S262634

IN THE SUPREME COURT OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON,
Plaintiffs and Appellants,

v.

CITY OF OAKLAND,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A154986

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MCLANE, BEDNARSKI & LITT LLP AND RAPKIN & ASSOCIATES, LLP IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Amici curiae McLane, Bednarski & Litt LLP and Rapkin & Associates, LLP request leave to file the attached amici curiae brief in support of plaintiffs and appellants Robert Zolly, Ray McFadden, and Stephen Clayton. (See Cal. Rules of Court, rule 8.520(f).)

Amici are two Los Angeles-based law firms specializing in criminal defense, class actions, and civil rights. Amici's interest in this appeal stems from their representation of jail inmates and their families in litigation challenging nine counties' practice of collecting exorbitant charges for jail telephone calls. Among other claims, amici's clients asserted that the call charges were a tax not approved by voters in violation of article XIII C of the California Constitution.

Despite agreeing that the charges were "exorbitant" and unrelated "to the cost of the services provided," the Second District Court of Appeal ruled against the plaintiffs on standing grounds. (*County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 357–358, review denied Aug. 19, 2020, S262577 (*County Inmate*).) The court reasoned that because the plaintiffs did not *directly* pay the excessive charges, but instead paid them through extremely high telephone rates, the tax was not "imposed" on them and they thus had no right to sue.

After the published opinions in *County Inmate* and this case issued, the *County Inmate* plaintiffs and the City of Oakland separately petitioned for review, both raising the conflict between the two decisions. But while the Court granted review here, it denied review in *County Inmate* even as a grant and hold.

Despite the denial of review, *County Inmate* is directly at issue in this appeal. Seizing on *County Inmate*'s holding, Oakland now argues that because plaintiffs did not *directly* pay the alleged tax to Oakland, they lack standing to sue.

The proposed brief seeks to assist the Court in several ways. First, amici argue that Oakland's (and *County Inmate*'s) standing analysis misapplies California's framework for determining standing, which gives the right to sue to any real party in interest unless a statute gives that right to someone else. Second, highlighting *County Inmate* as an example of the consequences that would flow from Oakland's position, amici argue that while Proposition 26 confirms a true and reasonable franchise fee is not a tax, a charge does not *constitute* a franchise fee merely because it is labeled one. Third, the brief urges the Court to reject Oakland's narrow interpretation of the word "imposed" in Proposition 26, which not only conflicts with the initiative's text but would give cities and counties an easy path to circumvent voter consent requirements going forward.

Although the Second District's *County Inmate* decision is now final, it still can and should be disapproved. Doing so could open the way for jail inmates and their families throughout the state who struggle to pay exorbitant jail telephone charges to bring new actions and finally have their day in court.

No party or counsel for any party authored any part of the proposed brief. Nor has any person or entity contributed to fund the proposed brief's preparation or submission. (See Cal. Rules of Court, rule 8.200(c)(3).)

March 22, 2021

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AMICI CURIAE BRIEF

INTRODUCTION

Proposition 26 is the latest in a string of voter initiatives aimed at providing an important constitutional check on the ability of cities, counties, and the state to impose new taxes. Before authorities can impose any new tax, article XIII C of the California Constitution (article XIII C) requires them to first get approval from two-thirds of voters. But despite voters' best efforts, cities and counties continue to come up with new ways to avoid article XIII C's mandate by dressing up taxes as disguised fees. It was for that reason that voters passed Proposition 26—to prevent local governments from " 'circumvent[ing] [the California Constitution's] restrictions on increasing taxes by simply defining new or expanded taxes as "fees." ' " (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 263 (*Jacks*).)

The City of Oakland now seeks to hammer Proposition 26's taxpayer sword into a government shield. Flipping the initiative's purpose on its head, Oakland argues that so long as a fee is *labeled* a franchise fee and is in some way payment for use of government property, that is the end of the inquiry. No matter how excessive, Oakland argues, the franchise fee is categorically not a tax. What's more, Oakland contends, because ratepayers do not *directly* pay the fee (waste haulers do), ratepayers lack standing to challenge that fee in court.

Oakland's arguments should be rejected. To begin with, the city's argument that Proposition 26 exempts any charge labeled a "franchise fee" overlooks not only the initiative's purpose but its text. Although franchise fees have historically been treated as nontaxes, that is true only as long as the franchise fee is in fact a franchise fee. As this Court explained in *Jacks*, while "charges that constitute compensation for the use of government property" are not taxes, a charge does not "constitute" a franchise fee when the amount bears no "reasonable relationship" to the cost or value of the property interest. (*Jacks*, *supra*, 3 Cal.5th at p. 254.) Thus, when a city imposes an unreasonable franchise fee, "the excessive portion is a tax." (*Id.* at p. 269.)

