S262634

FILED WITH PERMISSION

IN THE SUPREME COURT OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN, AND STEPHEN CLAYTON,

Plaintiffs and Respondents,

v.

CITY OF OAKLAND,

Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF REUBEN ZADEH, MABLE CHU, AND HERB NADEL IN SUPPORT OF RESPONDENTS ROBERT ZOLLY, RAY MCFADDEN, AND STEPHEN CLAYTON

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

(continued)

Page

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Pursuant to California Rules of Court, rule 8.520(f), Reuben Zadeh, Mable Chu and Herb Nadel respectfully request permission to file the attached amici curiae brief in support of plaintiffs Robert Zolly, et al.[1]

[1] Amici certify that no person or entity other than amici, their members, and their counsel contributed to writing the proposed brief or made any monetary contribution intended to fund the preparation or submission of the brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

This controversy is of local concern but also of broad public interest. At stake is whether our local governments may avoid the classification of franchise fees as taxes, to the extent the collected fees exceed the government's costs of administering the franchise program. Amici have descended on the Court from the four corners of California, ranging from the Legislature and League of Cities to the individual payors of increased service fees represented by amici here. The groups most concerned in the ultimate outcome of the Court's decision are the League of California Cities and citizens such as those represented here.

Reuben Zadeh, Mable Chu, and Herb Nadel are business property owners and managers in the City of Los Angeles. Amici are concerned about the sudden and dramatic increases in solid-waste disposal pricing for Los Angeles businesses, which tripled overnight in 2017 and increased by over 1000% for some businesses. Amici believe that unlawful profit-sharing between haulers and government is at the root of this problem and are greatly concerned to see these problems occurring elsewhere. Amici's counsel, involved in other litigation involving these charges,[2] has studied the issue before the Court and recently discovered authority that may render the issue moot.

Amici believe the brief will assist the Court, for a number of reasons:

---

[2] *Apartment Owners Association of California, Inc., et al. v. City of Los Angeles, et al.*, Los Angeles Superior Court case no. BC677423 / BC709658 (Hon. Maren E. Nelson).

(1) Authority is presented that may moot the issue on review as to the parties;

(2) Mootness, being both a jurisdictional as well as a prudential concern, should be raised at any time in order to avoid judicial action on an illusory controversy;

(3) Consideration of the authority disclosed here may spare the Court the need to later overrule its decision;

(4) Other issues related to the litigation are addressed here and not elsewhere; and

(5) The belated timing of this submission is not without cause.

Covid-19 has played havoc with amici's attempt to inform the Court of their observations. They closely followed *Zolly* through the courts and planned to submit an application but have been delayed by counsel's repeated struggles with Covid-19 followed by unexpected, prolonged debility following Moderna vaccinations on February 5th and March 5th, just as the filing deadline approached. (Exhibit 7.)

With counsel's very limited stamina, amici submitted a letter to the Court on March 15th, which was not accepted for filing. In response, amici now submit this application and brief. (See Exhibits 1-7.) Amici pray the Court will deem these reasons good cause.

Mootness is an issue that can never be raised too late. For this reason, and for all the reasons discussed above, amici ask the Court to accept and file the attached amici curiae brief.

April 18, 2021

PELUSO LAW GROUP, PC
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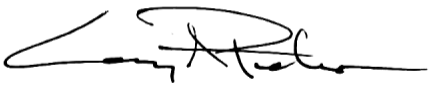

Larry A. Peluso
Attorney for Amici Curiae,
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AMICI CURIAE BRIEF

INTRODUCTION

Four years ago this Court held that a city's surcharge on an electric power utility's gross receipts was compensation for the use of government property rather than a tax subject to voter approval, if the surcharge bore a reasonable relationship to the value of the property interest. The Court characterized the surcharge as "a payment made in exchange for a property interest." *Jacks v. City of Santa Barbara*, 3 Cal.5th 248 at pp. 257 and 269 (2017).

Now, again, a city and a consumer are engaged in a similar controversy. The question is whether the "reasonable costs" limitation contained within the final paragraph of California Constitution, article XIII C, section 1, subdivision (e) applies to paragraph (4) of subdivision (e).

Here, amici present authority indicating that the issue on review is moot as to these parties, and direct the Court to the unavoidable conclusion that the tax status of franchise fees must be determined by reference to paragraph (1).

LEGAL ARGUMENT

I. CALIFORNIA COURTS DISTINGUISH BETWEEN PRIMARY AND SECONDARY USES OF STREETS.

California courts have long distinguished between the primary use of streets for transportation and secondary uses for the long-term placement of facilities and equipment.

> There is a natural distinction between the ordinary use of streets by the public for travel and other purposes, and the exclusive and more or less permanent use of portions of streets for the purposes here in question by individuals or corporations. This distinction has long been recognized. In speaking of the latter use by a telegraph company the court said, in City of St. Louis v. Western Union, 148 U.S. 92, 13 S.Ct. 485, 488, 37 L.Ed. 380: 'this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public.' This distinction has been recognized in many cases in this state, the use of travel being referred to as the primary use and the more exclusive use being referred to as the secondary use. Not only is this distinction an entirely logical one but it is one which may be applied also to franchises granting rights which involve and affect these separate and distinct uses. That a distinction exists between a primary franchise granting a right to control a business affected with a public interest, and a secondary franchise, giving a right to occupy definite portions of certain streets, has long been recognized. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162; Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 P. 557.

City of San Diego v. Southern Cal. Tel. Co., 92 Cal.App.2d 793, 800 (App. 1949); see also *Sunset Tel. & Tel. Co. v. Pasadena*, 161 Cal. 265, 281-282 (1911).

II. THE 'REASONABLE VALUE 'REQUIREMENT ESTABLISHED IN *JACKS* WAS DIRECTED TO A POWER UTILITY'S *SECONDARY USE* OF STREETS, FOR THE FIXED PLACEMENT OF EQUIPMENT AND FACILITIES.

A small subset of local government franchises, such as ambulance service franchises, are granted as simple rights to conduct business, without a concomitant grant to use public real property. However, California local governments rarely if ever seek franchise fees in return for such franchises. It is highly significant that, in *Jacks*, the Court specified that the franchise fee "payment was "made in exchange for a property interest." *Jacks v. City of Santa Barbara*, 3 Cal.5th 248 at pp. 257 and 269. Indeed, the Court's holding in *Jacks* would make no sense if not limited to franchises that convey more than a right to do business; that also convey a right to use public real property for the fixed placement of facilities and equipment.

Those most interested in *Jacks* understood well that the characterization of the franchise fees depended upon the conveyance of the real property interest, as exemplified by the first paragraph of Argument in the amicus brief of the League of California Cities in *Jacks*:

> Franchise fees are well established in California jurisprudence. "A franchise is a grant of a possessory

> interest in public real property, similar to an easement." *(Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 *(Santa Barbara Taxpayers).)* It is "a negotiated contract between a private enterprise and a governmental entity for the long-term possession of land." *(Ibid.)*

(Exhibit 8; Amicus Brief of the League of California Cities in Support of the City of Santa Barbara, at p. 6.)

Courts seeking to write concisely have sometimes described the consideration for the fee as the "privilege of using the avenues and highways," without mentioning the nature of the use, but these decisions do involve the conveyance of property interests for long-term fixed placement of equipment. The League's amicus brief in *Jacks* goes on to provide an example of such language, with citations to decisions.

> In turn, as the Court of Appeal acknowledged, "the definition of 'franchise fee' has been constant for nearly a century." (Slip Op., p. 6.) It is "a 'charge which the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways **occupied** by the public utility.'" *(Ibid.,* citing *Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670 *(Tulare County); City of Santa Cruz v. Pacific Gas* & *Electric Co.* (2000) 82 Cal.App.4th 1167, 1171.)
>
> (Exhibit 8 at *id.*, emphasis added.)

In California, local governments demand franchise fees in return for the grant of a real property interest, and not in return for a right to conduct business somehow cast as a property interest.

III. THE DECISIONS IN *ZOLLY* ARE DIRECTED TO A REFUSE COLLECTOR'S *PRIMARY USE* OF STREETS FOR TRANSPORTATION, INVOKING THE APPLICATION OF OTHER LAW.

A. California Vehicle Code section 9400.8 prohibits local governments from charging for the use of streets for their primary use of transportation of legal loads.

In 2005, the court of appeals examined Vehicle Code section 9400.8 in a case of a county that attempted to assess charges for the use of county roads:

> Vehicle Code section 9400.8 provides in pertinent part: "Notwithstanding any other provision of law, … no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989."
>
> *County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal.App.4th 1544, 1615 (2005).

> By adopting Vehicle Code section 9400.8, the Legislature expressly prohibited a county from "impos[ing] a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads … ."

Id. at 1619.

> Accordingly, Vehicle Code section 9400.8 must be construed to prohibit a local agency from imposing fees or charges on legal loads that are hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear to the roads.

Id. at 1622.

The decision goes on to explain the clear preemptive language of the statute and the absence of exceptions to the rule of section 9400.8, discussing these factors also in light of this court's principles of statutory construction, which need not be repeated here. *Cty. Sanitation Dist. No. 2* at 1558, 1615 (last paragraph), 1617-1621 (sections B and D), reh'g denied, 2005 Cal. App. Lexis 702 (5th Dist., Apr. 25, 2005). However, guidelines of statutory construction endorsed by the California Supreme Court greatly assist the analysis of the remaining issues in these cases.

The application of section 9400.8 appears to eliminate paragraph (4) as a factor in arguments seeking to avoid classification of franchise fee revenue as taxes.

B. The application of Vehicle Code section 9400.8 renders the question on review moot as to the parties; and the Court may find no direct conflict between *BATA* and *Zolly*.

"It is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment

which can be carried into effect, and not to give opinions upon moot questions or abstract propositions…." *Paul v. Milk Depots, Inc.*, 62 Cal.2d 129, 132 (1964). "Mootness, like other jurisdictional questions, is so important courts can and should raise the question *sua sponte*." *City of Hollister v. Monterey Ins. Co.*, 165 Cal.App.4th 455, 479-80 (2008).

An appeal is mooted when the ruling will have no effect on the parties' substantive rights; when any ruling would have no practical effect and cannot provide any effective relief. *Lincoln Place Tenants Assn. v. City of Los Angeles*, 155 Cal.App.4th 425, 454 (2007).

A local government may not charge for the use of roads and streets for transportation. The refuse haulers use Oakland's streets for transportation. Therefore, Vehicle Code section 9400.8 renders paragraph (4) inapplicable in *Zolly*. Paragraph (4) may not be applied as an exception to avoid classification of any portion of the franchise fees as taxes.

The application of section 9400.8 appears to moot the question on appeal as to the parties and in any case where paragraph (4) is implicated by the primary use of city streets for transportation.

In light of the fact distinctions between *Zolly*, which involves the primary use of city streets for transportation, and *BATA*, involving bridge tolls, the Court may or may not find conflict between the decisions of the courts of appeal.

C. Prudential considerations may persuade the Court to capitalize on this opportunity to address an issue of widespread public interest.

