FILED WITH PERMISSION

Case No. S262634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

Plaintiffs-Appellants,

v.

CITY OF OAKLAND

Defendant-Respondent

REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

The franchise fees that Petitioner City of Oakland ("Oakland" or "the City") negotiated with its private sector waste-hauling and recycling franchisees are contract consideration, *not* taxes. (*See* Opening Brief ("OB") 20-54.) The franchise fees are categorically exempt from the definition of "tax" under California Constitution, article XIII C, section 1, subdivision (e) ("Article XIII C"), as amended by Proposition 26.[1] Analysis of the relevant constitutional provisions and the Proposition 26 ballot materials confirms that franchise fees are not limited by Article XIII C's voter approval requirements.

The Zolly Respondents' Answering Brief on the Merits ("AB") fails to rebut Oakland's showing that franchise fees are categorically exempt from the definition of "tax." Respondents rely instead on inapposite case law and Respondents' flawed interpretation of Article XIII C. They argue that franchise fees are not exempt under Article XIII C's fourth exemption ("Exemption 4") and are subject to constitutional voter approval requirements to the extent they exceed the "reasonable value" of the relevant franchise. For this proposition, Respondents rely exclusively on this Court's 2017 decision in *Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248 (*Jacks*). But *Jacks* explicitly declined to analyze the Article XIII C

[1] For the Court's ease of reference, a copy of Article XIII C, sections 1 and 2, is attached to this Reply Brief. (See Cal. R. Ct. 8.204(d).)

language relevant to this dispute and is further distinguished by its narrow facts. Respondents nonetheless try to import the *Jacks* "reasonable value" test into the post-Proposition 26 version of Article XIII C by arguing that voters must have intended to maintain *Jacks*' "reasonable value" limitation on franchise fees. That argument fails on its face: voters who passed Proposition 26 in 2010 cannot have intended to maintain a "reasonable value" test that this Court did not articulate until seven years later.

Respondents renounce the position they initially took in the Court of Appeal – and which the Court of Appeal adopted – seeking to extrapolate a "reasonable value" test from Article XIII C's "reasonable cost" and burden-shifting language. But their new position fares no better. Respondents still cannot overcome the fact that Exemption 4's plain text (applicable to franchise fees) includes *no* "reasonability" language – in direct contrast with the other exemptions that *expressly* limit the exempt portion of a charge to its "reasonable cost." Respondents' attempt to import into this section of the Constitution a "reasonable value" requirement, in the absence of any language to that effect, is illogical and contrary to long-established principles of statutory construction.

Respondents' strained interpretation is also contrary to voter intent. Proposition 26's ballot materials emphasize that the purpose of Proposition 26 was to limit excessive *regulatory* and similar fees. The ballot materials make no mention of franchise fees or other government property charges,

nor do they describe any supposed "reasonable value" limitation on such fees. Even if the plain language of Article XIII C were not enough, this is further evidence that voters did not intend to limit franchise fees or convert them into a "tax" requiring voter approval.

Finally, Respondents fail to rebut Oakland's arguments that its franchise fees were not "imposed" on ratepayers in the first instance – a threshold definitional requirement to be a "tax." Unlike the ratepayers in *Jacks*, ratepayers here bear no obligation whatsoever to pay the franchise fees to Oakland. That obligation is borne exclusively by the franchisees. The mere fact that the franchisees may consider those franchise fees as one of many cost factors in setting customer rates does not convert those fees into a "tax." Nor does it confer standing upon Respondents to challenge the franchise fees as allegedly improper taxes.

Oakland has established that the franchise fees at issue here are not taxes. Respondents' challenge to those fees therefore fails as a matter of law. The Court of Appeal's decision should be reversed.

FACTUAL DISCUSSION

Respondents' lengthy recitation of Oakland's RFP and negotiations process (AB 11-15) unintentionally supports Oakland's position.[2] This

[2] Respondents' factual background section discusses the contents of an Alameda County civil grand jury report that is not part of the record on appeal. (See AB 15-16; see also AB 11, 14, 48 (citing to the grand jury

recitation confirms that Oakland underwent "a lengthy and challenging bidding and negotiations process" before awarding the franchise. (See OB 14.) This process is one of the hallmarks of a traditional franchise arrangement and underscores that no "tax" was "imposed" on Oakland residents here. And by criticizing the City's elected officials' efforts to adhere to Oakland's policies (see AB 11), Respondents only highlight their myopic approach to Article XIII C and *Jacks*. The transaction at the heart of this case involves a contract, contract consideration, and ordinary franchise fees, not a tax.

Respondents argue that as owners of multi-family properties, they are impacted by high waste-hauling and recycling rates, which they allege are the result, in part, of franchise fees. (AB 14.) For the reasons described in Oakland's Opening Brief and below, those arguments are factually and legally unavailing.

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report in the Joint Appendix, 2 JA 394-406).) Both the Superior Court and the Court of Appeal denied Respondents' prior requests to take judicial notice of the grand jury report. (AB 15 fn. 2.) Nevertheless, Respondents have again moved this Court to take judicial notice of the grand jury report. (Respondents' Motion for Judicial Notice (December 21, 2020) No. S262634.) Oakland has filed an Opposition to Respondents' Motion for Judicial Notice and respectfully requests that the Court strike and disregard the references and citations to the grand jury report on pages 11, 14, 15, 16, and 48 of Respondents' Answering Brief. (Oakland's Opposition to Motion for Judicial Notice (February 18, 2021) No. S262634.)

