Case No. S262634

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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**ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON**

*Plaintiffs-Appellants,*

v.

**CITY OF OAKLAND**

*Defendant-Respondent*

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# PETITIONER CITY OF OAKLAND'S CONSOLIDATED ANSWER TO THE BRIEFS OF AMICI CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION AND *COUNTY INMATE* COUNSEL

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

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## INTRODUCTION

Oakland's briefing on the merits established that franchise fees are categorically exempt from the definition of "tax" under California Constitution, article XIII C ("Article XIII C"), section 1, subdivision (e), paragraph (4) ("Exemption 4"), and, thus, are not subject to any constitutional "reasonable cost" or "reasonable value" limitation. (See Oakland's Opening Brief on the Merits ("OB") at pp. 20-41; Reply Brief on the Merits ("RB") at pp. 11-28.) Article XIII C, as amended by Proposition 26, expressly *excludes* any "charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property" from the definition of "tax." (See Cal. Const., art. XIII C, § 1, subd. (e), par. (4).) Franchise fees come within Exemption 4 because a franchise is property, and franchise fees are "the purchase price of the franchise." (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262-63 (*Jacks*); see also *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 86 (*Zolly*) ("Relevant here is the fourth exemption, which applies to 'A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.'").)

The briefs of amici curiae the League of California Cities and the California State Association of Counties (together, "the League/CSAC"), the Legislature of the State of California ("the Legislature"), and Bay Area Toll Authority and the Metropolitan Transportation Commission (together,

"BATA/MTC") (collectively, the "Oakland Amici") bolster Oakland's position and textual analysis showing that franchise fees, as charges for the use or purchase of government property, are categorically exempt from the definition of "tax."

By contrast, Respondents and their supporting amici curiae, the Howard Jarvis Taxpayers Association ("HJTA") and McLane, Bednarski & Litt LLP and Rapkin & Associates, LLP (the "County Inmate Counsel") (together, the "Zolly Amici"), have offered shifting, often conflicting theories to challenge the franchise fees at issue here. The Zolly Amici propound a variety of arguments to support their ultimate theory that Oakland's franchise fees (and franchise fees generally) are an improper tax if they are not limited to either the "reasonable cost" to the government of operating the franchise (HJTA) or the "reasonable value" of the franchise (the County Inmate Counsel). Oakland rebuts these and the Zolly Amici's other arguments below.

## LEGAL DISCUSSION

### I. The Zolly Amici's Arguments Fail to Recognize That Franchises Like Oakland's Are a Form of Property, and That Franchise Fees Are Contract Consideration for Franchise Property Rights

The Zolly Amici contend that franchise fees are charges for "entrance to or use of local government property" that are not categorically exempt from the definition of "tax," but instead must be limited to either the "reasonable cost" of operating the franchise (see, e.g., HJTA Br. at pp.

9, 28-30) or the franchise's "reasonable value" (see County Inmate Br. at pp. 20-26). The Zolly Amici's arguments rest on a fundamental misunderstanding of Oakland's waste-hauling and recycling franchises, and they fail on multiple levels.

To start, California law has long recognized that franchises are property. (See, e.g., *Jacks, supra*, 3 Cal.5th at p. 262; *City & County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 747 (*Market St. Ry. Co.*) ("A franchise is property[.]"); *Stockton Gas & Electric Co. v. San Joaquin County* (1905) 148 Cal. 313, 316 (same); see also 34A Cal.Jur.3d (Feb. 2021 update) Franchises from Governmental Bodies, § 4 ("A franchise is property of an incorporeal and intangible nature, and is considered an estate in real property.") (citations omitted); 12 McQuillin Law of Municipal Corps. (3d ed. Aug. 2020 update) Franchise defined, § 34:2 ("When granted, a franchise becomes property in the legal sense of the word, by virtue of contractual right[.]") (citations omitted).) A franchise "enable[s] an entity to provide vital public services with some degree of permanence and stability, as in the case of franchises for utilities."[1] (*Santa*

[1] Waste-hauling and recycling services are frequently the subject of exclusive franchises. (See 12 McQuillin Law of Municipal Corps., *supra*, Power to grant exclusive franchises—Waste management contracts, § 34:36 (local governments may "offer exclusive franchises respecting the hauling and disposal of nonrecyclable solid waste and recyclable waste." (citations omitted)); 34A Cal.Jur.3d, *supra*, Franchises from Governmental Bodies, § 6 ("[C]ities may grant exclusive franchises for solid-waste

*Barbara County Taxpayers Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 949 (*Santa Barbara Cty.*); see also League/CSAC Br. at p. 9 (franchises are "'granted by the government to particular individuals or companies to be exploited for private profit as such franchisees seek permission to use public streets or rights-of-way *in order to do business with a municipality's residents*, and are willing to pay a fee for this privilege'") (quoting 12 McQuillin Law of Municipal Corps., *supra*, Franchise defined, § 34:2) (emphasis added).)

