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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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SUPREME COURT
FILED

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CITIZENS FOR FAIR REU RATES, et al.,
Plaintiffs and Appellants,

vs.

CITY OF REDDING, et al.,
Defendants and Respondents.

APPLICATION TO FILE AMICUS CURIAE BRIEF and BRIEF OF AMICUS CALIFORNIA TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS

Review of a Published Decision of the
Third Appellate District, Case No. C071906

Reversing a Judgment of the Superior Court of
the State of California for the County of Shasta,
Case No. 171377 (Consolidated with Case No. 172960)
Honorable William D. Gallagher, Judge Presiding

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court rule 8.520(f), the California Taxpayers Association respectfully submits this application for permission to file an AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CITIZENS FOR FAIR REU RATES, ET AL.

Undersigned counsel certifies that there are no parties, counsel, entities or other individuals to identify under California Rules of Court rule 8.520(f)(4).

CALIFORNIA TAXPAYERS ASSOCIATION'S STATEMENT OF INTEREST

The California Taxpayers Association (CalTax) is a nonprofit, nonpartisan research and advocacy association founded in 1926 with a dual mission: to guard against unnecessary taxes and promote government efficiency. CalTax represents the interests of its members, and the state's taxpayers at large, in the areas of income and franchise, property, sales and use, and other state and local taxes, assessments, fees and penalties. CalTax's membership includes individuals and many businesses across all industries, ranging from small firms to Fortune 500 companies. CalTax is dedicated to the uniform and equitable administration of taxes and minimizing the cost of tax administration and compliance. In 2010, CalTax co-sponsored Proposition 26 and wrote ballot arguments stating that the initiative will stop state and local policymakers from enacting hidden taxes on goods and services, such as electricity.

Amicus has a great interest in the Court's resolution of this matter, which will have a direct impact on Amicus, its members, and

many other taxpayers across the state. Because of Amicus' broad-based membership and its expertise and experience, in addition to that of its members, concerning the legal and policy issues raised by this case, Amicus believes that its perspective on the relevant issues will be of assistance to this Court.

The central issue in this case concerns the proper construction of Cal. Const., art. XIII C, § 1, subd. (e), which was added to the Constitution by the voters in Proposition 26 (2010). Amicus believes Defendant and Respondent City of Redding has been illegally imposing a charge on its own municipal electricity department, Redding Electric Utility (REU), and in turn on electricity customers within the City, in the form of a "payment in lieu of taxes" (PILOT), in contravention of the letter and intent of Proposition 26 which requires voter approval for such exactions. While the particular charges in this case are limited to the City of Redding, unless stopped here similar charges are likely to proliferate statewide as local jurisdictions continually search for new revenue sources. Amicus therefore has a strong interest in defending the proper interpretation of Proposition 26. Otherwise, the intent of the voters in adopting Proposition 26 will be thwarted and people's right of self-determination regarding new and higher local taxes will be undermined.

THE PROPOSED BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER BY ADDRESSING THE FOLLOWING ISSUES:

Amicus Curiae's brief will address the following issues: (1) that in adopting Proposition 26, the voters were *specifically* focused on eliminating overcharges on electricity, and that is exactly what is happening in this case; (2) the test for determining whether a local

charge is a tax under Proposition 26 is very simple and the PILOT easily meets that test; (3) the PILOT is not the reasonable cost of providing a service under Proposition 26 because the PILOT is illegal under Cal. Const., art. XIII, § 3(b), the City provides the same services allegedly provided to REU in return for the PILOT to other members of the public who do not pay the PILOT, and the PILOT is not calculated in a way that even attempts to capture the costs of providing services to REU; and (4) the PILOT does not predate Proposition 26, and even if it did, it is still invalid.

THE ISSUES INVOLVED IN THIS CASE ARE OF SUCH PARAMOUNT IMPORTANCE AS TO CONSTITUTE GOOD CAUSE FOR GRANTING THE APPLICATION

The issues involved in this case touch upon matters including the people's right of initiative; the proper interpretation and application of Proposition 26 with respect to local levies, charges, and exactions; and the underlying validity of payments in lieu of taxes imposed upon local government owned property. These issues are of such far-reaching and statewide importance that the issues themselves herein involved constitute good cause for this Court to grant CalTax's request to file an AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CITIZENS FOR FAIR REU RATES, ET AL.

CONCLUSION

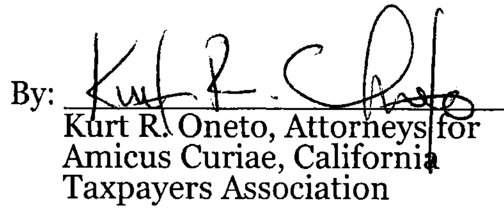
For the foregoing reasons, the California Taxpayers Association respectfully requests that the Court grant it permission

to file an AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CITIZENS FOR FAIR REU RATES, ET AL.