Although *Jacks* applied pre-Proposition 26 law, that initiative did not depart from the historical understanding of fees described in *Jacks*. While reaffirming that a franchise fee is not a tax, Proposition 26 left intact the prior common-sense rule: when a bloated "franchise fee" exceeds any reasonable estimate of the franchise's value, the excessive portion does not constitute a fee "for entrance to or use of local government property." (Art. XIII C, § 1, subd. (e)(4).) To that extent, the franchise fee exemption does not apply and the excessive portion is a tax.

There is no merit either to Oakland's argument that article XIII C does not apply because franchise fees are contract consideration that cannot be "imposed." Putting aside that Proposition 26 refutes Oakland's reading on its face, this Court has explained that when a city negotiates an excessive franchise fee with a service provider, the provider is merely the "conduit through which government charges are ultimately *imposed* on ratepayers." (*Jacks*, *supra*, 3 Cal.5th at p. 269, emphasis added.) The same is true here.

Finally, Oakland's standing challenge—relying on *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354 (*County Inmate*), review denied Aug. 19, 2020, S262577—overlooks basic California law on standing to sue and should be rejected. Under Code of Civil Procedure section 367 (section 367), suit may be brought by any "real party in interest"—*unless* a statute provides otherwise. Although many tax statutes limit who can sue for a refund, Oakland does not argue that article XIII C does so. Plaintiffs thus have standing if they are real parties in interest—which, having suffered an economic injury in fact, they no doubt are.

County Inmate's contrary approach not only confuses California law on standing but would effectively shut the courthouse door to the only parties with any real interest in challenging the unlawful tax. To avoid voter approval, authorities would need only launder their taxes through willing third-party providers by "contracting with [them] to impose the desired tax on residents rather than enacting it directly." (*Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 88 (*Zolly*), review granted Aug. 12, 2020, S262634.)

That is a dangerous step, and not one required by anything in article XIII C. *County Inmate* should be disapproved, and the decision below should be affirmed.

ARGUMENT

I. Plaintiffs have standing to enforce article XIII C.

A. Plaintiffs have standing because they are real parties in interest and article XIII C does not deny them standing.

Oakland argues that plaintiffs lack standing to challenge its excessive fee under article XIII C. (OBOM 52–54.) This argument, if adopted, would mean *no one* would sue, thus allowing an alleged constitutional violation to evade judicial review. As we explain, that is not the law.[1]

Any analysis of standing begins with California's general standing law. By statute, lawsuits in California must be brought by the "real party in interest"—that is, a party with a beneficial interest in the case—*unless* a statute provides otherwise. (§ 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"].)

Applying that simple framework, courts determine standing by first asking whether any "particular statute specifies who may maintain an action." (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1302 (*IBM*).) If one does, the action must be brought " ' "in the name of the person to whom the right to sue is given by statute, regardless of any question as to the real party in interest." ' "

[1] We address standing first because it "is a 'threshold issue to be resolved before the matter can be reached on the merits' " (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 465)—and because it was the central question in *County Inmate*.

(*Ibid.*) But if no statute limits standing, section 367's general rule applies and the plaintiff need only be a real party in interest.

This Court has explained what it means to be a real party in interest: to have standing, a plaintiff must " 'ha[ve] a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.' " (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 599 (*Teal*).) In other words, unless standing to sue is "var[ied]" by statute, "the plaintiff must [simply] be able to allege injury." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175, citing § 367.) And, as plaintiffs note, economic harm is " 'a classic form of injury in fact.' " (ABOM 18, quoting *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.)

These principles apply in tax cases just as in any other. When a tax statute says who may sue for a refund or other relief, courts apply "the explicit statutory limits [the statute] imposes on taxpayer standing" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1251 (*Weatherford*); see, e.g., *IBM*, *supra*, 131 Cal.App.4th at p. 1302 [when a tax statute limits standing, the plaintiff must be " ' "the person to whom the right to sue is given by statute, regardless of any question as to the real party in interest" ' "].)

And many tax statutes do just that. (See, e.g., Rev. & Tax. Code, §§ 5140 [standing to seek refund of property tax limited to the "person who paid" the tax, and "[n]o other person may bring such an action"], 6937 [standing to seek refund of sales tax limited to "the person who paid the amount"]; Code Civ. Proc., § 526a [limiting taxpayer standing to seek injunction restraining agency's expenditure of funds]; see also *IBM*, *supra*, 131 Cal.App.4th at p. 1303 [listing more than a dozen tax statutes that limit taxpayer standing, and concluding that "Revenue and Taxation Code section 5140 provides a statutory exception to the general rules governing the capacity to sue"].) Those statutes are examples of section 367's *exception* at work. (See § 367 [real parties in interest have standing "*except* as otherwise provided by statute" (emphasis added)].)

