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S225589

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROLLAND JACKS and **ROVE ENTERPRISES, INC.**
Plaintiffs and Appellants

vs.

CITY OF SANTA BARBARA,
Defendant and Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

Of a Published Decision of the
Second Appellate District, Division Six, Case No. B253474

Reversing a Judgment of the Superior Court of the State of California
for the County of Santa Barbara, Case No. 1383959
Honorable Thomas P. Anderle, Judge Presiding

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INTRODUCTION

The Answer to the Petition for Review is no answer; it simply argues the Opinion was rightly decided. It ignores two of the four questions presented for review — conceding by silence that review of these issues is warranted, argues the Opinion rightly decided another, and implicitly accepts the need for clarification of the last. By their failure to oppose the motion for judicial notice or to address the cases cited there, Appellants Rolland Jacks and Rove Enterprises, Inc. (collectively, "Jacks") admit the issues the Petition identifies are pending in many lower courts and are of statewide importance.[1] By disputing the merits — rather than the review-worthiness — of the two questions it does address, the Answer demonstrates the questions raised here are genuine and worthy of review in this Court.

Review is plainly appropriate.

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[1] The failure to oppose the City's Motion for Judicial Notice can be taken as acquiescence in it. (Cal. Rules of Court, rule 8.54(c) ["A failure to oppose a motion may be deemed a consent to the granting of the motion."]; see also *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1221 [granting notice in absence of opposition].)

I. THE ANSWER DOES NOT ADDRESS TWO OF THE FOUR QUESTIONS PRESENTED

a. Whether and to What Extent *Sinclair Paint* Survives Proposition 26 Is a Live Issue

The Answer cites *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*) but once, and devotes a single sentence to it. (Answer at p. 14.) Yet, by arguing that Proposition 26 can have no application here because it is not retroactive as to local government, it concedes that the import of *Sinclair Paint* for this case and others like it is a live issue.

Jacks thus has no answer for how Proposition 26, enacted 13 years after *Sinclair Paint* was decided, and which states an express exception from its definition of "taxes" for fees for the use of government property, can be reconciled with the Court of Appeal's opinion's ("Opinion") reading of *Sinclair Paint* here. The City does not argue Proposition 26 should apply here, as Jacks contends; the City instead contends that there is a conflict between the Opinion's interpretation of *Sinclair Paint* and the voters' approval of Proposition 26 over a decade later.

b. The Answer Has No Comment on the Opinion's Classification of the Disputed Franchise Fee as a Tax Due to the City's Use of Its Proceeds for General Services

The Petition's third question states: "Does a franchise fee for use of public rights of way become a tax if its proceeds are used for a municipality's general fund purposes?" The Answer makes no mention of this issue and thus silently concedes it is worthy of review.

As the Petition demonstrates, this approach to the characterization of revenue measures is unsupported by precedent and creates ambiguity as to the legal status of many municipal revenue sources. Jacks does not dispute that cities use franchise fees for general fund purposes, as demonstrated by the materials in the City's Motion for Judicial Notice in support of review, nor that the City used the 1-percent franchise fee which predated that in issue here for general fund purposes; Jacks thus does not explain how, or whether, to apply the Opinion's test for franchise fees (i.e., those which do not fund "general City governmental purposes" [Opinion at p. 7]) to every franchise fee in the state, jeopardizing all of them. Resolution of this issue is of statewide importance and ought not await further developments in the Court of Appeal.

