S225589

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

CITY OF SANTA BARBARA,
Defendant and Respondent.

REPLY 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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INTRODUCTION

Plaintiffs and Appellants Rolland Jacks and Rove Enterprises, Inc. (collectively, "Jacks") offer little to dispute Defendant and Respondent City of Santa Barbara's ("City") Opening Brief. Jacks mistakes the facts and the record, cites a factual stipulation to prove a point of law, and gives legal consequence to a decision of the Public Utilities Commission (PUC) it did not intend and which exceeds its power. He offers distinctions which cannot explain the facts of this case much less the range of cases for which this Court makes precedent; he offers no rationale that can make a tax of the 1 percent surcharge that does not also make a tax of the historic 1 percent franchise fee which he disclaims intent to attack.

Thus, this Court may comfortably reverse the Court of Appeal and affirm the trial court judgment because there is no meaningful distinction between the City's historic 1 percent franchise fee and the additional 1 percent franchise fee in issue here. Our law has long recognized franchise fees are compensation for use of public property and therefore not taxes — a distinction affirmed by Proposition 26 in 2010.

I. JACKS MISTAKES THE FACTS AND THE RECORD

A. JACKS DOES NOT ENGAGE THE PUC DECISION

In its role as regulator of the billing practices of investor-owned utilities, the California Public Utilities Commission (PUC)

requires its own approval before a utility may collect from its customers a tax or fee levied by a local government exceeding the average of that levied by other local governments. Its Decision 89-05-063 ("Decision") is intended to properly allocate among utility customers above-average taxes and fees set by some, but not all, local governments in a utility's service area (2JA7:439) and disclaims authority or intent to distinguish taxes from fees. (2JA7:436–437 ["Any issue relating to [local authority to levy taxes or fees] is a matter for the Superior Court, not this Commission."]; 2JA7:442 at ¶ 9). Jacks cannot dispute these points.

Indeed, Jacks mentions the Decision only in passing footnotes (Answer Brief (Ans.), pp. 30, fn. 9; 35, fn. 12; 41, fn. 15) and neglects to mention it distinguishes franchise fees from taxes (2JA7:423 [utility users' taxes], 425 [franchise fees], 426 [business license fees], 429 [special taxes], 430 [property taxes]) and expressly acknowledges the power of chartered cities like Santa Barbara to charge greater franchise fees than may counties and general law cities. (2JA7:425–426 ["the amount paid charter cities [for franchise fees] can differ" from amounts set by statute for general law cities and counties because charter cities "are permitted to negotiate franchise fees or taxes in excess of the above statutory formulas"].) Accordingly, the City and Southern California Edison (SCE) agreed to treat the 1 percent surcharge in issue here ("the surcharge") differently than Santa Barbara's historic 1 percent franchise fee ("the

initial fee") due to the PUC's regulation of SCE's charges to its customers, not because of Santa Barbara's legislative intent. Jacks' contrary claim (Ans. at p. 41 & fn. 15) is simply wrong.

B. SCE Pays the Surcharge as Compensation for Use of City Rights of Way

Jacks misrepresents the franchise agreement's treatment of the surcharge, suggesting it is not bargained compensation for the City's electricity franchise. To do so, he quotes all of section 4 of the franchise agreement, which states that the initial fee is consideration for SCE's use of City streets, but quotes only part of section 5 to obscure that it uses the same language as to the surcharge. (Ans. at pp. 34–35, quoting 2JA7:406.) The Opening Brief demonstrates that the initial fee and the surcharge are both negotiated compensation for SCE's franchise and SCE bears the legal incidence of each. (Opening Brief (OB) at pp. 40–41.)

Jacks observes that the initial fee and the surcharge produce different amounts of revenue to the City. (Ans. at p. 43, citing 2JA6:334.) This is peculiar. However, the record does not disclose why this is so and Ordinance 5135 requires the two charges in identical terms — "1 percent of the Gross Annual Receipts" SCE earns in the City. (2JA7:406.) The legislative language is the same; so, too, the legal character. It is simply not the case that "SCE did not agree to pay a 2% Franchise fee payment," as Jacks contends. (Ans. at p. 42.)