But when a taxpayer sues under a law—such as article XIII C—that does *not* provide otherwise, courts apply the "general standing requirements under section 367." (*Weatherford*, *supra*, 2 Cal.5th at p. 1249.) In such cases, standing turns simply on whether the plaintiff has an "interest in the outcome of [the] lawsuit." (*Id.* at p. 1247.)

Andal v. City of Stockton (2006) 137 Cal.App.4th 86, 89 (*Andal*) is on point. There, cell phone companies joined with three customers to sue the City of Stockton, claiming the city violated article XIII C by imposing a fee on 911 calls without voter approval. Although the cell phone companies directly paid the fee, the city challenged only the *cell phone companies'* standing, not the customers'. (*Id.* at p. 90.) Because article XIII C does not limit who may sue, the court looked to whether the companies had shown " 'some injury, actual or threatened' "—and concluded they had because they faced penalties if they did not collect the tax. (*Id.* at p. 94.) It went without saying that the customers who ultimately bore the fee had a stake in the case.

Similarly, in *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349, 358 (*Sipple*), New Cingular joined with four customers to sue more than a hundred cities (and a few counties), claiming the cities had violated a nationwide moratorium by collecting an internet access tax. As in *Andal*, the cities did not challenge the customers' standing, acknowledging they were the "real parties in interest" because they ultimately bore the tax. (*Ibid.*) By contrast, New Cingular had suffered no injury, the cities argued, "because it merely passed through taxes paid by its customers." (*Ibid.*) Still, the court held that New Cingular had standing. (*Id.* at p. 361.) Applying section 367 (see *id.* at p. 358), the court ruled that New Cingular had a beneficial interest because it faced contractual liability to its customers if it did not sue (*id.* at p. 361).

Other tax cases follow the same framework. In case after case, courts have applied the beneficial-interest test to determine taxpayer standing when no statute limits who can sue. (See, e.g., *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1362–1366 (*TracFone*) [TracFone had standing to challenge user taxes on prepaid calling cards because it stood to recover any refund and was thus "beneficially interested"]; *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282, 285 [hotel owner had standing to challenge constitutionality of a lodging tax because he faced penalties and business losses and thus had a "sufficiency of interest to maintain the action"].)

Here, too, because article XIII C does not limit who may sue to enforce its requirements, the Court should apply section 367's general rule and determine whether plaintiffs are real parties in interest. Because plaintiffs alleged that they bore the brunt of Oakland's excessive franchise fee and stand to recover any refund, they have alleged an actual, economic injury in fact. That is enough. (*Teal*, *supra*, 60 Cal.4th at p. 599 [a party has a beneficial interest in the case when the party " 'has either suffered or is about to suffer an injury' "].)

B. *County Inmate* conflicts with California law on standing to sue and should be disapproved.

In all likelihood, Oakland would not be questioning plaintiffs' standing but for *County Inmate*. That decision held that even when no statute limits standing, plaintiffs who bear the brunt of a tax but do not pay the tax *directly* to the government lack standing to sue. To reach that conclusion, the court read property tax and sales tax cases as creating a "general rule" for all tax cases: "that a person may not sue to recover excess taxes paid by someone else." (*County Inmate*, *supra*, 48 Cal.App.5th at p. 360.) But as the discussion above shows, there is no such general rule. Although many tax statutes indeed limit taxpayer standing to the person who directly pays the tax (the legal taxpayer), article XIII C is not among them.

For support, *County Inmate* relied on *Grotenhuis v. County of Santa Barbara* (2010) 182 Cal.App.4th 1158. (See *County Inmate*, *supra*, 48 Cal.App.5th at p. 360.) But *Grotenhuis* does not support *County Inmate*'s general rule. Because the plaintiff there sought a property tax refund, the court applied Revenue and Taxation Code section 5140, which limits standing to the " 'person who paid the tax.' " (*Grotenhuis*, at p. 1164.) The court reasoned that *the statute* " 'could not be more clear: "No other person may bring such an action." ' " (*Ibid.*) Since the property taxes were paid by the plaintiff's company, not the plaintiff himself, he could "not sue to recover excess property taxes paid by someone else, . . . who pays the tax by design or mistake." (*Id.* at p. 1165.) Thus, far from implying some general rule for all tax cases, *Grotenhuis* simply applied a specific "*statutory limitation* on standing"—just as section 367 instructs. (*Id.* at p. 1164, emphasis added.)