DATED: August 19, 2015

Respectfully submitted,

Nielsen Merksamer Parrinello Gross & Leoni, LLP

By: 
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<u>BRIEF OF AMICUS CURIAE CALIFORNIA TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS</u>

I. INTRODUCTION

Of the many battles fought by CalTax and its taxpayer advocate allies, none has been more important and hard-fought than the struggle against the creative attempts by governments to raise new revenue by mislabeling local "taxes" as something else in order to avoid having to win voter approval for their imposition. Proposition 13 (1978), Proposition 62 (1986), and Proposition 218 (1996) all sought to advance and protect that basic principle: that taxpayers should have the right to vote on new or higher local taxes.

The latest in this decades-long struggle was Proposition 26 (2010). Proposition 26 goes to the heart of the fundamental issue in this case: can the City of Redding (City) enact a tax simply by "rebranding" it (in this case, by calling it a "payment *in lieu of* taxes" (PILOT)) and burying it in a price for electrical service that exceeds the actual cost of providing that service?

The PILOT in this case is a poster child for why the voters adopted Proposition 26. The entity imposing the PILOT (the Redding City Council) and the entity nominally paying the PILOT but passing the cost on to the public through charges for electricity service (Redding Electric Utility (REU)) are different arms attached to the same body. And because the nominal fee payer, REU, can

pass on the PILOT tax to its customers without them even knowing that they are paying it, none of the checks and balances for the imposition of local taxes exist. In enacting Proposition 26, the state's voters made it clear they intended to put an end to such hidden taxes, even going so far as to specifically say they were trying to end the practice of burying hidden taxes in electricity charges. It is this practice that the Court of Appeal correctly invalidated.

Amicus also demonstrates below that the PILOT cannot be sustained because it is calculated and applied in a manner that makes it *impossible* to be legally imposed under Proposition 26 absent voter approval. Lastly, apart from the invalidity under Proposition 26, the PILOT is an unconstitutional imposition of a property tax on local government-owned property.

II. ARGUMENT

1. The Court Should Apply Proposition 26 According to Its Plain Language as was Intended by Voters, Not by Microscopically Dissecting It to Defeat the Voters' Intent.

The principles of constitutional interpretation are similar to those governing statutory construction. When the language is clear and unambiguous, the plain meaning governs. (*Silicon Valley Taxpayers Assn. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 444 (*SVTA*).) The language of Proposition 26, set forth in Cal. Const., art. XIII C, § 1(e), is abundantly clear, and it is just as

clear that the PILOT is a tax under that constitutional provision.[1]

No doubt seeking to overcome the plain language of Proposition 26, City's Opening Brief instead attempts to dissect Proposition 26 in the most hyper-technical sense possible, parsing words, splitting hairs, and jumping onto the most minor of asserted language differences to support its mistaken claim that Proposition 26 really allows the imposition of local levies, charges, and other exactions without voter approval to continue unabated. (See City Opening Br., at pp. 30-33.) As discussed *infra*, however, City's position "makes a mockery of the Constitution" and cannot stand. (*Capistrano Taxpayers Assn. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1515.) As this Court made clear in enforcing

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[1] Proposition 26 states that "*any* levy, charge, or exaction *of any kind*" imposed by a local government is a tax except for seven specific exceptions. The exceptions are (1) a charge imposed for specific benefits or privileges provided directly to the payor that are not provided to those not charged and which does not exceed the reasonable cost to the government in providing the benefit/privilege; (2) a charge imposed for specific services or products provided directly to the payor that are not provided to those not charged and which does not exceed the reasonable cost to the government in providing the service/product; (3) a charge imposed for a reasonable regulatory cost to a local government in issuing licenses, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement thereof; (4) a charge imposed for entrance to or use of local government property or the purchase, rental, or lease of local government owned property; (5) fines and penalties imposed as a result of a violation of law; (6) a charge imposed as a condition of property development; and (7) assessments and property-related fees imposed in accordance with Cal. Const., art. XIII D. (Cal. Const., art. XIII C, § 1(e).)

Proposition 218, "We must enforce the provisions of our Constitution and 'may not lightly disregard or blink at...a clear constitutional mandate.' (Citation.)" *SVTA, supra,* 44 Cal.4th 431 at 448.) Despite City's best efforts, the text of Proposition 26 is unwavering. Furthermore, even assuming *arguendo* that an ambiguity did exist, the rules of initiative interpretation unequivocally reinforce the conclusion that the PILOT is a tax under Proposition 26.

