IN THE SUPERME COURT
OF THE STATE OF CALIFORNIA

No. S262634

Robert Zolly, Ray McFadden, and Stephen Clayton
Plaintiffs and Appellants,

vs.

City of Oakland
Defendant and Respondent

Consolidated Answer to Amicus Curiae Briefs of Bay Area Toll Authority and Metropolitan Transportation Commission, League of California Cities and the California State Association of Counties, and the Legislature of the State of California

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After a Published Decision from the Court of Appeal
First Appellate District, Division One, Appeal No. A154986
Alameda County Superior Court Case No. RG16821376

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INTRODUCTION

Amici ask this court to construe the fourth exception to article XIII C's definition of "tax" in a vacuum.[1] A charge that is nominally a franchise fee is always "imposed for … use of local government property," amici urge, no matter how astronomical the amount. But amici's position faces two insurmountable obstacles:

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[1] This answer uses the term "amici" to refer to Bay Area Toll Authority and Metropolitan Transportation Commission (collectively, "BATA"), League of California Cities and the California State Association of Counties (collectively, "League"), and the Legislature of the State of California ("Legislature").

(1) the voters' intent when they originally enacted article XIII C in 1996, and (2) the voters' intent when they amended that article in 2010.

First, *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (*Jacks*) effectuated voters' intent from 1996 by construing article XIII C's original version to limit franchise fees. Otherwise, local governments would have frustrated that intent by continuing to inflate franchise fees to make up for limits on their taxing authority. Amici implore this court to ignore article XIII C's original franchise-fee limit because this case involves the article's amended version. Yet—especially because the amendment was meant to reinforce the original version—this court cannot ignore the article's history.

Second, voters' intent in 2010 was the *opposite* from what amici's position requires. Since article XIII C originally limited franchise fees, amici's position would mean that article XIII C's amendment removed that limit. But the only changes to existing law mentioned in the amendment's ballot materials were additional limits. Even if the amendment did not affect article XIII C's treatment of franchise fees, as amici assert, that would mean the original franchise-fee limit remains intact.

It is ironic that amici are trying to use Proposition 26—a measure passed to stop local governments from circumventing taxing-authority limits—to undo a limit on local governments' taxing authority. That ploy should be rejected.

LEGAL DISCUSSION

I. Amici wrongly assert that article XIII C's original franchise-fee limit is irrelevant to whether that limit still exists post-amendment.

Amici contend that, since *Jacks* analyzed franchise fees under article XIII C's *former* version, *Jacks* "does not bear" on franchise fees' treatment under article XIII C's *current* version. (BATA's Am. Br., at p. 36; Legislature's Am. Br., at p. 23.)

That ahistorical approach defies how this court has construed the series of anti-tax initiatives culminating in Proposition 26. Through each successive initiative, voters have tried "to close government-devised loopholes" in the current law. (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 (*Apartment Ass'n*) [Propositions 13 and 218]; see also *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 [Propositions 13, 218, and 26].) Because of voters' iterative approach, "the intent and purpose of [Proposition 13] inform[] [the] interpretation of [Proposition 218]." (*Apartment Ass'n, supra,* at p. 839; see also *Jacks, supra,* 3 Cal.5th at pp. 261–262 [holding that the analysis of *Sinclair Paint Co. v. State Bd. Of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*) about fees under Proposition 13 "remains sound" under Proposition 218].) The intent and purpose of Proposition 218, in turn, inform the interpretation of Proposition 26. (See *Jacks, supra,* at pp. 262–263 [stating that "the purpose of [Proposition 26] was to *reinforce* the voter approval requirements set forth in Propositions 13 and 218"].)

To cut this thread running through Propositions 13, 218, and 26, amici mischaracterize the import of *Jacks*. Amici assert the truism that the people who voted for Proposition 26 in 2010 could not have relied on the *Jacks* decision issued in 2017. (BATA's Am. Br., at pp. 36–37; Legislature's Am. Br., at p. 23.) But amici overlook that *Jacks* was effectuating voters' intent from when they had passed Proposition 218

in 1996.[2] (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1048.) To accept amici's position, then, voter intent between 1996 and 2010 would have had to have shifted in such a way that, when voters passed Proposition 26, their intent no longer supported a franchise-fee limit. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) But none of Proposition 26's context supports such a shift. (Answer Br. on the Merits ("Answer Br."), at pp. 27–44.)