Jacks also fails to address paragraph E of section 6 of the franchise agreement, which allows the City to transform the 30-year franchise agreement into a year-to-year contract should SCE not pay the surcharge. (Ans. at p. 36; see 2JA7:407.) He similarly omits that the primary purpose of the franchise agreement is to compensate the City for SCE's use of its rights of way. (Ans. at p. 34; see 2JA7:404 at § 2.) By his silence, he concedes that *Sinclair Paint*'s "primary purpose" test would interpret the surcharge as other than a tax. Indeed, Jacks offers a definition of "rent" (Ans. at p. 34, & fn. 11) that easily encompasses SCE's payment for the right to use City property to deliver electricity.

Jacks asserts that, if SCE owed the surcharge as it owes the initial fee, the franchise provisions for the two would be similar. (Ans. at pp. 41–42.) Sections 4 and 5 of the franchise agreement **are** substantially similar — each requires a fee of "1% of the Gross Annual Receipts of Grantee" "as compensation for the use of the streets in the City." (Cf. 2JA7:405–406 at § 4 with § 5 (intro para.) & subd. B.) To the extent they differ, sections 4 and 5 reflect the PUC Decision distinguishing average franchise fees from those of chartered cities which exceed that average. (2JA7:425–426; see also Ans. at p. 49 [arguing SCE would not agree to surcharge without compliance with PUC policy to allow pass-through to its customers].)

SCE negotiated for the required PUC approval and compliance with its requirement that SCE list the surcharge as a separate line item on customers' bills. Had the City awarded a franchise to another utility which served only the City, there would be no need for the surcharge — and thus no basis to conclude it is a tax. The City would simply charge a 2 percent franchise fee. (2JA7:439 [advice letters and segregated billing required only if levies "rise to a total level significantly exceeding the average level of the total of those imposed by the other local governmental entities within the utility's service area"].) Such transitory things as the current state of the utility market and PUC's policies allocating SCE's expenses among its shareholders, all its rate-payers, and a city's rate-payers cannot limit the scope of a chartered city's constitutional power to negotiate and charge a franchise fee.

Jacks' unsupported speculation that SCE refused to pay a 2 percent franchise fee because it would "automatically" be paid by its customers is simply wrong. (Ans. at pp. 48–49.) The parties deferred seeking PUC approval because of turmoil in electric markets, not because the economic incidence of the surcharge is on SCE's customers. (2JA7:450) Moreover, the PUC Decision applies to any franchise fee greater than 1 percent, regardless of how structured, because such fees necessarily exceed the average of those in a utility's service area, as counties and general law cities outnumber

charter cities and are limited by statute to franchise fees of 1 percent. (OB at pp. 13–14.)

Also unpersuasive are Jacks' claims that Proposition 218 forbids contracts which place burdens on non-parties (Ans. at p. 3) and that it "eliminated local government authority ... to enact financial burdens upon citizens." (Ans. at p. 17.) He overlooks such common legislation as minimum wage laws, rent control and minimum price requirements reflected in cases like *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 (ordinance obliging retailers to charge $0.10 for paper bags did not impose a "tax" under Prop. 26). Nor does he account for this Court's decisions in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Ass'n*) (fee on landlords to fund housing code enforcement not a property related fee under Proposition 218) or *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 425 (*Richmond*) (same as to water connection fee). Plainly Proposition 218 limits local governments' power to impose **some** fees, but not all. Jacks provides no aid to this Court in distinguishing those governed by Proposition 218 from those which are not.

Thus, the surcharge results from a voluntary agreement and is intended to compensate the City of SCE's use of its rights of way.

C. SCE's Customers Bear the Economic Incidence, and SCE the Legal Incidence, of Both the Initial Fee and the Surcharge

Jacks errs to claim the franchise ordinance "place[s] the financial obligation only on utility users." (Ans. at p. 42.) As demonstrated above, that ordinance requires SCE, as consideration for the City's franchise, "pay to the City" both the initial fee and the surcharge. (2JA7:406 at § 5.) If it does not, it risks forfeiture of the franchise under its section 14. (2JA7:410–411.)

Jacks also mistakenly speculates that SCE pays the initial fee from its profits. (Ans. at pp. 26–27 [citing only 3JA18:676–681, the entirety of the second stipulated facts].) In fact, the PUC Decision makes clear that fee is borne by all SCE customers, within and without the City, because it is near the average of such fees set by all the jurisdictions in which SCE does business. (2JA7:438–439.) SCE passes both the initial fee and the surcharge on to its customers.