"When construing a constitutional provision enacted by initiative, *the intent of the voters is the paramount consideration.*" (*Davis v. City of Berkeley* (1990) 51 Cal.3d 227, 234; emphasis added.) "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In determining the voters' intent in adopting an initiative measure, this Court has declared it will consider the historical context of the amendment as well as the ballot arguments favoring the measure. (*Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979.)

The historical context surrounding Proposition 26 is set forth in its findings and declarations. As declared in those passages, Proposition 26 was the culmination of more than three decades'

worth of efforts by the voters, starting with Proposition 13 and continuing through Proposition 218, to gain control over local imposition of new or higher taxes and finally put an end to the clever devices that local governments had employed to extract ever greater revenue from Californians without their consent. Proposition 26 was intended to "ensure the effectiveness" of these prior initiative constitutional amendments by eliminating the ability of local governments to enact "hidden taxes". (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114[2]; see Historical Notes, 2A West's Ann. Cal. Const., (2013 supp.), foll. art. XIII A, § 3, pp. 141–142.).)

2. In Passing Proposition 26, the Voters Specifically Intended to Ban Hidden Taxes in Electricity Charges Absent Voter Approval.

When adopting Proposition 26 voters were contemplating the precise type of hidden tax that is presented by this case. The

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[2] http://vig.cdn.sos.ca.gov/2010/general/pdf/english/text-proposed-laws.pdf#prop26. (Last visited Aug. 18, 2015.)

argument in favor of Proposition 26 includes the following statements:

> YES ON PROPOSITION 26: STOP POLITICIANS FROM ENACTING HIDDEN TAXES
>
> ......
>
> Local politicians have been calling taxes "fees" so they can bypass voters and raise taxes without their permission—taking away your right to stop these Hidden Taxes at the ballot...DON'T LET THE POLITICIANS CIRCUMVENT OUR CONSTITUTION TO TAKE EVEN MORE MONEY FROM US...When government increases Hidden Taxes, consumers and taxpayers pay increased costs on everyday items.

(Voter Information Guide, Gen. Elec. (Nov. 2, 2010) Argument in Favor of Prop. 26, p. 60; capitalization in original.[3])

Furthermore, the argument in support of Proposition 26 expressly stated that the measure would stop politicians from imposing Hidden Taxes on, among other things, electricity:

> Here are a few of the examples of things they [politicians] could apply Hidden Taxes to unless we stop them: Food, Cell Phones, Gas, *Electricity*...

(*Id.*, emphasis added.)

The expressions of voter intent in adopting Proposition 26 are unmistakable. First, voters wanted to approve ALL local revenue measures at the ballot box (save for seven distinctly specified exceptions discussed *infra*). They did not want local officials

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[3] http://vigarchive.sos.ca.gov/2010/general/propositions/26/arguments-rebuttals.htm. (Last visited August 18, 2015.)

imposing such charges without voter approval. This does not mean that local officials cannot place tax measures on the ballot or advocate for their passage. It simply means that taxpayers wanted to vote to approve or disapprove such local charges. (See Cal. Const., art. XIII C, § 1, final ¶ [placing burden on the *local government* to prove by a preponderance that a charge is not a tax].) Second, voters expressly intended that hidden taxes would not be built into charges for everyday items like electricity, and they made that intent absolutely clear in the argument supporting Proposition 26.

Amicus CalTax urges the Court to analyze the facts of this case with this long and consistent intent of the voters in mind, and reject City's attempt at revisionist history. With this as background, Amicus now turns to the specific questions posed by the Court.

3. The PILOT is Presumed to be a Tax Under Proposition 26; and City Bears the Burden of Proving It is Not.

The test for determining whether a local charge is a tax under Proposition 26 is quite simple: "*any* levy, charge, or exaction *of any kind*" is presumptively a tax; and the *local government* has the burden to prove otherwise. (Cal. Const., art. XIII C, § 1(e); emphasis added.) Here, it is undisputed that City imposes the PILOT on REU, REU includes an amount to cover the cost of the PILOT in charges to customers for electric service, and the PILOT is transferred to City's

general fund. It is also undisputed that in January, 2011, City increased REU rates by 7.84 percent and acknowledged that one of the purposes for doing so was "to obtain funds necessary to maintain such intra-City transfers as authorized by law." (Citizens for Fair REU Rates Answer Br., at p. 12.) Under Proposition 26, this makes the PILOT presumptively a tax unless City proves the PILOT falls into one of the exemptions specified in paragraphs (1) to (7) of subdivision (e) of Section 1 of Article XIII C of the Constitution.