Amici also contend that *Jacks* is irrelevant because the fourth exception covers many charges that have different legal considerations than franchise fees. (BATA's Am. Br., at p. 37; Legislature's Am. Br., at p. 20.) But *Jacks* merely applied *Sinclair Paint*'s general principle about "the relationship between a charge and the rationale underlying the charge" to the specific context of franchise fees. (*Jacks, supra,* 3 Cal.5th at p. 269; see also *id.* at pp. 261, 267–268.) Because the rationale of a franchise fee is a government's right to be paid for transferring a property interest (i.e., a franchise) (*id.* at pp. 262, 267), a fee that "exceeds any reasonable value of the franchise … does not come within the rationale that justifies the imposition of fees without voter approval" (*id.* at p. 269). And since all charges covered by the fourth exception involve the transfer of a government-property interest, the amounts of those charges must also be tethered to the values of the respective property interests conferred.[3]

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[2] Indeed, in ascertaining voters' intent when they had passed Proposition 218, *Jacks* drew from *Sinclair Paint*'s analysis of Proposition 13, which was passed back in 1978. (*Jacks, supra,* 3 Cal.5th at pp. 258, 260–262, 267–269; see also *id.* at p. 267 [concluding that "[n]othing in Proposition 218 reflect[ed] an intent to change the historical characterization of franchise fees"].)

[3] Legislature asserts that the fourth exception covers state-park entrance and use fees, port-access charges, bridge and road tolls, and vehicle-permit fees. (Legislature's Am. Br., at pp. 12–13, 25–27.) While this court does not need to reach that question (Answer, at p. 36, fn. 12), at least some of those charges could be classified as paying for

It is true that, for a local government which wants to impose hidden taxes, a franchise fee is a particularly enticing vehicle. A utility has the incentive to agree to whatever franchise-fee amount the government proposes because the utility's captive clientele will ultimately foot the bill.[4] (See *Jacks, supra,* 3 Cal.5th at pp. 269–270; cf. *Wexler v. California Fair Plan Association* (Apr. 14, 2021, No. B303100) 2021 WL 1398866, at *11 [describing moral hazard "as the incentive that insurance can give an insured to increase risky or destructive behavior covered by the insurance"].) But when the negotiating party foots the bill—such "as the negotiated rent paid by the lessor of a publicly owned building"—the rent amount more likely "reflects its market value[.]" (*Jacks, supra*, at pp. 269–270; see also *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 422–423.) Thus, where, unlike here, the negotiating party has an incentive to seek the lowest price for the government-property interest, the charge will typically qualify as a nontax under the fourth exception. (*Jacks, supra,* at p. 269.)

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benefits or privileges analyzed under article XIII C's first exception (or article XIII A's analogous first exception). (See *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 950 [holding that "user fees or charges are typically cost recovery charges imposed upon individual citizens for the specific, temporary use of public property and/or services"].) Indeed, League defines a franchise as " '*a special privilege* … to be exploited for private profit … .' " (League's Am. Br., at p. 9, italics added, quoting 12 McQuillin Mun. Corp. (3d ed.) § 34.2.) To the extent that a supposed franchise fee pays for something other than the use of "public streets or rights-of-way" (*Jacks, supra,* 3 Cal.5th at p. 262), it arguably should be analyzed under the first exception (and its reasonable-costs limit) as well.

[4] League contends that solid-waste haulers have an incentive to negotiate franchise-fee amounts because they are profit-seeking enterprises. (League's Am. Br., at p. 22.) But the franchise fee does not cut into a waste hauler's profits because it passes on that cost to its customers.

Amici try to downplay article XIII C's original franchise-fee limit for an obvious reason: it requires amici to show that Proposition 26 removed that limit. And, as explained below, neither the text nor context of Proposition 26 requires that perverse interpretation.

II. Amici do not explain why Proposition 26 would remove a tax-approval limit it was meant to reinforce.

Amici insist that the fourth exception's plain meaning clearly places no limit on franchise-fee amounts. (BATA's Am. Br., at pp. 17–21; Legislature's Am. Br., at pp. 12–24.) But amici's position would turn Proposition 26's purpose on its head. Instead of *reinforcing* tax-approval limits, the measure would have *removed* that limit as to franchise fees. For several reasons, the Court should reject amici's counterintuitive construction.

A. *Contrary to amici's position, the fourth exception's plain text does not compel this court to find that Proposition 26 removed the franchise-fee limit.*

Read in context, the fourth exception's text does not clearly authorize exorbitant franchise fees. Amici's contrary arguments are unpersuasive.

BATA first contends that the fourth exception's phrase "imposed for" cannot limit charge amounts. According to BATA, the phrase denotes that the transfer of a franchise "is the *triggering condition* for the charge, not the *motivation* for it." (BATA's Am. Br., at p. 24.) BATA adds that, when a customer asks her bank—" 'What was this charge imposed for?' "— her question refers to "what she did to incur the charge, not how the bank will spend the proceeds." (*Id.* at pp. 24–25.) But ratepayers do not argue that "imposed for" refers to a government's motivation in imposing a charge (i.e., the intended use of the charge's proceeds). (Answer Br., at pp. 24, 35–36.)

