IN THE SUPERME COURT
OF THE STATE OF CALIFORNIA

No. S262634

Robert Zolly, Ray McFadden,
and Stephen Clayton
Plaintiffs and Appellants,

vs.

City of Oakland
Defendant and Respondent

Answer Brief on the Merits

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

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QUESTION PRESENTED

Must city franchise fees that are subject to California Constitution, article XIII C, be reasonably related to the value of the franchise?

INTRODUCTION

Under *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (*Jacks*), article XIII C's original version limited a franchise fee to a reasonable estimate of the franchise value. And any fee amount in excess of that value was actually a tax. Otherwise, cities would continue to inflate franchise fees to make up for limits on their taxing authority. Then Proposition 26 amended article XIII C to make it even tougher for cities to hide taxes within ostensible fees. According to Oakland, though, that amendment actually *erased* article XIII C's franchise-fee limit.

But the voters passed Proposition 26 to close loopholes—not to open a limitless one. Article XIII C as amended lists seven types of charges that it excepts from the definition of "tax." And each excepted charge is limited. Whereas some limits are found within the exceptions themselves, others are found within background constitutional principles.

The fourth exception at issue here, which covers a "charge imposed for entrance to or use of local government property," is limited like the other six exceptions. The fourth exception uses the phrase "imposed for" to specify that a covered charge must be imposed *because of* the use of city property and not unrelated revenue generation. So, when the evidence shows that a franchise fee exceeds any reasonable estimate of the franchise value, it reveals that the excessive portion is not imposed because of the use of city property but is actually a hidden tax—the very evil Proposition 26 sought to eliminate. Thus, article XIII C's current version keeps the prior version's franchise-fee limit.

Oakland's contrary textual arguments are not persuasive. It contends that the fourth exception's language excepts all charges that cities denominate as franchise fees. But the exception's phrase "imposed for" makes the exception ambiguous. And even if the exception were clear in isolation, Proposition 26's history, statements of intent, and other exceptions to the definition of "tax" would create ambiguity. Oakland also notes that the first three exceptions are

expressly limited to a city's reasonable costs, whereas the fourth exception is not. Yet the fact that a franchise fee is payment for a city asset accounts for this difference. Since each excepted charge is different, the exceptions use different wording to prevent hidden fees.

Because the fourth exception is not clear in context, Oakland must find support for its interpretation in Proposition 26's ballot materials. But those materials emphasized that Proposition 26 would stamp out hidden taxes wherever they are hiding—including within city-imposed charges on utility services like the ostensible franchise fees here. Oakland incorrectly contends that the materials were silent as to franchise fees. But even if that were true, it would support the ratepayers' view here that Proposition 26 did not affect article XIII C's preexisting limit on franchise fees.

This court should affirm the Court of Appeal's opinion.

FACTUAL BACKGROUND

Oakland's Zero Waste RFP process goes off the rails.

Oakland had exclusive franchise agreements for garbage collection and disposal (with Waste Management of Alameda County (WMAC)) and for recycling collection (with California Waste Solutions (CWS)). (2 JA 277:7–9, 397.) Those agreements were set to expire at the end of June 2015. (2 JA 277:20–22, 397.) So, in the early part of 2012, Oakland established a competitive-bidding process to select companies that would perform those garbage and recycling services (as well as a new, compostable-collection service) starting in July 2015. (2 JA 277:9–13, 397.) That process was part of Oakland's "ambitious 'Zero Waste' plan" to greatly reduce landfill deposits. (2 JA 397:9–11, 396.) Oakland tasked its Public Works Department (or the "agency") to execute the request-for-proposal (RFP) and contracting phases of the process. (2 JA 276:26–277:1.)

The RFPs solicited proposals for three exclusive franchises: garbage-and-compostable collection (called "mixed material and organics" or MM&O), garbage disposal, and recycling. (2 JA 277:11–13, 397.) In an April 2012 report, the agency cautioned the city council that, to " 'strike a balance between securing economic benefits for Oakland and achieving the best customer rates for the services, it must guard against unintentional bias or infeasible requirements that would suppress competition.' " (2 JA 278:15–20.) Yet the city council directed that proposals had to comply with 32 policy directives, including that "franchise contracts include provisions on city policies for equal benefits, living wage, and campaign contributions; … inclusion to the maximum extent possible of Oakland local business and employment of Oakland residents; … and [a] requirement for a customer service call center located in Alameda County." (2 JA 278:5–14.) These policy directives "decreased the value of the franchises awarded because they constitute additional franchise expenses that do not generate revenue." (2 JA 278:21–23.)

Over the next three years, Oakland engaged in a "tortured procurement process." (2 JA 278:25–279:4.) At the outset, Oakland's stringent RFP requirements precluded a "competitive bidding environment." (2 JA 279:5–6.) "Initially, six potential bidders expressed interest for garbage and recycling collection services, and five potential bidders for landfill disposal services." (2 JA 279:6–8.) But in January 2013, only the incumbent providers (WMAC and CWS) had submitted proposals for the garbage-and-compostable collection and recycling-collection franchises. (2 JA 279:8–9, 399.) And only WMAC submitted a proposal for the garbage-disposal franchise. (2 JA 279:8–9, 399.) Then the agency was overwhelmed by the task of evaluating those proposals and negotiating with WMAC and CWS pursuant to the newly minted Zero Waste framework. (2 JA 279:11–16.) In May 2014, about 16 months after the proposals were submitted, the agency recommended that Oakland "award all three franchise contracts to WMAC" because that provider's "bundled rate structure provided the lowest overall rate option for Oakland residents." (2 JA 279:17–19.) However, the city council rejected that recommendation, directed the agency to solicit "best and final offers" from CWS and WMAC, and "allowed CWS to expand its bid to include" garbage collection. (2 JA 279:19–22.)

When the agency received each provider's best and final offers a month later, "the contracting process started to … fall apart." (2 JA 279:24–26.) While the agency had taken 16 months to evaluate and negotiate the original proposals, it had only six weeks to evaluate and negotiate these new proposals—including CWS's 700+ page proposal that now also sought the garbage-disposal franchise. (2 JA 279:27–280:3.) The agency did not have the resources to adequately evaluate and negotiate the new proposals in that short time frame. (2 JA 280:3–5.) The agency again recommended WMAC for all three franchises because they " 'would provide the best value for the Oakland ratepayers and the best customer experience, while meeting [Oakland's] Zero Waste Goal.' " (2 JA 280:6–10.) The agency also

warned that CWS lacked the needed infrastructure to continue uninterrupted service upon the expiration of the current franchise agreement. (2 JA 280:10–12.) Yet, again, the city council rejected the agency's recommendation and instead awarded all three franchises to CWS. (2 JA 280:13–15.)

After WMAC challenges defects in the RFP process, Oakland shifts two of the franchises to WMAC.

In August 2014, WMAC sued Oakland and CWS for RFP-process irregularities and sought to undo the three franchise contracts. (2 JA 280:16–18.) WMAC also "began collecting signatures for a ballot referendum that asked city voters to invalidate the ordinances awarding the franchise contracts to CWS." (2 JA 280:18–20.) WMAC and CWS settled their dispute a month later, agreeing to shift the garbage-and-compostable-collection and garbage-disposal franchises to WMAC, and to extend CWS's recycling franchise from 10 years to 20. (2 JA 280:21–281:8.) The settlement was contingent on Oakland's amending the franchise ordinances accordingly, which Oakland did quickly. (2 JA 280:28–281:8.) Rather than being the product of a transparent, competitive-bidding process, the franchise agreements resulted from rushed, closed-door negotiations that only marginally involved Oakland. (2 JA 278:25–279:4, 281:9–14, 401.)

Under the franchise agreements, Oakland collects over $28 million annually from rates paid by its residents to the franchisees.

WMAC agreed to pay Oakland $25,034,000 for the exclusive right to collect garbage and compost from the city's residents and businesses. (2 JA 281:15–20, 331, 344.) Similarly, CWS agreed to pay Oakland $3,000,000 for the exclusive right to collect recycling from the city's residents and business. (2 JA 281:21–25, 326, 351.) The Oakland ordinances authorizing these charges characterized WMAC and CWS as "public utilit[ies]." (2 JA 326, 331.) These charges (called "franchise

fees" by the contracting parties) are subject to increases in subsequent years, according to an inflation index. (2 JA 326, 331, 344, 351.) Oakland, WMAC, and CWS contemplate that WMAC and CWS will pay their respective charges from the rates they collect from Oaklanders. (2 JA 281:26–282:2, 404.)

Oakland redesignates $3.24 million of WMAC's franchise fee to be an AB 939 fee instead.

