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

OPENING BRIEF

After 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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TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW 10

INTRODUCTION 10

STATEMENT OF FACTS AND PROCEDURAL HISTORY 12

I. 1989 PUC Decision 12

II. The History of Santa Barbara's Franchise Fee 15

III. The 1999 Franchise Fee Agreement 17

IV. Procedural History 18

STANDARD OF REVIEW 21

LEGAL DISCUSSION 22

I. Before Proposition 26, Franchise Fees Were Not Taxes 22

II. Proposition 218 Does Not Make Franchise Fees Taxes 26

III. Proposition 218 Does Not Apply to Revenue Measures Which Are Not "Imposed" 28

IV. Franchise Fees Are Not Property Related Fees Subject to Proposition 218 30

V. Proposition 26 Confirms That Fees for the Use of Government Property Are Not Taxes 33

VI. The 1 Percent Increase Is Not a Tax Under These Standards 35

A. That the Increase Generates Revenue and That the City Uses That Revenue for General Fund Purposes Do not Make it a Tax 35

B. A Revenue Measure's Economic Incidence Cannot Determine its Character as Tax 37
C. The Increase's Purpose to Compensate the City for Use of its Rights of Way is Sufficient to Establish it is Not a Tax 40
D. The City is Entitled to Deference in Setting Franchise Fees 43
CONCLUSION 46
CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.520(c) 41

TABLE OF AUTHORITIES

Page(s)

California Cases

Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles (2001)
24 Cal.4th 830 32

Bay Area Cellular Telephone Co. v. City of Union City (2008)
162 Cal.App.4th 686 27

Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County (2013)
218 Cal.App.4th 195 ..... 19, 20, 33

California Farm Bureau Federation v. State Water Resources Control Bd. (2011)
51 Cal.4th 421 44

California Taxpayers' Ass'n v. Franchise Tax Bd. (2010)
190 Cal.App.4th 1139 ..... 35, 44

Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com. (2012)
209 Cal.App.4th 1182 30

City and County of San Francisco v. Farrell (1982)
32 Cal.3d 47 26

City of San Diego v. Shapiro (2014)
228 Cal.App.4th 756 38

City of Santa Cruz v. Pacific Gas & Elec. Co. (2000)
82 Cal.App.4th 1167 16

Cornelius v. Los Angeles County etc. Authority (1996)
49 Cal.App.4th 1761 39

Contra Costa County v. American Toll Bridge Co. (1937)
10 Cal.2d 359 ..... 25, 43

County of Fresno v. Malmstrom (1979)
94 Cal.App.3d 974 23

County of Tulare v. Dinuba (1922)
188 Cal. 664 ..... 24, 38

Evans v. City of Berkeley (2006)
38 Cal.4th 1 44

Greene v. Marin County Flood Control and Water Conservation Dist. (2010)
49 Cal.4th 277 ..... 21, 26

Hagman v. Meher Mount Corp. (2013)
215 Cal.App.4th 82 ..... 20, 42

People ex rel. Harris v. Pac Anchor Transp., Inc. (2014)
59 Cal.4th 772 21

Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach (2001)
86 Cal.App.4th 534 45

Howard Jarvis Taxpayers Ass'n v. City of Fresno (2005)
127 Cal.App.4th 914 36

Howard Jarvis Taxpayers Assn. v. City of Roseville (2002)
97 Cal.App.4th 637 ..... 20, 24, 36

Johnson v. Bradley (1992)
4 Cal.4th 389 16

Kern County Farm Bureau v. County of Kern (1993)
19 Cal.App.4th 1416 24

Mills v. County of Trinity (1980)
108 Cal.App.3d 656 23

Moore v. City of Lemon Grove (2015)
237 Cal.App.4th 363 36

Ponderosa Homes, Inc. v. City of San Ramon (1994)
23 Cal.App.4th 1761 29

Russ Bldg. Partnership v. City and County of San Francisco (1987)
199 Cal.App.3d 1496 22

Santa Barbara County Taxpayer Assn. v. Board of Supervisors (1989)
209 Cal.App.3d 940 ..... 24, 25, 42, 43

Santa Clara County Transportation Authority v. Guardino (1995)
11 Cal.4th 220 ..... 13, 14, 15, 30

Schmeer v. County of Los Angeles (2013)
213 Cal.App.4th 1310 33

Shapell Industries, Inc. v. Governing Board (1991)
1 Cal.App.4th 218 23

Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority (2008)
44 Cal.4th 431 21

Silver v. City of Los Angeles (1961)
57 Cal.2d 39 45

Sinclair Paint Co. v. State Bd. of Equalization (1997)
15 Cal.4th 866 ..... *passim*

Southern Pacific Pipe Lines, Inc. v. City of Long Beach (1988)
204 Cal.App.3d 660 15

People ex rel. Spiers v. Lawley (1911)
17 Cal.App. 331 38

Terminal Plaza Corp. v. City and County of San Francisco (1986)
177 Cal.App.3d 892 22

Torres v. City of Yorba Linda (1993)
13 Cal.App.4th 1035 ..... 38, 39

Traders Sports, Inc. v. City of San Leandro (2001)
93 Cal.App.4th 37 18

Trammell v. Western Union Tel. Co. (1976)
57 Cal.App.3d 538 30

Weisblat v. City of San Diego (2009)
176 Cal.App.4th 1022 27

Federal Cases

Fulton Corp. v. Faulkner(1996)
516 U.S. 325 38

United States Trust Co. of New York v. New Jersey (1977)
431 U.S. 1 45

California Constitution

art. II, § 9 13
art. III, § 3 45
art. XI, § 5 16
art. XIII A, § 3, subd. (b) 22
art. XIII A, § 3, subd. (b)(4) 34
art. XIII A, § 4 ..... 12, 26
art. XIII B 24
art. XIII B, § 8, subd. (c) 42
art. XIII C 21, 26, 29, 30
art. XIII C, § 1, subd. (a) 26
art. XIII C, § 1, subd. (b) 21, 29
art. XIII C, § 1, subd. (c) 33
art. XIII C, § 1, subd. (d) 26
art. XIII C, § 1, subd. (e) 22

art. XIII C, § 1, subd. (e)(1) 34
art. XIII C, § 1, subd. (e)(2) 34
art. XIII C, § 1, subd. (e)(3) 34
art. XIII C, § 1, subd. (e)(4) 34, 44
art. XIII C, § 1, subd. (e)(5) 35
art. XIII C, § 2, subd. (d) 26, 27
art. XIII D 21, 26, 30, 32
art. XIII D, § 1 ..... 26, 30
art. XIII D, § 2, subd. (e) 31
art. XIII D, § 2, subd. (g) 31
art. XIII D, § 2, subd. (h) 31
art. XIII D, § 3, subd. (b) 20, 31
art. XIII D, § 6 ..... 11, 29