Instead, because the transfer of a government-property interest is the justification for a charge under the fourth exception, the phrase "imposed for" means "imposed because of." (Answer Br., at pp. 9, 33.)

The fourth exception thus limits a franchise fee to an amount justifiable by the transfer of the franchise. (*Ibid.*) When BATA's hypothetical bank customer asks—"What was this charge imposed for?"—she is really asking what *justified* the bank taking that amount of money out of her account. The justification is more than a "triggering condition"—it is a legal basis. And just like a bank must have a legal basis to take an accountholder's money, a city must have a legal basis to impose a charge without first getting voter approval. (*Jacks, supra,* 3 Cal.5th at pp. 261, 269) Indeed, the fourth exception uses the word "for" in precisely the same sense this court did in *Jacks*. (See *id.* at p. 269 ["To constitute compensation *for* a property interest, . . . the amount of the charge must bear a reasonable relationship to the value of the property interest"], italics added.)[5]

Indeed, amici do not dispute that the six other exceptions are limited. (See BATA's Am. Br., at pp. 26–27; Legislature's Am. Br., at pp. 21–22.) Nor do amici explain why voters would have inserted one limitless exception in the middle of those six limited exceptions. (Answer Br., at pp. 32–33.) Instead, Legislature argues that, because ratepayers "have cobbled together different limitations for various exceptions[,]" the canon of statutory construction *noscitur a sociis* does not apply. (Legislature's Am. Br., at p. 21.) Yet each exception needs its own limit because the rationale and preexisting jurisprudence for each exception is different. (Answer Br., at p. 31–32, 36–37; see also *Jacks, supra,* 3 Cal.5th at p. 269 [tailoring *Sinclair Paint*'s analysis of fees to the specific context of franchise fees].) Even so, the seven limits

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[5] BATA and Legislature incorrectly assert that ratepayers rely on a reasonable-costs limit and that ratepayers have materially changed their position. (BATA's Am. Br., at pp. 22, 24–26; Legislature's Am. Br., at pp. 13–15.) Since the operative complaint, ratepayers have argued that the supposed franchise fees here are invalid under article XIII C because they are not reasonably related to the value of the corresponding franchises. (2 JA 282.)

together ensure that a local government does not exploit an exception to impose a tax without first getting voter approval. (See *Jacks, supra,* at p. 267 [noting that "[a]s voters restricted the taxing authority of local governments, … some local jurisdictions increased the [franchise fees] they imposed"].)

BATA also argues that the fourth exception's "imposed for" limit would conflict with the other six exceptions. Regarding the first three exceptions, BATA contends that limit would render the "reasonable costs" limit surplusage. (BATA's Br., at pp. 25–26.) But the "reasonable costs" limit in the first three exceptions complements those exceptions' "imposed for" limit: it prevents a city from justifying higher charges by incurring *un*reasonable costs in conferring a benefit, providing a service, or regulating an industry. (Answer Br., at pp. 36–37.) And without the "reasonable costs" limit, those categories of fees would remain subject to a more lenient reasonableness standard. (See *Sinclair Paint*, *supra*, 15 Cal.4th at p. 874 [noting that special assessments were allowed if they reflected the benefit or service's reasonable value, and regulatory fees were allowed if they reflected a "reasonable relationship to the [operation's] social or economic 'burdens' "].) Regarding the last three exceptions, BATA contends the "imposed for" limit would "*eclipse* [the] constitutional protections" underlying those exceptions. (BATA's Am. Br., at p. 27.) But the "imposed for" limit does not appear in the fifth through seventh exceptions.

B. *The ballot materials refute amici's position that Proposition 26 removed Proposition 218's franchise-fee limit.*

Amici urge this court to decide this case solely on the fourth exception's plain text because Proposition 26's Voter Information Guide leaves them without tenable arguments. (See BATA's Am. Br., at pp. 17–18; Legislature Am. Br., at p. 16.) Legislature, in fact, does not even try to argue that the Voter Information Guide supports their construction. And although BATA tries, its attempt is not persuasive.

BATA contends that Proposition 26 was focused on further limiting regulatory fees and drawing a bright line between taxes and fees—not on imposing a franchise-fee limit. (BATA's Am. Br., at pp. 28–35.) The initiative's preamble and argument in favor, though, show that voters were trying to prevent hidden taxes in any form. (Answer Br., at pp. 40–41.) And the part of a franchise fee that is not justified by its underlying rationale—just like any fee—is a hidden tax. (*Id.* at pp. 41–42.) But even assuming *arguendo* that BATA were correct, that would at most mean Proposition 26 left Proposition 218's franchise-fee limit unaffected. BATA at one point seems to accept this fatal flaw in its position. (See BATA's Am. Br., at p. 32 [stating that "Proposition 26 *did 'not affect'* … local government charges for the 'entrance to or use of [state or local] government property' "], italics added and alteration in original, quoting Cal. Const., art. XIII C, § 1, subd. (e)(4).)

