Case No. S262634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

Plaintiffs-Appellants,

v.

CITY OF OAKLAND

Defendant-Respondent

PETITIONER CITY OF OAKLAND'S ANSWER TO THE BRIEF OF AMICI CURIAE REUBEN ZADEH, MABLE CHU, AND HERB NADEL

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

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INTRODUCTION

Petitioner City of Oakland ("Oakland") hereby answers the Brief of Amici Curiae Reuben Zadeh, Mable Chu, and Herb Nadel (the "Zadeh Amici" and the "Zadeh Amici Br.") filed on May 4, 2021.[1] The Zadeh Amici make two main arguments against exempting franchise fees from the definition of "tax" as charges for the use or purchase of government property. (See Cal. Const., art. XIII C, § 1, subd. (e), para. 4 ("Exemption 4").) *First*, they argue that California Vehicle Code section 9400.8 prohibits local governments like Oakland from charging for the use of their roads for transportation, and thus prohibits franchise fees paid for the use of city streets – an outcome they contend "moots" this appeal. *Second*, the Zadeh Amici argue that Exemption 4 does not apply to franchises that do not involve the physical placement of utility fixtures or equipment, and that such franchises should instead be considered under the first exemption ("Exemption 1") of California Constitution, section 1, article XIII C ("Article XIII C").

Neither argument is persuasive. The Zadeh Amici's arguments rest on a flawed understanding of the distinct types of franchises granted under state and local authority. The law they cite does not support treating franchises differently depending on how a franchise uses city streets or property – i.e.,

[1] Oakland timely filed its Consolidated Answer Brief in response to the other amici curiae on April 28, 2021, before this Court granted leave to the Zadeh Amici to file their belated application and brief. This answer is filed within 30 days of the Court's order granting leave.

for transportation necessary to carry out the relevant public service or for utility and equipment placement. The Zadeh Amici misapply Vehicle Code section 9400.8, which is inapposite to franchise fees. And they misconstrue Article XIII C, the exemptions in subdivision (e), and their distinct purposes and functions. The authorities on which the Zadeh Amici rely ultimately support Oakland's position that its franchise fees fall within Exemption 4 (if they are subject to Proposition 26 at all) and are categorically exempt from the definition of "tax."

LEGAL DISCUSSION

I. The Zadeh Amici Misunderstand the Meaning of Primary Versus Secondary Franchises

The Zadeh Amici argue that franchise fees come within Exemption 4 only if they "convey a right to use public real property for the fixed placement of facilities and equipment." (Zadeh Amici Br. at p. 7.) This argument rests on the premise that there is a distinction under California law between "the primary use of streets for transportation and secondary uses for the long-term placement of facilities and equipment." (*Id.* at pp. 6-9.)

A. The Distinction Between Primary and Secondary Franchises Is Not at Issue Here

The Zadeh Amici are correct that there is a distinction in state law between primary and secondary franchises but are incorrect that this distinction is at issue in this case. *City of San Diego v. Southern Cal. Tel. Co.*, on which the Zadeh Amici rely, recognized a distinction between

primary and secondary franchises. But that distinction concerns the general right to conduct and exist as a business (the "primary franchise") versus the right to use or occupy city streets and property (the "secondary franchise"). (See *City of San Diego v. Southern Cal. Tel. Co.* (1949) 92 Cal.App.2d 793, 800-01 (*City of San Diego*), disapproved in *Pacific Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal. 2d 766, 776.) The case does *not* distinguish between the use of streets for transportation versus "the long-term placement of facilities and equipment," as the Zadeh Amici contend.

As one treatise explains:

> The franchise to exist as or be a corporation is ordinarily called the corporate franchise, and it is a separate and distinct form of franchise. It is also commonly referred to as the "primary" franchise, or sometimes as the "general franchise," and is the corporation's right to live and to do business by the exercise of the corporate powers granted by the state.

(6A Fletcher Cyc. Corp. (Sept. 2020) § 2867; see also *id.* § 3073 ("The right to exist as a corporation is ordinarily referred to as the corporate franchise, and commonly called the 'primary' franchise.").)