City argues that the PILOT is not a tax under Proposition 26 because REU's non-rate revenue exceeds the amount of the PILOT, and REU's rates are lower than other investor-owned utility rates. (City Opening Br., at pp. 35-38, 46.) Neither of these rationales satisfies any of the seven exceptions to the definition of a local "tax" found in Proposition 26. (Cal. Const., art. XIII C, § 1(e)(1)-(7).) REU might generate more non-rate revenue than is paid out in PILOT, but that is not one of the exceptions to the definition of "tax" specified in Cal. Const., art. XIII C, § 1(e). REU's rates might be lower than those of one or more other electricity providers, but that is not one of the exceptions to the definition of "tax" specified in Cal. Const., art. XIII C, § 1(e) either. Therefore, even assuming *arguendo* the City's arguments were true, they still fail to demonstrate that the

PILOT is not a tax because neither are included in the exceptions to Proposition 26's definition of a local "tax."

4. Proposition 26's Exception for Reasonable Costs to a Local Government in Providing a Service or Product Does Not Apply to the PILOT.

a. City Fails to Meet the Exception from Local "Tax" Under Proposition 26 Because it Offers the Same Services to Those Who Pay the PILOT and Those Who do Not.

City's PILOT is unconstitutional because it does not represent the reasonable cost of providing a service under Proposition 26. City argues that the PILOT qualifies as a reasonable cost of providing electricity because the PILOT compensates City for vital benefits and services provided to REU like police and fire protection, street maintenance, rights-of-way, and "administration." (City Opening Br., at pp. 3, 39-40.)

Thus, from City's perspective, the PILOT takes the form of a contractual obligation to "repay" City for services provided to REU. City's argument overcomplicates Proposition 26 by conveniently overlooking the key element of Proposition 26's exception for charges imposed for specific local government services.

In order not to be a tax, Cal. Const., art. XIII C, § 1(e)(2) states that a charge must be imposed for a specific service or product provided directly to the payor "*that is not provided to those not charged.*" (Emphasis added.) City asserts that the PILOT

compensates City for police protection, fire protection, and street maintenance; however, City fails to recognize that these services *are* provided to others who do not pay the PILOT; and those services are not denied to those who do *not* pay the PILOT. City provides police and fire protection to anyone in the City. 911 emergency operators, for example, do not ask callers if they pay the PILOT before dispatching first responders. City street maintenance crews do not question homeowners if they pay the PILOT before repairing the roads in front of their houses. Unless City decided to ONLY provide police and fire protection and street maintenance to REU and no one else, the PILOT cannot as a matter of law qualify as a reasonable cost of providing a service under Proposition 26.

Because of this, City cannot satisfy the burden Proposition 26 *places on City* to prove that the PILOT is not a tax and that the way in which costs are allocated bear a fair or reasonable relationship to payors' burdens on, or benefits received from, City. To the contrary, City's allocation of the PILOT (only paid by REU) in comparison to its allocation of public safety and street maintenance services (provided to everyone in City) guarantees that there is <u>no</u> relationship between how benefits are distributed on the one hand and how costs are allocated on the other.

b. Because REU is City's Alter Ego, City Controls Both Ends of the Transaction and Can Impose the PILOT for the Benefit of Its General Fund in Violation of Proposition 26.

Beyond the fact that the "services" REU pays for via the PILOT *are* provided to those not charged the PILOT, the arrangement between City and REU is not an arm's length transaction. A fiction running throughout City's briefs is the implication that City and REU are separate and distinct legal entities, with the former providing services to the latter and the latter providing compensation in return. The truth of the matter is that REU is simply a department of City, no different from the police department, the fire department, or the public works department. The governing body of City is the same as the governing body of REU (the City Council); thus the "value" of any "service" set by City will automatically be accepted by REU since they are one in the same. Due to its ownership and control of REU, there would be no limit on what price City could arbitrarily charge to REU for any services provided. The members of the City Council can simply put on their "council member" hats and declare that services provided by City to REU are worth $XX. The members of the City Council then can put on their "REU governing board" hats and agree to pay that amount to City's general fund. Proposition 26 does not permit such devices.

There is no limit on the dollar value the City Council can attribute to services allegedly provided to REU because they know that they themselves will be the ones agreeing to pay that price on the other end. Thus, City can set the value of the services allegedly provided based on general fund needs rather than on any objective estimate of providing "services" to REU. City could contract to provide police, fire, and public works services to outside entities, but there would be arms-length bargaining to assure the agreed-upon-price was fair and reasonable. But REU has no ability to resist the price City affixes to any services provided because REU *is* the City. Whatever City says must be paid will be paid. Under City's theory, the "contractual obligation" is no different than a general tax imposed on REU ratepayers because City can use it as a pure revenue device given the City Council's control of both ends of the transaction. This is especially the case when city departmental budgets are *already* compensated for costs they incur for the benefit of other departments, as is current City practice. (Citizens for Fair REU Rates Answer Br., at p. 30.)

c. The PILOT is Fundamentally Different from Costs Imposed by Third-Party Government Entities.