II. THE ANSWER CONCEDES THE NEED TO CLARIFY WHETHER COURTS SHOULD CHARACTERIZE REVENUE MEASURES BASED ON THEIR ECONOMIC RATHER THAN THEIR LEGAL INCIDENCE

a. The Answer Argues the Disputed Charge Is a Tax under Proposition 218 Because Jacks Bears Its Economic Incidence, Thus Conceding the City's Point

The Petition's fourth question for review asks: "In identifying charges exempted from Proposition 218's definition of 'tax,' may a court look to charges' economic rather than legal incidence?" Jacks' Answer repeatedly asserts the answer to this question is "yes," thus conceding review is needed to address the conflict between this position and precedent. (Answer at pp. 2–3 ["City has masqueraded the financial burdens" of franchise fee], 8 [1-percent increment a utility user tax and thus "imposed by cities upon utility users," emphases omitted], 10 [1-percent increment is "tax imposed by the City upon utility users"], 14–15 [characterizing 1-percent increment as "a city's enactment of financial burdens"], 16 & fn. 6 [discussing taxes which can "statutorily" be passed through to consumers], 18–19 [alleging due process concerns in "financial burdens" of 1-percent increment], 24 [noting utility users pay the 1-percent increment, but do not thereby obtain rights to use property].)

Jacks offers little more than a recitation of some of the stipulated facts, without analysis of the operative agreement between the City and SCE, to arrive at his conclusion the increment is a tax. He does not claim all franchise fees are taxes or dispute that utilities pass on these fees — as they do all overhead expenses— to their customers, and thus admits review is warranted here.

b. The Answer Argues Courts *Must* Apply Economic Rather than Legal Incidence to Characterize a Revenue Measure, Confirming This Issue Bears Resolution

Based on this bald conclusion the 1-percent increment in Santa Barbara's franchise fee is a tax, Jacks argues existing law **requires** courts to look to charges' economic rather than legal incidence to determine their legal character. Thus he implicitly acknowledges this issue requires clarification. (Answer at pp. 8 [characterizing increment as utility tax because SCE collects it], 13 [claiming law does not permit City to "divide" increment into legal and economic burdens], 16 & fn. 6 [claiming lack of precedent for distinction between legal and economic incidence], 17–19 [arguing utility customers have due process rights arising from "economic incident" of fee].)

This claim is unpersuasive. Courts routinely analyze the legal incidence of a tax; it is the Opinion's reliance on economic incidence that is noteworthy. Jacks does not reconcile the Opinion's view with

that presented in *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 784, which discussed the distinction between legal and economic incidence, citing U.S. Supreme Court precedent, nor does Jacks dispute the practical problems and confusion that will result if courts are required to investigate the economic incidence of revenue measures, which changes from time to time and place to place in light of the relative market power of buyers and sellers in particular transactions.

The statutes cited in footnote 6 to the Answer do not help Jacks. Revenue and Taxation Code section 6051 allows sales taxes — as to which legal and economic incidence plainly differ — without anything in the statute requiring that result. (Rev. & Tax. Code, § 6051 [imposing tax "upon all retailers" at rates "of the gross receipts of any retailer from the sale of all tangible personal property"]; see *Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1552–1553 ["California's policy regarding sales tax is that the tax is imposed on retailers for the privilege of selling tangible personal property in the state. Nevertheless, a retailer may seek sales tax reimbursement from a consumer", citations omitted].) Indeed, it is not always true that legal and economic incidence differ, as sellers bear both in "sales tax holiday" promotions.

Revenue and Taxation Code section 7251 et seq.[2] is the transaction and use tax law, which is comparable to a sales tax and

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[2] The Answer's citation (at page 16, footnote 6) to Revenue and

analyzed alike. (E.g., Rev. & Tax. Code, §§ 7253 [adopting definitions from sales tax statutes], 7261, subd. (b) [requiring local transaction tax provisions identical to statutory provisions for sales tax].) Revenue and Taxation Code section 8733 is a fuel tax imposed on purchasers, but collected by vendors, and is comparable to other third-party taxes like hotel bed taxes and alcohol taxes. (See Rev. & Tax. Code, §§ 8732 ["A vendor of fuel the use of which is taxable under this part ... shall, at the time of sale, collect the tax from the user"].) Such third-party taxes are legally incident on buyers but statute obliges sellers to collect and remit them to the State. (Rev. & Tax. Code, § 8733 ["The tax required to be collected by the vendor constitutes a debt owed by the vendor to this State."].) Jacks does not dispute that the same is true for franchisees of all kinds, nor that franchisees pay franchise fees from receipts from their customers.