California Statutes

Code Civ. Proc.
§ 526a 39

Gov. Code
§ 25530 25
§ 50335 ..... 25, 44
§ 53720 12
§ 53722 12
§ 53723 27
§ 53750 26

Pub. Util. Code
§ 6001 13
§ 6201 13
§ 6264 25

Rev. & Tax Code
§ 7200 28

Other State Statutes

Broughton Act ..... *passim*

Franchise Act of 1937 ..... 13, 15, 19, 44

Mitigation Fee Act 29

Proposition 218 Omnibus Implementation Act of 1997 27

Local Legislation

City of Santa Barbara Charter, § 1401 17

City of Santa Barbara Ord. 5135 ..... 17, 28, 30, 46

Other Authorities

The Cal. Municipal Law Handbook (Cont. Ed. Bar 2015)
§ 1.9 16

ISSUE PRESENTED FOR REVIEW

Is the City of Santa Barbara's 1 percent increase on its electricity bills (i.e., the 1 percent surcharge) a tax subject to Proposition 218's voter approval requirement or a franchise fee that may be imposed by the City without voter consent?

INTRODUCTION

This case involves a single legal question: is a fee established pursuant to a franchise negotiated between the chartered city of Santa Barbara ("the City") and Southern California Edison ("SCE") for the latter's use of the City's rights of way and other property for its for-profit activity a "tax" requiring voter approval under 1996's Proposition 218? Such fees have long been understood not to be taxes under California law and nothing in Proposition 218 changes that for three reasons:

- Proposition 218 did not change the definition of "tax" established by earlier case law;
- Proposition 218 applies only to revenue measures governments "impose," not voluntary payments negotiated by sophisticated, commercial entities with substantial market power like SCE; and
- The 1 percent increase to the franchise fee is not charged because SCE owns property, but because it does not — it is in the nature of rent for use of City rights of way and other

> property. Therefore it is not a property related fee within the reach of Proposition 218 — article XIII D, section 6 of our Constitution.[1]

This conclusion is confirmed by the definition of "tax" adopted by 2010's Proposition 26.

Plaintiffs and Appellants Rolland Jacks and Rove Enterprises, Inc. (collectively, "Jacks") argue the 1 percent increase of the City's franchise fee is a tax, distinguished from other franchise fees, because its economic incidence is on SCE's customers — that is, they ultimately pay it. This argument is unavailing. The law is well settled that whether a charge is a tax is determined by its legal incidence — i.e., who has a legal duty to pay it. It is equally well settled that payments for use of government property are in the nature of rent, not taxes. Jacks' theory would unsettle decades of law. It would make tax law unpredictable because the economic incidence of a revenue measure turns on the market power of those who bear a legal duty to pay it, and market power changes from time to time and place to place. By contrast, the legal incidence of a revenue measure is stable, knowable by the usual tools of statutory construction, and better serves the needs of courts and the society they serve.

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[1] All references in this brief to articles and sections of articles are to the California Constitution.

Jacks provides no serviceable test to characterize the fee as a tax. Taxes and fees alike are accounted for in general funds and are used to fund a variety of services. The fact the City agreed the 1 percent increase would not be payable until after Public Utilities Commission (PUC) action is irrelevant to the question whether the fee is a tax. At bottom, like all franchise fees, the 1 percent increase to which SCE and Santa Barbara agreed as consideration for the franchise is not a tax — it is a payment for the use of City property.

For all these reasons, the City urges this Court to affirm Judge Anderle's grant of judgment on the pleadings to the City.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. 1989 PUC DECISION

The Public Utilities Commission ("PUC") adopted Decision 89-05-063 ("Decision") on May 26, 1989. The Decision followed Proposition 13 but preceded Propositions 218 and 26, and came at a time when Proposition 62 was understood to be unenforceable.[2]

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[2] Proposition 62, Government Code sections 53720 et seq., restates Proposition 13's requirement for two-thirds voter approval of local government special taxes and imposed a new requirement for majority voter approval of local general taxes. (Gov. Code, §§ 53722 [special taxes], 53723 [general taxes]; Cal. Const., art. XIII A, § 4 [Prop. 13 requirement of two-thirds voter approval of special taxes].)

(2JA7:415,[3] citing *Schopflin v. Dole* (1989) 208 Cal.App.3d 617.[4]) It standardizes what had been an earlier, ad hoc practice (see 2JA7:421, fn. 3 and 2JA7:438, fn. 15) to require investor-owned utilities like SCE to segregate and pass through to local customers costs to comply with some requirements of cities or counties. This reflected the PUC's view that these local costs were more appropriately borne by local utility customers alone rather than by all a utility's customers. However, the Decision expressly disclaims legal authority to characterize local government revenue measures as taxes or otherwise or to interfere with their imposition. (2JA7:416, 436–437, 442–443.)

The Decision allowed a utility to include in its general rate base and thereby charge all customers for its cost of:

- some franchise fees — those of 0.5 and 1 percent imposed under the Broughton Act (Pub. Util. Code, § 6001 et seq.) and the Franchise Act of 1937 (Pub. Util. Code, § 6201 et seq.) (2JA7:435, fn. 8);

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[3] Citations to the Joint Appendix are in the form: [Volume]JA[TAB#]:[p.#].

[4] This decision concluded Proposition 62's voter-approval requirement violated article II, section 9's prohibition on referenda on taxes. It was subsequently depublished and its rule overtaken by this Court's decision upholding Proposition 62 in *Santa Clara County Transportation Authority v. Guardino* (1995) 11 Cal.4th 220.

- ad valorem property taxes (2JA7:438); and,
- utility users taxes other than on the utility's own use of utility services (*ibid.*).

Thus, those charges the PUC requires to be segregated from the general rate base are not necessarily taxes. Its rule is both over-and under-inclusive as a test of what this Court has found to be "taxes" under Proposition 13 — it excludes some taxes (utility users taxes and ad valorem property taxes) and includes assessments, fees, and a utility's own costs of regulatory compliance.