Franchise fees, therefore, may be the "*purchase price* of the franchise." (*Jacks, supra*, 3 Cal.5th at p. 262 (emphasis added); *Market St. Ry. Co., supra*, 9 Cal.2d at p. 749 ("A sale implies a *purchase price*, which has been variably set as a sum payable in cash upon the award of the franchise … .") (emphasis added); see also 34A Cal.Jur.3d, *supra*, Franchises from Governmental Bodies, § 5 ("As between the sovereign and the grantee, a franchise constitutes a contract when supported by a *valid consideration*.") (emphasis added) (citation omitted).) "[F]ranchise fees are paid for the governmental grant of a relatively long possessory right to use

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handling services.") (citation omitted).) The exclusivity of the franchise granted by Oakland to the private waste-haulers is highly valuable given the legal presumption *against* exclusive franchises. (See, e.g., 12 McQuillin Law of Municipal Corps., *supra*, Construction, § 34:41 ("Exclusive franchises are not favored by the courts. No presumption arises as to the exclusiveness of a franchise. Exclusiveness of a franchise is not implied in its grant, but must be set out in writing.") (citations omitted).)

land, similar to an easement or a leasehold, *to provide essential services to the general public*." (*Santa Barbara Cty.*, *supra*, 209 Cal.App.3d at pp. 949) (emphasis added).)

The Zolly Amici's arguments overlook the broad property rights that make up a franchise and for which franchise fees are paid as consideration. The Zolly Amici's theory instead rests on the demonstrably incorrect assumption that Oakland's franchises comprise only the right to use city streets and rights of way, and thus that its franchise fees were paid in exchange for only that specific property interest. (See, e.g., HJTA Br. at pp. 11, 14, 16-18, 20, 24-25, 28-30; County Inmate Br. at pp. 20-26 & fn. 6.) HJTA incorrectly contends that "[t]he 'property interest' theoretically granted to the haulers in this case is the right to use city streets in the conduct of their business." (HJTA Br. at p. 28; *id.* at p. 20 (claiming that Oakland asserts its franchise fees are "in exchange for use of city streets");[2] see also County Inmate Br. at p. 26 & fn. 6 (arguing Oakland's franchise

[2] In support of its contention that "[t]he 'property interest' theoretically granted to the haulers in this case is the right to use city streets in the conduct of their business," HJTA cites Oakland's Petition for Review, at page 18, suggesting that Oakland's Petition for Review supports HJTA's characterization of the "property interest" at issue here. (See HJTA Br. at 28.) This is not true. The only relevant discussion on the cited page of Oakland's Petition for Review is the basic assertion that "Exemption 4 applies to amounts paid in exchange for government property interests, such as franchise fees." (Oakland's Pet. at 18–19.) Nowhere did Oakland state or imply that those "government property interests" include only "the right to use city streets." To the contrary, Oakland has consistently established otherwise.

fees are taxes to the extent they were "not simply a 'charge imposed for entrance to or use of local government property'" because they otherwise "exceed[] the rationale for imposing the charge as a nontax").)

Oakland's franchises consist of a bundle of related property interests, which include, but are not limited to, the right to use city streets. (See, e.g., 34A Cal.Jur.3d, *supra*, Franchises from Governmental Bodies, § 3 ("the right to use the streets and the right to take a profit from that use" are *distinct* rights that "*conjointly* constitute the franchise") (emphasis added) (citation omitted); see also 12 McQuillin Law of Municipal Corps., *supra*, Franchise defined, § 34:2 ("the grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services" constitutes "the franchise") (citations omitted).)

The Zolly Amici likewise do not engage the language of the franchise agreements themselves, which reflect the broad scope of property interests exchanged in the bargain between Oakland and its waste-hauling and recycling franchisees. The implementing ordinances for the WMAC and CWS franchises spell out that the franchise fees were charged

> [i]n consideration of the special franchise right granted by the City to Franchisee to transact business, provide services, use the public street and/or other public places, and to operate a public utility for Mixed Materials and Organics collection services.

(2 JA 331 (WMAC); see also 2 JA 326 (similar language for CWS); see also OB 47-48; RB 16-17.) This language makes clear that in exchange for

the franchise fees, the franchisees obtained property interests that included *both* (1) the "special" (i.e., exclusive) right to "operate a public utility" to collect and haul waste or recycling materials, including the right to transact business and provide those essential services to Oakland residents; *and* (2) the right to "use the public street and/or other public places" as needed to carry out the franchises' business. (See 2 JA 331 (WMAC ordinance); 2 JA 326 (CWS ordinance).)

Accordingly, the Zolly Amici's singular focus on the right to enter upon or use government property to the exclusion of other transactions involving government property is inconsistent with the multiple property interests that make up Oakland's franchise. As the California Legislature's amicus brief in this case explains:

> [A] franchise fee is not necessarily limited to the right to use *real property*. A franchise fee also includes consideration for the privilege of being, for example, the sole provider of waste and recycling services for Oakland residents. This right is an intangible asset that both the parties and the lower courts have assumed constitutes purchase or use of local government property.

(Legis. Br. at pp. 6-7 & fn. 2 (citing Opening Brief quoting implementing ordinances) (emphasis in original).)

Similarly, although its amicus brief primarily supports Oakland's position, BATA/MTC's alternative suggestion that this Court can find "that franchise fees … simply fall outside Proposition 26's [Exemption 4] exception" if it decides "*Jacks* governs local government franchise fees

despite Proposition 26," is misguided. This suggestion rests on a long outdated and exceedingly narrow view of "property." (See BATA/MTC Br. at 37-38.) Because franchises are a form of government property, *by definition* they come within the plain language of Exemption 4's second prong. The Court has no basis to simply excise franchise fees from the government property exemption. And, Oakland's franchise fees are *also* consideration for the use of public lands and streets, much like the bridge tolls at issue in *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435 (*BATA*). (See 2 JA 331 (WMAC implementing ordinance); see also 2 JA 326 (CWS implementing ordinance).)