In contrast to the primary franchise, "[a]ll franchises possessed by a corporation, except the franchise to be a corporation, are special or secondary franchises." (*Id.* § 2871.) "A secondary or special franchise impresses its owner with vested rights and typically takes the form of utilities or other monopolies created to further the public interest…." (*Ibid.*)

In sum, the "primary franchise" is the "right to exist as a corporation," whereas the "secondary franchise" consists of the powers and privileges vested in the corporation. (See *id.* § 16; see also 33 C.J.S. Executions (Mar. 2021) § 30 (discussing distinction between "primary franchise to exist and do business as a corporation" and "the special or secondary franchises of the corporation" in context of franchises that may be subject to execution in satisfaction of judgments).)

Accordingly, the Zadeh Amici's attempt to characterize Oakland's franchises as involving "primary" rights and to distinguish those from the "secondary" franchise rights in *Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, is inapposite. *Both Jacks* and *Zolly* involve secondary franchises, that is, the grant of special rights including (but not limited to) the right to use city streets and property incident to carrying out the public services of the franchise.

Nothing in *City of San Diego* is to the contrary. There, the court considered whether the primary franchise granted by the state to operate a telephone service statewide afforded the franchisee the right to conduct business on city streets without the express grant of a secondary franchise from the city to use city streets and property. (See *City of San Diego, supra*, 92 Cal.App.2d at p. 801.) The court merely affirmed the distinction between the general right to exist and conduct business and the secondary franchise right to use city streets and property in holding that the franchisee was

required to obtain a secondary franchise to conduct its business on and within city property. (See *id.* at pp. 801-07.)

City of San Diego does not support the notion that franchise fees (like Oakland's) are not charges for the use or purchase of government property under Exemption 4 simply because the franchise does not involve the placement of utility fixtures or equipment on city property. The franchises are property, and the franchise fees are the charges paid in exchange for that property interest, placing them squarely within the language of Exemption 4. (See, e.g., Oakland's Consolidated Answer Br. at pp. 7-13.)

B. A Franchise Need Not Involve the Fixed Placement of Facilities or Equipment to Constitute a Property Interest

The Zadeh Amici's attempt to characterize Oakland's franchises as conveying only "the right to do business" because they do not involve "the fixed placement of facilities and equipment" is equally flawed. (Zadeh Amici Br. at p. 7.) To start, this argument ignores the implementing ordinances for the WMAC and CWS franchises, which plainly convey more than the mere "right to do business."[2]

[2] The implementing ordinances for the WMAC and CWS franchises show that the franchise fees were, among other things, charged

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

In addition, the Zadeh Amici provide no authority indicating that a franchise must involve the placement of equipment or facilities to constitute a franchise or convey a property interest. To the contrary, numerous authorities confirm the absence of any such requirement or distinction. A franchise simply "enable[s] an entity to provide vital public services with some degree of permanence and stability, as in the case of franchises for utilities." (*Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 949; see also 12 McQuillin Law of Municipal Corps. (3d ed. Aug. 2020 update) Franchise defined, § 34:2 (franchises are "granted by the government to particular individuals or companies to be exploited for private profit as such franchisees seek permission to use public streets or rights-of-way in order to do business with a municipality's residents"); 34A Cal.Jur.3d (Feb. 2021 update) Franchises from Governmental Bodies, § 4 ("A franchise is property of an incorporeal and intangible nature, and is considered an estate in real property.").)

Oakland's waste-hauling and recycling franchises, like other secondary franchises, convey a "property interest" in the form of an exclusive franchise to operate a public utility and use city streets to carry out

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Materials and Organics collection services.

(2 JA 331 (WMAC); see also 2 JA 326 (similar language for CWS); see also Oakland's Opening Br. at pp. 47-48; Oakland's Reply Br. at pp. 16-17.)

that public utility and profit therefrom. (Oakland's Consolidated Answer Br. at p. 8.) The Zadeh Amici's argued distinction does not change this well-established framework.

