirement that levies, charges and exactions be for their intended purpose, reasonable, and proportional can be harmonized with the excessive fines clauses of the state and federal constitutions, which provide that "Cruel or unusual punishment may not be inflicted *or excessive fines imposed*." (Cal. Const., art. I § 17; U.S. Const., 8th Amend; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689.) Thus, fines and penalties must be reasonably related to the severity of the defendant's crime and the harm he caused; in other words, the "cost" to society.

Similarly, the constitution contains a reasonableness requirement for sales and leases to which the last paragraph can be harmonized. Article XVI, section 6, of the California Constitution prohibits the Legislature from making "any gift, of any public money or thing of value to any individual, municipal or other corporation." California courts have construed this "gift of public property" clause to prohibit the sale or lease of state property without adequate consideration. Consideration is adequate if it approximates fair market value. (*Post v. Prati* (1979) 90 Cal.App.3d 626, 635; *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, 845.) The State's acquisition of property is an investment, and its "cost" includes not just money but also risk, which accounts for any appreciation in value. A sale or lease for fair market value, then, does not exceed the state's "cost."

Absurd results can thus be avoided by harmonizing the last paragraph with other, more particular provisions of the state constitution which control the amounts of fines and prices. A fine is not "unreasonable" if it is not excessive under the excessive fines clause. A price is not "unreasonable" if it represents adequate consideration under the gift of public property clause.

For these several reasons, the absurdity argument advanced by the City is not good grounds for contravening voter intent by the creation of a new categorical public property fee exemption that will swallow the whole of Proposition 26.

VII

THE TEST FOR FRANCHISE FEES UNDER PROPOSITION 26 IS DIFFERENT FROM THE TEST ARTICULATED IN *JACKS*

Applying the law that pertained to franchise fees prior to the voters' enactment of Proposition 26, this Court in *Jacks v. City of Santa Barbara* held that a franchise fee is not a hidden tax needing voter approval if the fee is reasonably related to the value of any special property rights conferred through the franchise. "[W]e hold that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred." (*Jacks*, 3 Cal.5th at 270.)

In the case of a trash hauling franchise, the *Jacks* test would be difficult to implement. The "property interest" theoretically granted to the haulers in this case is the right to use city streets in the conduct of their business. (City's Petition for Review at 18.) But everyone has the right to use city streets without purchasing a franchise, and many businesses (e.g., Amazon, Uber, even

ice cream trucks) use city streets to connect with their customers significantly more than a waste hauler's once-a-week trash collection, yet pay nothing.

California law recognizes a "fundamental right to travel." It is part of our liberty as a free people, a "basic human right protected by the United States and California Constitutions." (*Halajian v. D & B Towing* (2012) 209 Cal.App.4th 1, 11.) "Highways are for the use of the traveling public, and *all* have the right to use them. ... [They] belong to the people of the state, and *the use thereof is an inalienable right* of every citizen. ... The use of highways for purposes of travel and transportation is *not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived*." (*City of Lafayette v. County of Contra Costa* (1979) 91 Cal.App.3d 749, 753 (quoting *Escobedo v. State of California* (1950) 35 Cal.2d 870, 875-876).)

Garbage trucks are not parking on city streets, nor are they given an exclusive right to drive on the street while they are operating. There is no market from which an appraiser could draw comparable values for the nonexclusive, transient contact of a vehicle with a public street. Looking at the franchise fees charged by other cities is unscientific because their fees are also arbitrary amounts invented in a vacuum. And on top of all that is everyone's legally recognized, "fundamental right" to use public streets. How much should be subtracted from the equation to account for that? The *Jacks* test thus invites protracted litigation as expert witnesses battle over the imprecise answer to an imprecise question.

The Proposition 26 test is much simpler to implement. It calls for the fee to be based on "the reasonable costs of the governmental activity," allocated according to the payor's burden thereon. (Cal. Const., art. XIII C, § 1(e).) If

the governmental activity is maintaining city streets, and if heavy garbage trucks put atypical stress on residential streets that are not designed for heavy vehicles, an engineer could perform a stress test and quantify how the hauler's trucks would shorten the pavement's useful life, then apply that to the city's overall road maintenance costs. The city could add to that its administrative costs for overseeing the hauler's contract compliance, enforcing its bill collection, and handling customer complaints directed to the city. If franchise fees are based on documented city costs in this way, litigation will seldom be necessary.