Jacks also argues electric customers receive no benefit in exchange for bearing the economic incidence of the surcharge, because it is SCE that may use City streets. (Ans. at p. 23 & fn. 6.) However, if we are to look past the franchise agreement and SCE to electric customers for purposes of burden, why not for benefit? SCE customers receive power by virtue of SCE's franchised use of City rights of way. Were those rights of way unavailable to SCE, it could not serve power to its Santa Barbara customers. Thus, Jacks relies on

economic incidence selectively — looking to costs, but not to benefits. Surely, a serviceable standard for application of Proposition 218 will have more intellectual consistency than this.

II. THE PARTIES DID NOT STIPULATE AS TO THE LEGAL CHARACTER OF THE FRANCHISE FEES

Jacks selectively quotes the stipulated facts to argue the City has conceded factually what is to be determined here legally. (E.g., Ans. at pp. 1, 2 & fn. 2, 3 & fn. 3, 13, 15.) Jacks omits to report that he stipulated that the surcharge is part of SCE's franchise fee payment and that the PUC has no power to distinguish taxes from fees:

- Answer Brief page 11 omits this sentence of stipulated fact 9 — "SCE would seek CPUC consent to include **the additional 1% franchise fee** on the billings to its customers within the City of Santa Barbara". (2JA345, emphasis added.)
- Answer Brief page 12 entirely omits stipulated fact 15, which quotes the Decision and states the PUC "has no jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers". (2JA347.)
- Answer Brief page 13 entirely omits stipulated fact 18, which states that the effect of the City's letter directing SCE to seek PUC approval was "to pursue the implementation of **the increase in the City's franchise compensation** from

1% to 2% of SCE's Gross Annual Receipts". (2JA348, emphasis added.)

More fundamentally, both sets of stipulated facts state "the parties are not entering into an agreement as to the legal determination and designation of [the surcharge]." (2JA7:345 at fn. 1; 3JA18:677 at fn. 1.) Thus, the parties did not, in fact, agree as to the legal consequences of Ordinance 5135 and the franchise agreement it embodies. They agreed that the imprecise language of their stipulations would not control its interpretation.

Nor **could** the parties stipulate to a legal issue. Parties may stipulate to such facts as the existence of Ordinance 5135 and the authenticity of a copy of it; they may not stipulate to its interpretation and legal effect. As Jacks' own authorities show, that is a legal question for the Court. (See Ans. at pp. 7–8 [citing *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70–71 ["It is a judicial function to interpret a contract or written document unless the interpretation turns upon the credibility of extrinsic evidence" citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865].) Moreover, Jacks concedes this Court reviews legal issues de novo — including the meaning of the franchise ordinance. (Ans. at pp. 7–8.)

III. THE SURCHARGE RESULTS FROM A VOLUNTARY CONTRACT AND IS THEREFORE NOT "IMPOSED" SO AS TO TRIGGER PROPOSITION 218

Jacks' effort to avoid a legal conclusion that Ordinance 5135 is a voluntary contract between the City and SCE cites only the First Amended Complaint in its entirety. (Ans. at pp. 42–43.) This is plainly insufficient. Law is not determined by pleadings; artful pleading may not evade the law. (E.g., *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22–23 ["The nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code[,]" quoting *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 733]; *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1373 ["plaintiffs may not avoid the strictures of defamation law by artfully pleading their defamation claims to sound in other areas of tort law," citation omitted].) This Court determines the legal effect of Ordinance 5135 from its terms, not from Jacks' complaint.

Jacks' own quote from *County of Tulare v. City of Dinuba* (Ans., p. 27) demonstrates that SCE accepted the duty to pay the surcharge when it accepted the benefit of the franchise and that the relationship between the City and SCE is voluntary, arising in contract. The franchise terms bear this out — if SCE does not pay the surcharge, it automatically loses the long-term nature of the franchise and the City can revoke it entirely. (2JA7:407 at § 6(E),

2JA7:410–411 at § 14.) Jacks' contrary claim (Ans. at p. 31) is supported only by citation to all of two sets of stipulated facts which, as demonstrated above, do not and cannot contradict Ordinance 5135.

Jacks would distinguish Ordinance 5135 as a purported regulation of SCE customers from the franchise agreement that ordinance approves. (Ans. at 36–37.) They are one and the same. Indeed, Jacks admits the franchise agreement was "adopted by Ordinance No. 5135". (Ans. at p. 26.) He elsewhere refers to Ordinance No. 5135 as "[t]he SCE-City contract". (Ans. at p. 31.)