County Inmate's reliance on sales tax cases fails for the same reason. Unlike taxes made invalid by article XIII C, retail sales taxes are governed by a "comprehensive" statutory scheme that defines the retailer as the taxpayer and allows only the retailer to file administrative claims and lawsuits to seek a refund. (*McClain v. Sav-On Drugs* (2019) 6 Cal.5th 951, 957.) As a result, a "customer who has paid excess sales tax reimbursement has no statutory remedy to obtain a refund from the [taxing authority] directly." (*Id.* at p. 955; accord, *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1114 ["it would not be consonant with the tax code . . . to . . . give consumers a cause of action against the [taxing authority] for the excess amounts [a] retailer [pays] in taxes"].) Those statutes are thus simply another "statutory exception to the general rules governing the capacity to sue." (*IBM*, *supra*, 131 Cal.App.4th at p. 1301.)

The same is also true of Code of Civil Procedure section 526a cases like *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472—the sole case, aside from *County Inmate*, that Oakland cites to support its standing argument. (See OBOM 52; RBOM 34–35 & fn. 10.) Because section 526a imposes "explicit statutory limits . . . on taxpayer standing," those limits supersede the "general standing requirements under section 367." (*Weatherford*, *supra*, 2 Cal.5th at pp. 1249, 1251; see *Jacks*, *supra*, 3 Cal.5th at p. 271 [taxpayer standing cases under section 526a "do not provide guidance" in cases under article XIII C].)

By insisting that a plaintiff point to something "in Proposition 26" to suggest "that taxes under Proposition 26 are to be treated differently from taxes under any other statute" (*County Inmate*, *supra*, 48 Cal.App.5th at p. 362), *County Inmate* turned section 367's framework on its head.[2] While more than a dozen tax refund statutes limit standing to " 'the person who paid' the tax or fee" (*IBM*, *supra*, 131 Cal.App.4th at p. 1304)—thereby triggering section 367's *exception*—article XIII C does not. If anything, the threshold for standing to enforce article XIII C should be generous because the provision must " 'be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' " (*Jacks*, *supra*, 3 Cal.5th at p. 267; see *Weatherford*, *supra*, 2 Cal.5th at p. 1251 [courts should not limit taxpayer standing in a way that would be

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[2] Although the *County Inmate* plaintiffs briefed section 367, the *County Inmate* opinion did not address it.

"incompatible with the recognized need to construe [a] statute broadly"].) Standing to enforce article XIII C thus turns on whether the plaintiff has a beneficial interest—which plaintiffs here do. (See, e.g., *Andal*, *supra*, 137 Cal.App.4th at p. 94 [standing to enforce article XIII C turns on whether the plaintiff was "adversely affected by the tax," whether or not the plaintiff was "the person taxed"].)[3]

If allowed to remain on the books, *County Inmate* would not only throw California law on standing into turmoil, but would allow cities and counties to avoid article XIII C's mandate with impunity. As *Jacks* and *County Inmate* bear out, when a city or county grants a monopoly to a private utility in exchange for a bloated "franchise fee," with eyes wide open that the utility can simply pass the fee on to its customers, no utility would risk disrupting its profitable arrangement by suing its benefactor. In such a case, the *only* parties with any real interest in challenging the fee as an invalid tax are the ratepayers who ultimately foot the bill.

This Court should reject Oakland's standing argument and disapprove *County Inmate*'s contrary holding.

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[3] *County Inmate* distinguished this case because plaintiffs here "sought declaratory and injunctive relief," not a refund. (*County Inmate*, *supra*, 48 Cal.App.5th at p. 362.) But the *County Inmate* plaintiffs also sought injunctive relief. And regardless, the type of relief does not change the standing analysis here. Indeed, the *Jacks* plaintiffs sued under article XIII C for both nonmonetary relief *and* a refund. (See *Jacks*, *supra*, 3 Cal.5th at p. 256; accord, *Sipple*, *supra*, 225 Cal.App.4th at p. 352 [plaintiffs sought refund]; *TracFone*, *supra*, 163 Cal.App.4th at p. 1361 [same].) If the *Jacks* plaintiffs had standing, so do plaintiffs here.

II. A "franchise fee" that exceeds the reasonable value or cost of using government property is a tax subject to article XIII C's voter approval requirement.

A. Whether a "fee" is a tax has always depended on whether the fee is reasonably related to the claimed nontax rationale.

Courts have been drawing the line between fees and taxes for a long time. As a general matter, taxes seek to raise revenue, whereas fees do not. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 (*Sinclair Paint*).) But courts have also recognized "that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts." (*Ibid.*)

In *Sinclair Paint*, this Court summarized three types of nontax fees recognized by prior cases: "(1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 874.) In doing so, the Court highlighted a common thread. To determine whether a charge is a fee or a tax, courts have always looked to whether the fee's amount reasonably corresponds to the government's non-revenue-raising rationale for imposing the fee. (See *Jacks*, *supra*, 3 Cal.5th at pp. 267–268 ["Each of the categories of valid fees we recognized in *Sinclair Paint* . . . was restricted to an amount that had a reasonable relationship to the benefit or cost on which it was based"].)