But BATA then backtracks and makes two arguments why Proposition 26 *did* affect the classification of franchise fees.

First, BATA contends that Proposition 26's clarification of the tax-versus-fee distinction did away with Proposition 218's franchise-fee limit:

> Drawing that [bright line between taxes and fees] would naturally cause a few former "taxes" to be reclassified as "fees" under Proposition 26's clear exceptions, even as many more "fees" were reclassified as "taxes" on balance.

(BATA's Am. Br., at p. 37.) Yet an amendment either clarifies an aspect of existing law or it changes that aspect—it does not do both. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922–923.) Here, by clarifying that charges "imposed for" the use of government property are not taxes, Proposition 26 maintained the preexisting line between valid and invalid franchise fees. (See *Jacks*, *supra*, 3 Cal.5th at p. 254 [concluding that, both historically and under Proposition 218, a fee does not constitute a franchise fee (i.e.,

"compensation for a property interest") unless the amount of the charge "bear[s] a reasonable relationship to the value of the property interest"].)

Moreover, Proposition 26's Voter Information Guide would have alerted voters to a reclassification of a "few former taxes" as fees—especially because that quirk would have directly conflicted with the initiative's stated purpose "to ensure the effectiveness" of Propositions 13 and 218. (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (f), p. 114 (Voter Information Guide) [uncodified section entitled "Findings and Declarations of Purpose"]; see also *People v. Valencia* (2017) 3 Cal.5th 347, 364 (*Valencia*).) Indeed, the Voter Information Guide strongly implied that Proposition 26 would not reclassify *any* taxes as fees. The Legislative Analyst's analysis explained that certain fees would be reclassified as taxes, while other fees would be unaffected. (Voter Information Guide, *supra*, analysis of Prop. 26, p. 58.) But the analysis did not mention the third category of charges posited by BATA: taxes that Proposition 26 would turn into fees, no longer subject to voter approval. Since that theorized, ironic consequence of Proposition 26 went unnoticed by the Legislative Analyst—which "must provide an analysis that is 'easily understood by the average voter' … 'including the effect of the measure on existing law' " (*Valencia, supra,* 3 Cal.5th at p. 365, quoting Elec. Code, § 9087, subd. (b))—then it surely went unnoticed by "the average voter" who helped enact the measure to *strengthen* voter-approval limits (*id.* at p. 372).

Second, BATA points to the fact that, unlike Proposition 218, Proposition 26 did not have a "liberal construction" clause. (BATA's Am. Br., at pp. 34–35.) Yet, since Proposition 26 had the remedial purpose of reinforcing existing tax limits, it should be liberally construed regardless. (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269.) Indeed, if Proposition 26 were

strictly construed as BATA suggests, Proposition 26 would erode—not reinforce—Proposition 218's limits.

Apart from the Voter Information Guide, amici assert a policy argument that tries to undo the voters' will. Amici contend that the fourth exception does not need to limit franchise-fee amounts because those amounts are already limited by the political process, such as the risk of referenda. (BATA's Am. Br., at p. 35; Legislature's Am. Br., at pp. 22–23; League's Am. Br., at pp. 14–19.) Yet, despite any supposed political checks, and despite existing constitutional limits, the voters in 2010 believed they had to do more to rein in the practice of imposing hidden taxes labeled as fees. (Voter Information Guide, *supra*, text of Prop. 26, § 1, p. 114.) Indeed, *Jacks* stated that the prospect of governments' inflating franchise fees to make up for limits on their taxing authority was not "speculative." (*Jacks, supra,* 3 Cal.5th at p. 269.) Moreover, Proposition 26 imposed on *local governments* the burden to prove that a charge is not a tax. (Cal. Const., art. XIII C, § 1, subd. (e).) But amici would impose on *voters* the onerous burden of going through the referenda process to invalidate exorbitant franchise fees—undermining the intent behind Proposition 26.

CONCLUSION

Amici do not explain why voters in 2010 would have had a laxer attitude toward exorbitant franchise fees than voters in 1996. Proposition 26's ballot materials show that, if anything, the opposite is true. This court should affirm the Court of Appeal's opinion.

Respectfully submitted,
Katz Appellate Law PC

Dated: April 28, 2021

By /s/
Paul Katz
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Respectfully submitted,

Dated: April 28, 2021 /s/

Paul J. Katz
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STATE OF CALIFORNIA
Supreme Court of California

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