Thus, Jacks has no persuasive reply to the Opening Brief's demonstration (at pp. 29–30) that SCE bears the legal incidence of the surcharge by voluntary agreement and the City "imposes" nothing that might trigger Proposition 218 here.

IV. JACKS OFFERS NO SERVICEABLE DISTINCTION OF TAXES AND FEES

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

The City does not argue that the distinction between the legal and economic incidences of a revenue measure arises from legislative intent. (See Ans. at p. 42.) Yet, Jacks tries to limit this logical distinction to those taxes which expressly allow taxpayers to pass their burdens on to others. (*Id.* at p. 43.) The City's authorities

demonstrate this distinction has meaning in broader circumstances. (OB at pp. 38–40.) Moreover, if the distinction were limited to cases in which the initial obligor of a fee is expressly permitted to pass it through to others, this is such a case. (2JA7:406–407 at § 6.)

Nor is this concept logically limited to taxes, although the Opening Brief cites tax cases. (Ans. at p. 44.) Other authorities apply it to fees. (See, e.g., *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, 462 [noting "[t]he focus is on markets, not taxpayers" when deciding Commerce Clause challenge to smog fee]; *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 377–378 [distinguishing "gratuities," property of employees, from "service charges," property of employers, though customers pay both]; cf. *Western Lithograph Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 162–163 [retailer sales taxes legally incident on retailer just as are gasoline taxes, citing *Standard Oil Co. v. Johnson* (1938) 10 Cal.2d 758].)

That the cases the Opening Brief cites involve taxes — and some taxes are in a context of regulation that require taxpayers to disclose what they pass through to customers — do not limit the distinction between legal and economic incidence to those contexts. Jacks cites no authority for his contrary claim. (Ans. at p. 43.) As the Opening Brief demonstrates, the distinction between legal and economic incidence is logical, not legislative. (OB at pp. 37–40.) It is not a "heretofore unknown" exception to the legal principles

distinguishing taxes from other revenue measures, as Jacks would have it. (Ans. at p. 42.)

Mere assertion this legal principle arises in tax cases is not proof it has no persuasive power elsewhere. As Justice Gilbert aptly put it: "The *Palsgraf* rule, for example, is not limited to train stations." (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666.)

B. JACKS STILL OFFERS NO WORKABLE TEST TO DISTINGUISH TAXES FROM FEES

1. Jacks' Critiques of the City's Arguments Fail

Jacks has no answer for the charges cited on pages 35 and 36 of the Opening Brief which would be taxes under his test. If the surcharge is a tax, then so, too, is any franchise fee; but consistent case law dating from the 19th Century and Proposition 26 hold otherwise. Jacks cannot and does not dispute that franchise fees have never been held to be taxes — decades after the PUC Decision first required utilities to separately list franchise fees and other charges on bills to customers in cities charging more than the average of such taxes and fees in a utility's service area.

Jacks' efforts to distinguish *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035 and the City's other cases (Ans. at pp. 44–45) misunderstand that legal incidence — determining by the usual tools of statutory construction who is legally bound to remit a tax or fee as opposed to who ultimately bears its economic burden in a given circumstance as a matter of fact — is a logical, predictable test

within the competence of courts to distinguish fees from taxes. He points to nothing in Proposition 218 that changes this standard or replaces it with an economic incidence test. Nothing in Proposition 218 changes earlier definitions of "tax." (See OB at pp. 26–28.)

Nor does the City's test make a fee of a utility users tax. (Ans. at p. 31.) Such taxes are legally incident on utility customers; utilities merely collect them. (E.g., *Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24, 29–30 [City power to tax utility customers includes power to compel special district to collect tax].)

2. Jacks' Reliance on Economic Incidence to Distinguish Taxes and Fees is Unpersuasive

The cases the Answer Brief cites on page 20 do not support Jack's favored economic incidence test. These are:

- *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 [regulatory fee is not a tax under "primary purpose" test];
- *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686 (*Bay Area Cellular*) [911 access fee a tax because those who pay are not those served];
- *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728 (*Evans*) [business improvement district assessment not a tax]; and

- *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586 [delinquent-utility-fee lien statutorily unauthorized, dicta discussing characteristics of service fees].