## II. Contrary to the Zolly Amici's Argument, Franchise Fees Were Always Considered Non-Taxes Before *Jacks* and Are Non-Taxes by Definition under Proposition 26

The Zolly Amici argue that pre-*Jacks* case law limited franchise fees to their "reasonable cost" or "reasonable value," and that Proposition 26 preserved those supposed limitations. (See, e.g., HJTA Br. at pp. 10-12 & 14 (quoting language from *Jacks* opining that the *Jacks* "reasonable value" limitation was "consistent with the principles that govern other fees"); see also County Inmate Br. at pp. 20-22).) In particular, they argue that before Proposition 26, all fees "had to be limited to recovering the government's actual, reasonable cost" of providing the relevant service. (HJTA Br. at p. 11; see also County Inmate Br. at pp. 20-22.) But the Zolly Amici are incorrect that pre-Proposition 26 authorities concerning other types of fees

created a limit on *franchise fees*. On the contrary, franchise fees were consistently treated differently under the law before *Jacks* was decided in 2017. (See OB at pp. 23-24; RB at pp. 22-23.)

### A. Before *Jacks*, Franchise Fees Were Considered Non-Taxes and Were Not Subject to Any "Reasonable Cost" or "Reasonable Value" Test

Before *Jacks*, franchise fees had consistently been treated as non-taxes and had never been subject to any legal "reasonable cost" or "reasonable value" test. (See *Jacks*, *supra*, 3 Cal.5th at p. 262; see also *Santa Barbara Cty.*, *supra*, 209 Cal.App.3d at p. 949 (franchise fees are "not taxes" and "not user fees or charges[] … [or] for regulatory licenses").) Instead, such fees were limited by what the market would bear. This Court's *Jacks* decision was the first case to apply pre-existing "reasonable cost" standards for regulatory and similar fees and transform those standards into a "reasonable value" test for the specific type of fee at issue in *Jacks* (a pass-through surcharge). (See OB 42-44; RB 23-24.)[3]

The Zolly Amici nonetheless argue that Proposition 26 codified pre-existing fee limitations applicable to *non*-franchise fees to newly restrict franchise fees. (See HJTA Br. at p. 14; see also County Inmate Br. at p. 10.) These arguments misstate the state of the law at the time Proposition 26

[3] As set forth below in section II(B), the discussion of franchise fees in *Jacks* appears to have been driven by the parties' characterization of the surcharge there as a franchise fee, even though that surcharge did not in fact constitute a franchise fee in the traditional sense.

was passed. Because *Jacks* and its novel "reasonable relationship to value" test *post-dated* Proposition 26 by seven years, "voters cannot have intended to 'keep' a limitation that did not exist at the time." (RB at pp. 22-23.) Nor can Proposition 26 be understood to preemptively embrace the later *Jacks* holding. (*Id.*; see also Legis. Br. at p. 23; BATA/MTC Br. at pp. 36-37.)

The Zolly Amici cannot avoid this chronological problem. Despite repeatedly arguing that pre-*Jacks* case law limiting regulatory and similar fees always applied to franchise fees, the Zolly Amici do not cite a *single* pre-*Jacks* case that limited a contractual franchise fee to its "reasonable cost" or "reasonable value." (See HJTA Br. at pp. 10-14; County Inmate Br. at pp. 10, 21-22.) The only case they cite to support a purported "reasonable value" limitation on franchise fees is *Jacks*. (See, e.g., County Inmate Br. at p. 10.) Even Respondents acknowledge that their proffered "franchise-fee test [was] *recently created* in *Jacks*" and did not exist before that decision came down. (See Answer to Petition for Review (July 10, 2020) at pp. 6-7 (emphasis added); RB at p. 22 (demonstrating that Respondents' argument for a preexisting franchise fee limit was based entirely on *Jacks*).)

### B. The *Jacks* Holding Does Not Govern Oakland's Franchise Fees Because the Pass-Through Surcharge in *Jacks* Was *Not* Contract Consideration Paid in Exchange for Franchise Rights

Likewise, to the extent that the Zolly Amici rely on *Jacks* and its "reasonable relationship to value" test, that reliance is unavailing because *Jacks*' holding regarding the specific pass-through surcharge addressed in that case is clearly distinguishable from Oakland's true franchise fees. (See OB at pp. 42-44; RB at pp. 23-24.) Although some language in *Jacks* may appear to suggest that pre-Proposition 26 franchise fees must be limited to an amount that bears a reasonable relationship to the franchise's value, the Court's actual holding is necessarily limited to the particular type of charge in that case.

*First*, *Jacks* is distinguishable because it expressly did not analyze the impact or meaning of Proposition 26 or Exemption 4 and its exemption of government property charges from the new definition of "tax." (OB at p. 41; RB at pp. 23-24.) Although *Jacks* indicated that franchise fees would fall under Proposition 26's Exemption 4, it declined to construe that provision because "Proposition 26's exception from its definition of a 'tax' with respect to local government property is not before us." (*Jacks*, *supra*, 3 Cal.5th at p. 263 & fn. 6.)

*Second*, *Jacks* is distinguishable on its facts because the pass-through surcharge the Court analyzed there was *not* a true franchise fee, in

contrast to Oakland's franchise fees here. As shown above, franchise fees are paid as contract consideration for the purchase of, and in exchange for, a franchise. (See *supra* § I.) But the 1% surcharge the plaintiffs challenged in *Jacks* was a different kind of fee. In that case, Southern California Edison ("SCE") agreed only to *collect* the 1% surcharge from its ratepayers and to pass that fee back to Santa Barbara, the local government with whom it had a contract, but the company bore no obligation to pay any part of the surcharge itself. Put another way, the surcharge was *not* paid *for the purchase of or in exchange for* the franchise rights awarded to SCE. In fact, the franchise agreement allowed SCE to *terminate* the franchise contract if it could not obtain approval to impose the surcharge on its ratepayers, making clear it was never a part of the purchase price *SCE* agreed to pay for the franchise. (See *Jacks*, *supra*, 3 Cal.5th at pp. 254-56.)