Three discretionary exceptions are found to the rule that appeals will be dismissed when found to be mooted; one of the three operates here:

(1) The issue on review is one of broad public interest but it cannot be repeated in circumstances where the issue is mooted by the authority presented here;

(2) Thus, controversy over the issue cannot recur between these parties;

(3) However, the issue may affect others. Therefore, here, where the issue is of broad public interest, the Court may elect to consider the issue while declaring the issue moot as to the parties to the appeal. *See, e.g., In re William M.*, 3 Cal.3d 16, 23-25 (1970) (questions of public concern not moot even if the court's judgment would not bind the parties); *In re Stevens*, 119 Cal.App.4th 1228, 1232 (2004) (review appropriate for moot issue "of great public import" that "transcends the concerns of the particular parties").

IV. WHERE THE USE OF PUBLIC PROPETY IS FOR TRANSPORATION OVER STREETS AND ROADS, PARAGRAPH (4) MAY NOT BE RELIED UPON AS A BASIS FOR EXCEPTING THE FRANCHISE FEES FROM CLASSIFICATION AS TAXES, AND THE TAX/NON-TAX STATUS OF THE FEES DEPENDS ENTIRELY UPON THE APPLICATION OF PARAGRAPH (1).

As the Santa Barbara Superior Court recognized in *Jacks*, paragraph (1) clearly applies to franchise fees. The language of paragraph (1) matches the California courts' definition of a franchise. With the view that paragraph (1) applies to franchise fees and the courts were defining the franchise itself, the expressions are virtually identical. Compare California Constitution, article XIII C, section 1, subdivision (e), paragraph (1) to the definition of a California court:

> A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> *Cal Const, Art. XIII C § 1*, subd. (e), para. (1).
>
> A franchise is a special privilege conferred upon a corporation or individual by a government duly empowered legally to grant it. If the privilege is one that any individual may enjoy without a permit from the government, or if it is a right which one individual may grant to another without

> approval of the government, it is not a franchise. The first distinguishing feature of a franchise is that it must arise from the power of the government to bestow." (*City of Oakland* v. *Hogan, supra*, 41 Cal.App.2d 333, 346-347.)
>
> *Copt-Air, Inc. v. City of San Diego*, 15 Cal. App. 3d 984, 987 (1971)

The text of paragraph (1) clearly applies and refers to franchise fees; it could apply to little else. But the application of paragraph (1) has been subject to attack, chiefly via a defense that could be denominated the "by contract; therefore not imposed" defense. In this defense, a local government argues that the fees cannot be "imposed" within the meaning of the first paragraph of subdivision (e) because they are a contract term and the product of contract negotiations. This argument fails to appreciate that while, in the time of Henry VIII, a franchise might have been granted by royal command without a contract, in a modern democratic republic, a local government can only grant a franchise through a contract.

Thus, to accept the "by contract, therefore not imposed" defense would render paragraph (1) irrelevant and absurd, violating many of the Court's fundamental principles of statutory construction. See, e.g., *People v. Woodhead*, 43 Cal.3d 1002, 1010 (1987) (settled that significance should be attributed to every word and phrase of statute, and a construction making some words surplusage avoided); *Neuwald v. Brock*, 12 Cal.2d 662, 669 (1939) (citing section 1859, Code Civ. Proc.) (when general and

special provisions of an act are inconsistent, the specific are paramount and control the general provision). Paragraph (1) applies to franchise fees. See also *Jacks v. City of Santa Barbara*, 3 Cal.5th 248 at 257, 268, and 269, repeatedly using the term "imposed" in the context of the franchise contract to describe the consideration demanded. In fact, the Court employs the term in the holding itself:

> We analyze whether the surcharge is a valid franchise fee or a tax, and we hold that a charge *imposed* in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise

Jacks at p. 257 (emphasis added).

V. THE COURT MUST RESIST THE PRESSURE TO WEAKEN THE DISCRETE, 7-ELEMENT DISJUNCTIVE TEST OF SUBDIVISION (e) BY SUPPLANTING IT WITH A BALANCING OF FACTORS TEST.

Knowing that refuse disposal franchise fees cannot survive paragraph (1) scrutiny, the cities effectively ask the Court to transform the discrete, 7-element disjunctive test of subdivision (e) into a fuzzy balancing test. The Court should view these urgings askance. Subdivision (e) constitutes a disjunctive test. Local franchise fees may avoid tax classification by satisfying just one of its elements, but those elements are discrete, individual

tests. The test may not be satisfied with a cocktail, whether shaken or stirred.

CONCLUSION

On amici's reading of the law, franchise fees may avoid classification as taxes,

- Under paragraph (1) to the extent fees collected do not exceed the government's cost of administration of the franchise program;

  or

- Under paragraph (4) where the use of government property is not the primary use of streets for transportation, to the extent the fees collected do not exceed the reasonable range of values of the real property interest conveyed.

Amici see no need to overrule or limit the *Jacks* 'reasonable value' test, for the test changes nothing in paragraph (4). It is an evidentiary test of good faith -- a check to ensure that the basis of the charge is truly a price paid "in exchange for a property interest." *Jacks v. City of Santa Barbara*, 3 Cal.5th 248 at 269. There is one caveat: The reasonableness of the value should be closely scrutinized.

The need for close scrutiny is clear. A comparison of points of view is helpful. Writing to support Oakland's petition for review, the League of California Cities distinguished between costs and valuation, urging that "cost" relates to effort and expense required to provide a service, while "value" relates to

"what a party is willing to pay." (Exhibit 9; League of California Cities amicus letter supporting the review in *Zolly,* at p. 6.) These are serviceable definitions in the context of commercial contracts between private parties. But the price "a party is willing to pay" has little meaning where the citizen is a third-party beneficiary to a contract, with little or no bargaining power, and her government is seeking revenue the citizen will be forced to pay in prices increased by any amount that governing body can persuade its contractor to charge, collect and pass on as franchise fees.

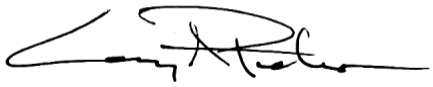
California has leaned a long way toward allowing local governments to exact revenue via franchise fees. The revenue can constitute a substantial amount of money and a substantial portion of the contractor's profits. On the facts of *Jacks*, ten years ago, Southern California Edison operated on a 12% profit margin (and at the time was seeking CPUC permission for an increase to 15%). Thus, a 2% franchise fee *on gross income* provides the City of Santa Barbara not 2% but 16.7% of SCE profits on sales to Santa Barbara citizens. In comparison, private refuse collectors commonly operate at about a 20% profit margin. Thus, a 10% franchise fee amounts to **fully 50% of the profit** of the joint enterprise (or 33% if the franchise fee is tacked onto the prices). Such arrangements cannot be characterized as legitimate franchise fees, and cities cannot pretend that they are not charging these increased fees to their citizens. These are full-blown joint-venture interests. It is impossible to conceive that

such huge charges will not, sooner or later, be passed on to consumers. And increases so substantial are taxes.

In the case of a public utility, where net revenue is modest and strictly limited by the Public Utilities Commission, a pass-through of a franchise fee may be justified. But where the franchisee is a private company, and charges to the citizens are markedly increased in order to provide the local government with expense-free net revenue, at no cost to the franchisee, the increased charges are merely taxes wearing a thin disguise.

April 22, 2021

PELUSO LAW GROUP, PC
LARRY A. PELUSO



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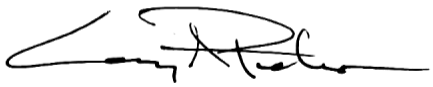
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 2,555 words as counted by the Microsoft Word word processing program version 16.47 (2021) used to generate the brief.

Dated: April 22, 2021



Larry Peluso

PROOF OF SERVICE

I, Julia Swanson, hereby declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and I am not a party to this action.

On April 23, 2021, I served the following documents:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF REUBEN ZADEH, MABLE CHU, AND HERB NADEL IN SUPPORT OF RESPONDENTS ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

EXHIBITS 1-9

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By the following means of service:

VIA ELECTRONIC SERVICE (TrueFiling). I hereby certify that this document was uploaded for electronic service upon the interested parties and the webmaster will give email notification to all parties.

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

Executed on April 23, 2021

_____

Julia Swanson

Exhibit
1A

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April 7, 2021

Mr. Jorge E. Navarrete
Clerk of the Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: Potential mootness in *Zolly v. City of Oakland*, S262634

Mr. Navarrete,

Thank you for your careful consideration of our letter of March 15, 2021 (Exhibits 1 and 2) and for your letter in reply. (Exhibit 3.) Writing as a true friend of the court, I strove to spare the court's valuable resources and assist the court in avoiding a non-judicial function: the consideration of an illusory controversy.

Inexperienced in submissions to the Supreme Court, we misunderstood the proof of service process. We believed *e-Submissions* automatically provided electronic service, like ECF in the federal courts.

We have been engaged for three years in litigation similar to the *Zolly* matter[1] and were aware of the *Zolly* appeal and petition for review. Late last year, I discovered authority that may moot the issue on review, but I did not appreciate the possible mooting of the *Zolly* issue on review until late February this year. I wanted to notify the court of the potential mootness but, two Moderna vaccinations on February 5 and March 5, caused a daily collapse with debilitating fatigue. (Exh. 7; CDC Vaccination Record.) The effect of the vaccinations must have been worse for me than for others because of my year-long struggle with long-haul Covid-19.[2]

Searching for guidance on how a non-party should notify the court of authority potentially mooting an appeal or review, I found nothing on point in the Rules of Court. I then searched for the most analogous procedure and considered the duty of parties to inform the court of new authority. (Exh. 4, Simms article.). I took notice of the rule of the California Supreme Court, that such notices must be limited to informing the court of the authority, without argument. This is why, in my debility, I tried my best to send

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[1] *Apartment Owners Association of California, Inc., et al. v. City of Los Angeles*, Los Angeles Superior Court case no. BC677423 (Hon. Maren E. Nelson).

[2] Covid-19 has affected both members of our small law firm, who are both over 70 years of age. After suffering the initial symptoms in the spring of 2020, Marshall Clyde, M.D. at Incline Village, Nevada Hospital directed me to quarantine at home. Episodes of debilitating fatigue followed.

the quick letter informing the court of authority that may render the issue on appeal moot. (Exh. 1: March 15 Peluso letter.)

I found examples online; one, a letter brief on mootness requested by the United States Supreme Court. (Exh. 5.) Comparing my situation to that of the examples I found, the differences were: (1) I am not a party; (2) my letter was unsolicited; and (3) the issue here was jurisdictional; thus, one that should be raised at any time upon its discovery.

I then found a letter to the United States Supreme Court from a non-party that had not been requested by the court. (Exh. 6; Letter of the Office of the Solicitor General of the United States.). That 'unsolicited' letter notified the court of information that could affect review.

As you see from the enclosed copy of the letter, the Department of Education was not a party to the case, but the Deputy Solicitor General knew information that could affect the court's review and was known to the author through involvement in a related legal matter.

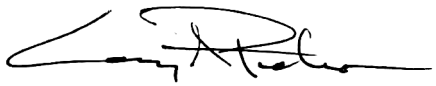
Thus, in my view, pointing to the authority was not a supporting brief, as are most third-party briefs. I acted as a true friend of the court, solely to assist the court.