Thus, “special assessments were allowed ‘in amounts *reasonably reflecting* the value of the benefits conferred’ [citation], development fees were allowed ‘if the amount of the fees bears a *reasonable relation* to the developer’s probable costs to the community and benefits to the developer’ [citation], and regulatory fees were allowed where the fees reflected bear a ‘*reasonable relationship* to the social or economic “burdens” that [the payor’s] operations generated.’ ” (*Jacks*, *supra*, 3 Cal.5th at p. 268, emphasis added.) Put simply, “[t]o the extent fees exceed[ed] a reasonable amount in relation to the benefits or costs underlying their imposition, they [we]re [considered] taxes.” (*Ibid.*)

Of course, those three categories of nontaxes were not exclusive. Historically, franchise fees—amounts paid in exchange for property interests—have also never been considered taxes. (*Jacks*, *supra*, 3 Cal.5th at p. 262 [citing cases].) But the same caveat applies: when a purported franchise fee does not “reflect a reasonable estimate of the value of the franchise,” the excessive portion does not “constitute compensation for the value received” and is thus a tax. (*Id.* at p. 267.)

Oakland suggests that the reasonable-value test did not arise until *Jacks* created it in 2017. (RBOM 22.) But that is not the case. When *Jacks* held that a fee is not a true franchise fee if it exceeds any reasonable estimate of the franchise’s value, it was not fashioning a new limit for franchise fees. Rather, the Court was applying a well-settled framework to those fees. “Traditionally, courts have determined whether a local government charge is" a tax or a fee "by analyzing the use of the fee involved rather than relying on its label." (*Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 661.) *Jacks* did not create new law; it applied old law.

Thus, "[w]hile a true franchise fee is indisputably a nontax, *Jacks* instructs us to look beyond any label and determine whether such a fee 'reflect[s] a reasonable estimate of the value of the franchise.' " (*Zolly*, *supra*, 47 Cal.App.5th at p. 85.) If it does not, then "the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the excessive portion is a tax." (*Jacks*, *supra*, 3 Cal.5th at p. 269.)

B. Under Proposition 26, franchise fees are invalid at least to the extent they do not bear a reasonable relationship to franchise value.

Proposition 26 reaffirmed the longstanding distinction between taxes and fees. In line with what courts had held for decades, voters confirmed that a fee's *label* does not control. Indeed, the creative use of sham labels was the very reason voters adopted Proposition 26. (See Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (f), p. 114 [proposing the ballot measure because local governments had "*disguised* new taxes as *'fees'* in order to extract even more revenue from California taxpayers" (emphasis added)].)

Proposition 26 thus broadly defined " 'tax' " to mean "*any* levy, charge, or exaction of *any* kind"—unless the charge is for one of seven nontax purposes. (Art. XIII C, § 1, subd. (e)(1)–(7), emphasis added.) And the initiative shifted to local governments "the burden of proving by a preponderance of the *evidence* that a levy, charge, or other exaction is not a tax." (*Id.*, § 1, subd. (e), emphasis added.)

Thus, to prove a franchise fee is exempt, it is not enough to point to the fee's label. A city must *prove* by a preponderance of *evidence* that the fee is in fact "for the entrance to or use of local government property." (Art. XIII C, § 1, subd. (e)(4).) And, at a minimum, "[t]o constitute compensation *for* a property interest, . . . the amount of the charge must bear a reasonable relationship to the value of the property interest." (*Jacks*, *supra*, 3 Cal.5th at p. 254, emphasis added.) If it does not, then "the excessive portion of the fee does not come within [subdivision (e)(4)'s] rationale" and is a tax. (*Id.* at p. 269.)[4]

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[4] Proposition 26 also requires the government to prove a charge is no greater "than necessary to cover the reasonable costs of the governmental activity" and is fairly allocated in proportion to "the payor's burdens on, or benefits received from, the governmental activity." (Art. XIII C, § 1, subd. (e).) These requirements are not confined to the first three exemptions. After all, the second requirement (fair allocation) is not mentioned at all in the exemptions, yet it still applies. (See *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 ["To qualify as a nontax 'fee' under article XIII C, as amended, a charge must satisfy *both* . . . requirement[s]"])

Granted, these requirements would not make sense if applied to exactions that do not constitute a "fee" in the traditional sense—such as fines and penalties or proceeds from selling government property. For those exemptions, the more general reasonable-relation test applies. But this Court need not decide at this point whether purported franchise fees are limited by

Oakland argues that applying *Jacks* in this way renders the " 'reasonable costs' " limits in exemptions one through three superfluous. (See OBOM 26; see also *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, 459–460, review granted Oct. 14, 2020, S263835 ["The absence of 'reasonable cost' language in the latter exceptions, when it is present in the first three, strongly suggests the limitation does not apply where it is not stated"].) Not so.