Despite these factual distinctions from Oakland's and other traditional franchise fees, the City of Santa Barbara described the 1% surcharge as a franchise fee in its summary judgment motion in *Jacks*. Santa Barbara "contend[ed] this separate charge [the 1% surcharge], together with another charge equal to 1 percent of SCE's gross receipts that SCE includes in its electricity rates, is the fee paid by SCE for the privilege of using City property in connection with the delivery of electricity." (*Jacks*, *supra*, Cal.5th at p. 254.) This Court then adopted the "franchise fee" framework based on the parties' choice of terms. Nonetheless, the

*Jacks* surcharge remains distinguishable from the franchise fees at issue in this case. (See OB at pp. 42-44; RB at pp. 21-24.)

### C. HJTA's Arguments That Franchise Fees Are "User Fees" That Must Be Limited to the "Reasonable Cost" of Providing a Government Service Are Unavailing

Finally, HJTA attempts to redefine franchise fees as "user fees" that would be subject to pre-*Jacks* limitations on "other fees" as codified in Proposition 26. HJTA posits that "[a] charge imposed for the temporary use of public property, such as a parking space or bridge toll, is a 'user fee,'" and that "[t]he fee at bar, then, for garbage trucks to operate on city streets, is a type of user fee." (HJTA Br. at p. 11; see also *id.* at p. 18.) HJTA then argues that because "user fees" have historically been "limited to recovering the government's actual, reasonable cost of providing the service" and "apportioned … [to be] reasonably related to the payor's own burden on, or benefit from the public service" (HJTA Br. at pp. 11-12), the test for franchise fees under Proposition 26 must also limit the fee to "'the reasonable costs of the governmental activity,' allocated according to the payor's burden thereon." (HJTA Br. at p. 29.)

HJTA's "user fee" construct fails for several reasons. *First*, as explained above, Oakland's franchise fees cannot be characterized as "user fees." Rather, they are consideration for a broad bundle of property interests. (See *supra* § I.)

*Second*, HJTA's argument misconstrues the meaning of "user fee." The court in *Santa Barbara Cty.*, on which HJTA relies, expressly held that franchise fees *are not user fees* (or taxes). (See HJTA Br. at pp. 11-12.) That court held that "[a]lthough franchises may be taxed like other forms of property, fees paid for franchises *are not taxes, user fees or regulatory licenses*." (*Santa Barbara Cty.*, *supra*, 209 Cal.App.3d at p. 950 (emphasis added); see also *id.* ("[F]ranchise fees collected for grants of rights of way are not "'proceeds of taxes'" … . These fees are not user fees or charges, nor are they for regulatory licenses.").) This is because "user fees or charges are typically *cost recovery charges* imposed on *individual citizens* for the *specific, temporary use* of public property." (*Ibid.* (emphasis added); see also Prop 26 Voter Information Guide at p. 56 (a "user fee" is a fee "where the user pays for the cost of a *specific service or program*") (emphasis added).)

In contrast, franchise fees like Oakland's are not imposed on "individual citizens" to recover costs for the "temporary use" of public property. They are exacted from corporations (the private waste-hauling and recycling franchisees) as contract consideration for a franchise right – which includes a "relatively long possessory right to use land," not a "temporary use" of property. (*Santa Barbara Cty.*, *supra*, 209 Cal.App.3d at p. 950; see *supra* § I.)

*Third*, HJTA's position is inconsistent with Respondents' current position and with HJTA's prior position as amicus curiae in the *Zolly* Court of Appeal. (See AB at 35 (conceding "there is clearly no government cost associated with a franchise fee"); RB at 11-13; Amicus Curiae Brief of Howard Jarvis Taxpayers Association (Dec. 30, 2019) No. A154986, at p. 13 (arguing "the applicable rule" is the "reasonable relationship to value" test in *Jacks*).)

HJTA's "user fee"-based "reasonable cost" standard has no support in either law or fact.

## III. The Zolly Amici Misconstrue the Meaning and Purpose of Proposition 26

### A. Exemption 4 Establishes a Categorical Exemption for Franchise Fees as Charges for the Use or Purchase of Government Property

Franchise fees are not a "tax" under Proposition 26 because Proposition 26 defined "tax" to exclude any "charge for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e), par. (4); see also OB at pp. 13-14; RB at pp. 13-14.) This exemption is categorical because the plain language does not require that such charges not exceed any "reasonable cost" or "reasonable value" threshold in order not to be a "tax." By contrast, there is express language in the first three exemptions that precede Exemption 4 that limits *those* charges to their "reasonable

costs." (Compare Cal. Const., art XIII C, § 1, subd. (e), pars. (1)-(3), with Cal. Const., art XIII C, § 1, subd. (e), par. (4); see also OB at pp. 13-14; RB at pp. 13-14.)

Under basic principles of construction, Exemption 4's omission of any express "reasonable cost" limitation and its contrasting language with the first three exemptions reflect voter intent to impose different requirements for each of Article XIII C's seven exemptions – each of which must be given meaning. (See, e.g., *Klein v. United States* (2010) 50 Cal.4th 68, 80 (quoting *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 73); see also OB at pp. 21-26; RB at pp. 13-14; Legis. Br. at p. 17; BATA/MTC Br. at p. 20.)