If this was error, I hope that you will appreciate the cause of our mistaken reasoning, and our misunderstanding, through inexperience, in believing that *e-Submission* would provide automatic electronic service.

As our letter has proved insufficient, we are now submitting an application for leave to file a belated amicus curiae brief, and hope the court will consider the factors discussed above as understandable good-cause to grant leave.

Very respectfully,

PELUSO LAW GROUP, PC



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Exhibits
1-7

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March 15, 2021

Mr. Jorge E. Navarrete, Clerk
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Zolly v. City of Oakland*, S262634

Dear Chief Justice Cantil-Sakauye and Associate Justices:

This case, which has been fully briefed, presents the stated issue, "Must city franchise fees that are subject to California Constitution, article XIII C, be reasonably related to the value of the franchise?"

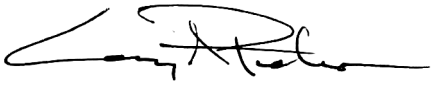
A more complete expression of the question might be, 'whether local government franchise fees must be "reasonably related to the value of the franchise" in order to avoid classification as taxes under California Constitution article XIII C, section 1, subdivision (e).'

It has come to our attention that existing authority may moot the question presented in *Zolly* by rendering it irrelevant. We call the Court's attention to the following authority:

1. California Vehicle Code § 9400.8.
2. *County Sanitation Dist. No. 2 v. County of Kern (2005)* 127 Cal.App.4th 1544 at 1558, 1615 (final paragraph), 1617-1621 (sections B and D), reh'g denied, 2005 Cal.App. LEXIS 702 (Cal. App. 5th Dist., Apr. 25, 2005).
3. *San Diego v. Southern California Tel. Co.*, 92 Cal.App.2d 793, 800 (1949) (point number 2 on primary versus secondary uses of streets), disapproved of on other grounds by *Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 Cal.2d 766, 776.

Respectfully,

PELUSO LAW GROUP, PC



Larry A. Peluso

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March 15, 2021

Mr. Jorge E. Navarrete, Clerk
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Zolly v. City of Oakland*, S262634

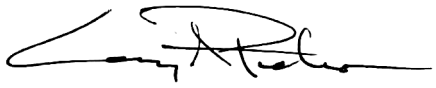
Dear Mr. Navarette,

Yesterday we mailed a letter to the Court by First Class Mail noting existing authority that may render moot the *Zolly* issue on review. Although greatly strapped for time and struggling with Covid-19 problems, we felt compelled to call this to the Court's attention.

In our rush, the letter was addressed directly to the Chief Justice and Associate Justices. We were unable to reach you by telephone yesterday but provide the enclosed letter again to you, and ask that you distribute copies to the Justices by the Court's electronic system. We have also submitted the letter by *e-Submissions*, and this may suffice as notice to the service list.

Very sincerely yours,

PELUSO LAW GROUP, PC



Larry A. Peluso

Supreme Court of California

JORGE E. NAVARRETE
CLERK AND EXECUTIVE OFFICER
OF THE SUPREME COURT

EARL WARREN BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

March 24, 2021

Larry A. Peluso
Peluso Law Group, PC
3419 Via Lido, #460
Newport Beach, CA 92663

Re: Robert Zolly et al. v. City of Oakland, S262634

Dear Counsel:

Please find attached your letter dated March 15, 2021, received in this Court March 23, 2021. The letter is not accompanied by a proof of service showing that all parties have been served a copy of your letter. In addition, it appears that after a check of the record, your name does not appear as a party nor as an amicus curiae, and therefore have no standing in this matter. Thank you for your letter; we hereby return it unfiled.

Very truly yours,

JORGE E. NAVARRETE
Clerk and
Executive Officer of the Supreme Court

//s//
By: I. Calanoc, Deputy Clerk

Enclosure

Keeping the court informed of new authority while your appeal is pending

Rules, procedure and practical advice for updating the court on significant decisions that impact your brief

By Gary Simms

As appellate practitioners know all too well, after the principal briefs (Appellant's Opening Brief, Respondent's Brief, and Appellant's Reply Brief) have been filed, an appeal will almost certainly remain pending in a California Court of Appeal or in the California Supreme Court for at least several months, perhaps as long as two years or more, before oral argument. The Supreme Court's website acknowledges that oral argument is usually held "several months to a year after all briefs on the merits have been filed." And the United States Court of Appeals for the Ninth Circuit's website states that oral argument is usually held between nine months and one year after briefing is completed.

These estimates are often optimistic. Indeed, some cases remain pending much longer than a few months to one year. For example, on the Supreme Court's November 2019 oral-argument calendar, one case had been pending two years and two months after the principal briefing, and another case had been pending for two years and seven months.

Because of the time lapse between the end of principal briefing and oral argument, it is important to frequently update your legal research to determine if any relevant new appellate decisions have been filed or if any relevant new statutes or regulations have been enacted. California appellate courts and the Ninth Circuit have procedures for doing so.

California Courts of Appeal

The Courts of Appeal and the Supreme Court have different rules for bringing new authority to the court's attention. In the Courts of Appeal, California

Rule of Court 8.254 governs the submission of new authority.
The rule states:

a) Letter to court

If a party learns of significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed, the party may inform the Court of Appeal of this authority by letter.

(b) Form and content

The letter may provide only a citation to the new authority and identify, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. No argument or other discussion of the authority is permitted in the letter.

(c) Service and filing

The letter must be served and filed before the court files its opinion and as soon as possible after the party learns of the new authority. If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument.

Although Rule 8.254 seems straightforward, a few points merit note.

What is significant?

The rule requires that the new authority must be "significant." (Rule 8.254(a).) Of course, whether new authority is significant can be somewhat subjective, but common sense suggests that, with one exception, you should not use Rule 8.254 to submit new authority that is merely cumulative of authority cited in your principal briefing.

The exception is when the Supreme Court has issued a new opinion that clearly supports Court of Appeal authority cited in your principal briefing. The obvious reason for this exception is that a Court of Appeal in which an appeal is pending is free to disagree with other Court of Appeal authority but is bound to follow Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) So, if you have cited one or more Court of Appeal decisions to support an argument, a new Supreme Court opinion that makes the same point should be deemed to be "significant."

Another circumstance in which new authority should be deemed to be significant is when it supports an argument for which there was no clear authority when you filed your principal briefing. And, of course, new authority is significant if it clearly refutes an argument by your opponent.

What's new?

Rule 8.254(a) defines "new authority" as authority "that was not available in time to be included in the last brief that the party filed or could have filed." Obviously, this includes court decisions and statutes or regulations that were issued or enacted after your last brief was filed, i.e., either your Respondent's Brief or your Appellant's Reply Brief. But it is possible that a new decision was issued a week or two before you filed your last brief, but you were not then aware of that new decision. This presents a judgment call, but you will likely not incur your court's displeasure if you comply with the requirements of Rule 8.254, with perhaps a notation that you were not aware of the new authority when you filed your last brief.

Whether authority is "new" can arise in another regard, although an uncommon one: when a court of appeal issues an unpublished opinion that either the issuing court or the Supreme Court later decides to publish. California Rule of Court 8.1115(a) prohibits the citation of unpublished opinions. So, in this situation, you could not have cited the opinion when it was filed. But when the Court of Appeal later certified its opinion for publication, the opinion only then became citable, and it should be deemed to be new authority.

Supreme Court Review

Rule 8.254's requirement for significance raises a question about Supreme Court orders granting review. Such an order is not "new authority" by any common understanding of the term because a grant of review is not a decision on the merits. But, of course, absent a subsequent dismissal of review, a grant of review will lead to a decision on the merits, which will result in a published, binding Supreme Court decision.

So, if the Supreme Court grants review in a case that raises an issue of importance in your case, there should be no problem submitting a letter to your court to notify it of the grant of review. Even though this technically may not be a notice of "new authority" under Rule 8.254, it does abide by the rule's mandate not to argue. Just tell your court the case in which review was granted, the Supreme Court docket number, the date on which review was granted, and the pages of your briefing where the issue is discussed.

In rare cases, you or your opponent may have cited a Court of Appeal decision that was very new when you cited it, and the Supreme Court later grants review of that decision. The grant would certainly seem significant enough to note it for the court in which your appeal is pending. And again, in keeping with the spirit of Rule 8.254, you should not make any arguments regarding the grant of review, but again, simply note the case in which review was granted, the Supreme Court docket number, and the date review was granted.

A Supreme Court grant of review may be significant in another regard. As we all know, California Rule of Court 8.1115(a) prohibits the citation of unpublished Court of Appeal opinions. The Supreme Court, though, grants review of unpublished as well as published decisions. Again, a grant of review will lead to a decision on the merits, which will result in a published, binding Supreme Court decision. Thus, even though Rule 8.1115(a) prohibits citation of an unpublished opinion, the rule does not prohibit citation of a Supreme Court grant of review of an unpublished decision. So, there should be no problem with bringing a new Supreme Court grant of review to your court's attention. Again, though,

abide by Rule 8.254's mandate not to argue the case.

Timing

Rule 8.254 does not set forth any deadline for submitting a notice of new authority. Rather, the rule states that the notice must be submitted "as soon as possible after the party learns of the new authority." It might be tempting to wait for a notice of oral argument before updating the legal research in your briefing. If you only then learn of the new authority and bring it to your court's attention, you will be in compliance with the rule's requirement to notify the court as soon as possible after you have learned of the new authority.

But as a practical matter, do not wait that long. Rather, frequently check for new authority after the principal briefing and, if you find any, bring it to your court's attention as soon as possible. This is because of the way in which the Court of Appeal and the Supreme Court process appeals. California's 90-day rule requires courts to issue their decisions within 90 days after a matter is submitted. (Cal. Const., Art. VI, § 19; Gov. Code, § 68210.) As appellate practitioners know, because of the 90-day rule, appellate courts begin work well before they issue a notice of oral argument and, except in very rare cases, they have a proposed opinion ready to file even before oral argument.

Thus, waiting to update your legal research until your court issues a notice of oral argument may cause your court to pay less heed to the new authority than they otherwise would have, especially if your new authority is not squarely controlling Supreme Court authority. This need for promptness is shown by the First District Court of Appeal's Local Rule 16 that "Parties submitting a letter of new authorities prior to oral argument under California Rules of Court, rule 8.254 must submit the letter when the authorities become available and as far in advance of any scheduled oral argument as possible."

A question of timing can arise after oral argument. Rule 8.254 states that, "If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument." Presumably, this means that, after oral argument, you should not cite authority that was decided before oral argument. But it is possible that a new decision was issued only a few days before oral argument, and you were not then aware of it. In that situation, you will probably not irritate your court if you submit a notice of the new authority after oral argument.

Another timing issue can arise, although very infrequently, when a new authority is issued after your court has issued its decision. You have 15 days after a decision in which to file a petition for rehearing. If a new authority is issued during that 15-day period and if that authority supports your petition for rehearing, you can, of course, cite and discuss the new authority in your petition. You are not constrained by Rule 8.254.

What if the new authority is issued after the 15-day deadline to file a petition for rehearing but before the Court of Appeal decision becomes final, i.e., 30 days after it is issued? The court can grant an extension of time to file the petition. (Rules 8.60(b) & 8.268(b)(4).) But the court cannot grant rehearing after its decision becomes final. (Rule 8.268(c).)