II. California Vehicle Code Section 9400.8 Does Not Apply to Franchise Fees and Does Not Render this Appeal Moot

Relying on their flawed "primary versus secondary" framework, the Zadeh Amici next argue that (1) Vehicle Code section 9400.8 prohibits local governments from charging for the use of roads for transportation; (2) Oakland's franchisees "use Oakland's streets for transportation"; and, thus, (3) "Vehicle Code section 9400.8 renders paragraph (4) inapplicable in Zolly." (Zadeh Amici Br. at p. 11.)

The Zadeh Amici are wrong for two reasons. *First*, again, Oakland's franchisees use Oakland's streets not simply "for transportation," but for the purpose of carrying out the business of a public utility; and the property interests conveyed via the franchise are not limited to the use of city streets and rights of way. (See, e.g., Oakland's Consolidated Answer Br. at pp. 7-13.)

Second, Vehicle Code section 9400.8 plainly does not apply to franchise fees generally or to Oakland's franchise fees specifically. *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544 (*County of Kern*) is the lone reported decision to have interpreted or even cited Vehicle Code section 9400.8 since its passage in 1989. Recognizing

that section 9400.8 is part of the portion of the Vehicle Code that concerns "weight fees," the court explained:

> Vehicle Code section 9400.8 is part of a statutory scheme that regulates fees based on vehicle weight. This statutory scheme as set forth in article 3 of chapter 6 of division 3 of the Vehicle Code, and the Legislature's statement in the legislation that added section 9400.8 to the Vehicle Code that "[n]othing in this act shall be construed to allow local governments to impose fees not otherwise authorized by statute" (Stats.1989, ch. 1337, § 4, p. 5498), support the conclusion that the Legislature intended to fully occupy the field of fees related to the weight of vehicles carrying legal loads.
>
> . . .
>
> 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.

(*County of Kern, supra,* 127 Cal.App.4th at pp. 1621-22.)

County of Kern thus makes clear that Vehicle Code section 9400.8 simply prohibits a local agency from charging fees on "legal loads" – i.e., weight-based fees. But the statute does not prohibit fees charged for other purposes, such as fees charged in exchange for a franchise or the use of city streets in connection with the operation of a public utility franchise. Indeed, *County of Kern* does not discuss franchises or franchise fees at all, nor have any franchise-related cases cited Vehicle Code section 9400.8 since its passage. Both facts indicate that section 9400.8 does not regulate franchise fees or prohibit the franchise fees at issue here.

The legislative history for Vehicle Code section 9400.8 further supports this conclusion.[3] Section 9400.8 was enacted in connection with a larger transportation package passed by the California Legislature that significantly increased truck weight fees. (See, e.g., Oakland's Motion for Judicial Notice, Ex. 1 at pp. 12 & 37.) In exchange for supporting the larger transportation legislation and the increased fees, the California Trucking Association requested the language in section 9400.8 "to avoid unreasonable burdens on truck travel that might be imposed by local governments, as an offset for higher truck weight fees imposed by the transportation funding package." (*Id.* at p. 14; see also *id.* at p. 18 ("Trucking companies, which will contribute several billion dollars in increased taxes and fees to the transportation program if SCA 1 passes, should not be subject to additional fees imposed locally.").)

Accordingly, section 9400.8 was intended merely to prohibit additional weight-based fees imposed by local governments at a time when truckers were facing increased truck weight fees statewide. Section 9400.8 has nothing to do with franchise fees.

[3] Oakland has filed a motion for judicial notice of the legislative history materials for Vehicle Code section 9400.8 concurrently with this answer brief. Although Oakland does not believe that Vehicle Code section 9400.8 is relevant to this appeal, the legislative history is relevant to counter the Zadeh Amici's arguments regarding the purported application of Vehicle Code section 9400.8 to the franchise fees at issue here.

III. Franchise Fees Are Charges Paid in Exchange for the Use or Purchase of Government Property – a Franchise – and Thus Fall Within Exemption 4

Finally, the Zadeh Amici wrongly contend that franchise fees are governed by Exemption 1 and not by Exemption 4. Exemption 1 involves charges "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, subd. (e), para. 1; see Zadeh Amici Br. at pp. 13-15.)