LEGAL DISCUSSION

I. Article XIII C Categorically Exempts Franchise Fees from the Definition of "Tax"; Respondents' Arguments to the Contrary Are Unavailing and Conflict with the Plain Text

Oakland's Opening Brief established that franchise fees are categorically exempt from the definition of "tax" under Article XIII C, section 1, subdivision (e), paragraph (4) ("Exemption 4") and that franchise fees are not subject to a "reasonable value" test. Respondents nonetheless argue that the text is ambiguous – albeit in a wholly different manner than the *Zolly* appellate decision held – and that Proposition 26 evinces voter intent to limit franchise fees to an extratextual "reasonable value." Respondents' misguided arguments and strained interpretation cannot circumvent the plain language exempting franchise fees from the definition of "tax."

A. Respondents Concede that the *Zolly* Appellate Decision Improperly Conflated "Cost" with "Value" in Improperly Reading a "Reasonable Cost" Burden into Exemption 4.

The *Zolly* appellate decision, *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 89 (*Zolly*), held that a franchise fee may constitute a "tax" to the extent it exceeds the fee's "reasonable value." That conclusion rested on the court's finding that Exemption 4 is ambiguous because Article XIII C's burden-shifting language "is silent" regarding whether the government's burden to prove a charge does not exceed the "*reasonable costs* of the governmental activity" (emphasis added) "applies to all seven

exemptions, or only to the first three exemptions that explicitly include a reasonableness requirement."[3] (*Zolly*, at 86-87.) The Court of Appeal then conflated the concept of "cost" with "value" to read a "reasonable *value*" limitation into Exemption 4. (*Id.* at 89; OB 31-33.)

At the outset, Respondents jettison their position before the *Zolly* appellate court. Instead, they concede that "the reasonable-cost burden of proof applies only to the first three exceptions," a position contrary to that adopted in the *Zolly* appellate decision. (AB 34 & fn. 10; see OB 24-26.) Despite their prior conflicting position, Respondents now concede that because franchise fees are paid "for use 'of a government *asset* rather than compensation for a cost'" (AB 34-35 (quoting *Jacks*, 3 Cal. 5th at 268 (emphasis in original)), "there is clearly no government cost associated with a franchise fee that could make that burden applicable." (*Id.* at 35.)

This concession undermines any effort to rely on the *Zolly* appellate decision. That decision's finding that Proposition 26 is ambiguous rested *entirely* on its flawed determination that the burden-shifting provision's "reasonable cost" language extended to Exemption 4. (OB 24-26.)

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[3] Subdivision (e) provides that, as to the seven preceding exemptions, the 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.'" (*Zolly*, 47 Cal.App.5th at 86-87 (quoting Cal. Const., art. XIII C, § 1, subd. (e)); OB 24-26.)

Respondents thus concede that the principal basis for the appellate court's holding in their favor misinterpreted the language of Article XIII C and should be rejected.[4]

B. Article XIII C Is Unambiguous and Contains No "Reasonable Value" Limitation on Franchise Fee Amounts

As Oakland established, the plain language of Exemption 4 categorically exempts any charge "imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property," from the definition of "tax" and thus from the voter approval requirements of Article XIII C, section 2. (Cal. Const., art. XIII C, § 1, subd. (e), par. (4); OB 13-14, 21-33.) The clear omission of any "reasonable value" requirement from Exemption 4 stands in direct contrast to the first three exemptions in Article XIII C, which expressly limit the specified charges to the "reasonable costs" or "reasonable regulatory costs" of the respective service or activity to avoid classification as a "tax."[5] (Cal.

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[4] Because they agree with Oakland regarding the errors in the *Zolly* appellate decision, Respondents likewise do "not address Oakland's arguments contesting the Court of Appeal's contrary conclusion" and conflation of "cost" and "value." (AB 35 fn. 11.)

[5] Article XIII C, section 1, subdivision (e)'s first three exemptions provide that the following are not a "tax":

> (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.

Const., art XIII C, § 1, subd. (e), pars. (1)-(3); OB 22.) This contrasting language reflects voter intent to impose different requirements for each of the seven exemptions. (See *ibid.*; see also *Klein v. United States* (2010) 50 Cal.4th 68, 80 (quoting *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 73).)

Respondents concede that Exemption 4 "can be read in isolation to support Oakland's view," but try to circumvent the provision's plain text by arguing that "[i]t is ambiguous whether, in light of its text and context, article XIII C's current version limits franchise-fee amounts." (AB 27, 29.) Respondents offer two main arguments for this supposed ambiguity: (1) Exemption 4's use of the phrase "imposed for" makes it ambiguous "whether the exception limits franchise-fee amounts" (AB 28-39); and (2) the "surrounding context" makes the exception ambiguous (AB 39-40). Both arguments are wrong and fail to negate the categorical exemption dictated by the provision's plain language.

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(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.

(Emphasis added.)