The Decision does not purport to characterize local government revenue measures as taxes or otherwise, and applies broadly to all kinds of local government revenue devices — including:

- taxes (2JA7:421, 426, 429, 436, 438, 445);
- assessments on property (2JA7:417, 441, 446);
- non-property assessments (2JA7:428);
- fees of various kinds (2JA7:418, 421, 423, 428, 436, 438, 445);
- costs utilities incur to collect locally imposed taxes, franchise fees, and related administrative requirements (2JA7:417, 446);
- regulatory costs such as fees for excavations in public rights of way (2JA7:428); and

- costs to relocate utility infrastructure to facilitate roadway improvements (*ibid.*).

Moreover, the Decision relies upon the long-standing rule that franchise fees are not taxes. (2JA7:417, 425 ["[Franchise fees] are not taxes on property or license charges for the privilege of operating a business, but rather they are negotiated, long-term mandatory contracts providing the governmental entities with compensation for the privilege extended to the utility to use or occupy streets or other public property within the franchise area."], 427.)

Thus, the charges the PUC requires to be segregated from the general rate base are not necessarily taxes, and the Decision does not provide a helpful test of whether a revenue measure is a tax. Nor did the PUC ever intend its Decision to provide such a test.

II. THE HISTORY OF SANTA BARBARA'S FRANCHISE FEE

Santa Barbara is a chartered city with the power to impose franchise fees in excess of the 0.5 and 1 percent rates authorized by the Broughton Act and the Franchise Act of 1937. (*Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal.App.3d 660, 669–670 & fn. 8 [chartered cities may adopt home-rule franchise regulations or issue franchises].)[5] In 1959, the City adopted a

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[5] California has two types of cities: those governed by the general laws and those governed pursuant to voter-approved charters

franchise agreement with SCE for electricity service in the City. (2JA7:344 at ¶ 4, 387–392.) The 1959 franchise had a term of 25 years — through 1984 — and referred to a preexisting "constitutional franchise."[6] (2JA7:344 at ¶ 4, 389 at § 2.) As early as 1887, the Santa Barbara Electric Company had installed lights on one Santa Barbara street. (2JA7:343 at ¶ 1.)

The City's voters approved a new charter in 1967, which has been in effect throughout this dispute. (2JA7:343–344 at ¶ 2, 354–385.) In 1984, as the 1959 franchise agreement was to expire, the City and SCE negotiated a new franchise with a 10-year term, through 1994. (2JA7:344 at ¶ 5, 394–401.) The parties extended this agreement five times through December 1999 as they negotiated a new agreement. (2JA7:344 at ¶ 6.) The parties made a new franchise agreement in December 1999 with a term of 30 years — through 2029. (2JA7:346 at ¶ 12, 403–413.)

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authorized by article XI, section 5. Chartered cities may by ordinance preempt statutes that govern "municipal affairs" but not those which address "matters of statewide concern." (See generally, *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394 [discussing historic foundations of home rule in California]; The Cal. Municipal Law Handbook (Cont. Ed. Bar 2015) §§ 1.9 et seq.).) Santa Barbara is a chartered city. (2JA7:343–344 at ¶ 2, 354–385.)

[6] The term refers to franchises granted by a since-repealed provision of our Constitution. (See generally, *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1171.)

III. THE 1999 FRANCHISE FEE AGREEMENT

The 1984 franchise agreement and its subsequent extensions established a franchise fee of 1 percent of the gross receipts of the sale of electricity, consistent with the Broughton Act. (See 2JA7:396.) The City sought an increased fee in negotiations for the 1999 franchise. (2JA7:344 at ¶ 8.) SCE ultimately agreed to pay a 2 percent franchise fee, provided all PUC procedures were followed. That required compliance with the Decision and separate listing of the 1 percent increase on customers' bills. (2JA7:345 at ¶ 9.) The parties agreed to the franchise, and the City enacted it by Ordinance No. 5135 on December 7, 1999 as required by section 1401 of the City Charter. (2JA7:346 at ¶ 12, 383 at § 1401, 403–413.)

Given the Decision's requirement the PUC approve a utility's request to recover the cost of such a fee from its customers' rates, the Agreement distinguishes an "Initial Term Fee" — to be paid pending PUC approval — from the "Recovery Portion" — the 1 percent increase SCE agreed to pay thereafter. (2JA7:406–407 at §§ 5–6.) The Decision obliges SCE to list that charge separately on bills to customers in Santa Barbara rather than to recover it from all its customers.

The Decision requires a utility seeking permission to recover the cost of a local charge, tax or fee above the average in the utility's service area to request an advice letter from the PUC. (2JA7:439–440.) SCE did not immediately pursue PUC permission to recover

the cost of the 1 percent increase given turmoil in the electricity market following California's famously failed experiment with energy deregulation. (2JA7:348 at ¶ 17.) In November 2004, when energy markets stabilized, the City Council authorized a letter to SCE instructing it to seek PUC approval to recoup the 1 percent increase from customers. (*Id.* at ¶¶ 18–19.) SCE did so on March 30, 2005 (2JA7:468-471) and the PUC granted approval by an April 20, 2005 advice letter (2JA7:479). SCE has since collected both the "Initial Term Fee" and "Recovery Portion." (2JA7:350 at ¶ 23.)

IV. PROCEDURAL HISTORY

Jacks filed the first Complaint here in December 2011 claiming the 1 percent increase[7] was a new tax enacted without the voter approval required by Propositions 62 and 218. (1JA3:56 at ¶ 59.) The City answered by general denial, raising affirmative defenses. Jacks filed a First Amended Complaint ("FAC"), dropping references to Proposition 62 which, of course, does not apply to chartered cities. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 46–47.) (1JA5:77 at ¶ 68.) The City's answer to the initial Complaint was deemed its response to the FAC.

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[7] The parties and the record sometimes refer to the 1 percent increase as the 1 percent "surcharge" to distinguish it from the historic 1 percent franchise fee.

The parties then stipulated to facts in support of cross-motions for summary judgment, attaching relevant documents. (2JA7:343–479.)[8] The trial court denied the motions in a 21-page ruling (3JA14:600–621) concluding Jacks had not shown the City's franchise fee increase violated the Broughton Act or the Franchise Act of 1937 (3JA14:610). The trial court also rejected the City's argument SCE was an indispensable party. (*Ibid.*) The trial court denied Jacks' motion as to the Proposition 218 claim, concluding Proposition 26 — enacted after the City began collecting the 1 percent increase — raised unresolved questions that barred complete resolution of either cause of action on the undisputed evidence. Specifically, the trial court questioned whether Proposition 26 is retroactive, found that Proposition 218 did not apply to the 1 percent increase, and thus that no vote was required until the 2010 effective date of Proposition 26 at the earliest. (3JA14:620–621.)