### B. The Zolly Amici's Proposed Interpretations of Article XIII C Are Inconsistent with Principles of Construction and Their Own Prior Positions

#### 1. The Zolly Amici Improperly Read a "Reasonable Value" or "Reasonable Cost" Requirement into the Text of Exemption 4, Leading to Surplusage and Absurd Results

The Zolly Amici's interpretation of Article XIII C is inconsistent with the provision's plain language and creates surplusage and illogical outcomes disfavored under standard principles of construction. (See *infra* at pp. 22-28.)

The *Zolly* appellate court found the exemptions in Article XIII C ambiguous based on language in Article XIII C, subdivision (e) that

requires the government to bear the burden of proving that the amount of a charge does not exceed "the reasonable costs of the governmental activity." (*Zolly, supra*, 47 Cal.App.5th at 87.) Specifically, the *Zolly* appellate court found it ambiguous whether paragraph (e) "applies to all seven exemptions, or only to the first three exemptions that explicitly include a reasonableness requirement." Applying similar reasoning, the Zolly Amici argue that Exemption 4's burden-shifting provision imposes a "blanket requirement" that charges under all seven exemptions must not exceed their "reasonable cost" in order to be exempt from the definition of "tax."[4] (See HJTA Br. at 18-19; see also County Inmate Br. at 23 fn. 4.) But the Zolly Amici's interpretation ignores the plain language of Article XIII C and Exemption 4 and contravenes rules of construction to achieve their desired result. When interpreting a voter initiative, courts must "examine the language of the initiative as the best indicator of the voters' intent." (*BATA*, 51 Cal.App.5th at 458-59.) Article XIII C clearly and plainly defines any charge as a "tax"

[4] The *Zolly* appellate court found that the "reasonable cost" language in Article XIII C, subdivision (e) rendered Article XIII C ambiguous, and then relied on its findings regarding voter intent "to conclude a franchise fee…must still be reasonably related to the *value* of the franchise" under *Jacks*. (*Zolly*, *supra*, 47 Cal. App. 5th at 87-88 (emphasis added).)

In contrast, HJTA rejects the *Jacks* and *Zolly* "reasonable value" test and instead argues that Article XIII C, subdivision (e) imposes an additional substantive requirement that government property charges not exceed their "reasonable *cost*." (See, e.g., HJTA Br. at pp. 9, 28-30; cf. County Inmate Br. at 23-24 & fn. 4 (arguing this Court need not decide if franchise fees are limited "by value or by cost").)

*except*, as to Exemption 4, any "charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e), para. (4); BATA/MTC Br. at 18-19.)

The Zolly Amici's argument that subdivision (e)'s burden of proof requirements nonetheless impose an additional "reasonable cost" limitation on all seven exemptions, including Exemption 4, fails on multiple grounds. (HJTA at pp. 19, 22.)

*First*, subdivision (e) is simply a burden-shifting provision that allocates the burden of proving the respective requirements of each exemption; it does *not* add substantive requirements. (See OB at pp. 25-31; RB at pp. 11-13; *BATA* at p. 461.)[5] Thus, the government bears "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" and is fairly allocated to the payor's burden or benefits received "where an exemption so requires (*i.e.*, the first three exemptions)." (OB at p. 26.) Nothing in

[5] HJTA incorrectly suggests that Oakland's citations to *BATA* are "improper" because this Court granted review of the *BATA* decision. (HJTA Br. at 19, fn. 2.) Oakland did not cite *BATA* as precedential, and it was entirely proper for Oakland to cite the case for its persuasive value. (See Cal. Rules of Court, rule 8.1115(e)(1); *BATA* Docket, Oct. 14, 2020 Grant and Hold Order (granting *BATA* petition for review but deferring further action in *BATA* "pending consideration and disposition of a related issue" in *Zolly*).)

Proposition 26's language or ballot materials suggests that this procedural burden-shifting clause was intended to add *substantive* requirements to any exemption.

*Second*, the Zolly Amici's interpretation of subdivision (e) as imposing additional substantive requirements creates untenable surplusage problems, contravening basic principles of construction. As the *BATA* court held in construing Article XIII A's parallel language, the express "reasonable cost" language in the first three exemptions is rendered superfluous if, as the Zolly Amici contend, subdivision (e)'s burden of proof language constitutes a *blanket* requirement that the government prove charges under all seven exemptions are limited to some "reasonable cost" and are proportionally allocated to the payor's burden in order not to be a "tax." (OB at p. 28; RB at pp. 11-13; *BATA*, 51 Cal.App.5th at pp. 459-60; see also BATA/MTC Br. at pp. 21-24.)

*Third*, HJTA misreads this Court's precedent in asserting that Oakland's "burden-shifting" interpretation is "contrary to the holding in *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191." (HJTA Br. at p. 21.) HJTA suggests that *San Buenaventura* held, for all seven exemptions, 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," and that voters "'intended each requirement to have independent effect.'" (HJTA Br. at p. 21 (emphasis added) (quoting *San Buenaventura*, 3 Cal.5th at p. 1214).)

But *San Buenaventura* neither construed the meaning of *Exemption 4* nor considered whether subdivision (e)'s "reasonable cost" and proportional allocation requirements apply to charges under *that* exemption. Rather, *San Buenaventura* considered whether groundwater pumping charges were exempt from the definition of "tax" as "charges imposed for specific government benefits, privileges, services, or products provided directly to the payor" under *Exemptions 1 or 2*. (See *San Buenaventura, supra*, 3 Cal.5th at p. 1209 (citing Cal. Const., art. XIII C, § 1, subd. (e), pars. (1) & (2)).)