In December 2014, Oakland adopted an ordinance that redesignated $3.24 million of WMAC's franchise fee as an AB 939 fee instead.[1] (2 JA 286:12–14, 337.) That amount is subject to automatic increases in subsequent years, according to an inflation index. (2 JA 384:1–3, 337.) But if any part of the AB 939 were to be invalidated, that same amount would be added back to WMAC's franchise fee. (2 JA 286:14–16, 337.)

Oaklanders' waste-collection rates skyrocket in part because of the charges that Oakland collects from WMAC and CWS.

The supposed franchise fees have caused WMAC and CWS to impose higher rates on their Oakland customers. (2 JA 281:26–282:2, 286:23–24.) The franchise fees "amounted to nearly 30% of some ratepayers' bills." (2 JA 282:1–2.) The new franchise agreements particularly impact owners of multi-family properties such as appellants Zolly, McFadden, and Clayton (sometimes referred to in this brief as the "ratepayers") who pay their tenants' associated bills. (2 JA 275:28–276:10.) Appellants' associated bills for their multi-family properties increased between about 80% and 155% from their amounts prior to the new franchise agreements. (2 JA 275:28–276:9.) The

[1] AB 939 is a state law called the Integrated Waste Management Act of 1989 that requires cities to develop and implement integrated waste management programs. To pay for these programs, a section of that law (codified at Pub. Resources Code, § 41901) permits cities to impose fees on their residents.

supposed franchise fees account for part of those increases. (2 JA 281:26–282:2, 286:23–24, 404.)

An Alameda County grand jury concludes that Oakland bungled the RFP process and that WMAC's franchise fee is disproportionately high.

Due to "numerous citizen complaints," an Alameda County grand jury "undertook a comprehensive investigation related to the solicitation and award of [Oakland's] Zero Waste contracts." (2 JA 396.) The grand jury "reviewed thousands of pages of documents," including the RFPs, the submitted proposals, agency reports, city council meeting minutes, the memorandum of understanding between WMAC and CWS settling their litigation, and "the final executed franchise contracts awarded to WMAC and CWS." (2 JA 398.) They also examined "hundreds of pages" of rate sheets submitted by WMAC and CWS, and similar rate sheets from surrounding communities. (2 JA 398.)

From that exhaustive review, the grand jury issued a final report on the flawed RFP process described above.[2] (2 JA 395–406.) The grand jury also concluded that the "franchise fees paid to the city of Oakland by WMAC under its contract are disproportionately higher than those [paid to] surrounding government entities." (2 JA 404.) The grand jury was "troubled that these fees … were not transparently reported or

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[2] The trial court and Court of Appeal denied appellants' requests for judicial notice of the grand jury's final report as immaterial. (2 JA 477:6–8; *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 78, fn. 2 (*Zolly*).) Yet the report is relevant as to whether appellants adequately pleaded that the supposed franchise fees here are inflated—the sole criterion in deciding whether the fees are actually taxes. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5 [stating that matters subject to judicial notice may be treated by the reviewing court as having been pleaded in the complaint].) So appellants are filing a new request for judicial notice in this court, which appends the same grand jury report. For ease of reference, though, this brief cites the copy of the report included in the joint appendix.

openly discussed with the public at any time during the contracting process." (2 JA 404.)

Appellants seek a declaratory judgment that the supposed franchise fees are partly disguised taxes, but the superior court dismisses the case because the fees are not imposed directly on ratepayers.

Appellants sued Oakland, contending that the franchise fees and the AB 939 fee are invalid. (1 JA 1–3.) After the hearing on Oakland's demurrer to the first amended complaint and while that demurrer was submitted to the superior court, this court issued its *Jacks* opinion. (1 JA 211–270.) In sustaining Oakland's demurrer to the first amended complaint, the superior court granted appellants leave to file a second amended complaint alleging facts that state a claim under *Jacks*. (1 JA 271.)

Accordingly, appellants' second amended complaint alleges that "[n]either of the franchise fees bears a reasonable relationship to the value received from the government and they are not based on the value of the franchises conveyed in order to come within the rationale for their impositions without approval of the voters." (2 JA 284:10–13; see also 2 JA 285:24–27.) Thus, the pleading seeks a declaration that the supposed fees are actually disguised taxes that violate article XIII C.[3] (2 JA 287:5–7.)

The superior court, however, sustained Oakland's demurrer to the second amended complaint. (2 JA 460:24–461:7.) The court distinguished *Jacks* because, unlike the franchise fees here, the fee in that case was imposed directly on the public utility. (2 JA 462:7–19.)

[3] The complaint also sought declaratory relief about the validity of the AB 939 fee. (2 JA 287:8–13.) But that claim, which was ultimately dismissed, is not germane to the question presented here.

The Court of Appeal reverses the sustaining of the demurrer as to the franchise-fee claim because the amended version of article XIII C keeps the original version's franchise-fee limit.

The Court of Appeal reversed the sustaining of the demurrer as to the validity of the franchise fees. (*Zolly, supra,* 47 Cal.App.5th at p. 92.) The court disagreed with Oakland's argument that *Jacks* did not apply because the ratepayers here pay the franchise fees indirectly as part of their rates instead of directly as a line item on their utility bills. (*Id.* at p. 85.) Instead, *Jacks*' holding applies to all charges that are nominally franchise fees. (*Ibid.*) The court also held the reasonable-relationship test for franchise fees still applies, even though article XIII C has been amended by Proposition 26. (*Id.* at p. 88.) Based on the initiative's ballot materials, the court found that the voters passed Proposition 26 to expand voter-approval limits on cities. (*Ibid.*) For a similar reason, the court rejected Oakland's argument that the franchise fees are not taxes because they are not "imposed" on ratepayers. (*Id.* at pp. 88–89.)

This court then granted Oakland's petition for review as to the franchise-fee issue. But this court denied requests to depublish the Court of Appeal's opinion.

LEGAL DISCUSSION

I. The ratepayers have standing to seek declaratory relief because the alleged taxes cost them money.

Near the end of its brief, Oakland buries a one-page argument that the ratepayers lack standing because they do not pay the franchise fees directly.[4] (OB 52–53.) This court ordinarily reviews standing de novo. (*People for Ethical Operation of Prosecutors and Law Enforcement v. Spitzer* (2020) 53 Cal.App.5th 391, 398.) And in any event, there is no decision to review here because Oakland did not raise standing below.

To have standing to contest the constitutionality of government action, the plaintiff must "show some injury, actual or threatened." (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 94 (*Andal*).) Here, the ratepayers allege "a classic form of injury in fact"—economic injury. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) The operative complaint alleges that the ostensible franchise fees caused appellants' waste-collection rates to increase hundreds of dollars per month: McFadden's monthly rates, for instance, increased from $355.61 to $908.11 (a 155 percent increase) partly due to the franchise fees. (2 JA 275:28–276:10, 286:23–24.) The complaint adds that "[a]ll Plaintiffs have paid, and will continue to pay, the rates being charged to them under the ordinances at issue here." (2 JA 276:11–12.) Standing requires nothing more.

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[4] A party ordinarily forfeits an argument, like Oakland's standing argument here, which is not segregated under its own heading. (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179, citing Cal. Rules of Court, rule 8.204(a)(1)(B).) And because standing is a threshold issue to be decided before reaching the merits (*Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132), Oakland's intermingling is especially inappropriate. Yet, because a standing argument implicates a court's power to resolve a case (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233), this brief addresses standing out of an abundance of caution.

Oakland contends, though, that because the ratepayers do not bear the legal incidence of the charges at issue, they do not have standing. (OB 52–53.) But Oakland rests that proposition upon inapposite cases.

Oakland first cites *Chiatello v. City & County of San Francisco* (2010) 189 Cal.App.4th 472 (*Chiatello*) in which a plaintiff contested a local-payroll-tax initiative under Code of Civil Procedure section 526a—a statute enabling taxpayers to combat government waste.[5] (*Id.* at pp. 477–482.) But the plaintiff there lacked standing because he was not "subject to the tax" at all—either directly or indirectly. (*Id.* at pp. 475, 488, 490, fn. 8, 496–497.) The plaintiff also sought injunctive relief, which would have had the impermissible effect of halting the collection of a local tax. (*Id.* at pp. 476, 495–498.) And the court's analysis was limited to standing under that anti-government-waste statute. (See *id.* at p. 490, fn. 8 [distinguishing *Andal*, which involved a challenge under Proposition 218].) None of those bases for *Chiatello*'s holding apply here.