1. The "Imposed For" Language Does Not Render Exemption 4 Ambiguous

Abandoning the counter-textual argument they proffered in the Court of Appeal (see *supra*, Discussion § I.A), Respondents now seek to read ambiguity and a "reasonable value" limitation into the phrase "imposed for," which leads to absurdities when considered in context of the provision as a whole. As to Exemption 4, Respondents argue the "imposed for" language requires Oakland to prove "that the charge is 'imposed for' the corresponding governmental activity or asset" to be exempt from the definition of "tax." (AB 33.)

The notion that voters intended the words "imposed for" to be a proxy for a "reasonability" requirement only in Exemption 4, when such a requirement was *expressly* stated in the three preceding exemptions, turns statutory interpretation on its head. "'[W]hen one part of a [constitutional provision] contains a term or provision, the omission of that term or provision from another part of the [constitutional provision] indicates the [voters] intended to convey a different meaning.'" (*Klein*, 50 Cal.4th at 80 (quoting *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 73).) Had voters wished to incorporate a "reasonability" requirement into Exemption 4, they could have done so explicitly, as in the first three exemptions. (*Id.* (that legislature "could have" but failed to use language similar to that in a separate section reflected different scope and meaning);

People v. Culbertson (1985) 171 Cal.App.3d 508, 515 (construing consecutive subdivisions bearing different language and finding that "[h]ad the Legislature intended a similar result in subdivision (c), they could have inserted a similar phrase in that subdivision").) Instead, they deliberately omitted such language in four of the seven exemptions – evidence of voter intent to "convey a different meaning."

In addition, Respondents argue that the phrase "imposed *for*" (emphasis added) serves to "connect a charge with its corresponding rationale" and ensure that the fee is imposed "*because of* the use of city property and not unrelated revenue generation." (AB 9 (emphasis in original).) The court in *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (*BATA*), correctly rejected this precise argument, holding that the word "for" refers to the "action of the state, not the use to which revenues will be put." (*BATA* (2020) 51 Cal.App.5th 435, 460, review granted Oct. 14, 2020, No. S263835; AB 35.) Thus, the charge is "'for' the state conferring a benefit or granting a privilege [Exemption 1]; providing a service or product [Exemption 2]; issuing a permit or performing an investigation [Exemption 3]; permitting access to or use of, or selling, renting or leasing [government] property [Exemption 4]." (*BATA*, 51 Cal.App.5th at 460.) Here, that means the "charge" (the franchise fee) is being exacted from the franchisee "for" Oakland's act of granting the franchisees the right to do business with Oakland, the right to operate a

public utility, and the right to use City property in connection with said utility.

Respondents try to support their interpretation in two ways. *First*, Respondents attempt to reconcile the express "reasonable cost" language in the first three exemptions with the absence of such language in Exemption 4. In doing so, they fail to explain why the "imposed for" language that they argue conveys a "reasonable value" limitation on Exemption 4 charges *also* appears in the first three exemptions. Because those exemptions already are *expressly* limited to their "reasonable cost," any supposed "reasonability" limitation in the phrase "imposed for" would be surplusage.

Respondents nonetheless argue that use of the words "reasonable cost" in only the first three exemptions was necessary in addition to "imposed for" because without it, "a city could opt to incur *unreasonable* costs in providing the governmental activity," yet be reimbursed in full because those charges still would be "imposed for" the governmental activity. (AB 36-37 (emphasis in original).) But this reasoning applies equally to franchise fees, which are imposed *for* – i.e., *because of* – the local government's granting of franchise property rights to the franchisee. The contractual exchange of property rights is the rationale for the franchise fee, and that rationale does not change depending on the amount of the fee or how the local government may use those proceeds. (See *BATA*, 51 Cal.App.5th at 460-61.)

In attempting to harmonize the first three exemptions with Exemption 4, Respondents tacitly admit there is another reason why franchise fees under Exemption 4 are not subject to an extratextual "reasonability" test: the *market*. In contrast to the government costs addressed in the first three exemptions that are "dictated by *cities themselves*," "the franchise value associated with the fourth exception is dictated largely by '*market forces*' *outside cities' control*." (AB 37 (emphases added and in original).) Respondents further admit "there is no risk that the fee limit associated with the fourth exception could be increased by cities' profligacy." (*Ibid.*)

Oakland agrees. Market realities limit franchise fees. Thus, an implied "reasonable value" test is not merely atextual: it is unnecessary. The correct reading, consistent with the plain text and the deliberate omission of any "reasonability" language from Exemption 4, is that municipalities bear only the burden of establishing that the fee is being paid as consideration for franchise rights. Respondents' warning that franchise fees will rise to "exorbitant" levels is speculation inconsistent with the real-world marketplace.[6]

[6] The factual record bears this out. Although Respondents contend that their interpretation is the only means to stop cities and counties from charging higher and higher taxes disguised as fees, the franchise fees at issue here were actually *lower* than the franchise fees under the previous contract. (OB 15; 1 JA 141 at § 6, 2 JA 326 at § 5, 2 JA 281 ¶¶ 34-35, 2 JA 284 ¶ 47.)