By limiting exemptions one through three to the government's cost, Proposition 26 made it even harder than before to prove those fees are valid. Before, charges imposed for a specific benefit or service (exemptions one and two) were at times allowed if they reflected the benefit or service's reasonable *value*. (See, e.g., *Sinclair Paint*, *supra*, 15 Cal.4th at p. 874 ["The cases uniformly [allowed] *special assessments* on property or similar business charges" if the amount "reasonably reflect[ed] the value of the benefits conferred"].) And regulatory fees (exemption three) "were allowed where the fees reflected bear a 'reasonable relationship to the social or economic "burdens" that [the payor's] operations generated.' " (*Jacks*, *supra*, 3 Cal.5th at p. 268.) But after Proposition 26, those charges are now strictly limited to the government's reasonable "costs." (Art. XIII C, § 1, subd. (e)(1)–(3).)

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value or by cost. By either measure, plaintiffs have stated a claim under article XIII C and the trial court's demurrer ruling must be reversed. Oakland must make a factual showing that its claimed fee actually is a fee.

That voters tightened the limit on the first three exemptions in no way suggests they wanted to open a new loophole by lifting all limits on the other exemptions. Yet Oakland would do just that. For example, Oakland's logic would *strip away* preexisting limits on development fees. Before Proposition 26, those fees were allowed only "if the amount of the fees bears a reasonable relation to the developer's probable costs to the community and benefits to the developer." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 875.) Under Oakland's reading, however, because the sixth exemption for development fees contains no reasonableness qualifier, Proposition 26 did away with that longstanding limit without a hint in the ballot materials that voters intended to change the law in that way. (See OBOM 38–39 [citing authority that courts avoid interpreting voter initiatives to repeal prior law unless voters clearly expressed an intent to do so].)[5]

As even Oakland agrees, neither Proposition 26 nor its ballot materials reflect any intent to affect franchise fees. (OBOM 38.) Under Proposition 26, as before, franchise fees are not taxes. (Compare art. XIII C, § 1, subd. (e)(4) with *Jacks*, *supra*, 3

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5 Although *Sinclair Paint* did not address fines and penalties, the same basic principle applies to those charges as well. If a city started handing out $10,000 fines for minor parking infractions, then besides whatever Excessive Fines Clause argument might apply, one could argue that the fine is so out of proportion to the city's rationale for imposing the fine (deterring parking violations) that it is a disguised tax. If any exemption were indeed limitless, it would sooner or later "become a vehicle for generating revenue independent of the purpose of the fees." (*Jacks*, *supra*, 3 Cal.5th at p. 261.)

Cal.5th at p. 267 [noting that "[h]istorically, franchise fees have not been considered taxes," and "[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees"].) But, as before, a charge does not *constitute* a fee "for entrance to or use of local government property" (art. XIII C, § 1, subd. (e)(4)) when it bears no reasonable relation to the underlying property interest. As with any other charge, when a charge denominated a "franchise fee" exceeds the rationale for imposing the charge as a nontax, it is a tax.[6]

In sum, applying the reasonable-relation test to purported franchise fees harmonizes Proposition 26's text and, in stark contrast to Oakland's reading, "serves [the initiative's] purpose of limiting taxes." (*Jacks*, *supra*, 3 Cal.5th at p. 261.) This Court should affirm the decision below on that basis.

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[6] Even on its face, Oakland's "franchise fee" is not simply a "charge imposed for entrance to or use of local government property." (Art. XIII C, § 1, subd. (e)(4).) According to the City's own ordinance, the " 'franchise fee' " was " 'consideration' " for not just the right to " 'use the public street and/or other public places' " but also the rights " 'to transact business, provide services, . . . and . . . operate a public utility.' " (OBOM 15.) The latter are not property rights. If anything, that is a classic example of a "charge imposed for a . . . *privilege granted* directly to the payor that is not provided to those not charged"—which must be limited by Oakland's reasonable *cost*, not the value of the property. (Art. XIII C, § 1, subd. (e)(1), emphasis added.) Oakland should not be allowed to avoid article XIII C's reasonable-cost requirement by simply lumping all charges under the label "franchise fee."