The City then moved for judgment on the pleadings, citing *Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 206–207 (*Brooktrails*), which holds Proposition 26 is not retroactive as to local governments. (3JA15:622–639.) Judge Anderle granted the City's motion without leave to amend, concluding:

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[8] The parties agreed to a second set of stipulated facts in support of the City's subsequent motion for judgment on the pleadings, but these do not figure substantially here. (3JA18:676–681.)

- the Agreement did not violate the Broughton Act or the Franchise Act of 1937, because neither applies to chartered cities (1JA1:7–8 [incorporating by reference the analysis of Feb. 26, 2013 order denying summary judgment]);
- the City's use of the proceeds of franchise fee for general fund purposes is immaterial to characterization of the franchise fee as a fee or tax (1JA1:15, citing *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 648 (*Roseville*));
- the 1 percent increase is paid for the privilege of using the City's rights of way and other property under *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*) and *Hagman v. Meher Mount Corp.* (2013) 215 Cal.App.4th 82, 91–92 (*Hagman*) (1JA1:15);
- that the 1 percent increase is not limited to the City's costs to make its rights-of-way available to SCE and therefore generates general fund revenue does not make it a tax (1JA:16);
- that SCE passes the 1 percent increase through to its customers — just as it recoups from customers' rates the Initial Term Fee and the franchise fees of all other cities and counties in its service area — does not make it a tax (1JA1:16);
- Proposition 26 is not retroactively applicable to the 1 percent increase (1JA1:18, citing *Brooktrails*); and
- the 1 percent increase would be exempt from Proposition 218, in any event, under article XIII D, section 3, subdivision (b) which

states: "For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." (1JA1:19–20).

The City filed a notice of entry of judgment on October 31, 2013. (1JA1:1.) Jacks timely appealed December 26, 2013.

The Court of Appeal issued its decision on February 26, 2015, concluding the 1 percent increase is essentially a utility users tax and invalid because not approved by voters as required by article XIII C, section 2, subdivision (b) — Proposition 218. This Court granted review June 10, 2015, depublishing that decision.

STANDARD OF REVIEW

Disputes under articles XIII C and XIII D are reviewed de novo. (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448–450; *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 (*Greene*).) Review of judgment on the pleadings is also de novo. (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 777.)

Whether the 1 percent increase is a tax requiring voter approval is a question of law, also reviewed de novo. (*Sinclair Paint, supra,* 15 Cal.4th at pp. 873–874.)

LEGAL DISCUSSION

I. BEFORE PROPOSITION 26, FRANCHISE FEES WERE NOT TAXES

There was no definition of "tax" in the state Constitution before 2010's Proposition 26 added subdivision (b) to article XIII A, section 3 and subdivision (e) to article XIII C, section 1. Proposition 13 and Proposition 218 do not define "taxes," but rely on earlier case law. This Court helpfully summarized the state of the law when Proposition 218 was adopted in 1996 as follows:

> The cases recognize that "tax" has no fixed meaning, and that the distinction between taxes and fees is frequently "blurred," taking on different meanings in different contexts. (*Russ Bldg. Partnership v. City and County of San Francisco, supra,* 199 Cal.App.3d at p. 1504;[9] *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 905 [223 Cal.Rptr. 379];[10] *Mills v. County of Trinity* (1980) 108 Cal.App.3d

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[9] *Russ Bldg. Partnership* holds San Francisco's transit impact fee on new commercial development is a development impact fee, not a tax.

[10] *Terminal Plaza Corp.* holds San Francisco's development impact fee on those who redevelop residential hotels for other uses to fund mitigation of housing loss is a development impact fee, not a tax.

656, 660 [166 Cal.Rptr. 674];[11] *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 983–984 [156 Cal.Rptr. 777].[12]) In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240 [1 Cal.Rptr.2d 818];[13] *County of Fresno v. Malmstrom, supra,* 94 Cal.App.3d at p. 983 ["Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services."].) Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. (*Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at p. 240; *Russ Bldg. Partnership v. City and County of San Francisco, supra,* 199 Cal.App.3d at pp. 1505–1506; see *Terminal Plaza Corp. v. City and County of San Francisco, supra,* 177 Cal.App.3d at p. 907.) But compulsory fees may be

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[11] *Mills* holds Trinity County's land use permit processing fees are regulatory fees, not taxes.

[12] *Malmstrom* holds assessments on real property under the Municipal Improvement Acts of 1911 and 1915 are not taxes.

[13] *Shapell Industries* holds fees on housing development to fund school construction are development impact fees, not taxes.

> deemed legitimate fees rather than taxes. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424 [23 Cal.Rptr.2d 910].[14])"

(*Sinclair Paint, supra,* 15 Cal.4th at p. 874.)

Franchise and other fees for use of government property have long been understood not to be taxes. As early as 1922, this Court defined a franchise fee as 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.

(*County of Tulare v. Dinuba* (1922) 188 Cal. 664, 670.) In 1989, the Court of Appeal determined Santa Barbara County's franchise fee on SCE was not subject to the Gann Limit of article XIII B as generating "proceeds of taxation." (*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 950 (*Santa Barbara County Taxpayer*). See also *Roseville, supra,* 97 Cal.App.4th 637 at p. 648 [distinguishing franchise fee from general fund transfer from municipal utility under Prop. 218].)

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[14] *Kern County Farm Bureau* held a fee collected on the property tax roll from agricultural property owners to fund operation of county landfills was a service or regulatory fee, not a tax.

Municipalities have broad discretion to set the terms of franchises, except where limited by statute. (See Pub. Util. Code, § 6264 [allowing franchise terms of any or indeterminate length]; Gov. Code, § 50335 [municipalities may grant easements to utilities "upon such terms and conditions as the parties thereto may agree"]; *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363 (*American Toll Bridge Co.*) ["the public body making the grant can prescribe terms and conditions in the granting and for the acceptance of a franchise" including the payment of money "without regard to the cost of supervision or inspection"].) Franchises —like the 30-year franchise at issue here — generally have long terms to enable profit-seeking utilities to invest in facilities in municipal rights of way and to recover that investment from customers' rates over the term of the franchise. (See *Santa Barbara County Taxpayer, supra,* 209 Cal.App.3d at p. 949 ["franchise fees are paid for the governmental grant of a relatively long possessory right to use land, similar to an easement or leasehold, to provide essential services to the general public" citing, inter alia, Gov. Code, §§ 25530 [allowing counties to lease land to highest bidder], 50335.)