Oakland next relies upon *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, review den. (*County Inmate*), in which the

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[5] The opening brief states: " 'To challenge the validity of a tax or other government levy, a plaintiff must be directly obligated to pay it.' (*Chiatello v. City & County of S.F.* (2010) 189 Cal.App.4th 865, 872 (retail customers lack taxpayer standing because sales tax is imposed on retailers, even though ultimately paid by the customers).)" First, Oakland miscites *Chiatello*. Second, *Chiatello* does not include the quoted statement or anything resembling it. Third, *Chiatello* did not involve a sales tax. Oakland apparently copied the sentence preceding its cite to *Chiatello* from a respondent's brief's argument in another pending appeal and misattributed that sentence as a quote from *Chiatello* itself. (See *Food & Water Watch v. Metropolitan Water District of Southern California* (No. B297553, Jul. 14, 2020) Resp. Br., available at 2020 WL 4258605, at *41.) Oakland also apparently derived its parenthetical from that same brief, which also mistakenly refers to *Chiatello* as a sales-tax case. (*Ibid.*) It seems Oakland did not read *Chiatello* before relying upon it.

court applied "[t]he general rule … that a person may not sue to recover excess taxes paid by someone else[.]" (*Id.* at p. 360.) But *County Inmate* distinguished this very case because the ratepayers here do not seek a refund but only declaratory relief.[6] (*Id.* at p. 362.)

Instead of those inapposite cases, *Andal*'s standing analysis is instructive. *Andal* held that, to contest a charge as an invalid tax under Proposition 218, a plaintiff did not need to be "the person taxed" so long as they are "adversely affected by the tax[.]" (*Andal, supra,* 137 Cal.App.4th at p. 94; see also *Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38, fn. 2 ["By reason of the *indirect impact* upon his business, appellant has standing to" challenge the validity of a tax provision], italics added.) The ratepayers' economic injury here surpasses this low bar for standing.

And if ratepayers did not have standing, then no one would enforce Proposition 26's franchise-fee limit. A utility that directly pays that fee does not have an incentive to sue because the fee enables the utility to obtain the franchise and it passes on the cost to its customers. (See *Jacks, supra,* 3 Cal.5th at pp. 262, 267–269.) Voters who passed Proposition 26 to prevent hidden taxes would not have wanted the initiative's limits to go unenforced. (See *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1249 [analyzing "the larger context of standing" in part to "better effectuate the [enactors'] purpose in providing certain statutory remedies"].) Indeed, the Public Resources Code contemplates that ratepayers can sue cities under article XIII C for imposing invalid taxes that are collected by waste-collection companies. (See Pub. Resources Code, § 40059.2, subd. (d)(2) [barring the enforcement of an indemnity provision requiring a waste-collection

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[6] *County Inmate* states that the ratepayers here "sought declaratory and injunctive relief[.]" (*County Inmate, supra,* 48 Cal.App.5th at p. 362.) Although the ratepayers' initial complaint sought both those forms of relief, the operative complaint seeks only declaratory relief. (1 JA 49–50, 2 JA 287.)

company to reimburse customers for fees it collected for a city that are found by a court "to have been imposed in violation of Article XIII C"].)

II. Since voters amended article XIII C to reinforce its voter-approval requirements, its current version still requires that a franchise fee be reasonably related to the franchise value.

Oakland contends that, in amending article XIII C, voters removed the article's franchise-fee limit. (See AOB 41.) But the amendment—read in its proper context—shows that is the last thing voters would have wanted.

A. *This court independently reviews whether the trial court erred in sustaining the demurrer as to the franchise-fee claim.*

Upon the sustaining of a demurrer, this court reviews independently whether the complaint states a claim. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010 (*Centinela*).) In doing so, this court accepts as true all properly pleaded facts and gives the complaint " ' " 'a reasonable interpretation, reading it as a whole and its parts in their context.' " ' " (*Ibid.*, quoting *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) This interpretation is also liberal, especially because the ratepayers here seek only declarative relief. (*Strozler v. Williams* (1960) 187 Cal.App.2d 528, 531.)

And even if the current complaint does not state a claim, this court must still decide whether the ratepayers have shown a reasonable chance that they can cure the defect by amendment. (*Centinela, supra,* 1 Cal.5th at p. 1010.)

Here, the demurrer's propriety depends mainly on the interpretation of article XIII C. Even outside the demurrer context, that question is reviewed de novo. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934 (*California Cannabis*).)

B. *Voters enacted article XIII C's current version to close loopholes in prior tax-relief measures.*

The constitutional provision at issue here comes from the latest in a "series of initiatives designed to limit the authority of state and local governments to impose taxes without voter approval." (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 10 (*Citizens*).)

First in 1978 came Proposition 13, which added article XIII A to the California Constitution and "limited local government authority to increase property taxes." (*Citizens, supra,* 6 Cal.5th at p. 10.)

Then in 1996, "voters adopted Proposition 218, known as the ' "Right to Vote on Taxes Act[,]" ' " which added articles XIII C and D. (*Citizens, supra,* 6 Cal.5th at p. 10, quoting *Jacks, supra,* 3 Cal.5th at p. 259.) Article XIII D enhances article XIII A's limits on cities' taxing real property and, in turn, article XIII C "buttresses article XIII D by limiting the *other* methods by which local governments can exact revenue using fees and taxes not based on real property value or ownership." (*Ibid.*, italics added.) Article XIII C requires cities to get approval from a majority of voters at a general election before imposing a general tax. (*Id.* at pp. 10–11.) But "Proposition 218 did not define the term 'tax.' " (*Id.* at p. 11.)

Voters passed Proposition 218 to stop cities from undermining Proposition 13. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 683 (*Riverside*).) Voters perceived that cities were thwarting the tax-relief and tax-approval limits of Proposition 13 by imposing " 'excessive tax, assessment, fee and charge increases … .' " (*Ibid.*, quoting Prop. 218, § 2, reprinted at Historical Notes, 2A West's Ann. Constitution (1999 (pocket supp.) foll. art. XIII C, p. 22.) Thus, articles XIII C and XIII D work together to block those end-arounds, which cities were using to make up for lost, property-tax revenue. (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836–837 (*Apartment Ass'n*).) Proposition 218 stated that its provisions " 'shall be liberally construed

to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' " (*Jacks, supra,* 3 Cal.5th at p. 267, quoting Prop. 218, § 5, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013) foll. art. XIII C, § 1, at p. 363.)

Voters in 2010, however, perceived that cities were *still* undermining Propositions 13 and 218's tax-relief and tax-approval limits. (*Citizens, supra,* 6 Cal.5th at p. 11.) So "voters passed Proposition 26, which further expanded the reach of article XIII C's voter approval requirement … ." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 (*San Buenaventura*).) This brief discusses Proposition 26 below in Part II.D.

C. *To prevent a city from raising unjustified revenue, article XIII C's original version required any franchise fee to be reasonably related to the franchise value.*

Article XIII C's original version required a franchise fee—the price paid for a utility to use public property—to be reasonably related to the franchise value.[7] (*Jacks, supra,* 3 Cal.5th at pp. 267–270.) *Jacks* analogized franchise fees to three types of charges (special assessments, development fees, and regulatory fees), which "are fees rather than taxes, and therefore are not subject to the voter approval requirements of Proposition 13." (*Jacks, supra,* at p. 260, citing *Sinclair Paint Co. v. State Bd. Of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*).) Those three charges involve a reasonable relationship between the price paid to the government and a governmental benefit or cost. (*Id.* at p. 261.) But "to the extent charges *exceed* the rationale underlying the charges, they are taxes." (*Ibid.*, italics added.) Otherwise "the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees." (*Ibid.*) And this

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[7] Because the contested charge in *Jacks* was imposed prior to Proposition 26, this court did not apply article XIII C's amended version (even though the amended version already governed newer charges). (*Jacks, supra,* 3 Cal.5th at p. 263, fn. 6.)

reasonable-relationship aspect of fees applied equally under Proposition 218. (*Id.* at pp. 261–262.)

Like the three fees discussed in *Sinclair Paint*, a franchise fee involves a reasonable relationship between a price paid to the government and a governmental benefit (i.e., the right to use its property). (*Jacks, supra,* 3 Cal.5th at pp. 267–268.) The receipt of that governmental benefit "justifies the imposition of a charge on the recipient to compensate the public for the value received." (*Id.* at p. 267.) Also like the *Sinclair Paint* fees, a franchise fee is a tax to the extent the price paid "exceeds any reasonable value of the franchise[.]" (*Id.* at p. 269.) The "excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval." (*Ibid.*) So, although "historically franchise fees have not been considered taxes" (*id.* at p. 267), that historical treatment does not necessarily apply to "a charge that is *nominally* a franchise fee" (*id.* at p. 271, italics added).

Otherwise, local governments would continue their trend of charging exorbitant franchise fees to make up for Propositions 13 and 218's limits on their taxing authority. (*Jacks, supra,* 3 Cal.5th at pp. 267, 269.) Because utilities do not ultimately bear the economic burden of franchise fees—they collect those fees from their ratepayers one way or another—utilities do not necessarily have "an incentive to negotiate a lower fee" that reflects the franchise's "market value[.]" (*Id.* at pp. 269–270.)