It is also possible that helpful new authority will be issued after a Court of Appeal decision becomes final but before the deadline for filing a Petition for Review in the Supreme Court. In that situation, you need only to cite and to discuss the new authority in your Petition for Review.

Procedure

The procedures for bringing new authority to an appellate court's attention depend on whether you are in the Court of Appeal or the Supreme Court. As discussed above, in the Court of Appeal, the procedure is governed by Rule 8.254, which limits you to merely citing the new authority and the pages of the briefing to which the new authority relates. Any argument is prohibited.[1]

Likewise, Rule 8.200(a)(4) prohibits the filing of a supplemental brief without the permission of the Court of Appeal's presiding justice. This gives rise to the question of whether you should request such permission. This, of course, is a judgment call. If it is very clear what the new authority means for your case, you probably don't need supplemental briefing. If it is not altogether clear how the new authority helps you or hurts your opponent, it probably is not even worth bringing to your court's attention.

A party who is hurt, though, by the new authority may have a different perspective. Rule 8.254 does not provide for any response to a notice of new authority. But if your opponent submits such a notice, you may want to attempt to distinguish the authority or to explain why your court should not follow it. In that situation, you must request permission to file a supplemental brief responding to the new authority. Of course, though, an argument not to follow new authority cannot be made to a Court of Appeal if the new authority is by the Supreme Court because the Court of Appeal must follow Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450.)

California Supreme Court

California Rule of Court 8.520(b) governs the submission of new authority to the Supreme Court. Unlike in the Court of Appeal, supplemental briefing is allowed as a matter of right under Rule 8.520(d). You are allowed to file a supplemental brief that does not exceed 2,800 words. (Rule 8.520(d)(2).) Also, unlike in the Court of Appeal, there is a deadline, i.e., 10 days before oral argument. (*Ibid*.) But as a practical matter, for the reasons discussed above, waiting until then will almost certainly be too late for the new authority to have any effect on the Supreme Court's decision because

their opinion will have been written well before oral argument.

Perhaps you could submit new authority to the Supreme Court under Rule 8.254, i.e., follow its bare-bones procedure of merely citing the new authority without argument. But note that Rule 8.254 is in Title 8, Chapter 2, Article 4 of the California Rules of Court. That chapter deals only with appeals in the Courts of Appeal. Moreover, because the Supreme Court rule, i.e., Rule 8.520(b), permits supplemental briefing, there would not seem to be a good reason to forego that opportunity.

Multiple new authorities

Because of the often-lengthy delay between the close of principal briefing and oral argument, it is possible that more than one significant new authority, e.g., a new court decision, may be issued during that time. Assume, for example, that shortly after the close of briefing, you learn of a significant new authority. Should you bring it to your court's attention right away, or should you wait a few months to determine whether there are any additional new authorities so that you can include all new authorities in one letter?

In the Court of Appeal, the answer is in Rule 8.254, which, as noted above, states that a party must notify the court of the new authority "as soon as possible after the party learns of the new authority." In the Supreme Court, though, a party has until 10 days before oral argument to notify the Court of the new authority. (Rule 8.520(d)(2).) So, you can perhaps wait a while to determine if there are any additional new authorities to bring to the Supreme Court's attention. But doing so presents a bit of a problem. That is because you will have no way of knowing whether the Supreme Court has already begun working on your appeal. So, if you wait too long, you may be too late.

Adverse new authority

The rules for bringing new authority to a court's attention are commonly and understandably thought of as being a way to inform the court of new authority that supports your position in the appeal. But of course, there can be new authority that is adverse to your position. If you know of such new authority, should you bring it to your court's attention?

Yes, because California Rule of Professional Conduct 3.3 states that "(a) A lawyer shall not . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be *directly adverse* to the position of the client and not disclosed by opposing counsel." (Emphasis added.) So, if you become aware when updating your legal research of a new authority that is directly adverse to your position, you should disclose that authority if your opponent has not already done so. Of course, though, what is "directly adverse" can be arguable.

Also keep in mind that Rule 3.3's reference to the "controlling jurisdiction" is not limited to California. As the official comments to Rule 3.3 make clear, "Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court." (Comment 3 to California Rule of Professional Conduct 3.3.)

Federal Courts

Bringing new authority to a federal appellate court's attention is governed by Federal Rule of Appellate Procedure 28(j). It states:

> "If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited."

In some respects, Rule 28(j) is the same as or similar to California Rule of Court 8.254. For example, Rule 28(j) requires that the new authority be "pertinent and significant." Rule 28(j) also requires that notice of the new authority must be made "promptly." And the Advisory Committee for the Ninth Circuit further explains that:

> In the interests of promoting full consideration by the Court and fairness to all sides, the parties should file all FRAP 28(j) letters as soon as possible. When practical, the parties are particularly urged to file FRAP 28(j) letters at least 7 days in advance of any scheduled oral argument or within 7 days after notification that the case will be submitted on the briefs."

(Advisory Committee Comment to Ninth Circuit Rule 28.6.)

The California and federal rules differ, though, in two important respects. *First*, unlike California Rule 8.254, which requires the authority to be new, i.e., "not available in time to be included" in your last principal brief, Rule 28(j) is broader, referring to authorities that "come to a party's attention after the party's brief has been filed." So, under Rule 28(j), if you somehow overlooked a "pertinent and significant" authority when you submitted your principal briefing, but later learn of that authority, you can submit it even if it is not new. But Rule 28(j) requires you to state the reasons for your supplemental citation. So, offer a brief explanation of why you were not aware of any significant authority that was not new when you filed your brief.

Second, unlike the California Rule 8.254, federal Rule 28(j) permits discussion of the new authority, subject to a limit of 350 words in the body of the letter. Also unlike the California rule, the last sentence of Rule 28(j) makes clear that your opponent is permitted to file a responsive letter of the same length (350 words) without first seeking leave of court.

Conclusion

On appeal, it behooves practitioners to periodically update their legal research between the close of principal briefing and oral argument and to notify their court of any significant new authority and, in federal court, also any overlooked significant authority. Such authority may tip the scales in your favor. Conversely, if the new authority is adverse to your case, you need to be aware of it and to request supplemental briefing to deal with it.


Simms

Gary Simms was a senior judicial attorney at the California Supreme Court for almost nine years for former Justice David Eagleson and then current Justice Marvin Baxter. Simms is certified as an appellate specialist by the State Bar of California's Board of Legal Specialization. Since leaving the Supreme Court, he has represented plaintiffs on appeal in the California Courts of Appeal and Supreme Court, the U.S. Ninth Circuit Court of Appeals, and appellate courts in Oregon and Texas. Simms serves on the Amicus Curiae Committee of the Consumer Attorneys of California. He has offices in Davis, California and Ashland, Oregon. He can be contacted at glsimms@simmsappeals.com.

Endnotes:

[1] If you submit a notice of a new court decision very shortly after it is issued, it may not yet have a volume and page number in the Official Reports. Thus, as a convenience for your court, include a citation to LEXIS, or Westlaw, or both of them.

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 15, 2019

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: NY State Rifle & Pistol Assn., Inc., et al. v. City of New York, et al., No. 18-280

Dear Mr. Harris:

On November 15, 2019, this Court ordered the United States to file a letter brief addressing whether this case is moot. In the United States' view, respondents have not established that this case is moot.

1. The prospect that petitioners may seek damages suffices to keep this case alive. This Court has held that a case becomes moot only if intervening events mean that a court can no longer "grant any effectual relief" to the plaintiff. *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (citation omitted). The Court has further held that "money damages" for past injuries qualify as effectual relief, and that, as a result, a claim for such damages, "if at all plausible, ensure[s] a live controversy." *Ibid.*; see 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.6, at 301-302 (3d ed. 2008) (Wright & Miller) ("[M]ootness is defeated so long as damages or other monetary relief may be claimed on account of the former provisions."). Most courts have held that even a claim for nominal damages prevents a challenge to a repealed statute from becoming moot. See 13C Wright & Miller § 3533.3 n.47, at 31-34. Although one court of appeals has held that a claim for nominal damages does not suffice, even that court agrees that a claim for actual damages ensures a live controversy. See *Flanigan's Enters., Inc.* v. *City of Sandy Springs*, 868 F.3d 1248, 1263-1270 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 1326 (2018); *Granite State Outdoor Adver., Inc.* v. *City of Clearwater*, 351 F.3d 1112, 1119 (11th Cir. 2003), cert. denied, 543 U.S. 813 (2004).

Under those principles, this case remains live, because petitioners could still seek and a court could still award actual or nominal damages on account of the transport ban's alleged violation of their Second Amendment rights. Petitioners have brought their lawsuit under 42 U.S.C. 1983, a statute that authorizes courts to award "damages * * * to compensate persons for injuries that are caused by the deprivation of [their] constitutional rights." *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978). The entities they have named as defendants—the City of New York and the License Division of the Police Department—are municipal bodies, which enjoy neither sovereign immunity nor official immunity from claims for damages. See *Northern Insurance Co.* v. *Chatham Cnty.*, 547 U.S. 189, 193 (2006); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 695-701 (1978); cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 (1997) (holding

that a claim for nominal damages against a State was not sufficient to avoid mootness because "Section 1983 creates no remedy against a State"). Moreover, the complaint includes allegations, and the summary-judgment affidavits include evidence, that the application of the transport ban to petitioners caused them injury in the past. J.A. 32-33, 52-54, 56-57, 59-61. And petitioners have never forsworn or waived damages in any of their pleadings or filings.

Although petitioners' complaint does not specifically request damages, see J.A. 47-48, any omission in the complaint would not, by itself, be conclusive as to mootness if petitioners were now to assert a claim for damages. See *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 66 (1978) ("omissions [in a prayer for relief] are not in and of themselves a barrier to redress of a meritorious claim"); see also Fed. R. Civ. P. 15(a)(2) (providing that a court should "freely" grant leave to amend a complaint where "justice so requires"); Fed. R. Civ. P. 54(c) (providing that a party's failure to demand particular relief "in its pleadings" does not automatically preclude the party from seeking that relief later in the litigation); 10 Wright & Miller § 2662, at 168 (4th ed. 2014) (explaining that the "liberal amendment policy of Rule 15, combined with Rule 54(c)," mean that a party can in some circumstances still "secur[e] a remedy other than that demanded in the pleadings"). The critical question on the merits would be whether the party's "tard[iness]" in requesting relief not specified in the complaint is "excusable" under the circumstances. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975). And in the unusual circumstances of this case—where the City waited until after the grant of a writ of certiorari to amend the challenged law, and where the City waited until after the completion of briefing on mootness to make additional representations about the future consequences of past regulatory violations, see *infra*—it may well be excusable for petitioners to make an express request for damages at this stage, even if they have not already done so.

In all events, questions about whether it is too late for petitioners to seek damages go to the merits, not to jurisdiction. Under Article III, the relevant inquiry is whether it is still possible for a court to grant "effectual relief," not whether "[u]ltimate recovery" is certain or even likely. *Mission Prod. Holdings*, 139 S. Ct. at 1660. It is still possible to grant damages for the past violations of petitioners' constitutional rights. To the extent petitioners seek such damages, the case remains live.