Second, Respondents argue that exemptions five through seven do not establish categorical exemptions but are implicitly "limited" by "background constitutional principles," which they aver makes Exemption 4 implicitly limited as well. (AB 31.) Because "the text of the last three exceptions [*sic*] do not include *express* limits" (emphasis added), Respondents must argue that they are limited by various "background constitutional principles" (e.g., the fines and penalties under the fifth exemption "must be proportional due to the excessive fines clauses of the state and federal Constitutions"; and the property development charges under the sixth exemption must be "roughly proportional to the projected impact of the proposed development"). (AB 31 (citing cases).) Again, Respondents propose importing language into the provision, contrary to principles of statutory construction. (*People v. Superior Court* (2010) 48 Cal.4th 564, 571 (*Pearson*) ("[courts] may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language"); *see also Klein*, 50 Cal. 4th at 80 (omission of similar language shows intent to convey different meanings).)

But even if these supposed "background constitutional principles" might apply in some contexts, they do *not* impose on municipalities the burden of proving anything more than what each exemption's text requires on its face. The *BATA* court correctly rejected this very argument as leading to absurdities, in the context of article XIII A's corresponding fifth

exemption for fines and penalties. (See *BATA*, 51 Cal.App.5th at 461 ("a reasonable costs limitation makes no sense with respect to … determination of fines and penalties for violations of law").)

The "imposed for" language does not make Exemption 4 ambiguous or constitute a latent "reasonable value" test.

2. The "Surrounding Context" Does Not Make Exemption 4 Ambiguous

Respondents next suggest that the "surrounding context," including "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," injects ambiguity into Exemption 4. (AB 39-40.) But none of these "contextual" factors introduces any ambiguity. The "context" of Proposition 26's history, scope, and purpose – as well as the plain text – show that voters understood and intended Exemption 4 to categorically exclude fees for the use, lease, or purchase of government property, such as franchise fees, from the definition of "tax."

C. Even If Exemption 4 Were Ambiguous, Evidence of Voter Intent Supports Oakland's Interpretation.

Even assuming, *arguendo*, that the *Zolly* appellate decision and Respondents are correct that Exemption 4 is ambiguous, Oakland has established that evidence of voter intent shows that franchise fees are not among the fees and charges Proposition 26 was intended to restrict and thus

are not "taxes." A complete analysis of the Proposition 26 ballot materials shows that the proposed amendments were principally aimed at *regulatory* fees and other specifically enumerated charges. (OB 34.)

Respondents counter that the ballot materials "show that voters wanted to keep Proposition 218's franchise-fee limit intact." (AB 40.) But Respondents fail to address Oakland's analysis and reference to contradictory ballot material language. (OB 34-40.) Instead, Respondents rely almost exclusively on broad statements of purpose that nowhere mention franchise fees, nor any intent that they be defined as a "tax" or otherwise limited to some undefined "reasonable value." Further, Respondents' "voter intent" arguments were correctly rejected by the *BATA* court in favor of the same plain language textual approach Oakland has set forth here.

1. Respondents' Arguments Regarding a Supposed Franchise-Fee Limit Under Proposition 218 and Voter Intent to Maintain It Are Based on a Flawed Premise and Misreading of *Jacks*

Respondents first contend that the Proposition 26 ballot materials show that voters intended to "keep Proposition 218's franchise-fee limit intact." (AB 40.) But this argument depends on a flawed premise – namely, that there *was* such a broadly applicable "franchise-fee limit" under Proposition 218. There was not. The pre-Proposition 26 version of Article XIII C contained *no* language indicating that franchise fees become a "tax"

if they are not limited to their "reasonable value." In fact, Propostion 218 ballot materials did not contain any reference to franchise fees at all. (See 2 JA 321 & 368-78.)

Instead, Respondents argue for a preexisting franchise-fee limit based entirely on this Court's 2017 decision in *Jacks*. (See AB 9 ("Under *Jacks*…article XIII C's original version limited a franchise fee to a reasonable estimate of the franchise value"); *id.* at 23-24, 36, 41-42 (citing *Jacks* as basis for purported franchise fee limit that "already existed" under "article XIII C's original version").) In their answer to Oakland's Petition for Review, Respondents similarly described this alleged limitation as the "franchise-fee test [this Court] *recently created* in *Jacks*" and referred to it repeatedly as "*Jacks'* franchise-fee test" or "*Jacks'* test." (Answer to Petition for Review (July 10, 2020) at 6-7 (emphasis added).)

It is factually impossible for voters to have intended, when they passed Proposition 26 in 2010, to maintain a limit on franchise fees purportedly established by this Court in *Jacks seven years later*. At the time voters passed Proposition 26, no court decision or other authority, including the Proposition 218 ballot materials themselves, had ever purported to impose a "reasonable value" limitation on franchise fees, which historically have been considered non-taxes and purely matters of contract. (See, e.g., OB 23-24, 45-47; *Jacks*, 3 Cal.5th at 262 ("[h]istorically, franchise fees have not been considered taxes"); 2 JA 368-78.) Simply put, voters cannot

have intended to "keep" a limitation that did not exist at the time the initiative was passed into law. (See *Robert L. v. Super. Ct.* (2003) 30 Cal.4th 894, 905 (courts typically look to "the materials that were before the voters").)