Thus, the franchise fee in issue here is not a tax under the case law extant when voters adopted Proposition 218.

II. PROPOSITION 218 DOES NOT MAKE FRANCHISE FEES TAXES

Proposition 218 added articles XIII C and XIII D to our Constitution, adding procedural requirements for taxes in article XIII C and procedural and substantive requirements for property related fees and assessments in article XIII D. Article XIII C, section 1, subdivisions (a) and (d) define and distinguish general and special taxes and use — but do not define — the word "tax." Section 2 of article XIII D provides definitions for that article, but does not define "tax." Similarly, the Proposition 218 Omnibus Implementation Act of 1997 — which this Court utilized to construe Proposition 218 in *Greene* — provides no definition of "tax." (Gov. Code, § 53750; *Greene, supra,* 49 Cal.4th at pp. 290–291.)

Thus, Proposition 218 adopted positive law summarizing earlier case law's distinction of general and special taxes under Proposition 13. (Cal. Const., art. XIII C, § 1, subds. (a) & (d); art. XIII A, § 4 [two-thirds voter approval required for local special taxes under Prop. 13]; see *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [defining "special taxes" in article XIII A, section 4 "to mean taxes which are levied for a specific purpose rather than ... a levy placed in the general fund to be utilized for general governmental purposes"].)

Proposition 218 reiterated Proposition 13's requirement that special taxes be approved by two-thirds of voters. (Compare Cal.

Const., art. XIII C, § 2, subd. (d) [Prop. 218]; with *id.*, art. XIII A, § 4 [Prop. 13]) and Proposition 62's requirement general taxes be approved by a majority of voters (compare *id.* at art. XIII C, § 2, subd. (b) [Prop. 218] with Gov. Code, § 53723 [Prop. 62].)

Before Proposition 26, courts looked to pre-Proposition 218 case law to determine whether a levy was a fee or a tax.[15] For example, *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1041–1044, applied *Sinclair Paint* to determine a levy assessed to recover the costs to administer a rental unit business tax was a tax because its primary purpose was revenue-raising. (See also *id.*, at p. 1035, fn. 11 [noting "cases decided under Proposition 13 have been used in analyzing the provisions of Proposition 218, with which we are primarily concerned here"].) Similarly, the First District applied *Sinclair Paint* and other pre-Proposition 218 cases to find a fee imposed on telephone lines to fund 911 emergency services to be a tax subject to voter approval rather than a service fee. (*Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 692–695; see also *id.* at p. 693, fn. 6 ["cases decided under Proposition 13 have been used in analyzing the provisions of Proposition 218"].) Thus, Proposition 218 provides no basis for determining whether a revenue source is a tax or something else. It

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[15] This Court decided *Sinclair Paint* after voters adopted Proposition 218, but expressly did not address it there. (*Sinclair Paint, supra,* 15 Cal.4th at p. 873, fn. 2.)

merely distinguishes what common law defines to be taxes as either general or special.

III. PROPOSITION 218 DOES NOT APPLY TO REVENUE MEASURES WHICH ARE NOT "IMPOSED"

The legal incidence of a revenue measure is determined by resort to the law pursuant to which it is established. In this case, Ordinance 5135 proves that the legal incidence of Santa Barbara's franchise fee is on SCE, rather than SCE's ratepayers. That Ordinance approves a voluntary agreement between SCE and the City to which Jacks is not party. (1JA1:16 [trial court holding "measure of compensation is a matter of contractual negotiation" and thus franchise fee need not be based on costs, and that amount of revenue City receives "determined by the negotiation with SCE"]; 2JA7:345 at ¶¶ 8–9 [documenting "negotiations" between City and SCE].) Moreover, SCE insisted in its negotiations with the City that it not be obliged to pay the 1 percent increase unless the PUC authorized SCE to "pass through" part of it to its customers pursuant to the Decision. The City played no part in SCE's decision to list the franchise fee on its customers' bills or the PUC's requirement that SCE do so. (2JA7:345 at ¶ 9.) By the same token, the State Board of Equalization — which enforces the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue & Taxation Code §§ 7200 et seq.) — has no role in determining whether a retailer passes sales tax on to

this Court when it buys goods or bears the tax itself, perhaps as a "sales tax holiday."

The franchise fee — including both the Initial Term Fee and the 1 percent increase — is not a property related fee subject to Proposition 218 (Cal. Const., art. XIII D, § 6) because it is not "imposed" on SCE. Rather, it is required by a contract negotiated between sophisticated entities for use of the City's property. The City does not impose the franchise fee on SCE's utility customers, but rather SCE passes the 1 percent increase on to its Santa Barbara customers as a component of service charges by order of the PUC. (Cf. *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 [defining "impose" as used in Mitigation Fee Act as "to establish or apply by authority or force, as in "to impose a tax"].) No force or authority is involved here — SCE willingly agreed to the franchise agreement after negotiating its terms with the City to obtain use of valuable public rights of way in its for-profit business. If anyone "imposed" the fee at issue on Jacks, SCE or the PUC — not the City — did so: SCE obtained the PUC's permission to pass a portion of the franchise fee to its customers. Yet Jacks sued the City, not SCE or the PUC. Neither SCE nor the PUC is a "local government" or an "agency" subject to Proposition 218. (Cal. Const., art. XIII C, § 1, subd. (b) [defining "local government" for purposes of Article XIII C]; *id.* at art. XIII D, § 2, subd. (a) ["agency" for

purposes of Article XIII D means "any local government defined in subdivision (b) of Section 1 of Article XIII C"].)

Even assuming this Court could somehow conclude the City imposed a tax here, a tax is "imposed" only on its initial legislative adoption — here, in 1999 — and by the terms of Ordinance No. 5135, any "tax" is imposed on SCE, not its customers to whom it may subsequently pass the economic burden of the franchise fee. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194–1195 [Prop. 218 did not require tax election on annexation to City because taxes had been "imposed" years earlier in compliance with then-applicable law]; see also *id.* at p. 1194, fn. 15 [collecting cases]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 240 ["'imposed' — which in this context [of Prop. 62] means enacted"].) But just as SCE is not a defendant here, it is not a plaintiff. Nor is it a local government subject to Proposition 218 that can "impose" a tax within the reach of that measure.