2. Petitioners propose several alternative theories under which this case remains live.

a. Petitioners first contend that this case remains live because they could still suffer future consequences as a result of their past violations of the repealed law. See Pets. Resp. to Suggestion of Mootness 16-18. We agree that, in principle, the possibility of future consequences for past violations of a repealed law can be sufficient to keep a case from becoming moot. We further agree with petitioners that, on the record before this Court, the possibility of such future consequences does keep this case from becoming moot. Under state law, a licensing officer enjoys "considerable discretion" in evaluating applications for handgun licenses. Pet. App. 3 (citation omitted). On the current record, there is a real possibility that licensing officers in the City would exercise that discretion to hold past violations of the transport ban against petitioners when considering future applications for handgun licenses.

The City, however, has informed the United States that, in exercising its discretion, the City will not give adverse effect to past violations of the former transport ban in future licensing

decisions. If the City makes such a representation to the Court, then the possibility of future enforcement by the City would be too "remote" to keep this case alive. *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 610 (2013); see 13C Wright & Miller § 3533.6, at 299-301; see also *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) ("[I]t has been the settled practice of the Court * * * fully to accept [such] representations" from governmental parties when evaluating mootness.). Likewise, the possibility that other unspecified, third-party jurisdictions could impose future consequences does not satisfy Article III, both because it is too remote and because it would not be redressed by the binding force of the judgment entered against the entities that are actually parties to this case. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *id.* at 569 & n.5 (opinion of Scalia, J.).

b. Petitioners also contend that this case remains live because they still object to restrictions contained in the new provisions enacted by the Police Commissioner and the State. Pets. Resp. to Suggestion of Mootness 13-16. Although petitioners' objections to the new provisions would establish a live controversy regarding those provisions, they do not establish a live controversy regarding the City's original transport ban. See, *e.g.*, *Allee* v. *Medrano*, 416 U.S. 802, 818 (1974).

c. Finally, petitioners invoke the principle that a defendant's voluntary cessation of a challenged practice moots a case only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation omitted); see Pets. Resp. to Suggestion of Mootness 22-33. But that principle does not apply to the new statute enacted by the State of New York. First, the voluntary-cessation doctrine applies only to "a *defendant's* voluntary cessation of a challenged practice." *Aladdin's Castle*, 455 U.S. at 289 (emphasis added). The State of New York is not a defendant; it is a third party. Second, this Court has never applied the voluntary-cessation doctrine to a statute enacted by a state legislature or Congress. The Court has instead "consistently and summarily held that a new state [or federal] statute moots a case." *Town of Portsmouth* v. *Lewis*, 813 F.3d 54, 59 (1st Cir. 2016); see, *e.g.*, *Massachusetts* v. *Oakes*, 491 U.S. 576, 582-584 (1989) (opinion of O'Connor, J.); *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559-560 (1986).

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

18-0280
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U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

February 22, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Gloucester County School Board v. G.G., No. 16-273

Dear Mr. Harris:

This case, which is scheduled for argument on March 28, 2017, involves a question about the proper application to transgender students of the prohibition on sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and its implementing regulations, see 34 C.F.R. 106.33, in the context of sex-segregated facilities such as bathrooms and locker rooms. In the decision below, the court of appeals deferred to the interpretation of Title IX and its implementing regulations reflected in administrative guidance issued by the United States Department of Education. See *Auer* v. *Robbins*, 519 U.S. 452 (1997).

This letter is to inform the Court that, on February 22, 2017, the Department of Education, in conjunction with the Department of Justice's Office for Civil Rights, announced their decision to withdraw that guidance and a subsequent joint guidance letter, not to rely on the views expressed in the guidance, and instead to consider further and more completely the legal issues involved. Enclosed is a copy of the document withdrawing the guidance.

We would appreciate it if you would circulate copies of this letter and attachment to the Members of the Court.

Sincerely,

Edwin S. Kneedler

Edwin S. Kneedler*
Deputy Solicitor General

cc: See Attached Service List

* The Acting Solicitor General is recused from this case.

COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.

Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.

Peluso — Last Name

Larry — First Name

MI

9/6/1950 — Date of birth

Patient number *(medical record or IIS record number)*

Vaccine	Product Name/Manufacturer Lot Number	Date	Healthcare Professional or Clinic Site
1st Dose COVID-19	Moderna 016H20A	2/5/21 mm dd yy	UCLA RR
2nd Dose COVID-19	MODERNA 030A21A	3/5/21 mm dd yy	UCLA MC RR 2-2
Other		___/___/___ mm dd yy	
Other		___/___/___ mm dd yy	

Exhibit

8

S225589

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

ROLLAND JACKS and ROVE ENTERPRISES, INC.,

Plaintiffs and Appellants,

v.

CITY OF SANTA BARBARA,

Defendant and Respondent.

On Review from the Court of Appeal
for the Second Appellate District, Division Six, Case No.
B253474

After an Appeal from the Superior Court of California,
County of Santa Barbara, Case Number 1383959,
Hon. Thomas P. Anderle

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CITY OF SANTA BARBARA; AMICUS CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: October 21, 2015 HANSON BRIDGETT LLP

By: _____

ADAM W. HOFMANN
Attorneys for Amicus Curiae
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CITIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

APPLICATION TO FILE AMICUS CURIAE BRIEF

INTRODUCTION

Pursuant to rule 8.520(f) of the California Rules of Court, the League of California Cities (the "League") respectfully requests permission to file an amicus curiae brief in support of Respondent City of Santa Barbara. This application is timely made within 30 days after the filing date of the City's reply brief on the merits.

No party or counsel for a party in this proceeding authored the proposed amicus brief in any part, and no such party or counsel, nor any other person or entity other than the amicus curiae, made any monetary contribution intended to fund the proposed brief's preparation or submission. (See Cal. Rules of Court, rule 8.520(f)(4).)

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance, and the League's members have a substantial interest in its resolution.

First, this case challenges the ability of local governments to negotiate fees for the valuable use of their property by private, for-profit utilities. Most, if not all, local governments in California derive a significant portion of their revenues from such "franchise fees," and use resulting revenues to fund essential services for their residents, businesses, and property owners.

In fact, according to data gathered by the State Controller, California cities derived a significant portion of their revenues from franchise fees in fiscal year ("FY") 2013-14, the last year for which data is available. (Motion for Judicial Notice in Support of Amicus Curiae Brief ("MJN") Exh. A.) The median city received 6% of its general revenues from franchise fees in FY 2013-14. (MJN Exh. A, at p. 1.) But many cities relied much more heavily on franchise fees, including:

- Needles - 31% (of general revenues)
- Lodi – 26.0%
- Arvin – 24%
- Adelanto – 23%
- Imperial Beach – 22%
- San Jacinto – 21%
- Colusa – 20%
- Azusa – 20%

(MJN Ex. A, at pp. 1, 2, 5, 6.) 87 additional cities in California relied on franchise fees to make up 10%-20% of their annual revenues during the same period. (MJN Ex. A.) The League's members, thus, have a strong interest in any decision that

implicates their ongoing ability to negotiate and collect franchise fees.

Second, local governments are bound by the provisions of Article XIII C, of the California Constitution.[1] The Opinion below applies Article XIII C to franchise fees for the first time. The Opinion places strict limitations on the ability of local governments to adopt franchise fees, imperils funding for vital government services, and places many local governments at risk for crippling, class-action refund claims.

The League believes it can aid this Court's review by providing a broader legal framework for this issue. The League's amicus counsel have examined those briefs and are familiar with the issues and the scope of the presentations. The League respectfully submits that additional briefing would be helpful to clarify that franchise fees have never been considered taxes, and the franchise fee at issue here was not converted to a tax by the procedures used to implement it.

Therefore, the League respectfully requests leave to file the brief combined with this application.

DATED: October 21, 2015 HANSON BRIDGETT LLP

By: _____

ADAM W. HOFMANN
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

[1] All subsequent references to articles and sections of articles are to the California Constitution.

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES

INTRODUCTION

The parties, the trial court, and the Court of Appeal all agree on one thing: franchise fees are not taxes. They are the negotiated cost private utilities pay for the right to use public property in their for-profit businesses. As a result, this case turns on whether there is something about the City of Santa Barbara's franchise agreement with Southern California Edison ("SCE") that converts half of the negotiated franchise fee into a tax. There is not.

Reaching a contrary conclusion, the Court of Appeal focused on the ways in which it believed a portion of the franchise fee resembled the City's utility users tax. The similarities drawn by the court, however, fall apart on close examination.

First, the Court of Appeal found that the City had been willing to grant franchise rights for a 1% fee, and the conditional provision that increased the fee 2% served only to increase revenue without any consideration paid in exchange. Not so. The City granted only a temporary and—in franchise terms—brief extension of SCE's prior franchise rights for a 1% fee. But the heart of the consideration the parties agreed to exchange was a 2% fee for a 30-year franchise. As a result, the whole fee fits the traditional definition of a franchise fee, and no part of that fee was for the generation of revenue without bargained-for consideration as with a utility users tax.

Second, the court found that half the franchise fee was akin to a utility users tax because SCE collects it directly from City residents as a surcharge, rather than recovering it as part of its electricity rates. But this feature of the franchise agreement was a term demanded by SCE in order to comply with the directives of the California Public Utilities Commission ("CPUC"). It is not a requirement of the City. To the contrary, the City has no interest in or authority to direct the manner in which SCE recovers the cost of its services. As a result, the surcharge was not imposed by the City, as is a utility users tax. The fact that SCE recovers a portion of its franchise cost in the form of a surcharge does not convert that portion of the City's franchise fee into a tax.

Third, the Court of Appeal considered the size of the franchise fee to be an indication that some portion of it must be a tax, holding that Proposition 218 governs the portion of the fee that exceeds prevailing rates in SCE's geographic territory. There is no basis in the text of the Constitution or related ballot materials to support the court's conclusion that Proposition 218 limits franchise fees. To the contrary, the court's construction of Proposition 218 would lead to the implied repeal of constitutional and statutory provisions that secure the City's right—as a charter city—to set franchise fees in excess of prevailing rates in SCE's service area. Implied repeal must be avoided if possible. As a result, the size of the franchise fee cannot be evidence that it is a tax.

Fourth, in drawing its comparisons, the Court of Appeal completely overlooked the ways in which the City's franchise fee and utility users tax differ. For example, on its face, the franchise fee is SCE's legal obligation, paid in exchange for franchise rights, while the utility users tax is a debt owed by City residents. It is true that, in practical terms, City residents pay both. But the distinction between the legal and economic incidence of the two levies is no mere technicality. Unlike the franchise fee, the City retains the authority to collect its utility users tax directly from City residents, and to impose penalties on those residents (not SCE) for non-payment. If, on the other hand, any part of the franchise fee goes unpaid, SCE loses its franchise; the City has no right to seek payment from City residents. Thus, the City's franchise fee bears the indicia of a traditional franchise fee and few material similarities with a utility users tax.

FACTUAL AND PROCEDURAL BACKGROUND

The League adopts the Statement of Facts and Procedural History as set forth in the City's Opening Brief. (OB 12-21.)