III. THE ANSWER MISUNDERSTANDS THE DISTINCTION BETWEEN LEGAL AND ECONOMIC INCIDENCE OF A REVENUE MEASURE

The Answer argues the City has no power to distinguish the economic incidence of a tax from its legal incidence. (Answer at p. 13.) This is not a question of legislative power, it is a legal doctrine

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Taxation Code section 7351 et seq. is an apparent typo for section 7251.

which recognizes that parties to private transactions can and do reassign the duty to pay government revenue measures. As the Petition observed, this Court pays sales taxes, not because the Legislature imposed the tax on the judicial branch, but because vendors can and do reassign its burden on the Court. (Petition at p. 29.)

The City does not argue that labels given revenue measures control (see Answer at pp. 13–14) but rather the opposite. Under *Sinclair Paint,* it is legal attributes of a revenue measure — not its label — that matter. (See Petition at pp. 19–20 [*Sinclair Paint* applies "primary purpose" test to determine whether challenged regulatory fees are taxes].) Thus, under *Sinclair Paint,* legislative intent to generate revenue combined with the absence of benefit to the payor indicates a tax, but a legislative intent to generate revenue combined with the grant of a privilege to the payor does not. (*Sinclair Paint, supra,* 15 Cal.4th at p. 874 ["In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted."].) Further, this Court examined in *Sinclair Paint* the legal authority for a fee to determine whether it was a tax; in other words, whether it was an exercise of the power to tax or an exercise of some other power such as the police power, or, as here, the power to grant franchises for the use of public property in pursuit of private profit. (*Id.* at pp. 875–877 [characterizing remediation fees charged lead-containing product manufacturers as

mitigation fees consistent with exercise of the police power rather than taxes].) Analysis of those indicators weighs in favor of the trial court's conclusion here that Santa Barbara's new franchise fee is just that, rather than the Opinion's conclusion it is a tax.

a. Review and Reversal Would Not Violate Due Process

The City's argument that the legal character of a revenue measure turns on its legal, rather than economic, incidence would not make State law that violates federal due process as Jacks fears. (Answer at pp. 17–19.) If, as the City argues, its franchise fee is not imposed on SCE's electric customers, then they need have no remedy against the City with respect to that fee to satisfy due process — only SCE need have a remedy. Any remedy SCE customers might have for an invalid fee on electric bills lies against SCE. Due process does not demand one have a remedy for another's injury. Indeed, Jacks admits he is not party to the franchise agreement here. (Answer at p. 20.)

Moreover, approval of a franchise is a legislative act subject to approval by resolution after public hearing and the possibility of referendum. (*Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 668 ["The rule is firmly established that the granting of a franchise by a city or county is a legislative act."]; see AA2:346 at

¶ 11[3] [City Clerk published notice of intent that City Council proposed to approve franchise agreement and held public hearing to approve it]; AA2:383 at § 1401 [City Charter requiring resolution to grant franchise and public hearing]; AA2:462 [November 23, 2004 City Council minutes listing speakers and vote to approve recommendation to begin collecting 1-percent increment].) Nothing in the record shows Jacks exercised his right to protest the City Council's enactment of the 1999 franchise agreement or 2004 recommendation that the City implement the 1-percent increment. Thus, Jacks' due process argument rings hollow. Indeed, as Justice Oliver Wendell Holmes observed a century ago: as to legislation, a person obtains due process in the voting booth, not in court. (*Bi-Metallic Inv. Co. v. State Bd. of Equalization* (1915) 239 U.S. 441, 445 ["General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."].)

b. Grant and Hold Review Would Be Appropriate

The Answer's effort to argue against grant and hold review under California Rules of Court, rule 8.512(d) as to *Wheatherford v.*

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[3] Citations to the Appellant's Appendix are in the form: AA[Volume]:[page number(s)].