IV. FRANCHISE FEES ARE NOT PROPERTY RELATED FEES SUBJECT TO PROPOSITION 218

Jacks challenges the 1 percent increase by collapsing the distinction between that charge — which is legally incident on SCE — and electric rates which Jacks pays under tariffs imposed by SCE and approved by the PUC — which have the force of law. (*Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 549–550 [legal

character of utility fees].) Jacks pays SCE's fees for electric service; those fees are expressly excluded from Proposition 218 by article XIII D, section 3, subdivision (b): "For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership."

Even if Jacks had standing to challenge the 1 percent increase on SCE, that charge is exempt from Proposition 218 for a further reason — it is not a property related fee or a fee for a property related service. Proposition 218 creates and regulates a class of fees known as property related fees, which it defines as:

> "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, **imposed by an agency upon a parcel or upon a person as an incident of property ownership**, including a user fee or charge for a property related service.

(Cal. Const., art. XIII D, § 2, subd. (e), emphasis added.)

Subdivisions (g) and (h) of article XIII D, section 2 define "property ownership" and "property related service":

> (g) 'Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
>
> (h) 'Property-related service' means a public service having a direct relationship to property ownership.

The 1 percent increase is not imposed on SCE because it owns property; rather it is imposed because it does not — it is a fee for the use of the City's property. (2JA7:405–406 at § 4 [franchise granted on "express condition" that SCE pay City "for use of the streets in the City"]; see also 1JA1:16 ["franchise fees do not constitute taxes because of their character as compensation for the long term use of public property"]; 1JA1:20 ["the franchise fees are compensation for the use of land required for such transmission"].) Thus, it is akin to the business regulatory fee this Court found outside the reach of article XIII D in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842–843 [holding "taxes, assessments, fees, and charges are subject to [Prop. 218] when they burden landowners as landowners" and distinguishing rental inspection fee because "it imposes a fee on its subjects by virtue of their ownership of a business — i.e., because they are landlords"].)

Thus, a franchise fee voluntarily paid by a utility like SCE is not imposed on a property owner or as an incident of property ownership sufficient to trigger Proposition 218 whether or not the utility has market power (and regulatory permission) to pass the economic burden of that fee in full or in part to its customers. Rather it is a voluntary rental for the use of public property with over a century of history in our law. It is neither a tax nor a property related fee within the scope of Proposition 218.

V. PROPOSITION 26 CONFIRMS THAT FEES FOR THE USE OF GOVERNMENT PROPERTY ARE NOT TAXES

Proposition 26 does not apply here because that 2010 measure is not retroactively applicable to Santa Barbara's 1999 ordinance. (*Brooktrails, supra,* 218 Cal.App.4th at pp. 205–207; see 1JA1:17–18.) However, that measure was intended to codify and broaden in certain respects earlier definitions of "tax." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 [Proposition 26 "an effort to close perceived loopholes in Propositions 13 and 218"], 1326–1329 [interpreting article XIII C, section 1, subdivision (c) to require taxes to be "payable to, or for the benefit of" a local government and holding retailers' charge for paper bags not a tax].) Thus, what is not a tax under Proposition 26 is not a tax under earlier law, though the reverse is not always true.

Proposition 26 excludes fees for the use of government property from its definition of "tax" and does not limit such fees to cost of service, as it does other fees:

> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> ....

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.[16]

(Cal. Const., art. XIII C, § 1, subd. (e)(4).)

By contrast, Proposition 26's exceptions for fees imposed in exchange for government-provided privileges and benefits, services and products, and regulation are limited to governments' costs. (Cal. Const., art. XIII C, § 1, subds. (e)(1), (e)(2), (e)(3); see also *id.*, final unnumbered par.) Thus, the exception of article XIII C, section 1, subdivision (e)(4) makes it apparent that the voters who adopted Proposition 26 were of the view that the state of the law in 2010 — including the requirements of 1996's Proposition 218 — did not treat fees for the use of governmental property as taxes.

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[16] Proposition 26 adopts nearly, but not entirely, identical definitions of "tax" for the State and local governments. (Compare Cal. Const., art. XIII A, § 3, subd. (b)(4) with art. XIII C, § 1, subd. (e)(4).) The State version of the exception for fees for use of government property twice substitutes the word "state" for "local government" and excludes vehicle license fees. It is otherwise identical to the local government exception quoted above.

VI. THE 1 PERCENT INCREASE IS NOT A TAX UNDER THESE STANDARDS

A. THAT THE INCREASE GENERATES REVENUE AND THAT THE CITY USES THAT REVENUE FOR GENERAL FUND PURPOSES DO NOT MAKE IT A TAX

That the 1 percent increase generates funds for the City does not make it a tax. (*Sinclair Paint, supra,* 15 Cal.4th at p. 880.) First, this argument proves too much, as it would make taxes of many other revenue measures, including those Proposition 26 makes clear are not, including:

- **Fines and penalties.** Article XIII C, section 1, subdivision (e)(5) exempts fines and penalties from Proposition 26's definition of tax. A leading treatise on municipal finance states "[m]ost revenues from fines and forfeitures may be expended for any legal municipal service." (Coleman, The California Municipal Revenue Sources Handbook (League of California Cities 2014) p. 107.[17]) Similarly, "[r]evenues from rental or use of city property and/or resources" are "[u]nrestricted unless indicated otherwise by agreement." (*Id.* at p. 109.) (See also *California Taxpayers' Ass'n v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 1139, 1146 (*CalTax*) [distinguishing penalties from taxes and fees].)

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[17] The City requests judicial notice of the relevant pages of this treatise in a Motion for Judicial Notice which accompanies this brief.

- **The Initial Term Fee and other franchise fees.** The Initial Term Fee and the 1 percent increase differ only in that the franchise ordinance expressly allows the latter to be passed through to customers. However, as the trial court observed (1JA1:15), both fees are in fact passed through to SCE's customers and both fund the City's general fund.
- **Fees which reimburse a general fund for services and facilities to utilities and other enterprise funds.** A rule that any charge that generates funds for a municipality is a tax would vitiate many cases holding that cities can recoup expenses borne by their general funds. (See, e.g., *Roseville, supra,* 97 Cal.App.4th at p. 648 [city may charge utilities "in-lieu fee" for right of way costs and transfer revenues to general fund under Prop. 218]; *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 (*Fresno*) [same]; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 372 (*Moore*) [upholding under Prop. 218 reimbursement to general fund of costs incurred for benefit of sewer utility].)