That Court's analysis was limited only to fees for government services or benefits under Exemptions 1 or 2 and the scope of the government's burden to prove whether such fees are or are not a tax. (See *id.* at pp. 1209-1214 (discussing the constitutionality of fees "for a government service," privilege, or benefit).) Accordingly, the Court's holding that subdivision (e)'s "reasonable cost" and proportional allocation requirements are "separate steps in the analysis" is equally limited to charges that fall under Exemptions 1 and 2 and does not apply to Exemption 4. (See *ibid.*)

*Fourth*, the Zolly Amici are wrong that Oakland's textual approach would create even greater absurdity. HJTA contends that "*not* applying the last paragraph to fees for entrance to or use of public property would be equally absurd" because it would mean "there is no legal limit" on franchise fees. (*Id.* at pp. 24-25.) HJTA then suggests a parade of horribles whereby utility providers will agree to pay ever-increasing fees to whet the "city's appetite" as part of a "'pay to play' shakedown," not caring "how much they pay" because the franchise fees are "simply passed through to the customers." (HJTA Br. at p. 25; see also County Inmate Br. at pp. 27-29.)

The picture the Zolly Amici paint is not reality. Although Article XIII C provides that franchise fees categorically are not *taxes*, other legal and practical limitations keep franchise fees in check. As the League of California Cities and the California State Association of Counties explain at length, there are a number of "existing economic, political, and legal forces that naturally constrain the amount of these [franchise] fees." (League/CSAC Br. at pp. 12-25 (describing other limitations of franchise fees, including regulation, citizen referendum petitions, and negotiation process); see also Legis. Br. at pp. 22-23.) Moreover, "[s]olid waste haulers, which are private and for-profit entities, … will not seek award of a franchise if there is no potential for profit," incentivizing them to

"maximize rates *while minimizing costs*." (League/CSAC Br. at pp. 12-25 (emphasis added).)

### 2. Respondents' Shifting Legal Theories Underscore the Fatal Flaws in Their and the Zolly Amici's Positions

In this case, as the Legislature's amicus brief chronicles, Respondents have offered three different legal theories to challenge Oakland's franchise fees. First, Respondents' original complaint did not allege violations of Proposition 26, focusing instead on alleged violations of Article XIII D; and they likewise opposed Oakland's demurrer to the second amended complaint on the ground that Oakland's franchise fees violated Proposition 218, not Proposition 26. (See 2 JA 384-87; see also Legis. Br. at 13 & Legis. RJN Exs. A & B.) Then, in their opening Court of Appeal brief, Respondents shifted their theory to argue that the franchise fees are taxes if not reasonably related to the "value" of the franchise, relying on the "reasonable cost" language in Article XIII C's burden of proof provision, subdivision (e). (See Appellants' Opening Brief on the Merits (Mar. 8, 2019) No. A154986; see also Legis. Br. at p. 13 & Legis. RJN Ex. C.) The Zolly appellate court adopted Respondents' construction of Article XIII C, which Respondents initially defended in their Answer to Oakland's Petition for Review. (See Answer to Petition for Review (July 10, 2020) at pp. 6-7; see also Legis. Br. at p. 13-14 & Legis. RJN Ex. D.)

But then, in this Court, Respondents shifted to a third theory, expressly disavowing their earlier construction that the Zolly appellate court applied in reversing the Superior Court's judgment in Oakland's favor. Respondents now concede that the "reasonable cost" limitation in Article XIII C, subdivision (e) cannot logically apply to franchise fees under Exemption 4 because "unlike the charges described in the first three exceptions, a franchise fee is paid for use 'of a government asset rather than compensation for a cost.' [Citation.] … [T]here is clearly no government cost associated with a franchise fee that could make that burden applicable." (AB at 34-35.) Instead, Respondents now argue, unsuccessfully, that the phrase "imposed for" in Exemption 4 means a government property charge must "actually [be] 'imposed for' the use of city property" in order to be exempt from the definition of "tax," such that fees in excess of a "reasonable estimate of the franchise value" are not "imposed for" the use of city property and are thus improper taxes. (See, e.g., AB at 33-36; see also Legis. Br. at 14.)

The record thus shows that Respondents have changed their legal theories at least three times in their effort to circumvent the plain-language, categorical exemption of franchise fees from Proposition 26's definition of "tax." The Zolly Amici, in their briefs in this matter and in other cases, have done the same. (See Legis. Br. at 13-14 (chronicling *BATA* plaintiffs' multiple changes in legal theory).) These shifting positions lay bare the

weakness in Respondents' and the Zolly Amici's franchise fee challenge here.

### C. Even if Article XIII C Were Ambiguous, HJTA Misconstrues the Ballot Materials, Which Show an Intent to Restrict Regulatory Fees, Not Franchise Fees

Finally, the Zolly Amici rely on the Proposition 26 ballot materials and general statements of intent to argue that the categorical exemption apparent from Exemption 4's plain text would effectively "open a new loophole" in contravention of Proposition 26's "purpose of subjecting more fees to voter approval, not fewer." (HJTA Br. at pp. 15-18; see also County Inmate Br. at p. 25.) HJTA argues that Proposition 26's intent to "close perceived loopholes" and address the problem of governments "disguising taxes as fees" means it would be "incongruous" to rule that Exemption 4 *categorically* exempts certain types of charges, including franchise fees (even though that is what the text itself requires). (HJTA Br. at p. 16.)