There is a distinction, however, between a franchise fee and the three *Sinclair Paint* fees. The former "is compensation for the use or purchase of a government *asset* rather than compensation for a cost." (*Jacks, supra,* 3 Cal.5th at p. 268.) Thus, a city can spend franchise-fee revenue "for whatever purposes the government chooses" and still be considered a fee. (*Ibid.*) By contrast, the *Sinclair Paint* fees must be reimbursement for a publicly borne cost. (*Ibid.*) Yet "the relationship between a charge and the rationale underlying the charge"—whether it

is "reasonable"—dictates whether the *Sinclair Paint* fees *and* franchisee fees are permissible without voter consent. (*Id.* at p. 269.)

Oakland contends that *Jacks*' holding did not cover franchise fees like the ones here, which are indirectly imposed on ratepayers as part of their rates. (OB 42–44.) Oakland notes that the contested charge in *Jacks* (called the "surcharge") was imposed directly on ratepayers as a separate line item on their utility bills and asserts that *Jacks'* "analysis was driven" by that fact. (OB 42–43.) Oakland concludes the *Jacks* surcharge "differs materially" from the franchise fees here. (OB 44.)

But the *Jacks'* majority and dissenting opinions contradict Oakland's interpretation of the holding's scope.

The *Jacks* majority stated that whether a franchise fee is imposed directly on the ratepayer or by "a unilateral decision" of the utility "does not alter the substance of the" charge. (*Jacks, supra,* 3 Cal.5th at p. 269.) For instance, the fact that the surcharge there "was separately stated" on customers' bills while another franchise fee (called "the initial 1 percent charge") was "included in the rates paid by customers" was "unrelated to the character or validity of the charges." (*Id.* at p. 269, fn. 10.) Because the surcharge, "like the initial 1 percent charge, … is a payment made in exchange for a property interest[,]" either could be a permissible franchise fee depending on its amount. (*Id.* at p. 269; see also *id.* at p. 267.) Regardless of how ratepayers pay a given franchise fee, though, the "fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters." (*Id.* at p. 270.)

Moreover, this discussion was part of the majority's holding. To be sure, the *Jacks* ratepayers had contested only the surcharge as an invalid tax. (*Jacks, supra,* 3 Cal.5th at p. 256.) But in rejecting a ratepayer argument about why the surcharge was a tax regardless of its relationship to the franchise value, the majority equated the surcharge and the initial 1 percent charge. (*Id.* at pp. 268–269 & fn. 10.) Then, after ruling that neither the city's motion for judgment on

the pleadings nor the ratepayers' motion for summary adjudication should have been granted, the majority sent the case back to the trial court for further proceedings. (*Id.* at pp. 272–274.) Accordingly, this court's treatment of the 1 percent charge and the surcharge as the same for tax purposes was "not dicta" since it was " 'responsive to the issues raised on appeal and … intended to guide the parties and the trial court in resolving the matter following … remand[.]' " (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1158–1159, first and second alterations in original, quoting *Garfield Medical Center v. Belshé* (1998) 68 Cal.App.4th 798, 806.)

Indeed, Justice Chin's solo dissent in *Jacks* criticized "the majority's holding that charges passed on by utilities are the same, for tax purposes, as charges imposed directly on ratepayers[.]" (*Jacks, supra,* 3 Cal.5th at p. 290 (dis opn. of Chin., J.).) He explained that, under the majority's holding, "plaintiffs may now allege [upon remand] that even the [initial 1 percent charge] is a tax because it is passed on to them through [the utility's] rates and it exceeds the value of the franchise rights [the utility] received." (*Id.* at p. 291 (dis. opn. of Chin, J.).) The majority did not dispute Justice Chin's characterization of their holding or the holding's consequence of allowing plaintiffs to contest the indirectly imposed fee as an invalid tax.

Thus, in arguing that *Jacks'* holding applies only to franchise fees imposed directly on ratepayers, Oakland relies upon the dissent's distinction that the majority rejected. (Compare OB 44 ["That some portion of those franchise fees might be included as one cost factor in setting rates does not bring them within the framework of *Jacks*"], with *Jacks, supra,* at p. 289 (dis. opn. of Chin, J.) ["a charge that is not imposed by the government on the payor … and that is passed on to the payor by the unilateral and discretionary decision of some third party, is not a tax, even if it is 'implicit' "], quoting *Jacks, supra,* at p. 269 (maj. opn. of Cantil-Sakauye, C.J.).) And like the dissent, Oakland believes the majority's reasonable-relationship test is impractical.

(Compare OB 44, fn. 10 [warning against "a nebulous and impracticable 'reasonable relationship to value' test that would inject increased cost and uncertainty"], with *Jacks, supra,* at p. 293 (dis. opn. of Chin, J.) [declining to endorse the majority's "vague, unprecedented, unworkable, and standardless test"].)

Rather than addressing these on-point statements in *Jacks*, Oakland notes the majority opinion's finding that the surcharge was imposed directly on the *Jacks* ratepayers. (OB 42–43.) The majority made that finding to rebut the city's argument that the utility had "voluntarily assumed" to pay the franchise fee. (*Jacks, supra,* 3 Cal.5th at p. 270.) But contrary to Oakland's assertion, the *Jacks* majority did not hold that this aspect of the surcharge was relevant in deciding whether it was a tax. (See *id.* at p. 271.) Instead, after stating that the surcharge was directly imposed on ratepayers, the majority reaffirmed that the validity of "a charge that is nominally a franchise fee … depends" on a single criterion: "whether it is reasonably related to the value of the franchise rights." (*Ibid.*)

Oakland also argues that, regardless of the scope of *Jacks'* holding, Proposition 26's amendment to article XIII C "categorically exempts franchise fees from the definition of 'tax.' " (OB 41.) But as explained below, that construction would turn voter intent on its head.

D. *It is ambiguous whether, in light of its text and context, article XIII C's current version limits franchise-fee amounts.*

Voters in 2010 passed Proposition 26 "to ensure the effectiveness" of Propositions 13 and 218. (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (f), p. 114 (Voter Information Guide) [uncodified section entitled "Findings and Declarations of Purpose"].) Fourteen years prior, Proposition 218's drafters had been concerned about cities skirting Proposition 13's limits by imposing "tax increases disguised via euphemistic relabeling as 'fees,' 'charges,' or 'assessments.' " (*Apartment Ass'n, supra,* 24 Cal.4th at p. 839.) That mislabeling included the practice of imposing "excessive fees," which

were partly taxes to the extent their amounts "exceed[ed] the rationale underlying the charges[.]" (*Jacks, supra,* 3 Cal.5th at p. 261.) Yet voters perceived that, even after Proposition 218's adoption, "California taxes ha[d] continued to escalate." (Voter Information Guide, *supra*, text of Prop. 26, § 1, subd. (c), p. 114.) Voters believed that, since Proposition 218 had not defined "tax," cities were able to "circumvent" the initiative's limits "by simply defining new or expanded taxes as 'fees.' " (*Id.*, subd. (f).)

To close this loophole, then, "Proposition 26 made two changes to article XIII C." (*Citizens, supra,* 6 Cal.5th at p. 11.) First, it broadly defines "tax" as including any city-imposed charge unless one of seven exceptions applies. (Cal. Const., art. XIII C, § 1, subd. (e).)[8] Second, it "requires the local government to prove 'by a preponderance of the evidence that … [an] exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.' " (*Citizens*, *supra,* at p. 12, alterations in original, quoting Cal. Const., art. XIII C, § 1, subd. (e).) The question here is whether the fourth exception to the definition of "tax" covers a franchise fee regardless of its amount.

1. When read in its proper context, the fourth exception's use of the phrase "imposed for" makes it ambiguous whether the exception limits franchise-fee amounts.

Oakland contends that the fourth exception to the definition of "tax" clearly covers all franchise fees—even exorbitant ones. (OB 21–23.) The exception applies to "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).) Oakland reasons that, because a franchise fee is "imposed for entrance

[8] For ease of reference, this brief includes an appendix with the full text of article XIII C, section 1, subdivision (e).

to or use of local government property" regardless of its amount, the exception does not limit franchise-fee amounts. (See OB 21–22.) And since the first three exceptions expressly limit their respective charges to amounts not greater than a city's "reasonable costs," Oakland adds, the fourth exception's omission of that limit corroborates its clear meaning. (OB 22–23.)

Yet Oakland's construction is myopic. Like when a court construes a statute, the "main concern" in construing a constitutional provision enacted via initiative "is giving effect to the intended purpose of" the provision. (*California Cannabis, supra,* 3 Cal.5th at p. 933.) Although this court infers voter intent from the "ordinary meaning" of a provision's words, those words " 'must be construed in context, keeping in mind the [provision's] purpose, and … sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.' " (*People v. Valencia* (2017) 3 Cal.5th 347, 358 (*Valencia*), quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) This context also includes the provision's history. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249 (*Kennedy Wholesale*); see also *Apartment Ass'n, supra,* 24 Cal.4th at p. 838 [stating that, because "Proposition 218 is Proposition 13's progeny[,] … it must be construed in that context"].) A contextual reading "tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger … scheme." (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293.)