Similarly, the City's use of the proceeds of the 1 percent increase for general fund purposes also does not make it a tax. (See *Roseville, supra,* 97 Cal.App.4th at p. 650 [affirming transfer of in-lieu franchise fee to general fund under Prop. 218]; *Fresno, supra,* 127 Cal.App.4th at p. 927 [same]; *Moore, supra,* 237 Cal.App.4th at p. 377 [reimbursement to general fund did not violate Proposition 218]; see

also Coleman, *supra,* at p. 103 [defining franchise fee: "[p]ayment to a municipality from a franchisee as 'rent' or 'toll' for the use of the streets and rights of way of a municipality. ... Use of Revenues: Unrestricted"].) The record here demonstrates that both the Initial Term Fee and the 1 percent increase fund the City's general fund. (AA1:281 [existing 1 percent fee "equates to approximately $500,000 annual revenue to the **General Fund**," emphasis added].) Neither is a tax for that reason alone.

B. A Revenue Measure's Economic Incidence Cannot Determine Its Character as Tax

The economic incidence of a revenue measure is also not determinative of its characterization of a tax. The Court of Appeal has explained the distinction between the legal and economic incidences of a revenue measure:

> The economic incidence of a tax refers to the party or parties who will ultimately bear the economic burden of the tax. The economic incidence of a tax may differ from the legal incidence of the tax, which refers to the party or parties who are responsible for remitting a particular tax to the government. The *Fulton Corp.* court explained this distinction by stating, "It is well established that 'the ultimate distribution of the burden of taxes [may] be quite different from the distribution of statutory

liability' [citation], with such divergence occurring when the nominal taxpayer can pass it through to other parties ... ."

(*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 783, fn. 28, citing *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 341.)

Courts discern the legal incidence of a revenue measure by applying the canons of construction to legislation, but economic incidence is a factual issue that will be disputable in many cases. Critics of other local government revenues seek to undermine the traditional rule that looks to legal incidence and to gain leverage in municipal finance disputes by arguing who "really" pays one fee or another at one time or another. Exchanging a fixed standard that applies the usual rules of statutory construction to determine the legal incidence of a fee for a factual free-for-all of competing expert opinion to determine who bears the economic burden of a fee is dangerous precedent and contrary to longstanding case law on the interpretation of franchise agreements. (*People ex rel. Spiers v. Lawley* (1911) 17 Cal.App. 331, 346–347 [franchise agreement construed as any writing]; see also *Tulare County v. City of Dinuba, supra,* 188 Cal. at p. 670 [franchise agreements "purely a matter of contract"].)

Just a few cases are sufficient to demonstrate the range of disputes which raise this issue. In *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1038–1039, plaintiffs challenged Yorba Linda's redevelopment plan, alleging standing due to residency in

neighboring Anaheim and payment of sales tax to Yorba Linda. Payment of sales tax did not confer standing because "a sales tax is a levy imposed on the retailer, not the consumer." (*Id.* at p. 1047.) Thus, the legal incidence of the sales tax controlled for purposes of standing even though its economic incidence is commonly on the buyer. It is for this reason this Court pays sales tax even though it is exempt from taxation — the tax is on vendors who have market power to pass the tax on to the Court.

Cornelius v. Los Angeles County etc. Authority (1996) 49 Cal.App.4th 1761, 1764 involved a challenge to the Los Angeles County Metropolitan Transportation Authority's affirmative action program. The court found no taxpayer standing under Code of Civil Procedure section 526a, because the sales and gasoline taxes the plaintiff paid were "taxes on the retailer, not the consumer to whom the retailer passes the burden." (*Id.* at p. 1777.)[18]

Here, as the trial court noted, economic incidence is over-inclusive as a test to distinguish taxes from other revenue measures. Such a test would capture other franchise fees and both the Initial Term Fee and the 1 percent increase. (1JA1:15 ["the concept of a franchise fee as compensation is unaffected by how the utility passes on that franchise fee to the customer base"].) Reliance on economic incidence would be over-inclusive and make taxes — in uncertain

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[18] This question arises anew in *Wheatherford v. City of San Rafael,* pending in this Court as case number S219567.

and unpredictable circumstances — of a variety of revenue measures long understood not to be taxes. For example, every fee SCE pays to the government is recovered from its customers via its base rates or designated surcharges. These include the Initial Term Fee and franchise fees of Santa Barbara County and other local governments, the 1 percent increase, the fees SCE pays for permits to construct in City rights of way, its income taxes, its air quality permit fees, and so on. Economic incidence is simply not a sufficiently subtle tool to distinguish taxes, assessments, and fees under our Constitution.

C. The Increase's Purpose To Compensate the City for Use of Its Rights of Way Is Sufficient to Establish It Is Not a Tax

The determinative fact here is that the 1 percent increase is consideration for the use of City rights of way under the franchise:

> SECTION 2. Purpose; Grant of Franchises.
>
> The Franchise granted to the Southern California Edison Company is a franchise authorized by the City Charter ... for the following purposes:
>
> A. To use for transmitting and distributing electrical power, communications related to electric power transmission and distribution, and other services and commodities by [SCE], for use by consumers for any and all lawful purpose, all poles, wires, conduits

and appurtenances which are now or may hereafter be lawfully placed and maintained in the streets within City under the Franchise to [SCE]; and,

B. To construct, maintain and use in said streets all poles, wires, conduits and appurtenances as necessary to transmit and distribute electrical power and communications related thereto for use by consumers, for any and all lawful purposes; and,

C. To use said poles, wires, conduits and appurtenances in said streets to transmit and distribute electrical power and communications related thereto for use outside the boundaries of City for any and all lawful purposes.

(2JA7:404 at § 2.)

Thus the purpose of the whole, 2 percent, franchise fee is "compensation for use of the streets in the City," enforced by the City's option to terminate the franchise if that sum is not paid. (2JA7:406–407 at §§ 5–6; see also 2JA7:406 at § 5(A) [payment of 2 percent fee "express condition" of franchise].) The franchise confers rights on SCE to use all City property — not just rights of way — and includes property of other governments under City control. (2JA7:404 at § 1(J).) Because the "primary purpose" of the 1 percent increase is compensation for the City's rights of way, it is not a tax.