City further argues that the PILOT is a reasonable cost of providing service because it is "compelled by legislation" adopted by City. (City Opening Br., at pp. 39-40.) Hence, City attempts to frame

the PILOT as a legal obligation imposed upon REU which REU has no discretion to escape. The problem, of course, is that REU is City's alter ego.

To avoid gutting Proposition 26, the PILOT imposed on REU by City must be viewed differently from statutory obligations imposed by other lawmaking bodies. City alleges that the PILOT is a cost of service no different than complying with federal Occupational Safety and Health Administration Rules or greenhouse gas mandates imposed by the state Legislature, and that "complying with applicable law" is necessarily a reasonable cost of providing the service. (City Opening Br., at p. 40.) However, with respect to local laws that City *imposes upon itself without voter approval to raise revenues,* Proposition 26 governs. Unlike federal workplace regulations or state greenhouse gas rules (which do not impose taxes or in-lieu-of-tax payments), City has a direct financial interest in imposing statutory obligations upon REU which require REU to pay money into City's general fund. Under City's argument, by passing an ordinance requiring REU to pay revenue to City, City could circumvent Proposition 26 on the ground that REU is simply satisfying a legal mandate. This proves too much. It would allow, for example, the Redding City Council to pass an ordinance requiring REU to pay *all* of its revenues over to the City general fund, and the

arrangement would still qualify as a reasonable cost of providing service because it would simply be "complying with applicable law." This would be an obviously improper evasion of the voter approval requirements of Proposition 26.

Justifying rates on the basis of *self-imposed* quasi-contractual or legislative obligations, with the same governing body controlling both ends of the transaction to the ultimate benefit of its general fund, is precisely the type of end-run on the constitutional right of voter approval of local taxes that Proposition 26 sought to eliminate. Similar end-runs have been rejected by the courts in recent weeks. In *Capistrano Taxpayers Assn., supra,* 235 Cal.App.4th 1493, San Juan Capistrano argued that it could justify its tiered water rates under Cal. Const., art. XIII D, § 6 by simply labeling the rates in the upper tiers as penalty rates for excessive water use. (*Id.*, at 1515.) The Court of Appeal responded that San Juan Capistrano's theory

> would open up a loophole in article XIII D, section 6, subdivision (b)(3) so large it would virtually repeal it. All an agency supplying any service would need to do to circumvent article XIII D, section 6, subdivision (b)(3), would be to establish a low legal base use for that service, pass an ordinance to the effect that any usage above the base amount is illegal, and then decree that the penalty for such illegal usage equals the incrementally increased rate for that service. Such a methodology could easily yield rates that have no relation at all to the actual cost of providing the service at the penalty levels. And it would make a mockery of the Constitution.

(*Id.*)

City's argument here would "make a mockery of the Constitution." When a charge is imposed on the public through a municipal department rather than directly by the municipality itself, all the municipality would need to do is pass an ordinance requiring the department to make payments to the municipality's general fund (or arbitrarily set the value of services provided to the department) and then have that charge passed on to the paying public under the guise of a legal obligation to comply with "applicable law" (or a contractual obligation). City's argument would open a gaping loophole in Proposition 26.

d. The Way PILOTs are Measured Makes It Impossible for Them to Be Used as a Proxy for the Reasonable Costs of Providing Utility Service.

Cal. Const., art. XIII C, § 1(e)(2) exempts from the definition of local tax charges imposed for specific government services or products provided directly to the payor that (1) are not provided to those not charged; and (2) do not exceed the reasonable cost to the local government of providing the services or products.

City argues that the PILOT recoups costs to City in providing services to REU. (City Opening Br., at p. 40 ["the PILOT is intended to defray costs to the City..."].) However, City concedes that the formula used to calculate the PILOT is the amount of property tax REU would generate if it were privately rather than publicly owned.

(City Opening Br., at pp. 1, 6, 8; City Reply Br., at pp. 11 n. 4, 22.) Tellingly, City never claims (let alone attempts to prove) that the actual formula used to calculate the PILOT is the sum total of all costs borne by City for services provided to REU.

Proposition 26 makes an exception for the reasonable costs to a local government in providing a service or product. It does not make an exception for charges to replace property tax revenue lost because the property is owned by City itself. And because the PILOT only captures the latter and not the former, it is impossible for the PILOT to be legally imposed absent voter approval.