ARGUMENT

I. FRANCHISE FEES ARE NOT TAXES.

Franchise fees are well established in California jurisprudence. "A franchise is a grant of a possessory interest in public real property, similar to an easement." (*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 (*Santa Barbara Taxpayers*).) It is "a

negotiated contract between a private enterprise and a governmental entity for the long-term possession of land." (*Ibid.*)

In turn, as the Court of Appeal acknowledged, "the definition of 'franchise fee' has been constant for nearly a century." (Slip Op., p. 6.) It is "a 'charge which the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility.'" (*Ibid.*, citing *Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670 (*Tulare County*); *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1171.)

Equally well settled is the proposition that "franchise fees collected for grants of rights of way" are not taxes. (Slip Op., p. 1, citing *Santa Barbara Taxpayers*, *supra*, 209 Cal.App.3d 940.) They are "compensation for the privilege of using the streets and other public property within the territory covered by the franchise." (*Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 Cal.2d 272, 283; accord *City of Los Angeles v. Tesoro Refining & Marketing Co.* (2010) 188 Cal.App.4th 840, 847; see also *Santa Barbara Taxpayers*, *supra*, 209 Cal.App.3d at p. 950, citing *City & County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 748-749 [holding that franchises are a form of property that may be taxed, but the franchise fees are not taxes].) Even the Court of Appeal below confirmed that its Opinion is not meant to foreclose "legitimate franchise fees." (Slip Op., p. 11, emphasis omitted.)

Rightly so. Nothing in the history of anti-tax amendments to the California Constitution—Propositions 13, 218, and 26—

sought to change that established principle. Proposition 218, enacted by voters in 1996, added Articles XIII C and XIII D to the California Constitution. Neither Article includes any mention of or limitation to franchise fees. And the related ballot materials—which focused on assessments and property-related fees—make no mention of franchise fees. (See MJN Ex. B, pp. 72-77; see also *Legislature v. Eu* (1991) 54 Cal.3d 492, 504 [holding voter pamphlets evidence voter intent, relevant to construe ambiguous terms in voter-enacted laws].)

The amendments to Articles XIII A and XIII C, which voters enacted in 2010 by "Proposition 26," confirm that fees for use of government property, like franchise fees, are not taxes. Proposition 26 enacted the first affirmative definition of the term "tax," with the express goal of reinforcing Proposition 218 and further narrowing the ability of government agencies to impose revenue measures without voter approval. (See MJN Ex. C, p. 114.) Even with this goal in mind, however, Proposition 26 expressly excluded from its limitations any "charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Art. XIII C, § 1, subd. (e)(4).) Although Proposition 26 does not control here, (Slip Op., pp. 4-5), it is illuminating that a 2010 measure meant to limit future revenue measures *reaffirmed* that franchise fees are not taxes.

II. THE CITY-SCE FRANCHISE AGREEMENT ESTABLISHED A 2% FRANCHISE FEE. NOTHING IN THE AGREEMENT CONVERTED THAT FEE INTO A TAX.

Despite universal agreement that franchise fees are not taxes, the Court of Appeal overturned a portion of the City's 2% franchise fee, finding that half of that fee was a tax enacted without voter approval in violation of Article XIII C. That decision rests on three determinations by the Court of Appeal: (1) SCE's franchise rights do not depend on the challenged portion of the fee; (2) SCE is required to collect the challenged portion of the fee directly from customers within the City; and (3) the City's 2% franchise fee exceeds the prevailing rate of franchise fees charged by other local agencies in SCE's service area. (Slip Op., p. 10.) As a result, the court found half the City's franchise fee resembles a utility users tax rather than a franchise fee. (*Id.*, at pp. 7-10.) This analysis was error.

A. The City negotiated a 2% fee for a 30-year franchise. No part of that fee constituted gratuitous revenue without valuable consideration.

As the Court of Appeal explained, the "primary purpose" of a government levy, not its label, determines whether it is a tax. (Slip Op., pp. 6-7, citing *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874, *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038.) Applying this principle, the Court of Appeal determined that half of the City's franchise fee was a tax because its primary purpose was to

generate revenue. The court reasoned that the City granted SCE a franchise during the initial phase of the new franchise agreement in exchange for a 1% fee. This, according to the court, demonstrated that the true value of the franchise was 1% of SCE's gross revenue. SCE's conditional agreement to pay an additional 1%, funded by a CPUC-approved surcharge, was just added revenue and thus akin to a utility users tax. (Slip Op., pp. 7-9.) This factual conclusion ignores the central exchange of consideration in the franchise agreement: a *30-year* franchise for a *2%* fee.

After years of receiving a 1% franchise fee from SCE, the City sought to increase that fee to 2% beginning with a new franchise in 1999. (2 JA 345 ¶ 8.) SCE eventually agreed, and the City adopted the terms of their agreement by Ordinance No. 5135. (2 JA 346 ¶ 12, 403-413.) Under that agreement, the City granted SCE a 30-year franchise "in exchange for" SCE's agreement to pay 2% of its gross annual receipts—as defined—"as a consideration . . . and as compensation for use of the streets in the City. . . ." (2 JA 406 § 5.)

For reasons discussed in Section II.B, *infra*, the agreement conditioned SCE's obligation to pay half of the new franchise fee on approval by the CPUC. (2 JA 406 § 6; see also Section II.B, *infra*.) But if the CPUC refused approval within three years, SCE's 30-year franchise became immediately terminable. (2 JA 405 § 3(A), (B) & (E), 407 § 6(E).) Thus, SCE was permitted to continue using its franchise for a fee of 1%, but only for three

years. (*Ibid.*) The full value of the 30-year franchise it negotiated was dependent on payment of a 2% fee. (2 JA 406 § 5.)

The exercise of a franchise often requires a substantial investment by service providers. That is why utilities negotiate for long-term franchise agreements that ensure they will have the time to recoup their costs. (See *Santa Barbara Taxpayers, supra*, 209 Cal.App.3d at p. 949 ["In sum, franchise fees are paid for the governmental grant of a relatively long possessory right to use land, similar to an easement or a leasehold, to provide essential services to the general public."].)

SCE's right to continue utilizing its franchise in the City for three years for a fee of 1% was an accommodation to ensure ongoing delivery of electricity while SCE obtained CPUC approval for the franchise-fee increase. But the City's actions demonstrate that—contrary to the Court of Appeal's finding—it was *not* willing to grant anything more than a brief, temporary franchise for a 1% fee. The real exchange of consideration, as reflected in Section 5 of the agreement, was a 2% fee for a 30-year franchise. Thus, the whole negotiated fee is consistent with the traditional definition of a franchise fee, and none of it was imposed to generate revenue without bargained-for consideration.

Nor is it relevant that revenues from the increased portion of the franchise fee are deposited in the City's general fund. (Slip Op., p. 9.) All the City's franchise revenues are deposited in its general fund—as with most if not all other cities and counties. And no law appears to limit the ways in which local governments

spend franchise revenues. The City's franchise fee remains consideration for the valuable use of public property, no matter how revenues are spent.

B. The method SCE uses to recover the cost of its franchise is controlled by the CPUC. It is not imposed by the City as a tax.

The Court of Appeal also concluded that half the City's franchise fee was a tax, rather than a franchise fee, because SCE passes it through as a surcharge to customers in the City. (Slip Op., pp. 10-11.) But the mechanism SCE uses to recover the increased cost of its franchise is determined by SCE and the CPUC. It was not imposed by the City, and it does not render the fee a tax.

The fundamental touchstone of any "tax" is that it is "imposed" upon payers without offsetting consideration. (Art. XIII C, § 2 [limiting taxes "imposed" by local government]; see also Gov. Code, § 53721 [defining "taxes" as those "imposed" for general or specific purposes].) Thus, no part of the franchise fee can be considered a City tax unless it is established by the City's unilateral authority. (See *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 (*Ponderosa Homes*) [defining "impose," as used in the Mitigation Fee Act, as "to establish or apply by authority or force. . . ."].)

The City did not establish the mechanism SCE uses to recover the increased cost of its franchise from its customers. As the Court of Appeal acknowledged, when the City began negotiating with SCE for a new franchise agreement, the City

sought to increase the franchise fee from the 1% paid in prior years, to 2% for the period 1999-2029. (Slip Op., p. 2.) In response, *SCE* proposed that it be permitted to recover the additional 1% as a surcharge, passed directly through to its customers in the City. (Slip Op., pp. 2-3.)

SCE's proposal, in turn, was designed to comply with a 1989 CPUC decision that governs the ways in which private utilities recover the costs of some franchise fees. (Slip Op., p. 3.) Under that decision, the CPUC permits investor-owned utilities to recover only some costs in the basis for their general service rates. As relevant here, electric utilities may include in their general rate case local franchise fees only up to the 1% limit state statutes impose on counties and general law cities. (2 JA 425 fn. 8.) When charter cities like Santa Barbara charge franchise fees in excess of the statutory limit, those costs must be segregated and passed through as a surcharge to customers within the charter city. (2 JA 438, 445 ¶¶ 1, 1(a).)

The City acquiesced to SCE's surcharge proposal as an accommodation to SCE and to allow it to comply with the CPUC mandate. (Slip Op., p. 3; 2 JA 406 § 5.) But the surcharge was not a requirement of the City. The City has no interest in the manner SCE recovers the cost of paying a 2% fee. Nor does it have any legal authority to establish such a surcharge. Only the CPUC may determine how investor-owned utilities recover their operational costs, whether through base rates or otherwise. (See Art. XII, § 6; *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548.) Thus, the City did not

"impose" the surcharge on city residents; nor could it. SCE's decision to recover a portion of its franchise cost as a CPUC-approved surcharge cannot convert the franchise fee into a City tax.

Pushing a contrary result, plaintiffs and appellants Rolland Jacks and Rove Enterprises, Inc. suggest that the City did impose the surcharge because that charge is reflected in a City ordinance. (AB 24-25.) This argument is misplaced; ordinances are simply the mechanism cities use to adopt franchise agreements. (*County of Alameda v. Pacific Gas. & Electric Co.* (1997) 51 Cal.App.4th 1691, 1696, fns. 3, 4 (*County of Alameda*) [holding that "the acceptance of a franchise is a matter of contract" but recognizing that franchises are granted by ordinance].)

Like other cities in California, all Santa Barbara franchises are granted by ordinance to ensure voters may exercise their referendum power over franchises. (See 2 JA 362 § 512, 383 § 1401.) The franchise agreement remains "a matter of contract" between the City and SCE, notwithstanding the fact that it is memorialized in an ordinance. (*County of Alameda, supra*, 51 Cal.App.4th at p. 1696, fns. 3, 4.)

C. The size of the City's franchise fee does not make part of it a tax.

The Court of Appeal also concluded that half the City's franchise fee was a utility users tax because, at 2%, it exceeds the prevailing rate for franchise fees in SCE's service area. (Slip Op., p. 10.) The court suggested that Proposition 218 must control the

portion of a franchise fee that exceeds regional norms. (Slip Op., pp. 10-11.) Otherwise, market forces and voter frustration will prove inadequate to constrain the size of franchise fees. (*Ibid.*) This analysis is unsupported by any legal authority. Moreover, because of state laws limiting franchise fees in general law cities and counties, the Opinion effectively reads Proposition 218 as an implied repeal of constitutional and statutory provisions which grant charter cities broad discretion to set franchise fees without reference to the statutory cap imposed on other local governments.