Respondents also incorrectly interpret *Jacks* and the reach of its pre-Proposition 26 holding. As the Opening Brief established, *Jacks* was predicated on a direct pass-through surcharge wholly absent here. (OB 42-44.) In *Jacks*, the City of Santa Barbara and the utility, Southern California Edison (SCE), agreed that the challenged 1% surcharge would be collected by SCE but paid *directly and solely by ratepayers*, and that SCE would have no legal obligation to pay any part of that fee to Santa Barbara. (*Id.* & at fn. 9 (under Santa Barbara ordinance, SCE's ratepayers were "obligated to pay the 1%" surcharge).) Those facts are the converse of the facts here. Whereas "SCE was not willing to assume the burden of paying the surcharge, and … both parties to the agreement understood that the charge would be collected from ratepayers" (*Jacks*, 3 Cal. 5th at 271), Oakland's franchisees *alone* assumed the contractual and legal obligation to pay the franchise fees at issue here. (See, e.g., 2 JA 487-8 (Superior Court held that the "contractual obligation to pay those fees rest[ed] directly upon the franchisees," who "remain responsible to pay the franchise fees to the City regardless of whether or not their customers utilize their waste collection and recycling services").)

Although Respondents (and the *Zolly* appellate decision) attempt to read *Jacks* broadly as applying to *all* franchise contracts and franchise fees, its holding must be considered in view of its specific factual context. (See, e.g., *Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1153 (holdings that speak "in broad terms" must be "informed and limited by the factual context presented") (citing *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790 fn. 11 ("It is axiomatic that an unnecessarily broad holding is 'informed and limited by the fact[s]' of the case in which it is articulated.") (citation omitted)).) The universal franchise fee limit Respondents advance does not follow from the narrow facts at issue in *Jacks* – even before one considers the effect of Proposition 26's franchise-fee exemption, which *Jacks* expressly declined to address. (See OB 41.)

2. Oakland's Interpretation Is Consistent with Proposition 26 Ballot Materials and Voter Intent

Oakland's interpretation of Proposition 26 is consistent with the measure's actual stated purpose and scope in the ballot materials. Respondents' contrary view misuses general statements of purpose to suggest that every individual provision must be interpreted to expand the definition of "tax." (AB 27-40.) These broader objectives do not elucidate the impact of the provision's language on franchise fees. (OB 34-40.) Nor do they show that Proposition 26 was meant to restrict franchise fees, which had never before been so restricted. (*Ibid*.) Although Proposition 26

was passed in part to expand the fees and charges that could be deemed a "tax" under California law, it *also* expressly *exempted* other categories of fees and charges from that expanded definition, thereby preserving their status as non-taxes. The plain text of Proposition 26 and the ballot initiative materials both make clear that franchise fees fall into that latter category.

The Proposition 26 ballot materials reflect the initiative's focus on curtailing state and local governments from disguising new taxes as *regulatory* fees. (OB 35; *Schmeer v. County of Los Angeles*, (2013) 213 Cal.App.4th 1310, 1326 (Proposition 26 was passed "in an effort to curb the perceived problem of a proliferation of *regulatory fees* imposed by the state") (emphasis added).) The voter guide explained that "the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns," including "user fees," "regulatory fees," and "charges imposed on property developers." (OB 38; See Voter Information Guide for 2010 General Election, available at <https://repository.uchastings.edu/ca_ballot_props/1335/>, Analysis by Leg. Analyst at 56-58 (highlighting "disagreements regarding regulatory fees" as a key driving factor for Proposition 26).)[7] The materials thus stressed the need to distinguish

[7] The Court of Appeal judicially noticed the Voter Information Guide. (See OB 18 & *Zolly*, 47 Cal.App.5th at 78 fn. 2; Oakland's Motion for Judicial Notice (Feb. 20, 2020) No. A154986.)

between regulatory fees and taxes but did *not* refer to franchise fees or franchise contracts at all, let alone as intended targets of Proposition 26.

Respondents do not dispute that the ballot materials do not mention franchise fees. (AB 40-44.) Nor do they identify any specific language that supposedly reflects voter intent to convert franchise fees into taxes. (*Ibid*.) Instead, Respondents argue that the absence of any language concerning franchise fees, or even government property more broadly, is irrelevant. (*Ibid*.) But the case Respondents cite to support this point, *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, is inapposite. *Ornelas* merely held that the specific legislative history considered there was inconclusive about the relevant statute's scope. (*Id.* at 1105 fn. 8.) It does not stand for Respondents' novel proposition that a ballot initiative's *silence* on a subject is irrelevant to ascertaining the measure's scope.

Instead, a ballot initiative's silence reflects "an *absence* of intent to affect that subject." (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197, fn. 19 (emphasis added; citations and quotations omitted); OB 38-39.) That principle dictates that franchise fees are *not* subject to Proposition 26's extended "tax" definition. Respondents fail to address this rule of construction.

Respondents' argument that Oakland's interpretation would open a "giant loophole" purportedly contrary to voter intent is wrong. That voters

intended to preserve certain categories of charges as non-taxes is manifested in Article XIII C, which includes the specific charges that would *not* be a "tax" as newly defined under Proposition 26. Franchise fees have always been considered a matter of contract negotiation and thus non-taxes. Accordingly, it is reasonable that voters intended to exempt these types of negotiations, thereby maintaining the government's ability to freely contract. Proposition 26 as a whole balances the expansion of the definition of "tax" with an express exemption of certain types of charges from that definition.