It is not hard to see why it is impossible for the PILOT to represent the costs of providing electric service. Each is driven by completely separate factors. For example, because the PILOT is supposed to replace property tax lost by municipalization of the electric utility, the amount of the PILOT can increase if the utility acquires more assets, expands its operations, or builds more facilities. (See City Opening Br., at p. 8 [PILOT amended in 1991-92 to include the value of construction in progress]; and City Reply Br., at p. 8 [PILOT amended in 2005 to include value of joint-venture assets].) The amount of the PILOT could also decrease if maintenance on REU's electric system is deferred or facilities become obsolete. Alternatively, the cost of providing electricity can

move up or down based on fuel prices, technology changes, political unrest in energy-producing regions, labor rates and disputes, and precipitation levels affecting hydroelectric power generation. (See City Opening Br., at p. 9 [retail electric rates were increased in 2008 due to fluctuations in the natural gas market and a dry year for hydroelectric power].) The cost of providing first responder, street maintenance, and similar services to REU will also move independently from the factors that drive the PILOT. (Collective bargaining costs, materials costs, year-to-year frequency of emergency calls, etc.) Anytime City's cost of providing services to REU in a given year equaled one percent of REU's imputed property value, it would be nothing more than random coincidence. City has not met its burden of proving that the cost of providing services to REU will *always* equal one percent of the value of REU's property; and City has not even attempted to make such a claim.

e. PILOTs can Never be a Reasonable Cost of Providing Service Because They Violate Cal. Const., art. XIII, § 3(b).

Pursuant to Cal. Const., art. XIII, § 3(b), local government owned property is exempt from taxation. City readily concedes that the PILOT is designed to replicate the one percent property tax REU's electric utility assets would bear if held by an investor-owned utility. (City Opening Br., at pp. 1, 6; City Reply Br., at pp. 11 n. 4,

22.) City even acknowledges that the PILOT is calculated using the State Board of Equalization's property tax assessment methodology. (City Opening Br., at p. 8; City Reply Br., at p. 11 n. 4.)

When viewed according to the real object, purpose, and result of the PILOT, it is an unconstitutional property tax on local government owned property. City attempts to evade that characterization through the use of the phrase "in lieu", but that provides no help. When determining the character of a charge, labels have little relevance:

> The character of a tax must be determined by its incidents and from the natural and legal effect of the language employed in the act. The nomenclature is of minor importance, for the court must look beyond the mere title and bare legislative assertion of the tax's designation and determine the real object, purpose and result of the enactment.

(*Sacramento Mun. Util. Dist. v. County of Sonoma* (1991) 235 Cal.App.3d 726, 733 [ignoring legislative assertion that a charge was an excise tax and determining that it actually operated as a property tax]; citing *Flynn v. San Francisco* (1941) 18 Cal.2d 210, 214-15.)

Beyond the single phrase "in lieu", City's briefs acknowledge that the PILOT *operates* as a property tax on local government owned property, including using the same methodologies the Board of Equalization uses in assessing privately-owned utilities, including electric companies. Moreover, PILOT revenues are also *used* in the

same manner as *ad valorem* property tax revenues. Property tax revenues fund general government purposes. (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 298 ["property tax revenues...fund general local governmental services"].) City concedes that PILOT revenues are used in the same manner: to fund general governmental services of City. (City Opening Br., at pp. 1-3.)

This is why so-called "in lieu fees" imposed on public agencies to make up for lost property taxes have already been declared unconstitutional under Cal. Const., art. XIII, § 3(a). (See *Calif. State Teachers Retirement System v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 58 [citing with approval a 1991 Attorney General opinion finding that an "in lieu" fee for general government purposes imposed on the California Public Employees' Retirement System based on its ownership of real property was unconstitutional (74 Ops.Cal.Atty.Gen. 6 (1991)].) The PILOT imposed on REU is no different.

City argues that the PILOT is necessary to keep City's general fund "on the footing it would have" if the community had not elected to municipalize electric service. (City Opening Br., at pp. 6-7.) However, Cal. Const., art. XIII, § 3(b) does not make any such exception to the prohibition on taxing local government owned

property.[4]

City's other defense is to point at other municipalities that impose PILOTs and essentially argue that they must be legal because "others are doing it". (City Opening Br., at pp. 1, 7-8.) But the fact that other local agencies might be engaging in an illegal practice does not legitimize it. (*Calif. Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 607 ["The ultimate resolution of a question of statutory meaning is a judicial question" and an erroneous construction "does not become decisive no matter how long continued"].)