1. The California Constitution places no limit on the size of a franchise fee.

Most importantly, there is no legal basis for the Court of Appeal's conclusion below that a franchise fee becomes a utility users tax when it exceeds a certain threshold. As this Court has noted, franchises were historically awarded to "the highest bidder." (*Tulare County, supra,* (1922) 188 Cal. at p. 670.) And, as discussed above, nothing in the text of Proposition 218 or related ballot materials indicates any intention to change that background rule. (See MJN Ex. B, pp. 72-77.)

To the contrary, even Proposition 26—which adds restrictions to Proposition 218—continues to permit franchise fees with no cost limitation. (Compare Art. XIII C, § 1, subd. (e)(1) [permitting charges "imposed for a specific benefit" that are limited to "the reasonable costs to the local government of conferring the benefit . . . ."], with Art. XIII C, § 1, subd. (e)(4) [permitting charges "imposed for entrance to or use of local

government property, or the purchase, rental, or lease of local government property."] Under the circumstances, there is no textual basis for the prevailing-rate cap the Court of Appeal would establish for charter cities.

2. Proposition 218 should not be read to implicitly repeal charter cities' constitutional and statutory authority to set franchise fees in excess of 1%.

"The implied repeal of a statute by a later constitutional provision is not favored; in fact the presumption is against such repeal, especially where the prior statute has been generally understood and acted upon." (*Metropolitan Water Dist. v. Dorff* (1979) 98 Cal.App.3d 109, 114 (*Metropolitan Water Dist.*) [holding that Proposition 13 did not invalidate water district's statutory authority to impose property taxes on newly annexed lands]; see also *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 816-817 [applying the doctrine against implied repeal to Proposition 218].)

State laws, the Broughton Act and Franchise Act of 1937, limit the amount counties and general law cities can charge for their franchises. (See Pub. Util. Code, §§ 6001, *et seq.*, 6201, *et seq.*) Charter cities, however, are not so limited and may charge whatever fee the market will bear. (See Pub. Util. Code, § 6205; see also Art. XI, § 5 [establishing that charter cities are not subject to general laws]; Art. XI, § 9, subd. (b) [permitting cities to prescribe terms and conditions for the operation of utilities]; Art. XII, § 8 [maintaining local control over the terms and conditions of local franchises].)

If Proposition 218 placed a prevailing-rate cap on franchise fees as the Court of Appeal suggests, it would have the effect of impliedly repealing these authorities. Because the Broughton Act and Franchise Act of 1937 cap the franchise fees charged by California's 58 counties and general law cities—comprising 2/3 of California cities (http://www.cacities.org/Resources/Learn-About-Cities)—the prevailing rate of franchise fees in any utility's service area that is not limited to a charter city will almost certainly be dictated by those statutes. As a result, a construction of Proposition 218 that limits franchise fees to prevailing rates effectively subjects charter cities to the Broughton Act and Franchise Act of 1937, and impliedly repeals the provisions of those statutes that expressly exempts charter cities. (Pub. Util. Code, § 6205.)

As discussed above, neither Proposition 218's text nor its legislative history expresses an intention to repeal charter city authority to set franchise fees without statutory limitation. And this Court should avoid a construction of Proposition 218 that repeals that authority by implication. (*Metropolitan Water Dist.*, *supra*, 98 Cal.App.3d at p. 114 [construing Prop. 13]; *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (2012) 209 Cal.App.4th 1182, 1192 [applying the same rule to Prop. 218].)

D. This franchise fee bears the indicia of a traditional franchise fee, not of a utility users tax.

To rule against the City, the Court of Appeal focused on the ways the City's increased franchise fee resembled a utility users tax. As discussed above, those apparent similarities fall apart upon close examination. Moreover, the Court completely failed to consider the ways in which the increased fee resembles traditional franchise fees. (Slip Op., p. 9.)

For example, the franchise agreement provides that SCE "shall pay to the City" the full 2% franchise fee. (2 JA 406 § 5.) That should be compared with the City's utility users tax, which is "imposed . . . upon every person in the City using electrical energy in the City." (MJN Ex. D, § 4.24.030.) And, unlike the franchise fee, the obligation to pay the utility users tax is "a debt owed by the service user to the City." (MJN Ex. D, § 4.24.120.)

This distinction the City identifies between the legal and economic incidence of the two charges is no mere technicality. (See OB 37-40.) While the franchise agreement provides for the collection of both the 1% increase to the franchise fee and the utility users tax directly from City customers, the City retains authority to collect only the utility users tax itself. (MJN Ex. D, §§ 4.24.120-130.) It has no authority to collect any part of the franchise fee directly from City residents.

Consistently, and significantly, if a utility customer fails to pay the City's utility users tax, the City may impose penalties, bring a debt-collection action, and utilize administrative remedies, all against electricity users in the City. (See MJN Ex.

D, §§ 4.24.110-140.) By contrast, if there is a failure to pay any part of the franchise fee, SCE loses its franchise, and no remedy is available to the City against SCE customers. (2 JA 410-411 § 14.)

Moreover, SCE's authority to collect the franchise fee—whether through a special surcharge or through standard rates—is determined by SCE and the CPUC, with no input from the City. By contrast, the City sets its utility users tax independently, and simply imposes upon SCE the obligation to collect it from customers. (MJN Ex. D, § 4.24.090.) The CPUC has no authority over the amount of the utility users tax or the manner of its collection, just as the City had no authority to require direct collection of the increased franchise fee from City residents. (See 2 JA 442-443 ¶¶ 9-10 [recognizing that the CPUC has no jurisdiction to determine the authority or treatment of local utility users taxes]; see also Section II.B, *supra*.) Nor does SCE bear any responsibility for payment of a utility users tax. (Pub. Util. Code, § 799.)

When reviewed in this light, it is clear that the franchise fee bears indicia of traditional franchise fees and little similarity to a utility users tax. It should be construed accordingly.

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CONCLUSION

The City's franchise fee is just what it claims to be: a negotiated price for the valuable use of its property rights by a private, for-profit utility. It is, accordingly, not a tax and is not limited by Proposition 218. The Court of Appeal's Opinion should be reversed and the trial court's judgment affirmed.

DATED: October 21, 2015 HANSON BRIDGETT LLP

By: _____

ADAM W. HOFMANN
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA
CITIES

WORD CERTIFICATION

I, Adam W. Hofmann, counsel for amicus curiae League of California Cities, hereby certify, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing "Application of the League of California Cities to File Amicus Curiae Brief in Support of Respondent City of Santa Barbara; Amicus Curiae Brief," that it contains 4,745 words, including footnotes (and excluding caption, certificate of interested entities or persons, tables, signature block, and this certification).

Dated: October 21, 2015

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File No. 09998.00264

July 8, 2020

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
and the Associate Supreme Court Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Zolly v. City of Oakland*, S262634
Petition for Review – Amicus Curiae Letter (Cal. Rules of Court, rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I. Introduction

The League of California Cities (the "League") respectfully submits this letter as *amicus curiae* in support of the Petition for Review in *Zolly v. City of Oakland*. Supreme Court review is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review of *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 88, as modified on denial of reh'g (Apr. 17, 2020), review filed (June 8, 2020) (hereafter *Zolly*) is necessary to resolve conflicting published court decisions.[1]

First, the Court of Appeal created a conflict of law by viewing the burden of proof for cost-based fees in the last paragraph of article XIII C, section 1, subdivision (e)[2] as creating a substantive reasonableness requirement for paragraph (4) and for franchise fees. The *Zolly* appellate decision specifically conflicts with the Court of Appeal for the First Appellate District, District Two's decision in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (Cal. Ct. App., June 29, 2020, No. A157598) 2020 WL 3496798, at *1 (hereafter *Bay Area Toll Authority*). *Bay Area Toll Authority* looked to the ordinary meaning of the constitutional text in article XIII A, section 3, subdivision (d) to determine that it did not create a substantive requirement of reasonableness for a state fee imposed for the entrance or use of state property under article XIII A, section 3, subdivision (b), paragraph (4). (*Bay Area Toll Authority*, *supra*, at *12-13.) Article XIII A, section 3, subdivision (b), paragraph (4) and subdivision (d) are virtually identical to article XIII C, section 1, subdivision (e), paragraph (4), and the final paragraph of subdivision (e), respectively. Instead of the Constitution's ordinary meaning, *Zolly* relied on

[1] The League submitted a separate letter requesting *Zolly*'s depublication if the Court determines not to grant review.
[2] Unspecified references to "article" will refer to the California Constitution.

voter intent to reach a different conclusion. *Bay Area Toll Authority* rejected *Zolly*'s approach and explicitly disagreed with *Zolly*'s interpretation. (*Id.* at *13, fn. 18.) *Bay Area Toll Authority* and *Zolly* are both citable, published decisions in the First Appellate District. A conflict between published appellate decisions therefore exists.

Second, the Court of Appeal misapplied this Court's holding in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (hereafter *Jacks*) by conflating "cost" with "value." *Jacks,* on numerous occasions, distinguishes "cost" from "value," and by conflating these terms, *Zolly* directly conflicts with Supreme Court precedent by placing additional restrictions on fees for use of government property that do not exist in case law or in the Constitution. If left standing, *Zolly* would deprive League members of important rights as owners and managers of property and subject League members to legal challenge and expensive litigation over not only issuance of franchise and concessions, but virtually every arrangement for access, use, or possession of government property including negotiated leases, licenses, and arrangements for use of government property.

For the reasons discussed in this letter, the League respectfully requests this Court grant the petition of review for *Zolly*.

II. Statement Of Interest

The League is an association of 478 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance. The committee has determined this case is a matter affecting all cities. *Zolly* creates uncertainty for public agencies seeking to establish franchise fees, which were never intended to be further regulated by Proposition 26 in the first place. Conflating "cost" and "value" may impact other fees imposed for use of local government property, placing limited local government revenues at further risk. With *Jacks* on remand, the recent issuance of the conflicting published opinion in *Bay Area Toll Authority*, and with *Mahon v. City of San Diego* (D074877)[3] pending in the Court of Appeal, review is necessary to clarify confusion created by *Zolly*.

[3] The trial court in *Mahon* found that the surcharge was a franchise fee, and was limited by estimate of the value of the franchise, not by cost. Appellant Mahon's brief notes that "the trial court held the [undergrounding] surcharge is compensation for use of City streets … as 'a portion of the consideration for the granting of the franchise rights and privileges.'" (Brief for Appellant, *Mahon v. City of San Diego* (2019) (No. D074877), 2019 WL 1755763 at *30.) Respondent City of San Diego's brief notes, "the trial court correctly explained [that] the Supreme Court in *Jacks* allows flexibility as to what form franchise compensation may take and did not limit how that compensation is

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III. *Zolly*'s Interpretation Of The Burden Of Proof In Article XIII C, Section 1, Subdivision (e) Conflicts With *Bay Area Toll Authority*, A Published Appellate Court Decision

Zolly concluded that franchise fees must be reasonably related to the value of the franchise interest conveyed. (*Zolly*, *supra*, 47 Cal.App.5th at p. 88).) To reach this conclusion, *Zolly* relied on voter intent instead of the ordinary meaning of the words in article XIII C, section 1, subdivision (e). *Zolly* determined that the burden of proof provisions in article XIII C, section 1, subdivision (e) were intended by the voters to create a new substantive reasonableness requirement applicable to franchise fees: "On this question, we find the provision ambiguous and look to the intent and objective of the voters in enacting the provision to guide our interpretation." (*Id.* at p. 87.)