Nothing in these cases uses economic incidence as a standard to distinguish taxes from fees. Each distinguishes fees from taxes, never holding that whether profit-seeking business passes a fee on to customers makes it a tax, as Jacks would have it. Nor do these cases provide analysis that can distinguish the initial fee here from the surcharge, making only the latter a tax. Reliance on the "perspective of the electric customer" (Ans. at p. 30) is reliance on economic incidence and, as the Opening Brief demonstrates, this is not a serviceable test by which to distinguish taxes from fees.

Jacks offers a scattershot list of factors all stemming from economic incidence to argue the surcharge — but not the historic franchise fee — is a utility users tax. (Ans. at p. 33.) He offers no support for his implication that approval by ordinance — a common practice for cities and counties entering long-term franchise agreements and required by the City's Charter (2JA7:383 at § 1401) — distinguishes franchise fees from taxes or allows conflation of legal and economic incidence. (Ans. at pp 1., fn. 1, 33.) Nor does he dispute that the City enacted its earlier franchises by ordinance. (2JA7:387 [1959 franchise designated "Ordinance No. 2728"]; 2JA7:394 [1985 franchise designated "Ordinance No. 4312"].)

Adoption of an ordinance is simply the method by which a governing body approves an agreement, as, for example, the statutorily mandated means to approve development agreements. (Gov. Code, § 65867.5, subd. (a) ["A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum"].) It is well settled that a public entity's "award of a contract, and all of the acts leading up to the award, are legislative in character." (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303, citation omitted.)

Furthermore, revenue measures of all legal types are approved by ordinance. (E.g., *Bay Area Cellular, supra,* 162 Cal.App.4th at p. 690 [911 service fee found to be tax adopted by ordinance]; *Evans, supra,* 3 Cal.App.4th at pp. 731–732 [business improvement district assessment authorized by ordinance found not to be a tax]; *Apartment Ass'n, supra,* 24 Cal.4th at pp. 833–834 [housing code enforcement fee adopted by ordinance not a property related fee under Proposition 218].)

Finally, Jacks cannot dispute that the initial fee — which he makes clear he does not challenge (Ans. at p. 1) — was adopted by Ordinance 5135 just as was the surcharge he does challenge. (2JA7:405–406 at § 4.)

Jacks' argument that the surcharge is like a utility tax and unlike the initial fee because SCE risks fines and penalties if it does not collect the surcharge and taxes (Ans. at pp. 29–30) is also wrong.

SCE can lose its franchise for non-collection. (2JA7:410–411 at § 14.) Were SCE to operate without a franchise, it would risk misdemeanor prosecution under Section 1406 of the City Charter. (2JA7:384.) Thus, the fact that failure to collect a utility users tax leads to fines and penalties (Ans. at p. 30) is no basis to distinguish such taxes from either the initial fee or the surcharge. Again, Jacks proves too much.

Jacks also fails to distinguish the surcharge in arguing the initial fee does not reflect a contractual obligation of utility customers and is not imposed on those customers by ordinance. (Ans. at p. 27.) As Jacks repeatedly argues (*id.* at pp. 37, 39), there is no contract here between the City and SCE's utility customers, just as there is none under a utility users tax.

Jacks claims the surcharge is a utility users tax because SCE must collect and remit both. (Ans. at pp. 30–31) This claim, too, fails to distinguish the initial fee. Under the PUC Decision, SCE collects that from its customers, too. (2JA7:426.) That it collects the initial fee from all customers and the surcharge only from Santa Barbara customers arises from the PUC Decision, not the City's choices. As noted above, the PUC neither claims nor has power to change the legal character of franchise fees. (Cf. Ans. at p. 41 & fn. 15.)

Jacks cannot dispute the City's broad discretion to set franchise fees unlimited by the Broughton Act or Franchise Act of 1937 — this is settled law. (OB at pp. 25, 44–45.) Nor did Jacks appeal the trial court's decision that the City's charter displaces

these general laws under article XI, section 5 of our Constitution. He simply has no answer to the Opening Brief's argument from the PUC Decision and our Constitution — not to mention the parties' stipulated facts — that the PUC did not intend to assert authority to alter the legal character of the City's franchise fees and lacks power to do so. (OB at pp. 13–15.) Thus, he cannot persuade that compliance with the PUC Ruling makes the surcharge a tax under Proposition 218.