To summarize, the PILOT walks like a property tax, talks like a property tax, and acts like a property tax. City's only defense is that the insertion of the words "in lieu of" between the word "payment" and "tax" somehow converts the PILOT from an unconstitutional property tax into a permissible charge for service. But as previously determined by an Attorney General opinion and the Court of Appeal,

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[4] If REU was owned by a private entity, the property tax generated by it would not belong solely to City. To the contrary, the property tax revenues would be required to be shared with multiple government agencies. (See Citizens for Fair REU Rates Answer Br., at pp. 39-40.) There is no evidence that City is sharing PILOT revenue with these other jurisdictions; nor do those other jurisdictions have the ability to extract hidden tax payments from consumers because they do not sell them electricity.

calling the leopard by a different name does not change its spots. If anything, the "payment *in lieu of* tax" label only reinforces the conclusion that the charge is a tax on local government owned property. An unconstitutional charge such as this can never be part of the reasonable cost of providing a service or product because the charge cannot be legally imposed in the first instance.

f. The PILOT is an Illegal Tax on Local Government Owned Property that Local Voters *Cannot* Approve.

The exemption from taxation of local government owned property stretches far back into California's constitutional history. (See, e.g., *Inglewood v. County of Los Angeles* (1925) 207 Cal. 697, 703 [property of a municipality is exempt from general government taxes under fmr. Cal. Const., art. XIII, § 1].) Furthermore, Cal. Const., art. XIII, § 3(b) prohibits local government owned property from being taxed *even* if the tax is approved by the voters. Thus, the PILOT is illegal not only because it was not approved by local voters as required by Proposition 26. It is also illegal because it constitutes a property tax on local government owned property that the voters have no power to approve in the first instance.

5. The PILOT does Not Predate Proposition 26.

City spills a substantial amount of ink attempting to incorrectly characterize the PILOT as a permanent, unbroken legal

requirement. It also spends a great deal of time discussing how the PILOT is valid under cases which predate Proposition 26. (City Opening Br. at p. 42 [citing 1982 case suggesting rates can be in excess of cost of service so long as they are subjectively "reasonable", and a 1975 case regarding "common law" rate reasonableness]; and pp. 43-45 [citing 1986 case suggesting local governments can earn profits from municipal utility operations to the benefit of their general funds].) These arguments have no merit.

First, the PILOT does not predate Proposition 26. The PILOT is inserted in and adopted as part of City's annual budget. (City Opening Br., at pp. 6-9, 11-12.) A budget bill is simply a list of appropriations itemizing recommended expenditures for the ensuing fiscal year. (*Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1455.) City argues that the PILOT predates Proposition 26 because it appeared in budgets prior to November 3, 2010. (City Opening Br., at pp. 16-17.) The very fact that the PILOT has been enacted via the budget process undermines City's argument. City's fiscal year, like that of most government agencies in California, runs from July 1 to June 30. (City Opening Br., at p. 7 n. 3.) Therefore, also like most other California government agency budgets, City's budget only remains effective during the fiscal year for which it was enacted. (See, e.g., *Committee*

to Defend Reproductive Rights et al. v. Myers (1981) 29 Cal.3d 252, 260 n. 3 [lawsuits seeking to restrain enforcement of the 1978 and 1979 state Budget Acts were "technically moot" because the budget acts in question had expired].) Once the relevant fiscal year expires, the budget act has no more force or effect. The simple fact that the PILOT was repeatedly enacted in successive budgets proves that it did not outlast the prior budget in which it was adopted absent reenactment.

Second, even assuming *arguendo* that the PILOT did predate Proposition 26—which as explained above it does not—the issue would be mooted by the fact that the PILOT does not predate Cal. Const., art. XIII, § 3(b) and is invalid under that section.

Finally, judicial decisions decided prior to the enactment of Proposition 26 do not take into consideration the requirements of Proposition 26 itself. Moreover, those decisions must be deeply discounted, if not entirely disregarded, in light of the voters' repudiation via Proposition 26 of the prior tax versus "fee" framework that all too often allowed the voter approval requirements contained in Propositions 13 and 218 to be circumvented. (*People v. Petrilli* (2014) 226 Cal.App.4th 814, 823 n. 5 [decision of Supreme Court regarding grand jury proceedings was later overturned by the electorate via adoption of an initiative

constitutional amendment]; *Strauss v. Horton* (2009) 46 Cal.4th 364 [initiative constitutional amendment superseding prior Supreme Court decision dealing with marriage].) Charging voters more than the actual cost of a service and earning profits on municipal utilities are precisely the type of local "hidden taxes" that Proposition 26 intended to invalidate absent voter approval. To the extent these and any other cases cited by City stand in the way of voter self-determination regarding new and higher local taxes, they are no longer viable authority in evaluating whether a local charge is subject to voter approval.[5]