First, the Zadeh Amici are incorrect that this Court recognized in *Jacks* that Exemption 1 "clearly applies to franchise fees." (Zadeh Amici Br. at pp. 13-14.) It did not. On the contrary, this Court at least implicitly recognized that franchise fees, as fees paid in exchange for property interests, fall under "Proposition 26's exception from its definition of 'tax' with respect to local government property" – i.e., Exemption 4. (*Jacks*, *supra*, 3 Cal. 5th at p. 263 & fn. 6; see also *id.* at pp. 262-63 (noting that Proposition 26 confirmed the "understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests" and citing Exemption 4).) This Court otherwise expressly declined to address Proposition 26 because it did not apply to the *Jacks* surcharge. (*Ibid.*) Nowhere did the Court indicate that Exemption 1 applies to franchise fees.

Second, applying Exemption 1 to franchise fees is illogical because franchise fees do not have an associated "cost," and thus cannot be limited to "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.) As this Court recognized in *Jacks*, franchise fees are paid "for the use or purchase of a government *asset* rather than compensation for a cost," and are not "based on the costs incurred in affording a utility access to rights-of-way." (*Jacks, supra*, 3 Cal. 5th at pp. 268, 274-75 (emphasis in original); see also *id.* at p. 268 (franchise fees are not "tied to a public cost"); p. 269 (contrasting "fees imposed to compensate for the expense of providing government services or the cost to the public of the payer's activities" with "fees imposed in exchange for a property interest").)

Even Respondents now agree that "there is clearly no government cost associated with a franchise fee that could make" a "reasonable cost" requirement applicable. (Respondents' Answer Br. on the Merits pp. 34-35.) Thus, applying Exemption 1 to franchise fees would be illogical and contrary to principles of construction. (See, e.g., *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 (courts must construe the plain language and avoid interpretations "that lead to absurd results or render words surplusage"); see also Oakland's Opening Br. on the Merits pp. 31-34.)

Third, the Zadeh Amici's interpretation is inconsistent with the intended purpose and genesis of Proposition 26 – specifically, the first three exemptions, which were a response to the discussion of regulatory and similar fees in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal. 4th 866 (*Sinclair Paint*). As *Jacks* explained, *Sinclair Paint* "summarized three categories of charges that are fees rather than taxes": (1) "special assessments [which] may be imposed in amounts reasonably reflecting the value of the benefits conferred by improvements"; (2) "development fees, which are charged for building permits and other privileges…'if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer'"; and (3) "regulatory fees…imposed under the police power to pay for the reasonable cost of regulatory activities." (*Jacks*, *supra*, 3 Cal. 5th at pp. 260-61 (citing *Sinclair Paint*).) This Court further explained that

> *Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits is reflected in Proposition 26, which exempted from its expansive definition of tax (1) charges imposed for a specific benefit or privilege which do not exceed its reasonable cost, (2) charges for a specific government service or product provided which do not exceed its reasonable cost, and (3) charges for reasonable regulatory costs related to specified regulatory activities. (Cal. Const., art. XIII C, § 1, subd. (e).)

(*Id.* at p. 262.)

Exemption 1 thus was intended to codify that special assessments and similar fees are not "taxes" when limited to the reasonable cost of providing

the benefits funded by those special assessments. Exemptions 2 and 3 similarly were intended to codify exemptions relating to the other fees *Sinclair Paint* addressed. (See also *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 (Proposition 26 "was largely a response to *Sinclair Paint*"); *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal. 5th 1191, 1210 fn. 7 ("Proposition 26 codifies *Sinclair Paint* in significant part").) Exemption 1 was *not* intended to apply to franchise fees, which were not discussed in *Sinclair Paint* and which cannot be "reasonably related to specific costs or benefits" like the special assessments, development fees, and regulatory fees *Sinclair Paint* addressed. Both *Jacks* and the *Zolly* appellate court correctly acknowledged that franchise fees, to the extent they are subject to Proposition 26 at all, fall within Exemption 4.

CONCLUSION

The Zadeh Amicus Brief offers nothing that changes the correct outcome here: the Court of Appeal's decision should be reversed.

Dated: June 3, 2021

Respectfully submitted,

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Dated: June 3, 2021

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STATE OF CALIFORNIA
Supreme Court of California

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