City of San Rafael, case number S219567 (review granted, Sept. 10, 2014) (*Wheatherford*) further evidences Jacks' misapprehension of the legal doctrine that distinguishes the legal from economic incidence of revenue measures. (Answer at p. 3, fn. 2.) That distinction is relevant to the characterization of revenue measures of all types and thus to the taxpayer standing issue in *Wheatherford*. Accordingly, the Answer concedes guidance is needed whether a revenue measure may be characterized as a tax based on its economic incidence rather than its legislative intent.

IV. THE ANSWER'S OTHER ARGUMENTS DO NOT UNDERMINE THE CASE FOR REVIEW

a. Bare Argument the Opinion Is Correct Is Not an Argument against Review; It Shows the Issues Are in Dispute

Jacks argues throughout his Answer that the mere fact the Opinion is consistent with Jacks' view of the law means this Court should deny review. (Answer at pp. 12 [arguing consistency of Opinion and Proposition 218, an issue the Petition does not raise], 15 [asserting Opinion does not apply to negotiated franchise fees, an issue the Petition does not raise], 20 [claim, without persuasive support, that Opinion does not limit rights of charter cities].) Of course, were that the case, this Court would never review decisions that please those on one side of a dispute. Such is not the purpose of

review. (*People v. Davis* (1905) 147 Cal. 346, 348 [Court's object "to supervise and control the opinions of the several District Courts of Appeal ... and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law ... a correct and uniform construction of the Constitution, statutes, and charters, and in some instances a final decision by the court of last resort of some doubtful or disputed question of law."].)

The Answer repeats Jacks' arguments below and his agreement with the Opinion but does not address the pressing legal questions identified in the Petition. That silence amounts to an admission that review is warranted here.

b. Nor Does the Fact the Opinion Criticizes *Redding* Undermine Review

At page 3, footnote 2, the Answer argues that grant and hold review as to *Citizens for Fair REU Rates v. City of Redding*, case number S224779 (review granted Apr. 29, 2015) (*Redding*) is inappropriate because the Opinion criticizes the case. The argument lacks logic. Tension between two published appellate authorities is a common reason **for**, not against, review. (Cal. Rules of Court, rule 8.500(b)(1) [this Court may order review "[w]hen necessary to secure uniformity of decision or to settle an important question of law"].) This Court's grant of review in *Redding* confirms that review of the

Opinion is also warranted to avoid inconsistency with this Court's decision in *Redding*.

c. The City Waived No Arguments on Appeal

Jacks claims the City waived its Proposition 26 claims because it did not argue them in the trial court. (Answer at p. 22.) However, the City had no duty to anticipate a published opinion breaking new legal ground and is entitled to seek review of the Opinion the Court of Appeal chose to publish. Moreover, the issue here is whether the challenged franchise fee is a tax requiring voter approval, and that issue was well briefed below and on appeal, meaning the City waived nothing here under the case law Jacks cites for waiver. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [reviewing questions concerning validity of ordinance because they involved matters of law briefed for trial court].) Of course, the rule of appellate forfeiture allows new legal issues to be raised on appeal in any event. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 ["a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record," citation omitted].)

d. The Answer Misunderstands the City's Position on Proposition 218

The City, of course, does not argue that Proposition 218 is unconstitutional. (Answer at p. 25.) Instead, the City argues the

franchise fee is simply not a tax subject to articles XIII A, XIII C, and XIII D of our Constitution.[4]

Rather, the Petition argues the City's constitutional authority to regulate utility operations and to impose franchise fees must be harmonized with the restrictions on its power under Propositions 13, 26, and 218. (Petition at pp. 32–34.) The Answer's repeated claims that Proposition 218 curtails the City's franchise rights (see pp. 1–2 [arguing Petition "refuses to acknowledge the import, purposes or mandate of Proposition 218"], 3 ["the [Opinion] correctly followed Proposition 218"], 11 ["[t]he purpose, terms and case law interpreting Proposition 218 are not in conflict"], 12 [claiming no conflict between Opinion and Proposition 218], 13 [confusing legal/economic incidence test with Proposition 218 limits], 15 [claiming need to identify "Proposition 218 classification" of franchise fee], 20 ["**Proposition 218 limits** charter city powers to financially burden citizens[,]" original emphasis], 25–26 ["case law uniformly interprets Proposition 218 as limiting cities' imposition of financial burdens upon citizens"]) amount to argument that articles XIII C and XIII D, adopted by Proposition 218, defeat the City's powers under articles XI and XII. This Court, of course, harmonizes the provisions of the Constitution when it is possible to do so. (E.g., *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316

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[4] Unspecified references to articles and sections of articles in this Reply are to the California Constitution.