But if voter intent "remains opaque" despite this contextual reading, then a court "may consider extrinsic sources, such as an initiative's ballot materials." (*California Cannabis, supra,* 3 Cal.5th at p. 934.)

Although the fourth exception can be read in isolation to support Oakland's view, a contextual reading elucidates an alternative meaning better aligned with the voters' stated intent in passing Proposition 26.

As explained above in Part I.C., article XIII C's original version required a franchise fee to be reasonably related to the franchise value. Otherwise cities would continue to inflate franchise fees to generate revenue denied to them by the constitutional limits on their taxing authority (*Jacks, supra,* 3 Cal.5th at pp. 267, 269)—a result antithetical to the tax-relief and tax-approval aims of Proposition 218 (*Riverside, supra,* 73 Cal.App.4th at p. 683). And then voters amended article XIII C via Proposition 26 "to *reinforce* the voter approval requirements set forth in Propositions 13 and 218." (*Jacks, supra,* at p. 263; see also *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 [stating that Proposition 26 "was an effort to close perceived loopholes in Propositions 13 and 218"].)

But Oakland's construction would mean that Proposition 26 *opened* a giant loophole. Oakland implicitly recognizes (as it must) that article XIII C's original version limited at least some franchise fees. (See OB 41–44.) And since Oakland contends that article XIII C's amended version has no franchise-fee limit whatsoever, that would mean Proposition 26 *removed* whatever franchise-fee limit had existed. (See OB 41.) Since Oakland's construction of the fourth exception " ' "would result in an evasion of the evident purpose" ' " of Proposition 26 to reinforce Proposition 218's limits, this court should not adopt it if another " ' "meaning would prevent the evasion and carry out that purpose." ' " (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 918, quoting *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291–1292.)

The six other exceptions—and the text of the fourth exception itself—disclose another meaning that furthers Proposition 26's goals. Proposition 26's broad definition of "tax" can provide its intended tax-relief and tax-approval effects only if the definition's exceptions are limited. (See *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316 [stating that statutory exceptions "should be narrowly construed"].) Otherwise a city could exploit a limitless

exception to generate revenue proscribed by the general voter-approval limit. (See *Jacks, supra,* 3 Cal.5th at pp. 267, 269.)

Accordingly, the six exceptions other than the fourth exception are limited.

The first three exceptions reflect "*Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits[,]" covering "(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." (*Jacks, supra,* 3 Cal.5th at p. 262.)

And although the text of the last three exceptions do not include express limits, background constitutional principles provide those limits.

- Under the fifth exception, charges imposed "as a result of a violation of law" must be proportional due to the excessive fines clauses of the state and federal Constitutions. (Cal. Const., art. XIII C, § 1, subd. (e)(5); see also *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689 [203 L.Ed.2d 11].)
- Under the sixth exception, charges "imposed as a condition of property development" must be roughly proportional to the projected impact of the proposed development. (Cal. Const., art. XIII C, § 1, subd. (e)(6); see also *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881; *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 612 [133 S.Ct. 2586, 186 L.Ed.2d 697].)
- Under the seventh exception, charges that are assessments or property-related fees must be proportional to the special benefit or cost associated with each affected parcel. (Cal.

Const., art. XIII C, § 1, subd. (e)(7); see also Cal. Const., art. XIII D, § 4, subd. (a) & § 6, subd. (b)(3).)

Given that all the other exceptions are limited, the canon of statutory construction *noscitur a sociis* suggests that the fourth exception is similarly limited. Under that canon (which means "it is known by its associates"), "courts may conclude that [voters] would not intend one subsection of a subdivision of a [provision] to operate in a manner ' "markedly dissimilar" ' from other provisions in the same list or subdivision." (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960, quoting *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) Since limits on cities' taxing authority prompt them to find new ways to generate revenue (see *Jacks, supra,* 3 Cal.5th at pp. 267, 269), the canon is particularly relevant here. If all the exceptions were limited except the fourth one, cities would rely heavily on the sole limitless exception to make money without obtaining voter consent. But that "interpretation creates a loophole that greatly undermines the strength of" Proposition 26. (*United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1156.)

And "the *location* of the provision in question within" article XIII C, section 1, subdivision (e) is notable. (*Valencia, supra,* 3 Cal.5th at p. 361.) If the drafters of Proposition 26 wanted to single out the charges covered by the fourth exception as being nontaxes regardless of amount, they could have segregated the exception from all the other limited exceptions. Instead, the drafters sandwiched the fourth exception between three limited exceptions above it and three limited exceptions below it. The placement of the fourth exception, then, "tends to reinforce" its limited nature. (*Id.* at p. 362.)

Nor does Oakland try to explain *why* voters who intended to reinforce Proposition 218's voter-approval limits would want to single out franchise fees as a way for cities to generate limitless revenue without voter consent. The more reasonable interpretation is that all

exceptions to the definition of "tax" are limited so that they prevent cities from evading limits on their taxing authority.

Moreover, the fourth exception's burden of proof and text support its limited nature. Article XIII C imposes on a city the burden to prove that a charge qualifies under an exception. (Cal. Const., art. XIII C, § 1, subd. (e).) To fit within any of the first four exceptions, then, the city must adduce evidence that the charge is "imposed for" the corresponding governmental activity or asset. (Cal. Const., art. XIII C, § 1, subds. (e)(1)–(4); see also *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 926 [stating that a phrase " 'should be accorded the same meaning' " in different parts of a law], quoting *Miranda v. National Emergency Services, Inc.* (1995) 35 Cal.App.4th 894, 905.) And because that governmental activity or asset is the "rationale underlying" the corresponding charge (*Jacks, supra,* 3 Cal.5th at p. 269), the phrase "imposed for" means "imposed because of" (Webster's New World College Dict. (5th ed. 2014) p. 564, col. 2 [defining "for" as "because of; as a result of"]).[9]

To prove that an ostensible franchise fee fits within the fourth exception, then, a city must prove the fee is actually "imposed for" the use of city property. But when the evidence reveals that the fee exceeds any reasonable estimate of the franchise value, "the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval." (*Jacks, supra,* 3 Cal.5th at p. 269.) The charge is not "imposed for" the utility's use of city property but rather "for generating revenue independent of the purpose of the fees." (*Ibid.*)

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[9] Zolly's reply brief before the Court of Appeal defined "for" as "in exchange as equivalent of." But that meaning does not make sense for the third exception because a company does not exchange a regulatory fee for being subjected to regulation; rather, the company's activities requiring regulation justify imposing the fee on them rather than taxpayers. (*Jacks, supra,* 3 Cal.5th at p. 261.)

Oakland contends, however, that the fourth exception's burden of proof and text do not limit franchise fees. (OB 24–34.) And Oakland cites *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435 (*Bay Area Toll*), review granted Oct. 14, 2020, No. S263835 as "a blueprint for the correct analysis here." (OB 27, fn. omitted.) Yet in construing an exception analogous to the fourth exception here, *Bay Area Toll* did not sufficiently account for the exception's context.

Bay Area Toll held that state-imposed toll increases were not taxes within the meaning article XIII A, § 3, subd. (b) because they fit within that subdivision's fourth exception for "[a] charge imposed for entrance to or use of state property … ." (*Bay Area Toll, supra,* 51 Cal.App.5th at pp. 459–461 & fn. 18.) That subdivision, which was also enacted via Proposition 26, places limits on the state's taxing authority which are analogous to the limits placed on cities by article XIII C, § 1, subd. (e) (except that article XIII A omits the sixth and seventh exceptions of article XIII C). (*Id.* at p. 461, fn. 18.) *Bay Area Toll* disagreed with the Court of Appeal opinion here, which had held that a city has the burden to prove that a franchise fee was " ' "no more than necessary to cover the reasonable costs of the governmental activity." ' " (*Ibid.*, quoting *Zolly, supra,* 47 Cal.App.5th at p. 87.) According to *Bay Area Toll*, that burden of proof applies only to the first three exceptions—which expressly limit their respective charges to reasonable costs—but not the fourth exception. (*Id.* at pp. 459–461 & fn. 18.)

The ratepayers here agree with *Bay Area Toll* and Oakland that the reasonable-cost burden of proof applies only to the first three exceptions.[10] That burden of proof makes sense only when an exception involves a government's activity that costs something. And unlike the charges described in the first three exceptions, a franchise fee is paid for use "of a government *asset* rather than compensation for a cost."

[10] The ratepayers' Court of Appeal reply brief took this same position.