The *BATA* court correctly rejected the same arguments Respondents make here regarding apparent voter intent and the purported opening of "loopholes" in analyzing the provision of article XIII A that is parallel to the Exemption 4 at issue here. (See OB 40; *BATA*, 51 Cal.App.5th at 458 (rejecting arguments that trial court's ruling was a "perversion of Proposition 26" whose intent was to "clos[e] loopholes," not "open new ones" (internal quotations omitted).)

In addition to the ballot materials, Oakland also cited a report prepared by the Legislative Analyst's Office ("LAO Report") as further evidence that franchise fees are categorically exempt. (OB 39-40.) Respondents attempt to discount the LAO Report because it was published after Proposition 26's enactment. (AB 43.) But the LAO Report is part of the record here because it was judicially noticed by the Court of Appeal

(*Zolly*, 47 Cal.App.5th 73 at 78 fn. 2; Oakland's Motion for Judicial Notice (Feb. 20, 2020) No. A154986), and it may be relied upon to ascertain voter intent. (See, e.g., *People v. Montes* (2003) 31 Cal.4th 350, 357 & fn. 9 (taking judicial notice of Legislative Analyst's Office analysis prepared 13 years after enactment of the statute being construed to aid in interpreting ambiguous language).)

Finally, Respondents wrongly dismiss Oakland's arguments regarding the increased difficulties cities and counties will face in funding essential public services if the decision below is upheld as "re-raising a public-policy concern that voters considered and rejected." (AB 43-44.) Once again, Respondents are incorrect that voters *rejected* these public policy and practicability factors in passing Proposition 26. On the contrary, the voters *exempted* franchise fees and other transactions involving government property from the definition of "tax." In doing so, voters expressed their intent not to hinder local governments' ability to enter into needed contracts for essential city services and to negotiate appropriate franchise fees and other key terms.

Accordingly, even if Article XIII C were ambiguous (it is not), extrinsic evidence of voter intent demonstrates that franchise fees are categorically exempt from the definition of "tax."

II. Respondents Do Not Meaningfully Rebut That the *Zolly* Appellate Decision Incorrectly Extended *Jacks* Beyond Its Limited Holding

Even if Proposition 26's categorical franchise fee exemption did not dispose of this case, Oakland further established that the franchise fees at issue here nonetheless would not constitute "taxes" under *Jacks*. (OB 41-44.) As discussed above and in the Opening Brief, the *Zolly* appellate decision extended *Jacks* beyond its narrow factual context to reach the traditional negotiated franchise fees at issue here. In contrast to the *Jacks* facts, here, Oakland's franchisees alone bear the contractual obligation to pay the franchise fees regardless of whether they collect any part of that fee from ratepayers. Accordingly, Oakland's franchise fees stand on a materially different footing than the mandatory pass-through surcharge that ratepayers paid in *Jacks. Jacks*' inapposite facts cannot support the extratextual "reasonability" test Respondents propose.

III. Respondents Fail to Rebut Oakland's Showing That Franchise Fees Are Not a Tax Under Article XIII C Because They Are Not "Imposed"

Oakland also established that franchise fees are not taxes for a separate and independent reason: they are not "imposed" by Oakland.[8] (OB 45-54.) Respondents counter that Oakland's franchise fees *are* "imposed"

[8] To constitute a "tax," a fee or charge must be "imposed by a local government" in the first instance. (Cal. Const., art. XIII C, § 1, subd. (e) (defining "tax" as "any levy, charge, or exaction of any kind *imposed by a local government*, except the following…") (emphasis added).)

because they were "established … by contract and ordinance." (AB 44.) But because a franchise is a negotiated contract for valuable franchise rights, and a franchise fee is the market price franchisees voluntarily pay for those property rights, franchise fees are not "imposed" as that term is understood in the context of a "tax." (OB 45-49.)

Respondents contend that Oakland "improperly adds a coercion requirement to the word's definition," yet agree that the word "impose" means "to establish by *authority or force*." (AB 45 (emphasis in original); OB 47 (same definition).) Moreover, in many contexts, California law has recognized the fundamental distinction between a duty *voluntarily assumed* and an obligation *imposed by law*. (See, e.g., *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1302 ("Contractual duties are voluntarily undertaken by the parties to the contract, not imposed by state law."); *Rich Vision Centers, Inc. v. Bd. of Medical Examiners* (1983) 144 Cal.App.3d 110, 117 (settlement payments were not unlawful penalties because they were not "imposed" by the Board but rather "voluntarily assented to" by contract); *Flying Tiger Lines, Inc. v. Truck Ins. Exchange* (1971) 20 Cal.App.3d 132, 134-35 (affirming denial of right to indemnity because anticipated liability "had not been imposed by law, but had been instead voluntarily assumed" under insurance contract); *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272 fn. 6 ("A

confidential relationship cannot be imposed on an individual, but must be voluntarily accepted.").)

Franchise fees are freely negotiated and voluntarily assumed by franchisees competing for the privilege to do business with the local government entity, and to operate a franchise on and within city or county property. Accordingly, they are *not* established by authority or force. Respondents nevertheless argue that cities like Oakland "*do* establish franchise fees 'by authority'" as part of their general "authority under this state's laws." (AB 45.) But the fact that Oakland is "authorized" to enter into franchise contracts and negotiate franchise fees does not mean those fees are *imposed* by authority. On the contrary, if "impose" were synonymous with *any* "authorized" action by a state or local government as Respondents suggest, the term would effectively be rendered meaningless.