The Proposition 26 test is not only required, then, it is simpler to implement, less likely to result in litigation, and assures that the City is adequately compensated.

CONCLUSION

For the above reasons, the Court of Appeal should be affirmed.

DATED: March 24, 2021.

Respectfully submitted,

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Timothy A. Bittle
TIMOTHY A. BITTLE
Counsel for Amicus HJTA

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes but excluding the caption page, tables, application, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 6,114 words.

DATED: March 24, 2021.

/s/ Timothy A. Bittle
TIMOTHY A. BITTLE
Counsel for Amicus HJTA

PROOF OF SERVICE

I, Kiaya Heise, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On March 24, 2021, I served **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS/APPELLANTS** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

X **BY UNITED STATES MAIL** I enclosed the document(s) in a sealed envelope or package addressed to the interested parties at the addresses listed below. I deposited the sealed envelope with the United States Postal service, with the postage fully prepaid. The envelope or package was placed in the mail in Vacaville, California.

X **BY ELECTRONIC MAIL** I electronically transmitted the document(s) in a PDF or Word processing format to the persons listed below via TrueFiling at their respective electronic mailbox addresses.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 24, 2021, at Vacaville, California.

Kiaya R. Heise

SERVICE LIST

Andrew M. Zacks Zacks, Freedman & Patterson, PC 601 Montgomery St., Suite 400 San Francisco, CA 94104 (415) 956-8100 E: az@zfplaw.com Paul J. Katz Katz Appellate Law 484 Lake Park Ave. #603 Oakland, CA 94610 E: paul@katzappellatelaw.com *Attorneys for Appellants Robert Zolly, et al.* **Via TrueFiling**	Cedric C. Chao Chao ADR, PC One Market Street Spear Tower, 36th Floor San Francisco, CA 94105 (415) 293-8088 E: cedric.chao@chao-adr.com Barbara Parker Kimberly Ann Bliss Maria Bee Celso Ortiz Zoe Savitsky Office of the City Attorney One Frank H. Ogawa Plaza- 6th Floor Oakland, CA 94612 E: bjparker@oaklandcityattorney.org kbliss@oaklandcityattorney.org mbee@oaklandcityattorney.org cortiz@oaklandcityattorney.org zsavitsky@oaklandcityattorney.org Stanley J. Panikowski Jeanette E. Barzelay DLA Piper LLP (US) 555 Mission Street, 24th Floor San Francisco, CA 94105-4240 E: stanley.spanikowski@us.dlapiper.com jeanette.barzelay@us.dlapiper.com *Attorneys for Petitioner City of Oakland* **Via TrueFiling**

Cara L. Jenkins Office of Legislative Counsel State Capitol, Suite 3021 925 L Street, Suite 900 Sacramento, CA 95814 E: cara.jenkins@lc.ca.gov *Attorneys for Amicus California State Legislature* **Via TrueFiling**	Joshua Nelson Lutfi Kharuf Joanna Gin Best Best & Krieger LLP 655 West Broadway, 15th Floor San Diego, CA 92101 E: joshua.nelson@bbklaw.com lutfi.kharuf@bbklaw.com joanna.gin@bbklaw.com *Attorneys for Amici League of California Cities* and *California State Association of Counties* **Via TrueFiling**
Jason R. Litt Jeremy B. Rosen Joshua C. McDaniel 3601 West Olive Ave., 8th Floor Horvitz & Levy LLP Burbank, CA 91505 E: jlitt@horvitzlevy.com jrosen@horvitzlevy.com jmcdaniel@horvitzlevy.com *Attorneys for Amici McLane, Bednarski & Litt LLP* and *Rapkin & Associates, LLP* **Via TrueFiling**	Brian P. Goldman Orrick Herrington & Sutcliffe LLP 405 Howard Street San Francisco, CA 94105 E: brian.goldman@orrick.com Ethan P. Fallon Orrick Herrington & Sutcliffe LLP 1152 15th Street NW Washington, DC 20005 E: efallon@orrick.com *Attorneys for Amici Bay Area Toll Authority* and *Metropolitan Transportation Commission* **Via TrueFiling**
Clerk of the Court Alameda County Superior Court 1221 Oak Street Oakland, CA 94612 **Via United States Mail**	