(*Jacks, supra,* 3 Cal.5th at p. 268.) To be sure, *San Buenaventura* held that a charge can be a nontax under article XIII C only if it satisfies both the reasonable-cost and reasonable-allocation burdens of proof. (*San Buenaventura, supra,* 3 Cal.5th at p. 1214.) But because both parties in *San Buenaventura* agreed that the charge there was for a government privilege or benefit as described in the first exception to article XIII C, section 1, subdivision (e), this court did not have the occasion to consider whether those burdens of proof also applied to the fourth exception. (See *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11 [observing that " 'cases are not authority for propositions not considered' "], quoting *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039.) And while the Court of Appeal here held that it was ambiguous whether the reasonable-cost burden of proof applied here (*Zolly, supra,* 47 Cal.App.5th at p. 87), there is clearly no government cost associated with a franchise fee that could make that burden applicable.[11]

Rather, as explained above, the fourth exception's limit comes from a city's burden to prove that a charge is actually "imposed for" the use of city property. *Bay Area Toll* also ruled, however, that the phrase "imposed for" does not limit a covered charge's amount. (*Bay Area Toll, supra,* 51 Cal.App.5th at pp. 460–461.) But the court's reasons do not support that conclusion.

Bay Area Toll first reasoned that the word "for" refers to the "action of the state, not the use to which revenues will be put[.]" (*Id.* at p. 460.) It is true that the revenue derived from a charge under the fourth exception "is available for whatever purposes the government chooses[.]" (*Jacks, supra,* 3 Cal.5th at p. 268.) But that does not mean a

[11] Because the ratepayers agree with Oakland that the reasonable-cost burden of proof does not apply to the fourth exception, this brief does not address Oakland's arguments contesting the Court of Appeal's contrary conclusion. (See OB 25–33.)

city can choose an unlimited *amount* for the franchise fee. (See *id.* at p. 269.)

Bay Area Toll also reasoned that, unlike the first three exceptions, there is no "self-defining reference point for determining the reasonable cost of allowing entry onto or use of state-owned property … ." (*Bay Area Toll, supra,* 51 Cal.App.5th at p. 461.) But as explained above, a reasonable-cost inquiry does not apply to the fourth exception. Instead, a charge under the fourth exception is limited by its underlying rationale (i.e., the use, entry, rental, or sale of city property). And in the context of franchise fees, that limit is the value of the property interest acquired by the utility—the franchise. (*Jacks, supra,* 3 Cal.5th at p. 269.) Even though "determining the value of a franchise may present difficulties" not encountered under the first three exceptions, that limit is still needed to ensure the franchise-fee amount is justified.[12] (*Id.* at pp. 269–270.) Likely because the case does not involve franchise fees, *Bay Area Toll* did not discuss *Jacks* or how it informs the interpretation of the fourth exception (other than to cite *Jacks* inside a quote from *Zolly*). (*Bay Area Toll, supra,* at p. 461, fn. 18.)

Finally, *Bay Area Toll* contrasted the text of the first three exceptions to infer a different voter intent behind the fourth exception. According to the court, whereas "the first three exceptions expressly limit the amount of the charge[,] the last two do not." (*Bay Area Toll, supra,* 51 Cal.App.5th at p. 460.) To be sure, each of article XIII C's first three exceptions limits the specified charge's amount to the "reasonable costs" incurred by the city in providing the associated governmental activity. (Cal. Const., art. XIII C, § 1, subd. (e)(1)–(3).) If the word "reasonable" were omitted in these first three exceptions, a city could opt to incur *unreasonable* costs in providing the

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[12] This court does not need to reach how the fourth exception limits other charges within its scope. (See *Jacks, supra,* 3 Cal.5th at p. 270, fn. 11 [leaving the issue of how to value franchise rights to "expert opinion and subsequent case law"].)

governmental activity (e.g., overstaffing the relevant department) and still be fully reimbursed without seeking voter approval. After all, the charge would still be "imposed for" the governmental activity and nothing else. Yet that scenario would conflict with the intent behind the anti-tax initiatives to control city spending. (See *California Cannabis, supra,* 3 Cal.5th at p. 941.)

But there is no need for the fourth exception to specify that a franchise fee is limited to the "reasonable" franchise value. Whereas the actual costs associated with the first three exceptions are dictated by *cities themselves* (in choosing the relevant "personnel and materials"), the franchise value associated with the fourth exception is dictated largely by "*market forces*" outside cities' control. (*Jacks, supra,* 3 Cal.5th at p. 269, italics added.) In contrast to the first three exceptions, then, there is no risk that the fee limit associated with the fourth exception could be increased by cities' profligacy. The drafters of Proposition 26 were " 'not required to use the same language to accomplish the same ends.' " (*Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 671 (*Alatriste*), quoting *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 783.)

The textual similarities and differences among article XIII C's first four exceptions track *Jacks'* discussion of the corresponding charges. All four of the fees (the three *Sinclair Paint* fees plus franchise fees) involve a reasonable relationship between the fee and its rationale. (*Jacks, supra,* 3 Cal.5th at p. 269.) This similarity explains why all four exceptions use the phrase "imposed for" to connect a charge with its corresponding rationale. (Cal. Const., art. XIII C, § 1, subd. (e)(1)–(4).) But in contrast to the three *Sinclair Paint* fees, franchise fees are not reimbursements for city costs. (*Jacks, supra,* at p. 268.) This difference explains why the fourth exception did not need to explicitly specify a "reasonable" limit to provide a meaningful safeguard against city spending and revenue-generation.

Alatriste illustrates how the "entire context" of a provision can show that subdivisions use different language to effectuate the same legislative intent. (*Alatriste, supra,* 183 Cal.App.4th at p. 670.) The court there compared two subdivisions of Business and Professions Code section 7031, which is part of the Contractor's State License Law and seeks to deter licensing-requirement violations. (*Id.* at pp. 664–666.) Section 7031's subdivision (a) acts as a "shield" by providing a complete defense to an unlicensed contractor's claim for compensation. (*Id.* at p. 664–665.) Subdivision (b) acts as a "sword" by providing a client with a claim to recover compensation paid to an unlicensed contractor. (*Id.* at p. 666.) The *Alatriste* defendant contractor appealed from a judgment reimbursing plaintiff under subdivision (b) for all compensation paid to defendant—including compensation for work done after the contractor became licensed. (*Id.* at pp. 663, 670.)

In arguing that subdivision (b) does not apply to compensation for post-license work, defendant contrasted that subdivision's text with subdivision (a). (*Alatriste, supra,* 183 Cal.App.4th at p. 670.) Subdivision (a) provides a defense where a contractor's claim does not allege "that he or she was a 'duly licensed contractor *at all times during the performance of that act or contract*,' whereas the Legislature did not use this 'at all times' phrase in section 7031(b)." (*Ibid.*, quoting Bus. & Prof. Code, § 7031, subd. (a).) But the court explained that subdivision (a) included the "at all times" phrase "to clarify the pleading and proof requirement for a contractor on an affirmative claim … ." (*Ibid.*) By contrast, "there was no need for the Legislature [under subdivision (b)] to require the plaintiff to allege when the contractor was unlicensed or that the contractor was unlicensed 'at all times.' " (*Ibid.*) Rather, subdivision (b)'s text allowing a plaintiff to recover " '*all* compensation paid to the unlicensed contractor for performance of *any* act or contract' was sufficient to reflect the legislative intent to permit full reimbursement regardless of a contractor's subsequent license status." (*Id.* at pp. 670–671, quoting Bus. & Prof. Code, § 7031,

subd. (b).) Thus, "the fact that the Legislature used different language in the two subdivisions does not mean the Legislature intended a different result." (*Id.* at p. 670.)

Just like the different subdivisions in *Alatriste*, the different exceptions to the definition of "tax" under article XIII C use different language to effectuate the same enactor intent. Indeed, as explained above, article XIII C's last three exceptions do not need to contain *any* express limits because they are already limited by background constitutional principles. Regardless of how an exception's limit is expressed, though, it furthers Proposition 26's tax-relief and tax-approval aims by not permitting cities to inflate permissible charges with impermissible taxes.

2. Even if the fourth exception's plain meaning in isolation clearly covered a franchise fee regardless of amount, the surrounding context would make the exception ambiguous.

As explained above, the fourth exception's phrase "imposed for" can be read to impose a franchise-fee limit or not. But even if the fourth exception's text in isolation clearly covered franchise fees regardless of amount, the exception's context would still create ambiguity.