On June 29, 2020 the Court of Appeal for the First Appellate District, Division Two filed its published opinion in *Bay Area Toll Authority* interpreting an analogous provision applicable to State fees – article XIII A, section 3, subdivision (b), paragraph (4). This provision defines a State "tax" to include all charges not specifically exempt, and exempts "[a] charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI." This language mirrors article XIII C, section 1, subdivision (e), paragraph (4). Both article XIII A, section 3, subdivision (d) and article XIII C, section 1, subdivision (e) contain virtually identical burden of proof language. The only difference between these provisions is the replacement of the word "State" for "local government" in article XIII A.

The Court of Appeal in *Bay Area Toll Authority* affirmed the trial court's conclusion that "the reasonable cost requirement of article XIII A, [section 3,] subdivision (d), did not apply to [subdivision (b), paragraph (4)] based on the plain meaning of the language used in section 3." (*Bay Area Toll Authority*, *supra*, 2020 WL 3496798 at *11).

> The first three exceptions [in Article XIII A, section 3, subdivision (b)] to the general definition of "tax" contain language limiting the charge to reasonable cost; the fourth and fifth exceptions do not. The absence of "reasonable cost" language in the latter exceptions, when it is present in the first three, strongly suggests the limitation does not apply where it is not stated … reading article XIII A, subdivision (d) of Section 3 as applicable to all of the subdivision (b) exceptions would render the express reasonableness language in the first three

calculated or charged. (*Id.*) *Jacks* must be understood to hold that all consideration that the City receives from [the utility] in exchange for the Franchise Rights is franchise compensation as that term is used in *Jacks*." (Brief for Respondent, *Mahon v. City of San Diego* (2019) (No. D074877), 2019 WL 3238984 at *35.)

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> exceptions surplusage. 'A construction making some words surplusage' is to be avoided.' [Citations.]

(*Id.* at *12.) The Court of Appeal in *Bay Area Toll Authority* noted its disagreement with *Zolly* regarding the application of the reasonableness standard:

> The *Zolly* court viewed the burden of proof provision of article XIII C, subdivision (e), as "requir[ing] that a charge be 'no more than necessary to cover the reasonable costs of the governmental activity'" and, because the provision is silent as to whether it applies to all the exemptions from the definition of "tax" or only the first three, which explicitly include a reasonableness requirement, found it ambiguous. [Citation.] The court therefore based its decision on the voters' intent, in passing Proposition 26, to "expand the definition of 'tax' to require more types of fees and charges be approved by two-thirds of the Legislature or by local voters." [Citation.] The *Zolly* court did not engage in the textual analysis that leads us to conclude subdivision (d) of article XIII A, section 3, does not impose a substantive requirement of reasonableness beyond that stated in subdivision (b) of this section. While we respectfully disagree with *Zolly* on the interpretation of the burden of proof provision, we of course express no opinion on the court's ultimate conclusion as to whether and when a franchise fee constitutes a tax.

(*Id.* at *13, fn. 18.)

The conflicting published opinions in *Bay Area Toll Authority* and *Zolly* will confuse the bench in their differing interpretations of the California Constitution. This Court should grant review in order to resolve the appellate level conflict as to the proper application of the reasonableness standard and statutory interpretation of article XIII A, section 3, subdivision (d) and article XIII C, section 1, subdivision (e).

IV. *Zolly* Creates A Conflict Of Law In Conflating "Cost" And "Value" In Article XIII C, Section 1, Subdivision (e)

This Court recognized that franchise fees historically have not been considered taxes. (*Jacks, supra*, 3 Cal.5th at pp. 262, 267.) In contrast to directly imposed taxes and fees, franchise fees are the product of contracts between sophisticated and capable parties, negotiated to compensate cities for a possessory interest in or special privilege to use public property and transact business in and with the city. (*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949; *Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal. App. 3d 660, 666; 12 McQuillin Mun. Corp. § 34:2 (3d ed.).)

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The California voters adopted Proposition 26, which added article XIII C, section 1, subdivision (e) to the California Constitution. Proposition 26, for the first time, defined the term "tax" for purposes of California law, to include any fee or charge imposed by a local government that does not fall under one of seven express exemptions. Some of these exemptions included specific cost of service limitations, including fees or charges for services or products provided by local governments, privileges or benefits granted by local governments, or regulatory activities related to issuing permits. (Cal. Const., art. XIII C, § 1, subd (e)., pars. (1)-(3).) Other exemptions, including fees or charges imposed for the use of government property, had no restrictions. (Cal. Const., art. XIII C, § 1, subd. (e), par. (4).) The Court of Appeal in *Zolly* (*Zolly*, *supra*, 47 Cal.App.5th at p. 86) and this Court in *Jacks* (*Jacks*, *supra*, 3 Cal.5th at p. 263) found that franchise fees fall within that fourth exemption. The drafters and voters chose not to restrict franchise fees in Propositions 13, 62, 218, or 26. (*Jacks*, 3 Cal.5th at pp. 267-268.)

The common feature among the first three exemptions is that they must be based on the cost of the governmental activity. (*Id.*) No such requirement exists under subdivision (e)(4). Nonetheless, *Zolly* introduced the requirement that fees for use of government property must be reasonably related to the value of the interest conveyed by conflating "cost" and "value." *Zolly* relied on the final paragraph of article XIII C, section 1, subdivision (e):

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the ***reasonable costs*** of the governmental activity, and that the manner in which those ***costs*** are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Value is not mentioned in this paragraph. This paragraph establishes evidentiary standards where a fee is based on "cost." These evidentiary standards require that, for cost-based fees, the local government must prove that a fee does not exceed the "reasonable costs" of the governmental activity, and that the "manner in which those costs are allocated" is reasonably related to the service or benefits provided. In *Jacks,* this Court made clear that franchise fees should not be limited by cost:

> - "More particularly, in connection with special assessments, the government seeks to recoup the costs of the program that results in a special benefit to particular properties, and in connection with development fees and regulatory fees, the government seeks to offset costs borne by the government or the public as a result of the payee's activities….In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a

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government asset rather than compensation for a cost". (*Jacks, supra,* 3 Cal.5th at p. 268.)

- "Unlike the cost of providing a government improvement or program, which may be calculated based on the expense of the personnel and materials used to perform the service or regulation, the value of property may vary greatly, depending on market forces and negotiations." (*Id*. at p. 269.)

- "In addition, in contrast to fees imposed for the purpose of recouping the costs of government services or programs, which are limited to the reasonable costs of the services or programs, franchise fees are not based on the costs incurred in affording a utility access to rights-of-way." (*Id.* at pp. 273-274.)

"Cost" and "value" mean very different things. Cost relates to the effort or expenditure required to provide a service, product, or benefit. Value, on the other hand, relates to what a party is willing to pay. The repercussions of conflating the two terms are significant. By conflating "value" and "cost" in its opinion, the Court of Appeal confused the standards applicable to fees for use of government property.[4] Additionally, the Court of Appeal's reliance on the final paragraph of article XIII C, section 1, subdivision (e) and conflation of the terms "cost" and "value" suggests a different reasonable cost standard that would be more restrictive than *Jacks*. *Jacks* makes clear that proof of "**value** may be based on bona fide negotiations concerning the property's value, as well as other indicia of **worth**." (*Jacks*, 3 Cal.5th at p. 270, emphasis added.) Consistent with principles governing other fees, this Court held that, "to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the **value** of the property interests transferred." (*Id.,* emphasis added.)

Zolly's conflation of "cost" and "value" conflicts with this Court's decision in *Jacks.* It creates confusing standards that are damaging to public agencies seeking to adopt franchise fees. Accordingly, this Court should grant review to clarify that "cost" does not apply to this Court's "reasonable value" standard set forth in *Jacks*.

[4] Following the Court of Appeal's reasoning, if the final paragraph of article XIII C, section 1, subdivision (e) were to be interpreted to create new substantive requirements applicable to all seven exemptions, fines and penalties would also be subject to cost-of-service requirements. This would go against the very nature of fines and penalties, which are imposed for the purpose of dissuading certain activity, and would render an absurd and impossible result.

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V. *Zolly* Creates Confusing And Contradictory Standards That Will Damage Public Agencies

Zolly creates confusion that will significantly impact public agencies in California. First, the Court of Appeal imposed a reasonableness standard for franchise fees where the California Constitution does not. This imposition alone places existing franchise agreements at risk because it opens them up to retroactive review. In *Bay Area Toll Authority,* the Court of Appeal expressly rejected this interpretation with respect to analogous Constitutional provisions applicable to State fees. Further, in *Zolly,* the Court of Appeal's introduction of the concept of "reasonable value" for fees imposed for use of government property was intended to reconcile Proposition 26 with this Court's decision in *Jacks.* (*Zolly*, 47 Cal.App.5th at p. 88.) *Jacks* specifically found that franchise fees need not be based on cost, and conflating "cost" with "value" is inconsistent with this Court's position and decades of existing law. The Court of Appeal has created confusing inconsistencies for public agencies seeking to negotiate franchise fees.

California cities rely on franchise fee revenue to fund vital programs. These important revenues would be put at risk due to contradictory published appellate court decisions and the Court of Appeal's misapplication of *Jacks* in *Zolly*, which is citable case law. An analysis of local revenues available to California cities using data from the California state controller as of 2014-2015 found that a significant portion of unrestricted revenues available to California cities was attributable to franchise fees. (Coleman, *A Primer on California City Revenues, Part One: Revenue Basics* (Nov. 1, 2016) Western City.) Additionally, public agencies rely on other forms of unrestricted revenues, including lease revenues for rental of government property, that are also exempt from the definition of a "tax" under article XIII C, section 1, subdivision (e), paragraph (4). The magnitude of the harm would only be compounded by the loss of revenue and budget deficits caused by the COVID-19 pandemic.

VI. Conclusion

For all of the reasons discussed above, the League of California Cities respectfully requests this Court grant the City of Oakland's petition for review.

Sincerely,

Lutfi Kharuf
for BEST BEST & KRIEGER LLP

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CERTIFICATE OF SERVICE

Robert Zolly v. City of Oakland
Case No. S262634

At the time of service I was over 18 years of age and not a party to this action. My business address is 500 Capitol Mall, Suite 1700, Sacramento, California 95814. On July 8, 2020, I served the following document(s):

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Clerk of the Court
Hon. Paul D. Herbert
Alameda County Superior Court
1221 Oak Street
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(510) 263-4300

Trial Court Judge
[Case No. RG16821376]
Via U.S. Mail

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 8, 2020, at Sacramento, California.

Claudia Peach

Claudia Peach

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
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Lower Court Case Number: **A154986**

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

4/23/2021

Date

/s/Larry Peluso

Signature

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