Respondents also rely on *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*), to argue that the term "impose" is not merely compulsory in nature, but can include voluntary charges. (AB 46.) This argument rests on a misreading of *Sinclair Paint*'s axiom 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," which Respondents claim "shows that a city can 'impose' a charge that is *not* compulsory." (AB 46; *Sinclair Paint*, 15 Cal.4th at 874.) But contrary to Respondents' argument, this language draws a clear

distinction between *compulsory* charges (*i.e.*, taxes) and *voluntary* ones (*i.e.*, non-taxes). Put another way, *Sinclair Paint* affirms that a fee or charge established in response to a voluntary decision generally is *not* "imposed" and thus is not a tax. (See also *supra* at 30-31 (collecting authorities distinguishing between voluntary obligations and duties "imposed" by law).) Furthermore, *Jacks* implicitly recognized that a fee voluntarily assumed is not a tax "imposed" on ratepayers. (*Jacks*, 3 Cal. 5th at 270 (suggesting that had SCE assumed the burden to pay the surcharge, it would not be an "imposed" tax); OB 48-49.)

Respondents argue that *Jacks* rejected a distinction between "franchise fees *directly* imposed on ratepayers versus those indirectly imposed on ratepayers" (AB 46 (emphasis added)), but they again ignore the specific factual context underlying the *Jacks* decision. (See *supra* at 23-24, 29.) To the extent *Jacks* declined to recognize a distinction between a direct versus indirect imposition of the Santa Barbara surcharge on ratepayers, *Jacks* rested on the fact that the ratepayers *exclusively* bore the obligation to pay the surcharge. (OB 40-44.) Accordingly, it did not matter whether the *Jacks* ratepayers paid the fee directly to Santa Barbara or indirectly through SCE as a pass-through; the ratepayers, and the ratepayers alone, were legally obligated to pay the surcharge under either scenario. (*Ibid*.)

That is not the case here. Unlike SCE, Oakland's franchisees voluntarily agreed to pay the franchise fees as a matter of contract. (OB 43, 47-48.) And unlike SCE, Oakland's franchisees remain obligated to pay those franchise fees even if they are unable to recover the cost of those fees through their customers' rates. (*Id.* at 51 & fn. 11.) This material factual distinction, which Respondents ignore, explains why SCE's surcharge could be deemed "imposed" while Oakland's franchise fees cannot.

Respondents' reliance on *Humphreville v. City of Los Angeles* (*Humphreville*) (2020) 58 Cal.App.5th 115 is similarly misplaced. Respondents cite *Humphreville* for the proposition that a city uses a utility "as a proxy" to impose franchise fees on ratepayers. (AB 46.) But the *Humphreville* court made clear that utilities are a "proxy" only "where a city imposes a franchise fee on a private utility, *which is then passed-through to each customer as a line-item on their monthly bills*" – that is, when it follows the specific *Jacks* fact pattern. (*Id.* at 124 (emphasis added).)

IV. Franchisees' Consideration of Franchise Fees as One Cost Factor in Setting Ratepayers' Utility Rates Does Not Confer Standing, and None of Respondents' Arguments Establishes Otherwise

Not only are Oakland's franchise fees not "imposed" on ratepayers, but the ratepayers also lack standing to challenge them. (OB 52-54.) Respondents acknowledge that this Court may consider standing issues

even if they were not explicitly raised below. (See AB 18 & fn. 4; OB 52 & fn. 12.) Contrary to Respondents' suggestion, Oakland has not "forfeited" its standing arguments by not including the word "standing" in the argument subheading. (See AB 18 & fn. 4.) Rather, standing issues were fairly encompassed in the "imposition" arguments that the subheading summarized. (See Cal. Rules of Court, rules 8.520(b)(1) & 8.204(a)(1)(B) (headings or subheadings need only "summariz[e] the point").)[9]

None of Respondents' cited authorities establishes that they have legal standing to challenge the contractual franchise fees at issue here. Respondents first suggest a "low bar for standing" requiring nothing more than alleging indirect economic harm. (AB 20.) But if that were sufficient, then any customer or ratepayer would have standing to challenge any government tax, fee, or charge imposed on or agreed to by any business by asserting that they would be indirectly subject to higher prices or rates. This unfounded approach would trigger an unmanageable "flood of lawsuits." (See, e.g., *Chiatello v. City & County of San Francisco* (*Chiatello*) (2010) 189 Cal.App.4th 472, 476, 497 (presaging "resulting uncertainty" and

[9] Respondents rely on *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179, for their "forfeiture" argument, but that case is inapposite. The *Pizarro* appellant forfeited arguments due to his brief's "lack of clarity and coherence" and his failure to "provid[e] a solid foundation for an argument" for reversal – not because of the absence of one word from a point heading.

"chaos" if plaintiffs with a comparatively small and uncertain interest were afforded standing to challenge taxes).)