In *Valencia*, this court held that Proposition 47 read holistically made a seemingly clear provision ambiguous. (*Valencia, supra,* 3 Cal.5th at p. 360.) The initiative allows certain offenders to petition for resentencing, but the judge has discretion not to resentence an otherwise eligible petitioner if they " 'would pose an unreasonable risk of danger to public safety.' " (*Ibid.*, quoting Pen. Code, § 1170.18, subd. (b).) The initiative defined that unreasonable-risk phrase "narrowly" and provided that the narrow definition "is effective *'[a]s used throughout this code*.' " (*Ibid.*, italics added, quoting Pen. Code, § 1170.18, subd. (c).) Accordingly, since another provision within the Penal Code (§ 1170.126, subd. (f)) used that same unreasonable-risk phrase, the plain meaning of "[a]s used throughout this code" read in

isolation would dictate that the narrow definition of the unreasonable-risk phrase applied to that second usage as well. (*Id.* at p. 362.) But other aspects of Proposition 47—its "primary focus[,]" other statutory language, the relevant subdivision's location within its section, and the initiative's uncodified sections expressing its intent—suggested that the narrow definition did *not* apply to that second usage. (*Id.* at pp. 360–362.) And "these two opposing interpretations render section 1170.18, subdivision (c) ambiguous." (*Id.* at p. 362.)

Valencia was not an anomaly. The opinion discussed three prior cases where a seemingly clear provision was made ambiguous by the provision's context. (*Valencia, supra,* 3 Cal.5th at pp. 358–360, discussing *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818–819; *Kennedy Wholesale, supra,* 53 Cal.3d at p. 249 & *People v. Hazelton* (1996) 14 Cal.4th 101, 105–106.)

Just like Proposition 47 as a whole shed new light on the subdivision at issue in *Valencia*, Proposition 26 as a whole sheds new light on the fourth exception at issue here. As explained above in Part II.D.1., Proposition 26's history, its uncodified statement of intent, its other limited exceptions to its definition of "tax," the fourth exception's location amid those other exceptions, and the applicable burden of proof all suggest that the fourth exception limits franchise-fee amounts. Thus, to understand what the voters intended in enacting the fourth exception, this court should "examine the materials that were before the voters." (*Valencia, supra,* 3 Cal.5th at p. 364.) And, as explained below, those materials confirm that the fourth exception does in fact limit franchise-fee amounts.

E. *Proposition 26's ballot materials show that voters wanted to keep Proposition 218's franchise-fee limit intact.*

According to its ballot materials, Proposition 26 was needed to reinforce the existing constitutional limits on governments' taxing authority. (Voter Information Guide, *supra,* text of Prop. 26, § 1, subd. (f), p. 114; see also *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7

Cal.5th 133, 151 [noting that " 'statements of purpose in a statute's preamble can be illuminating,' particularly if a statute is ambiguous"], quoting *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103.) Those existing limits had a "loophole": they did not define the distinction between taxes and fees. (Voter Information Guide, *supra,* argument in favor of Prop. 26, p. 60.) And governments, by imposing taxes but calling them "fees," had exploited that loophole to avoid getting voter approval. (*Ibid.*; see also *id.*, text of Prop. 26, § 1, subd. (e), p. 114.) Proposition 26, by defining taxes and fees according to their substance, would close that loophole and stop governments' mislabeling. (Voter Information Guide, *supra*, text of Prop. 26, § 1, subd. (f); *id.*, argument in favor of Prop. 26, p. 60.)

Proposition 26's drafters believed that this mislabeling was pervasive. The argument in favor of Proposition 26 emphasized that governments already hid taxes in a variety of contexts: "State and local politicians are using a loophole to impose Hidden Taxes on *many products and services* by calling them 'fees' instead of taxes." (Voter Information Guide, *supra*, argument in favor of Prop. 26, p. 60, italics added.) And, without Proposition 26, cities' creativity could grow: "Here are a *few examples* of things [politicians] could apply Hidden Taxes to unless we stop them: Food, Cell Phones, Emergency Services, Gas, *Electricity*, Toys, Insurance, Entertainment, *Water*, Beverages." (*Ibid.*, italics added and formatting altered.) Because governments could conceivably hide taxes in any number of ostensible fees, Proposition 26 would root out hidden taxes wherever they are hiding. (See *ibid.*)

And the part of a franchise fee that exceeds the franchise value is a hidden tax. (*Jacks, supra,* 3 Cal.5th at p. 269.) On the surface, a city appears to impose the entire franchise-fee amount in exchange for granting a utility the right to use city property. (See *ibid.*) But because that amount exceeds what a utility which is seeking to negotiate the lowest possible fee would pay, it implies that the government padded the fee to make extra revenue from taxpayers without having to get

their approval. (See *id.* at pp. 269–270.) That is precisely the type of mislabeling that Proposition 26's drafters intended to stop. Indeed, the Argument in Favor's warning about hidden taxes imposed on "Electricity" and "Gas" applies to excessive franchise fees. (Voter Information Guide, *supra*, argument in favor of Prop. 26, p. 60.) Accordingly, when voters passed Proposition 26, they intended to prevent franchise fees (and all other types of fees) from being Trojan Horses for new taxes.

But Proposition 26 did not need to create a new franchise-fee limit because one already existed. Under article XIII C's original version, a charge was a permissible franchise fee only to the extent that its amount was reasonably related to the franchise value. (*Jacks, supra,* 3 Cal.5th at p. 269.) So Proposition 26 reinforced that existing limit by providing that an ostensible franchise fee is a nontax only if it is "imposed for" the use of city property (and not independent revenue generation). (See *supra* Part II.D.1.)

Oakland claims that the ballot materials were "silent regarding franchise fees" and thus did not affect article XIII C's treatment of them. (OB 38; see also OB 35–39.) According to Oakland, "Proposition 26 focuses on improper regulatory fees[.]" (OB 35.) But, as explained above, Proposition 26's drafters were concerned about taxes hiding in many ostensible fees. And the materials discussed regulatory fees merely as an illustrative example. (See Voter Information Guide, *supra*, analysis of Prop. 26 by Legis. Analyst, pp. 57–58; *id.* at p. 114, text of Prop. 26, § 1, subd. (e); *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105, fn. 8 [noting that legislative history indicating one concern to be addressed by legislation did not demarcate the law's scope].)

Oakland's view of the ballot materials also undermines its overall argument. For article XIII C's amended version to categorically exempt franchise fees, as Oakland argues, Proposition 26 would have had to *remove* the original's version franchise-fee limit. (See *supra* Part II.D.1.) So, if Proposition 26 *did not affect* article XIII C's

treatment of franchise fees as Oakland also argues, then the article's amended version cannot categorically exempt franchise fees. Instead, Proposition 26 kept the preexisting, franchise-fee limit intact.

Oakland also relies on a report prepared by two employees of the Legislative Analyst's Office—which was published four years *after* Proposition 26 was enacted. (OB 39–40.) Unlike the Legislative Analyst's analysis within Proposition 26's ballot materials, voters obviously could not have relied on a report that did not yet exist. Thus, it does not help ascertain voter intent. (See *People v. Castro* (1985) 38 Cal.3d 301, 312 [stating that opinions, authored by people "who were not drafters of the proposed initiative[,]" and which were "not distributed to the electorate by way of the voter's pamphlet" do not help "in determining the intent of the electorate"].)

In any event, the report provides no context or analysis for its conclusion that certain charges are "categorically exempt" from article XIII C's definition of "tax." (See City of Oakland's Feb. 20, 2020 motion in the Court of Appeal for judicial notice, p. 16.) The report, for instance, does not mention that fines, property-development charges, and property assessments are limited by background constitutional principles. (See *ibid.*)

And the report conflicts with the Legislative Analyst's analysis that *was* presented in Proposition 26's ballot materials. That analysis explained that Proposition 26's expanded definition of "tax" would convert some fees into taxes and leave other fees unaffected. (Voter Information Guide, *supra*, analysis of Prop. 26 by Legis. Analyst, p. 58.) But the analysis did not contemplate that the initiative would convert some *taxes into fees*—such as the excessive portion of a franchise fee. (See *ibid.*; *Valencia, supra,* 3 Cal.5th at pp. 365–366 [citing the Legislative Analyst's silence about an initiative's possible impact on existing law as evidence the voters did not intend that impact].)

Finally, Oakland asserts that limiting a franchise fee to its franchise value would hamper cities' ability to "fund essential public

services and programs." (OB 44, fn. 10; see also *Ramirez v. City of Gardena* (2018) 5 Cal.5th 995, 1001 [stating that, when interpreting an ambiguous statute, a court may consider public policy].) But article XIII C does not bar cities from raising taxes; it merely bars them from doing so without voter approval. And when voters are asked, they frequently approve new local taxes. (City of Oakland's Feb. 20, 2020 motion in the Court of Appeal for judicial notice, p. 13 [indicating that voters in most California counties approve over 50 percent of proposed local taxes, with Alameda County approving over 70 percent].) Moreover, the argument against Proposition 26 warned the initiative would "harm local public safety and health, by requiring expensive litigation and endless elections in order for local government to provide basic services." (Voter Information Guide, *supra*, argument against Prop. 26, p. 61.) Thus, Oakland is re-raising a public-policy concern that voters considered and rejected.