The Zolly Amici's arguments fail because they are based on a limited view of the Proposition 26 ballot materials. The initiative's purposes were not limited to converting all fees into potential taxes. Like Respondents, the Zolly Amici "misuse[] general statements of purpose to suggest that every individual provision must be interpreted to expand the definition of 'tax.'" (RB at p. 24.) But while Proposition 26 was passed in part to expand the charges that could be deemed a "tax," it also simultaneously *exempted* other categories of charges from that expanded

definition, evidencing an express intent to preserve those charges as *non-taxes*. (*Id.* at pp. 24-25; see also Legis. Br. at pp. 18-19; BATA/MTC Br. at pp. 29-35.)

The Zolly Amici's stringent "anti-tax" reading of the Proposition 26 ballot materials is contradicted by numerous statements that reflect Proposition 26's primary focus on curtailing state and local governments from disguising new taxes as *regulatory* fees. (See, e.g., OB 35; *Schmeer v. County of Los Angeles*, (2013) 213 Cal.App.4th 1310, 1326 (Proposition 26 was passed "in an effort to curb the perceived problem of a proliferation of *regulatory fees* imposed by the state") (emphasis added).) For instance, HJTA cites Proposition 26's findings and declarations as evidence of its purpose to "subject[] more fees to voter approval, not fewer." (HJTA Br. at pp. 15-16.) But those Findings and Declarations of Purpose instead show Proposition 26's specific focus on excessive and improper *regulatory* fees:

> [The recent] escalation in taxation does not account for the recent phenomenon whereby the 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. *Fees couched as 'regulatory' but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.*

(See Ballot Pamp., Gen. Elec. (Nov. 2, 2010) Prop. 26 "Findings and Declarations of Purpose," § 1(e), <https://repository.uchastings.edu/ca_ballot_props/1305/> (emphasis added).)

HJTA's repeated citations of Proposition 26's intent to "close loopholes" are likewise irrelevant. (See, e.g., HJTA Br. at p. 16.) Those statements are entirely consistent with the initiative's principal focus on closing loopholes *for regulatory and similar fees*. Nor does exempting franchise fees as a charge for the use or purchase of government property *open* a new loophole because franchise fees, as contract consideration for the purchase of a franchise, have never been considered taxes in the first place, nor been constrained by any "reasonable cost" or "reasonable value" limitation. (See *supra* §§ I & II.)

The Zolly Amici also ignore statements in the ballot materials that made clear that "some fees and charges are *not affected*." (See Voter Information Guide for 2010 General Election, available at <https://repository.uchastings.edu/ca_ballot_props/1335/>, Analysis by Leg. Analyst at p. 58 (emphasis added); see also Oakland's Motion for Judicial Notice (Feb. 20, 2020) No. A154986; *Zolly*, *supra*, 47 Cal.App.5th at 78 fn. 2 (granting judicial notice).) Unaffected charges included "most user fees, property development charges, and property assessments" and other fees that either "generally comply with Proposition 26's requirements already, *or are exempt from its provisions*." (*Ibid.* (emphasis added); see

also Voter Information Guide for 2010 General Election at pp. 60 & 61 ("Prop. 26 protects legitimate fees."); Legis. Br. at p. 18 (describing "balanced approach" reflected in ballot materials).)

Finally, HJTA incorrectly dismisses the ballot materials' silence regarding franchise fees as irrelevant, arguing it is an "unreasonable test" to expect the ballot materials to mention every type of affected fee. (HJTA Br. at p. 17.) Far from an "unreasonable test," courts regularly interpret a ballot measure's silence as "an *absence* of intent to affect that subject." (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197, fn. 19 (emphasis added; citations and quotations omitted); OB 38-39.)

HJTA nonetheless argues that even though the materials did not mention franchise fees by name, the materials' discussion of "user fees" and "garbage fees" indicated an intent to sweep up not just Oakland's franchise fees, but all franchise fees. (HJTA Br. at p. 17.) But these arguments also fail. As shown above (see *supra* § II(C)), franchise fees are *not* "user fees." Nor are Oakland's franchise fees "garbage fees" simply because they relate to the collection of waste and recycling. Rather, the ballot materials mentioned "garbage fees" as a *specific type* of "user fee" where "the user pays for the cost of a specific service or program." (Voter Info. Guide at p. 56.) Neither reference applies to Oakland's franchise fees here or to franchise fees more generally.

## IV. Oakland's Franchise Fees Were Voluntarily Assumed as Contract Consideration and Were Not "Imposed" on the Franchisees or Respondents

The County Inmate Counsel challenge Oakland's showing that its franchise fees were not "imposed" – the threshold requirement to constitute a "tax" – because the franchisees voluntarily assumed those fees. (See OB at pp. 45-49; RB at pp. 29-33.) The County Inmate Counsel argue that Oakland's franchise fees were "imposed" simply because they were "establish[ed], enact[ed], or create[d]." (County Inmate Br. at pp. 30-33 (arguing "nothing in article XIII C suggests that a charge cannot be 'imposed' as part of a voluntary transaction").)