Chiatello thus recognized the "legitimate concerns for limiting the ability of persons *not required to pay a tax themselves* to challenge the validity of that tax" in affirming the plaintiff's lack of standing where he was not himself subject to the tax measure he sought to challenge. (*Chiatello*, 189 Cal.App.4th at 476 (emphasis added).) Respondents attempt to distinguish *Chiatello* because it was decided under a separate statute authorizing taxpayer challenges and involved a request for injunctive relief, not just declaratory relief.[10] (Cf. AB 19.) But *Chiatello*'s reasoning in support of standing limitations for those who are "not required to pay a tax themselves" is instructive regardless of its different procedural posture.

Respondents also rely on *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 94, for the proposition 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.'" (AB at 20 (citing *Andal*, 137 Cal.App.4th at 94).) But Respondents misstate *Andal*'s holding. Neither *Andal*, nor *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282, on which it relied, held that *any* person who may be "adversely

[10] Respondents correctly note that Oakland's Opening Brief miscited and misquoted *Chiatello*. (AB 19.) Oakland apologizes for this inadvertent error and for any resulting confusion. Nevertheless, *Chiatello* remains persuasive and applicable to the standing principles implicated here.

affected" by a tax has standing to challenge it. Rather, in both *Andal* and *Gowens*, the court found that the possibility that the plaintiffs (cell phone companies and a hotel owner) might lose business or face substantial penalties in connection with their obligations to collect, record, and remit taxes from their customers to the government was sufficient to confer standing. (*Andal*, 137 Cal.App.4th at 94-95; *Gowens*, 179 Cal.App.2d at 285; see also *Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38 fn. 2 (standing sufficient under *Gowens* due to indirect impact on plaintiff's *business*, not mere increase in cost or rate).) These potentially adverse consequences are substantially more material and direct a harm than the possibility that a franchisee may include a franchise fee among the bucket of expenses it considers when setting its customer rates. (Cf. *Jacks, supra,* 3 Cal.5th at 271 ("Valid fees do not become taxes simply because their cost is passed on to the ratepayers.").)

Respondents' attempt to distinguish *County Inmate Telephone Services Cases* (2020) 48 Cal.App.5th 354 (*County Inmate*), review den. Aug. 19, 2020, is equally unavailing. Respondents argue that *County Inmate* does not apply because the plaintiffs there sought a refund, not mere declaratory relief.[11] (AB 19-20.) But *County Inmate*'s holding was broader

[11] Although couched as declaratory relief, Respondents effectively seek a "refund" in the form of a "declaration that the portion of the franchise fees which violate Prop. 218 *must be refunded* to the ratepayers unless approved by vote." (2 JA 287 (emphasis added).)

than that, affirming that "plaintiffs do not have standing to *contend the commissions are an unconstitutional tax*" because they did not pay the commissions directly and only indirectly suffered (allegedly) the downstream effect of those commissions. (*County Inmate*, 48 Cal.App.5th at 360 (emphasis added).) That principle applies with equal force here.

Finally, Respondents argue that if they lack standing, then "no one would enforce Proposition 26's franchise-fee limit" because franchisees allegedly have no "incentive to sue" where they can simply pass the fees on to their customers. (AB 20.) Respondents similarly argue that voters "would not have wanted the initiative's limits to go unenforced." (*Ibid.* (citing *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1249).)[12]) But there is no "franchise-fee limit" under Proposition 26 that voters intended to enforce in the first place. (See *supra*, Discussion § I.C.) On the contrary, as Oakland established above and in the Opening Brief, the voters who passed Proposition 26 elected to categorically exempt, not restrict, franchise fees. Limiting standing to prevent legal challenges by individuals who do not bear the direct burden of a franchise fee is consistent with this categorical exemption and thus with voter intent.

[12] *Weatherford* also supports limiting taxpayer standing to situations "where plaintiffs are *directly taxed* by the defendant locality." (2 Cal.5th at 1252 (analyzing standing under section 526a) (emphasis added).)

In sum, Respondents fail to show that simply potentially bearing some portion of the ultimate economic burden of the franchise fees (because those fees are among the franchisee's costs when setting rates) – which the franchisees alone are legally obligated to pay – confers standing on Respondents to challenge those contractually negotiated fees.

V. The Superior Court Did Not Err in Sustaining the Demurrer Because Respondents' Challenge Fails as a Matter of Law

Lastly, Respondents argue that the Superior Court erred in sustaining the demurrer to their franchise fee challenge because they alleged that "Oakland's franchise fees bear no reasonable relationship to the franchises' values." (AB 48-49.) As demonstrated above and in the Opening Brief, those allegations fail to state a claim *as a matter of law* because franchise fees either are not "imposed" in the first instance, or are categorically exempt from Article XIII C's definition of "tax" under Exemption 4 and thus not subject to any "reasonability" limitation. (OB 20-41, 45-54.) Accordingly, the Superior Court's order sustaining the demurrer as a matter of law was proper and should be affirmed.

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CONCLUSION

For the reasons set forth here and in the Opening Brief, Petitioner City of Oakland respectfully requests that the Court reverse the decision of the Court of Appeal.

Dated: February 19, 2021

Respectfully submitted,

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

/s/ *Barbara Parker*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it includes 7,510 words, including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: February 19, 2021

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

APPENDIX

Section 1

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(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.

(Sec. 1 amended Nov. 2, 2010, by Prop. 26. Initiative measure.)

Section 2

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

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