3. Jacks' New Four-Part Test Assumes What it Must Prove

Jacks attempts to respond to the Opening Brief's observation that he offered the trial court no sensible standard that can make the surcharge a tax without also making a tax of the initial fee. He offers for the first time on appeal a new, four-part test — unrooted in Proposition 218's text or case law — that assumes the conclusions he would reach. (Ans. at p. 19.) Jacks offers this test to identify a tax under Proposition 218:

- **(1) Identify the payer.** But he does not tell us whether "the payer" is one legally obligated to pay a tax, or one who actually does — i.e., he ignores the distinction between legal and economic incidence and merely assumes the two coincide when, as the Opening Brief demonstrates (at pp. 37–40) they often do not.

- **(2) Define the burden.** Again, Jacks assumes the relevant "burden" is economic burden, but provides no explanation why this Court should look to economic rather than legal burden and how it should account for cases in which market forces change that burden from time to time or place to place. (E.g., *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 783 ["despite the superficial normative appeal of allowing those who 'pay' for a tax to approve its imposition, it is often difficult to calculate the true economic incidence of any given tax"].)

- **(3) Identify the legal duty that compels payment.** Here Jacks assumes Ordinance 5135 compels electric customers to pay the surcharge and SCE to pay the initial fee. However, as demonstrated above, the Ordinance compels SCE to pay both on penalty of losing the franchise. Moreover, SCE's rates are compulsory on its customers under law cited in the Opening Brief that Jacks' Answer Brief does not address.

- **(4) Determine if the City complied with Proposition 218.** This, too, assumes the answer it seeks — no one argues Proposition 218 can be ignored as to revenue measures to which it applies. The challenge is to determine to what it applies.

Moreover, Jacks' four-part test cannot account for the outcomes of *Apartment Ass'n* and *Richmond*.

V. JACKS HAS NO ANSWER TO THE CITY'S PROPOSITION 26 ARGUMENT

Jacks does little to refute the City's reliance on Proposition 26's express exemption from its new definition of "tax" for fees for use of government property. (Cal. Const., art. XIII C, § 1, subd. (e)(4).) As Propositions 218 and 26 are in pari materia, and the latter amends the former, Proposition 26 is better understood to maintain earlier law on this point than to carve out a new exception just 14 years after Proposition 218 eliminated it. If it did, surely Proposition 26's text or legislative history would give some hint of that intent. Jacks identifies none and his Answer Brief barely mentions Proposition 26. (Ans. at pp. 45–46.) That silence is telling.

CONCLUSION

Jacks offers neither a persuasive critique of the City's arguments nor a useful analysis of how the surcharge here can be a tax while the initial fee described in substantially similar terms by the same ordinance is not. The City demonstrates that Proposition 218 maintains earlier law defining "tax" which distinguished franchise fees from taxes. Helpful, too, is Proposition 26's exception from its definition of "tax" for franchise fees and other fees for use of public

property. This is drawn from prior law rather than entirely new, thus reinforcing the City's reading of Proposition 218.

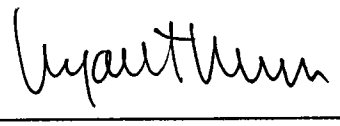
Further, Jacks' reliance on economic incidence is not a workable test of the taxes which require voter approval under Proposition 218. Such a test is both under- and over-inclusive, as the Opening Brief demonstrates, not least because it would make taxes of both the initial fee and the surcharge despite long-standing law to the contrary and Jacks' own professed desire to avoid challenge to the initial fee.

Thus, it is enough to decide this case to observe that SCE pays the surcharge to compensate the City for use of its rights of way and — for that reason — it is not a tax under earlier law, Proposition 218 or Proposition 26.

Accordingly, the City respectfully requests this Court reverse the Court of Appeal and affirm the trial court judgment for the City.

DATED: Sept. 21, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



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Respondent City of Santa Barbara

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.520(C)(1) & 8.204(C)(1)

Pursuant to California Rules of Court, rules 8.520(b), 8.520(c)(1), and 8.204(c)(1), the foregoing Reply Brief by Respondent and Appellant City of Santa Barbara contains 4,829 words (including footnotes, but excluding the tables and this Certificate) and is within the 8,400 word limit set by California Rules of Court, rule 8.520(c)(1). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: Sept. 21, 2015

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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 September 21, 2015, I served the within document(s):

REPLY 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 September 21, 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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