In *Sinclair Paint,* this Court held that whether a revenue measure is a special tax requiring voter approval under Proposition 13 or a regulatory fee exempt from that measure turns on its "primary purpose." (*Sinclair Paint, supra,* 15 Cal.4th at pp. 879–881.) The decision notes that "taxes are imposed for revenue purposes" but distinguished those charges paid "in return for a specific benefit conferred or privilege granted." (*Id.* at p. 874.) Further, this Court noted "[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or seek other government benefits or privileges." (*Ibid.*) As shown above, the "primary purpose" of the 1 percent increase is compensation for use of the City's rights of way, and thus SCE receives a specific privilege from the City in the form of that use and voluntarily agreed to pay for that privilege.

Hagman applied *Sinclair Paint*'s primary purpose test to determine whether a mosquito abatement assessment was a tax, again noting that taxes are imposed for revenue purposes, but finding that the assessment did not fit the definition of tax because it funded vector control for the benefit of assessees. (*Hagman, supra,* 215 Cal.App.4th at p. 92.) *Santa Barbara County Taxpayer* determined franchise fees proceeds are not "proceeds of taxes" under the Gann Limit (Cal. Const., art. XIII B, § 8, subd. (c)). It so held because franchise fees are paid "for the governmental grant of a relatively long possessory right to use land, similar to an easement or a leasehold," not taxes ("exactions which raise general tax revenues")

or user fees ("cost recovery charges imposed upon individual citizens for the specific, temporary use of public property and/or services"), both of which are "proceeds of taxation" subject to the Gann Limit. (*Santa Barbara County Taxpayer, supra,* 209 Cal.App.3d at pp. 949–950.)

D. The City Is Entitled to Deference in Setting Franchise Fees

Given that the franchise fee is a bargained-for price for use of the City's rights of way in SCE's search for profits, its terms are legislative in character. (*American Toll Bridge Co., supra,* 10 Cal.2d at p. 363 ["it has been held that the public body making the grant can prescribe terms and conditions in the granting and for the acceptance of a franchise"].)

This is consistent with this Court's established test to distinguish fees from taxes. *Sinclair Paint* determined the validity of a "regulatory fee," one designed to compensate victims of lead poisoning. (*Sinclair Paint, supra,* 15 Cal.4th at pp. 874 [describing three types of "special tax" cases: special assessments, development fees, regulatory fees], 880 ["if regulation is the primary purpose of the fee measure, the mere fact that the measure also generates revenue does not make the imposition a tax"].) *CalTax* rejected a taxpayer group's request to analyze a penalty provision under *Sinclair Paint* — because the penalty provision was not a regulatory fee — and instead examined it using the traditional framework for

determining a statute's constitutionality, giving deference to the legislator. (*CalTax, supra,* 190 Cal.App.4th at pp. 1146–1147.)

Sinclair Paint also asks whether revenues derived from a regulatory fee match the costs of regulation. (See *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 437, citing *Sinclair Paint, supra,* 15 Cal.4th at p. 876 [applying Prop. 13].) The Legislature set the rates for franchise fees for general law cities and counties decades ago — and thus a franchise fee need not relate to any costs associated with maintaining rights of way. Chartered cities like Santa Barbara are not limited by the Broughton Act or the Franchise Act of 1937, but may negotiate franchise fees with utilities as they would rent for use of City-owned land, charging what the market will bear rather than recovering their costs to make land available. (Cf. Cal. Const., art. XIII C, § 1, subd. (e)(4) [Prop. 26 exception for fees for use of government property does not limit such fees to cost recovery].)

Because the franchise fee rate is but one of the City's terms for SCE's use of its property, the City's terms are entitled to deference and are limited only by its Charter. (See Gov. Code, § 50335 [allowing public utility easements "upon such terms and conditions as the parties thereto may agree"]; 2JA7:382 at § 1400 [City Charter franchise provision allows City Council "to prescribe the terms and conditions of any such grant"]; cf. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 13 [upholding conditioning of free berths in City marina

on nondiscriminatory membership policy]; *Silver v. City of Los Angeles* (1961) 57 Cal.2d 39, 41 [manner of negotiations for lease of tidelands a municipal affair].)

Thus, the terms of Ordinance No. 5135, including the franchise fee, are legislation. Under fundamental rules arising from the separation of powers, legislation is reviewed with deference to the legislator except as otherwise required by preemptive statute or a constitutional provision:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

(Cal. Const. Art. III, § 3.) Indeed, the Court of Appeal has described the deference courts give to legislation in cases like this as "traditional standards of deference to the legislature's judgment in economic and social matters." (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 561, citing *United States Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 24–25.)

Thus, the franchise fee and the manner in which Santa Barbara exercised its constitutional authority as a chartered city to determine on what terms it will make its streets available to SCE for its money-making activity is the kind of legislation that is entitled to a degree of judicial deference.

CONCLUSION

The 1 percent increase is a franchise fee like all others, notwithstanding that it is economically incident on SCE customers; accounted for in the City's general fund; and funds general City services such as police, fire, streets, and libraries. Longstanding law unchanged by Proposition 218 makes clear that the fact the City and SCE agreed on the fee as consideration for the latter's use of City rights of way is sufficient to make it a fee rather than a tax. Jacks' offered new standards to distinguish taxes from fees are unworkable and unsupported by precedent. They do not persuade.

For all these reasons, the City respectfully requests this Court to affirm the trial court judgment on the pleadings for the City.

DATED: August 3, 2015

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CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.520(C)

Pursuant to rule 8.520(c)(1) of the California Rules of Court, the foregoing Opening Brief contains 8,277 words (including footnotes, but excluding the tables, statement of issues presented, and this Certification) and is within the 14,000 word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: August 3, 2015 **COLANTUONO, HIGHSMITH & WHATLEY, PC**

RYAN THOMAS DUNN
Attorney for Petitioner
CITY OF SANTA BARBARA

PROOF OF SERVICE

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

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 August 3, 2015, I served the within document(s):

CITY OF SANTA BARBARA'S OPENING BRIEF

☐ **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 attached.

☒ **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 on the attached service list.

☐ **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(s) on the attached service list 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 August 3, 2015, at Los Angeles, California

Pamela Jaramillo

SERVICE LIST

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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Clerk of the Court of Appeal Second Appellate District, Division 6 200 East Santa Clara Street Ventura, CA 93001	Re: Case No. B253474
California Supreme Court 350 McAllister San Francisco, CA 94102	By Federal Express Overnight Delivery