As the Court of Appeal here ruled, the Proposition 26's ballot materials strongly support an intent to limit franchise-fee amounts. (*Zolly, supra,* 47 Cal.App.5th at pp. 87–88.)

F. *Oakland imposed the ostensible franchise fees because, under its charter-city authority, it established them by contract and ordinance.*

Like any charge a city establishes under its governmental authority, Oakland imposed the franchise fees here. Under article XIII C, section 2, subdivision (b), a city cannot impose a general tax until it is approved by a majority vote of the electorate. And "impose" in that context means what it ordinarily does: to establish, create, or enact. (*California Cannabis, supra,* 3 Cal.5th at p. 944.) That same definition applies to article XIII C's subdivision at issue here (art. XIII C, § 1, subd. (e)), which defines the term "tax" for purposes of section 2. (See *Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 459 [stating that "when a word is used

repeatedly in the Constitution, it is given the same meaning throughout unless the context clearly requires otherwise"].)

Here, Oakland established the ostensible franchise fees by executing the two franchise agreements and then enacting those charges into law via ordinances. (2 JA 323–332, 341–353.) Because Oakland "imposed" those charges within the meaning of article XIII C, section 1, subdivision (e), those charges are taxes unless they fit into an exception.

In contending that it did not "impose" those charges, Oakland improperly adds a coercion requirement to the word's definition. Oakland asserts that, because utilities *choose* to pay franchise fees, those fees are not "imposed." (OB 45–49.) Oakland cites various cases for the truism that a franchise fee is the contract consideration a utility provides in exchange for a franchise.[13] Oakland then contrasts that voluntary transaction with the phrase " 'to impose[,]' " which means " 'to establish by *authority or force*, as in "to impose a tax." ' " (OB 47, italics added, quoting *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770.) Yet cities like Oakland *do* establish franchise fees "by authority"—their authority under this state's laws. (*Jacks, supra,* 3 Cal.5th at pp. 264–265.) Indeed, Oakland's ordinances granting the franchises state that "[t]he California Integrated Waste Management Act of 1989 and Oakland City Charter Article X and Oakland Municipal Code Chapter 8.28 also *authorize* local governments to enter into exclusive franchises to provide Garbage handling services for the health, safety and wellbeing of its citizen (California Public

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[13] The cited cases are *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1944) Cal.2d 272, 283; *Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670; *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363; *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1171; and *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949.

Resources Code Section 40059)" and that Oakland was exercising that authority. (2 JA 323, 328, italics added.)

Oakland then quotes *Sinclair Paint* for the proposition that " '[m]ost taxes are compulsory rather than *imposed* in response to a voluntary decision to develop or to seek other government benefits.' " (OB 48, italics added, alteration in original, quoting *Sinclair Paint, supra,* 15 Cal.4th at p. 874.) But this quote shows that a city can "impose" a charge that is *not* compulsory—as illustrated by the use of the phrase "imposed for" in the first four exceptions to article XIII C, section 1, subd. (e). (See *supra* Part II.D.1.)

In addition, Oakland asserts that *Jacks* "implicitly" supports the theory that the term "imposed" requires coercion. (OB 48–49.) Oakland notes that the surcharge in *Jacks* was "imposed" on ratepayers because they, not the utility, had the legal duty to pay it. (See OB 49– 51.) By contrast, Oakland reasons, the franchise fees here are not "imposed" because the utilities assumed the legal duty to pay them. (OB 50–52.) But Oakland merely rehashes its distinction between franchise fees directly imposed on ratepayers versus those indirectly imposed on ratepayers that *Jacks* expressly rejected. (See *supra* Part II.C.) It does not matter whether the ratepayers technically have the legal obligation to pay a franchise fee "[b]ecause a publicly regulated utility is a conduit through which government charges are *ultimately imposed* on ratepayers[.]" (*Jacks, supra,* 3 Cal.5th at p. 269, italics added; see also *Humphreville v. City of Los Angeles* (Dec. 3, 2020, No. B299132) ___ Cal.App.5th ___ [2020 WL 7065315, at *4] [stating that the purpose behind the Constitution's restrictions on taxation, to stop cities from extracting more money from taxpayers, is implicated when "the city is using the utility as a proxy" to impose a franchise fee on ratepayers].) Again, Oakland is echoing Justice Chin's solo dissent in *Jacks*. (Compare OB 51 ["Those authorities show that a fee or tax is imposed only on the party that bears the *legal* incidence (*i.e.,* obligation) of the fee or tax …"], with *Jacks, supra,* at p. 293 (dis. opn. of Chin, J.) ["I

focus my analysis, as our precedent directs, on the legal incidence of the Recovery Portion" rather than applying the majority's reasonable-relationship test]; see also *Mahon v. City of San Diego* (Nov. 20, 2020, No. D074877) ___ Cal.App.5th ___ [2020 WL 6817061, at *16, fn. 37] [stating that Justice Chin's focus on the legal incidence of a franchise fee was the "central thesis" of his *Jacks* dissent].)

Oakland also rehashes its argument that *Jacks* supports its legal-incidence distinction where the opinion notes that the utility did not have the legal incidence to pay the surcharge. (OB 48; see also *supra* Part II.C.) But as explained above, *Jacks* held that a franchise fee's relationship to the franchise value—not its legal incidence—dictates its validity. (*Jacks, supra,* 3 Cal.5th at p. 271.)

And in any event, the ratepayers *are* coerced to pay the franchise fees. They need their tenants' garbage to be collected and, to do so, they must pay their tenants' garbage bills. (Oakland Muni. Code, § 8.28.100 [requiring an owner to ensure that solid waste is properly disposed].) And those bills include payment for franchise fees, regardless if those fees are segregated in a line item or integrated into higher rates. (*Jacks, supra,* 3 Cal.5th at p. 269, fn. 10.) The fact that the ratepayers could theoretically decline to pay the franchise fees by applying annually to self-haul waste (and paying an annual fee for that privilege) is irrelevant. (See OB 53; 2 JA 441 [Oakland Muni. Code, § 8.28.115.].) Article XIII C does not force residents into choosing between paying a hidden tax or bearing the enormous burden and cost of creating and maintaining their own waste-collection service. Nothing in *Jacks*, for instance, required residents to use the utility instead of generating their own electricity via solar panels. (See *Jacks, supra,* 3 Cal.5th at p. 256 [providing that the utility collected the surcharge from "its customers"].)

III. Because the ratepayers allege that the franchise fees are not reasonably related to the corresponding franchise values, the trial court erred in sustaining the demurrer as to that claim.

The second amended complaint here alleges repeatedly that Oakland's franchise fees bear no reasonable relationship to the franchises' values:

> 46. Neither of the franchise fees bears a reasonable relationship to the value received from the government and they are not based on the value of the franchises conveyed in order to come within the rationale for their imposition without approval of the voters. Oakland did not complete a value analysis of the government property interest conveyed and, to the extent it did, the franchise fee bears no reasonable relation based on that value.
>
> …
>
> 52. Neither the [garbage-and-compostables-collection] nor the [recycling] franchise fees reasonably reflect the value of those franchises because they are set at a level so high that the franchises rely on the power of Oakland to compel a captive audience … to pay whatever rates Oakland mandates. …

(2 JA 284:10–286:6.)

The pleading also alleges various supporting facts, including:

- the RFP process was not competitive, transparent, or thorough (2 JA 278:25–281:14);
- the city council's RFP proposal requirements diminished the values of the franchises (2 JA 278:21–24, 286:2–4);
- Oakland suddenly redesignated $3.24 million of WMAC's franchise fee as an AB 939 fee, but if part of the AB 939 fee is invalidated, that same amount becomes part of WMAC's franchise fee again (2 JA 286:14–16).

In addition, the grand jury's final report concluded that WMAC's franchise fee was disproportionate compared to franchise fees paid in surrounding cities. (2 JA 404.)

Because "the [second] amended complaint … adequately allege[s] the basis for a claim that the [franchise fees] bear[] no reasonable relationship to the value of the franchise[s], … the trial court erred in" sustaining the demurrer. (*Jacks, supra,* 3 Cal.5th at p. 273.)

CONCLUSION

Oakland's interpretation of Proposition 26 would mean that, instead of preventing hidden taxes, the initiative encouraged them. The initiative's context shows otherwise. Because the trial court embraced Oakland's mistaken interpretation in sustaining the demurrer, this court should affirm the Court of Appeal's opinion reversing that portion of the trial court's order.

Respectfully submitted,
Katz Appellate Law PC

Dated: December 21, 2020

By /s/
Paul Katz
Attorney for Appellants

APPENDIX

Article XIII C, section 1, subdivision (e) of the California Constitution states in its entirety:

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

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided 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 providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

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

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

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

CERTIFICATE OF WORD COUNT

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California.

Respectfully submitted,

Dated: December 21, 2020 /s/

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STATE OF CALIFORNIA
Supreme Court of California

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