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[5] Even assuming for the sake of argument that the pre-Proposition 26 cases cited by City remain valid legal authority after the passage of Proposition 26, they are not on point. None of them dealt with a situation where a local government imposed a tax on its own property. To the contrary, the present situation is most analogous to the *Calif. State Teachers Retirement System* case, *supra,* 216 Cal.App.4th 41. In that case, the state teachers' retirement system (STRS) purchased an office building in Los Angeles in 1984. As a public entity, its interest in the building was exempt from taxation, so the property was removed from the county tax roll. The County of Los Angeles still taxed the possessory interest in the building held by a private lessee pursuant to Gov. Code, § 7510. (*Id.*, at 48-49.) However, STRS complained that Section 7510 resulted in taxation of not only the lessee's possessory interest but also STRS' reversionary interest in the property, in violation of Cal. Const., art. XIII, § 3(a). (*Id.*, at 49.) The Court of Appeal held that Section 7510 violated Cal. Const., art. XIII, § 3(a) because it taxed the constitutionally exempt reversionary interest in the property held by STRS. (*Id.*, at 61.) The only difference in this case is that City holds both the reversionary and present interest in the taxed property.

III. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal below should be affirmed. The PILOT is a general tax under Proposition 26, does not and cannot qualify as a reasonable cost of providing a service under Cal. Const., art. XIII C, § 1(e)(2), is also an illegal property tax on local government owned property, and does not predate Proposition 26.

DATED: August 19, 2015

Respectfully submitted,

Nielsen Merksamer Parrinello
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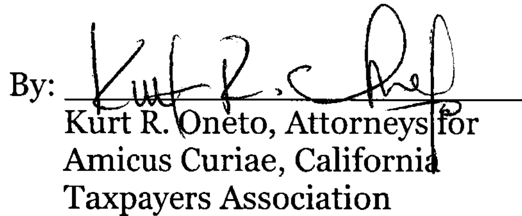
By: 
Kurt R. Oneto, Attorneys for
Amicus Curiae, California
Taxpayers Association

DECLARATION OF KURT R. ONETO
IN CERTIFICATION OF BRIEF LENGTH

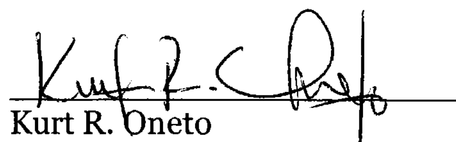
Kurt R. Oneto, Esq., declares:

1. I am licensed to practice law in the state of California, and am the attorney of record for Amicus Curiae California Taxpayers Association ("CalTax"), in this action. I make this declaration to certify the word length of Brief of Amicus Curiae CalTax.

2. I am familiar with the word count function within the Microsoft Word software program by which the Brief was prepared. Applying the word count function to the Brief of Amicus Curiae CalTax, I determined and hereby certify pursuant to California Rules of Court Rule 8.204(c) that the Brief contains 5,746 words, and is within the word count limit imposed by Rule 8.204(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on August 19, 2015, at Sacramento, California.



Kurt R. Oneto

Citizens for Fair REU Rates v. City of Redding
California Supreme Court Case No. S224779

PROOF OF SERVICE

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

I am a citizen of the United States employed in the County of Marin. I am over the age of 18 and not a party to the within cause of action. My business address is 2350 Kerner Blvd., Suite 250, San Rafael, California. I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service and for pickup by Federal Express.

On August 20, 2015 I served a true copy of the foregoing **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CALIFORNIA TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS** on the following parties in said action, by serving:

Walter P. McNeill McNeill Law Offices 280 Hemsted Drive, Suite E Redding, CA 96002 *Attorneys for Plaintiff and Appellant Citizens for Fair REU Rates*	Michael G. Colantuono Michael R. Cobden Megan S. Knize Colantuono, Highsmith & Whatley, PC 11364 Pleasant Valley Road Penn Valley, CA 95946-9000 *Attorneys for Defendant and Respondent City of Redding*
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Clerk of the Court Shasta County Superior Court 1500 Court Street Redding, CA 96001-1686	Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814

_X__ **BY U.S. MAIL:** By following ordinary business practices and placing for collection and mailing at 2350 Kerner Blvd., Suite 250, California 94901 a true copy of the above-referenced document(s), enclosed in a sealed envelope; in the ordinary course of business, the above documents would have been deposited for first-class delivery with the United States Postal Service the same day they were placed for deposit, with postage thereon fully prepaid.

Executed in San Rafael, California, on August 20, 2015.

I declare under penalty of perjury, that the foregoing is true and correct.

Paula Scott