C. *County Inmate* shows the abuse that would follow from holding that a fee labeled a franchise fee is never a tax.

Oakland argues that *Jacks*'s reasonable-relation limit for franchise fees "is not merely atextual: it is unnecessary." (RBOM 18.) According to the city, the fear "that franchise fees will rise to 'exorbitant' levels is speculation inconsistent with the real-world marketplace." (*Ibid.*)

Jacks disagreed. After holding that a franchise fee is a tax when the amount exceeds the rationale for imposing the fee, the Court warned: "If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees." (*Jacks*, *supra*, 3 Cal.5th at p. 269.) Given the recognized need for oversight over "local governments' attempts to produce revenue through charges imposed on public utilities," the Court explained, "this concern is more than merely speculative." (*Ibid.*)

And it is easy to see why. When a city grants a private utility a lucrative monopoly in exchange for a purported franchise fee, the utility will happily agree to "pay" a higher fee if necessary to outbid other companies and win the contract. Both parties understand that since the utility is free to pass any charge on to its customers, the fee is no skin off the utility's back.

County Inmate—a putative class action filed by county jail inmates and their families to challenge an " 'unconscionable practice by California counties' " (*County Inmate*, *supra*, 48 Cal.App.5th at p. 358 [quoting plaintiffs])—showcases this point. In exchange for granting telephone carriers the exclusive right to provide an inmate calling system in county jails, nine counties collect "exorbitant" site commissions.[7] (*Id.* at p. 357.) As a result of those commissions, inmates and their families must pay rates "far greater than those paid for ordinary telephone service." (*Id.* at p. 358.) In some counties, a 15-minute call can run more than $26. (Saavedra, *California commission to consider lowering phone rates for jail inmates* (Oct. 8, 2020) O.C. Register <https://bit.ly/2OIyKcw> [as of Mar. 16, 2021].)

These commissions bear no relation to the reasonable cost or value of making the telephone lines available, yet still end up being the single largest component affecting jail telephone rates. (See *County Inmate*, *supra*, 48 Cal.App.5th at p. 358 [noting that "in all cases" the site commission make up "more than 50 percent" of inmates' jail telephone rates].) In Los Angeles, for example, the county receives no less than *67.5 percent* of the carrier's total revenue. (*Ibid.*)

Because the contracts guarantee the counties the lion's share of call revenues, it would be infeasible for the carriers to absorb the site commissions and still make a profit. So the carriers pass the fees on to jail inmates and their families, placing a severe financial strain on a group "disproportionately composed of African-Americans and Latinos, as well as persons

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[7] The counties claim these commissions are franchise fees, but the *County Inmate* plaintiffs disagree. Not only do the commissions outstrip any reasonable estimate of the cost of making the telephone lines available by orders of magnitude, but they are often charged in straight proportion to the carriers' *revenue*—which would make no sense if the fees were payment for a property interest.

with mental illnesses or substance abuse problems." (*County Inmate*, *supra*, 48 Cal.App.5th at p. 359.)

As former Los Angeles County Supervisor Zev Yaroslavsky explained: "Everyone's making a lot of money at the expense of inmates' families . . . . [¶] They're in jail . . . . That doesn't give us the right to fleece them." (Lazarus, *Gouging L.A. County inmates with high phone fees* (Sept. 8, 2014) L.A. Times <https://lat.ms/30wm3nB> [as of Mar. 16, 2021], internal quotation marks omitted.) According to a former FCC commissioner, this system " 'has preyed on our most vulnerable for far too long' "; " '[f]amilies are being further torn apart and the cycle of poverty is being perpetuated.' " (Fung, *Calling a prison inmate can cost $54 a pop. The FCC thinks that's way too high* (Oct. 22, 2015) Wash. Post <https://wapo.st/3cjVMyC> [as of Mar. 16 2021].)[8]

In short, as *County Inmate* shows, the concern that unaccountable cities and counties could abuse the loophole Oakland seeks by collecting exorbitant fees from willing utilities is hardly "speculation." (RBOM 18.)

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[8] To its credit, California stopped collecting commissions at its state prisons more than a decade ago. (Mai-Duc, *FCC to consider limiting costs of prison phone calls* (Aug. 8, 2013) L.A. Times <https://lat.ms/2PAHFwT> [as of Mar. 16, 2021].) When it did, jail telephone rates plummeted. (*Ibid.*)

III. Excessive franchise fees required by local governments as part of an agreement are "imposed" by local governments.

Oakland contends that its franchise fees are not taxes because "they are not 'imposed' by the City of Oakland." (OBOM 45.) According to Oakland, "[t]he voluntary, contractual nature of franchise fees is inimical to the concept of an 'imposed' charge." (*Ibid.*)

To be sure, article XIII C defines " 'tax' " to mean any "levy, charge, or exaction of any kind *imposed* by a local government." (Art. XIII C, § 1, subd. (e), emphasis added.) But nothing in article XIII C suggests that a charge cannot be "imposed" as part of a voluntary transaction. As this Court has explained, "impose" simply means to establish, enact, or create. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 [noting that this definition aligns with both the "ordinary meaning of 'impose' " and the relevant ballot materials, which use " 'create,' 'establish,' and 'impose' interchangeably"].)