The County Inmate Counsel are mistaken. First, the term "impose" means "to establish by *authority or force*," implying a coercive element not relevant to a voluntary transaction like franchise contract negotiations. (See AB 45 (emphasis in original); OB at p. 47 (same definition); RB at p. 30.) Numerous authorities confirm this distinction between obligations that parties assume voluntarily and those imposed on them by law. In *Tulare County. v. City of Dinuba* (1922) 188 Cal. 664 (*Tulare*), for instance, this Court concluded that franchise fees are "purely a matter of contract" such that the franchisee's "obligation to pay *is not imposed by law but by his acceptance of the franchise*." (*Id.* at p. 670 (emphasis added); see OB at pp. 46-47.) Similarly here, the franchisees' obligation to pay is "not imposed

by law" but rather by their "acceptance of the franchise" awarded to them by Oakland.[6]

The County Inmate Counsel's discussion of *Sinclair Paint, Jacks*, and Proposition 26 is equally unavailing. Like Respondents, the County Inmate Counsel point to this Court's statement in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, that "[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges," to support the contention that taxes may result from voluntary acts and need not be imposed by force. (*Id.* at p. 874; see County Inmate Br. at p. 31.) But that statement says nothing about franchise fees, nor does it mean all fees arising from all voluntary transactions involving the government are "imposed." On the contrary, as this Court held in *Tulare*, franchise fees are *not* "imposed by law." (*Tulare*, *supra*, 188 Cal. at p. 670.)

The County Inmate Counsel next suggest that if Oakland's franchise fees are not "imposed" so as to satisfy the threshold "tax" definition, they

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[6] Other courts have affirmed this distinction in other contexts. (See, e.g., *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1302 ("Contractual duties are voluntarily undertaken by the parties to the contract, not imposed by state law."); *Flying Tiger Lines, Inc. v. Truck Ins. Exchange* (1971) 20 Cal.App.3d 132, 134-35 (affirming denial of right to indemnity because anticipated liability "had not been imposed by law, but had been instead voluntarily assumed" under insurance contract); see also RB at 30-31 (citing additional case law with similar holdings).) The County Inmate Counsel fail to address or rebut this authority.

also cannot be charges "imposed" for the use or purchase of government property under Exemption 4. (See County Inmate Br. at p. 30.) Oakland agrees – if the franchise fees are not "imposed" as a threshold matter, then Proposition 26 and Exemption 4 would not apply to them at all. If the Court does not adopt Oakland's (and the Superior Court's) position that its fees are not "imposed" in the first place and finds instead that they are "imposed," *then* the Proposition 26 analysis would apply, and the franchise fees would fall under Exemption 4's categorical exemption. These are simply alternative arguments.

Finally, the County Inmate Counsel fail to rebut Oakland's showing that the franchise fees were not imposed *on ratepayers*, which was a basis for the Superior Court's decision sustaining Oakland's demurrer. (See 2 JA 487-88 (finding that here, unlike in *Jacks*, "the franchise fees here are *not being imposed* by the City on its residents") (emphasis added).) As Oakland has established, "[t]o the extent *Jacks* declined to recognize a distinction between a direct versus indirect imposition of the Santa Barbara surcharge on ratepayers, *Jacks* rested on the fact that the ratepayers *exclusively* bore the obligation to pay the surcharge." (RB at p. 32.) The reverse is true here. (See *id.* at p. 33.) The County Inmate Counsel's arguments overlook these material distinctions, which limit *Jacks*' relevance here. (See also *supra* § II(B).)

## V. The Remote Economic Harm Alleged by Respondents as Downstream Ratepayers Does Not Confer Legal Standing

The County Inmate Counsel also contest Oakland's showing that Respondents lack legal standing, arguing that mere "interest" in the outcome of the lawsuit is sufficient. (County Inmate Br. at p. 12-19.) But like in *County Inmate Telephone Services Cases* (2020) 48 Cal.App.5th 354 (*County Inmate*), the "interest" alleged here is too remote and not sufficiently "concrete and actual" to confer legal standing on ratepayers who have no legal obligation to pay the franchise fees. (See, e.g., *Teal v. Super. Ct.* (2014) 60 Cal.4th 595, 599; see also OB at pp. 50-51; RB at pp. 33-38.) The cases the County Inmate Counsel cite likewise support the general rule that the party who actually pays the fee or alleged tax or is directly impacted by it (i.e., the franchisees here) is the one with legal standing.[7]

The court in *County Inmate* rejected the theory that a customer "who pays higher prices because of a tax on a vendor who raises prices in order to recover the amount of the tax from the customer" has standing to challenge

[7] See *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86 (*Andal*) (cell phone providers had standing because they faced penalties for failure to collect tax from customers); *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349 (*Sipple*) (similar); *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282 (*Gowens*) (similar); *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359 (calling card provider had standing because it did not collect taxes from customers but instead paid taxes from its own funds).

that tax. (*County Inmate, supra*, 48 Cal.App.5th at p. 361; see also RB at p. 35.) That court's reasoning applies equally here. (See *County Inmate, supra*, 48 Cal.App.5th at p. 367 ("[W]e see no basis for treating purported Proposition 26 taxes, for standing purposes, differently than sales taxes, or property taxes, or telephone user taxes, or airplane fuel taxes, or any other taxes.").) The Zolly Respondents' lack of legal standing is an independent ground on which this Court may reverse. (See OB at p. 52; RB at pp. 34-35.)

## CONCLUSION

For the reasons set forth here and in its briefs on the merits, Petitioner City of Oakland respectfully requests that the Court reverse the decision of the Court of Appeal.

Dated: April 28, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it includes 7,717 words, including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: April 28, 2021

/s/ *Cedric Chao*
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CHAO ADR, PC

Case No. S262634

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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**ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON**

*Plaintiffs-Appellants*,

v.

**CITY OF OAKLAND**

*Defendant-Respondent*

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# CERTIFICATE OF SERVICE

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

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**STATE OF CALIFORNIA**
Supreme Court of California

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Supreme Court of California

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