[construing Proposition 26 "in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect[,]" citing *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 and *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043].) The Answer itself thus demonstrates the need for review to accomplish that harmonization.

e. The Answer Does Not Acknowledge the Tension the Opinion Creates Between the Powers Our Constitution Affords the PUC and Chartered Cities

The Answer acknowledges the impact of the Opinion on the balance of the Public Utilities Commission's ("PUC") power to regulate investor-owned utilities to limit their monopoly pricing power and chartered cities' power to charge rents for the use of their rights of way only in footnote 3 on page 4. Its comment supports review. That the PUC allows utilities to pass through to customers only "reasonable" expenses supports a conclusion that the powers of the PUC should be harmonized with those of chartered cities, rather than to defeat municipal power. This is especially so here, as the PUC has acknowledged chartered cities' authority to charge more than the franchise fees set by statute decades ago and precisely because the Legislature stated those statutory rates were not

intended to limit the authority of chartered cities to demand more. (Pub. Util. Code, § 6205.)

According to its voter-approved charter and as acknowledged by PUC precedent, Santa Barbara has authority to impose a 2-percent franchise fee on SCE. SCE acceded to this demand as part of its compensation for the right to use the City's rights of way to deliver electricity and derive profits. However, the PUC required SCE to list the 1-percent increment in the franchise fee separately on customer bills. Yet nothing in our Constitution or statutes empowers the PUC to wield judicial power to determine which charges are taxes or legislative power to determine the appropriate rate for franchise fees. Indeed, the PUC disclaims intent to determine either. (See AA2:416 ["Nothing prevents or interferes with the local entity's power or ability to tax; our procedure merely identifies the source and localizes excess costs imposed by a local entity."]; AA2:442 ["The Commission has no jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers, or utilities, or users' taxes on commodities used by a utility to produce its product."].) The PUC does not claim the power the Opinion gives it — a power our Constitution reserves to chartered cities — and the Answer does not persuade otherwise, demonstrating review is needed to better harmonize the respective powers of cities and the PUC under our Constitution than does the Opinion.

CONCLUSION

Thus, the Answer is no answer to the Petition for Review and confirms the issues it presents are worthy of review. The City respectfully urges this Court to grant review or, in the alternative, to grant review and hold briefing pursuant to California Rules of Court, rule 8.512(d) with respect to *Wheatherford v. City of San Rafael*, case number S219567 (review granted Sept. 10, 2014), or *Citizens for Fair REU Rates v. City of Redding*, case number S224779 (review granted Apr. 29, 2015).

DATED: May 6, 2015

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CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.504(d)

Pursuant to California Rules of Court, rule 8.504(d), I hereby certify that the foregoing Reply to Answer to Petition for Review contains 3,652 words (including footnotes, but excluding the tables and this Certification) and is within the 4,200-word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: May 6, 2015

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PROOF OF SERVICE

Rolland Jacks, et al. v. City of Santa Barbara,
Appellate Court Case No. B253474
Santa Barbara Superior Court Case No. 1383959

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On May 6, 2015, I served the within document(s):

REPLY TO ANSWER TO PETITION FOR REVIEW

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service listed below.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 6, 2015, at Los Angeles, California

Pamela Jaramillo

Pamela Jaramillo

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Rolland Jacks, et al. v. City of Santa Barbara
Supreme Court Case No. S225589
Appellate Court Case No. B253474
Santa Barbara Superior Court Case No. 1383959

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