Indeed, Oakland's cramped view of the word "imposed" conflicts with Proposition 26's own text. In the very provision at issue here, voters used "imposed" to describe the government's act of requiring contract consideration for the purchase, rental, or lease of government property. (See art. XIII C, § 1, subd. (e)(4) [exempting charges "imposed for . . . the purchase, rental, or lease of local government property"].) Presumably, cities and counties aren't in the business of forcing anyone to buy, rent, or lease government property. Thus, Oakland's claim that "voluntary contract consideration . . . by definition cannot be 'imposed' " (OBOM 47) is wrong.

For support, Oakland relies on *Sinclair Paint*'s statement that " '[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges.' " (OBOM 48.) But *Sinclair Paint*'s use of "imposed" supports plaintiffs, not Oakland. Although *most* taxes might well be compulsory, *some* taxes *are* "imposed in response to a voluntary decision to develop or to seek other government benefits or privileges." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 874.) And that remains true under Proposition 26: when a local government requires a charge in exchange for providing a "specific benefit conferred or privilege granted," that charge is "imposed." (Art. XIII C, § 1, subd. (e)(1).)

In *Jacks*, this Court rejected the city's argument that the surcharge was not a tax "imposed on ratepayers," but a burden SCE "voluntarily assumed." (*Jacks*, *supra*, 3 Cal.5th at p. 270.) For one thing, SCE agreed to levy, collect, and deliver the surcharge to the city. (*Ibid.*) But even if SCE had not agreed to do so, the Court explained, it was enough that SCE was "allowed" to pass the surcharge on to its customers and the circumstances suggested the city knew SCE would likely do so. (*Id.* at pp. 270–271.) Looking to substance over form, the Court recognized that SCE acted as the mere "conduit through which government charges [we]re ultimately imposed on ratepayers." (*Id.* at p. 269.)

Oakland seeks to distinguish *Jacks* by arguing that the agreement there stated SCE would collect the surcharge from ratepayers. (OBOM 49–50.) But that should not be the test. As *Jacks* recognized, it is *irrelevant* "to the character or validity" of a charge whether it is baked into the rate or a line item on the bill. (*Jacks*, *supra*, 3 Cal.5th at p. 269, fn. 10.) Whether the intent to saddle ratepayers with an excessive franchise fee is spelled out in the agreement or allowed with a wink and a nod, it is still an excessive fee imposed—and collected—by the government. Were the Court to accept Oakland's reasoning, "any local government could avoid running afoul of article XIII C by merely contracting with a third party to impose the desired tax on residents rather than enacting it directly. This result would directly conflict with the purpose of Propositions 218 and 26." (*Zolly*, *supra*, 47 Cal.App.5th at p. 88.)

Take *County Inmate*, for example. There was no agreement or ordinance requiring the telephone carriers there to collect the charges from the inmates and their families. But even so, no one could doubt the carriers would do so. Because each county collected more than half the carriers' revenue, there was no way the carriers could absorb the cost and still make money. As a result, financially struggling inmates are forced to pay exorbitant rates to call their loved ones.

Invoking the distinction between legal and economic incidence, Oakland also argues that its franchise fee isn't a tax because it isn't directly imposed *on* ratepayers. (OBOM 49–52.) But questions of legal and economic incidence are irrelevant because, unlike some tax statutes, article XIII C does not confine standing to the legal taxpayer. (See *Jacks*, *supra*, 3 Cal.5th at

p. 271 [declining to base validity of franchise fee on legal vs. economic incidence].) Article XIII C requires only that Oakland impose the invalid fee—which it did—not that Oakland impose the fee directly on ratepayers. In short, the validity of "a charge that is nominally a franchise fee" does not turn on who pays it or how they pay it, but on whether the charge is *in fact* a reasonable charge for property rights. Under that test, plaintiffs have alleged a violation of article XIII C.

CONCLUSION

This Court should affirm the decision below and disapprove the Second District's contrary decision in *County Inmate*.

March 22, 2021

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Dated: March 22, 2021

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PROOF OF SERVICE

Zolly v. City of Oakland
Case No. S262634

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On March 22, 2021, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MCLANE, BEDNARSKI & LITT LLP AND RAPKIN & ASSOCIATES, LLP IN SUPPORT OF APPELLANTS** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 22, 2021, at Burbank, California.

Jill Gonzales

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