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 IN SUPPORT OF PETITION FOR REVIEW

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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I. INTRODUCTION

Petitioner the City of Oakland ("the City" or "Oakland") established in its Petition for Review ("Petition") that review of *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73 (Mar. 30, 2020, *as mod. on denial of reh'g*. Apr. 17, 2020) (*Zolly*), is warranted for three main reasons: (1) to clarify the scope of Proposition 26's exemption of franchise fees from California Constitution, Article XIII C, section 1, subdivision (e)'s definition of "tax"; (2) to clarify the proper application and interpretation of *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (*Jacks*) beyond its limited, atypical facts; and (3) to clarify what it means for a charge to be "imposed" in order to constitute a "tax."[1] (See Petition at 6-12.)

The City also established the importance of immediate review in light of the harsh real-world consequences to city and county finances and public health and safety that *Zolly* will bring about. The City likewise showed the impracticability of subjecting thousands of existing franchise contracts throughout California to litigation under a hitherto unknown "reasonable relationship to value" test and of injecting that novel test into an already complex public contracting process. (Petition at 37-41.)

[1] California Constitution, Article XIII C, Section 1, subdivision (e) may be referred to as, "Article XIII C" and subdivision (e)(4) as "Exemption 4." "Proposition 26" refers to the 2010 initiative that resulted in amendments to California Constitution, Article XIII A, Section 3 and Article XIII C, Section 1, subdivision (e).

Events since *Zolly* was decided, including after Oakland filed its Petition, underscore the need for this Court's review. *Two* splits of authority have emerged between *Zolly* and recent Court of Appeal decisions on the very issues Oakland has submitted for review. One split involves *Howard Jarvis Taxpayers Ass'n v. Bay Area Toll Authority* (June 29, 2020, Nos. A157598, A157972) __ Cal. App. 5th __ [2020 WL 3496798] (*Bay Area Toll Authority*), which directly conflicts with *Zolly*'s interpretation of Article XIII C as amended by Proposition 26. The other involves *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354 (*County Inmate*), which directly conflicts with *Zolly*'s interpretation of *Jacks* and its reasoning regarding what it means for a charge to be "imposed" under the constitutional definition of "tax." These recent splits of authority highlight the need for immediate review to secure uniformity of decision among the courts. That need is further supported by the strong interest in this Petition by Amici The League of California Cities and the California State Legislature, and by the pandemic's accelerating impact on California cities and counties, dramatically increasing the need for public services while local government revenues are steeply falling.

Respondents' Answer to Petition for Review ("Answer") is silent on many of Oakland's points. Where Respondents provide rebuttal, they fail to refute Oakland's showing that review is warranted to clarify (1) the application of Proposition 26 and Exemption 4 to franchise fees and (2) the

reach of this Court's *Jacks* decision. Respondents instead argue that (1) Oakland's proposed interpretation of Article XIII C as amended by Proposition 26 is wrong, and (2) *Jacks* should not be revisited. (Answer at 6-10.) But Respondents' dismissal of Oakland's arguments in this manner ignores key issues highlighting the need for review.

First, Respondents ignore the need for clarification of the meaning and intent of Proposition 26. Article XIII C *categorically* exempts franchise fees from the definition of "tax." Further, the Proposition 26 ballot history materials demonstrate an absence of voter intent to restrict franchise fees as "taxes." Respondents argue that Oakland's interpretation would mean cities can "raise limitless revenue via utilities." (Answer at 7, 9.) Not so. Oakland's position is the same as that adopted by the Court of Appeal, First Appellate District, Division Two in *Bay Area Toll Authority* in interpreting an identical provision, and is echoed and supported by the California Legislature. (See June 29, 2020 Deputy Legislative Counsel for the California State Legislature's Depublication Request.) But the interpretive differences between the *Zolly* appellate decision and *Bay Area Toll Authority*, among other cases, show that clarification of Proposition 26 is needed.

Second, Respondents ignore the lack of lower court decisional uniformity regarding the meaning and application of *Jacks*, as well as *Jacks'* express reservation of questions regarding Proposition 26 and its

impact on franchise fees for later determination. Respondents fail to rebut this basis for review.

Finally, Respondents assert that "other recently published cases do not create a split requiring this court to grant review here." (Answer at 11-12.) But the *Bay Area Toll Authority* and *County Inmate* opinions and the amicus letters submitted here establish otherwise. (See July 8, 2020 Amicus Letter of The League of California Cities; June 18, 2020 Amicus Letter of *County Inmate* Plaintiffs and Appellants.) The inconsequential factual and procedural distinctions drawn by Respondents cannot overcome the existence of a split on these important legal questions that require review and clarification. The Petition should be granted.

II. LEGAL DISCUSSION

A. Review Is Needed to Clarify Proposition 26's Exemption of Franchise Fees from Article XIII C's Definition of "Tax," Which Respondents Fail to Meaningfully Rebut

Oakland's Petition established that review is needed to settle whether franchise fees are *categorically* exempt from the definition of "tax" under Article XIII C by virtue of Proposition 26 because it includes an exemption to the definition of "tax" (Exemption 4) for charges for the use or purchase of government property, which applies to franchise fees. (See Petition at 9-10, 16-30.)

Respondents' answer to this point does not grapple with facts that point to Proposition 26's intent to limit excessive *regulatory fees* and

similar cost-driven fees, *not* privately-negotiated franchise fees in city service contracts. (Answer at 7-10; see Petition at 16-30.)

Respondents also object to Oakland's interpretation of the Proposition 26-amended Article XIII C as purportedly "depend[ing] on the dubious proposition that the anti-tax Proposition 26 liberated cities to raise limitless revenue via utilities." (Answer at 7.) But that misconstrues Oakland's position (see Petition at 16-30), which is consistent with another division of the Court of Appeal, First Appellate District, in *Bay Area Toll Authority*, as well as the California Legislature, which pointed out that the *Zolly* court "incorrectly interpreted the plain language of Section 1(e) of Article XIII C of the California Constitution." (June 29, 2020 Deputy Legislative Counsel for the California State Legislature's Depublication Request at 1.)

1. The Emergence of a Split in Authority Underscores the Need for Review

The *Zolly* appellate court's decision created a split in authority that has already grown in size: in *Bay Area Toll Authority*, the Court of Appeal, First Appellate District, Division Two adopted Oakland's position in interpreting a near-identical[2] constitutional provision applicable to state government charges, Article XIII A, section 3, subdivision (b)(4). The

[2] The only difference between the relevant portions of Article XIII A, section 3 and Article XIII C, section 1 is that the word "state" is substituted for the term "local government."

language of that provision exactly mirrors Article XIII C, section 1, subdivision (e)(4), including an identical burden-shifting provision. (*Compare* Cal. Const., art XIII C § 1, subd. (e)(4) & (e) last paragraph, *with* Cal. Const., art. XIII A § 3, subd. (b)(4) & (d).)

Bay Area Toll Authority held that "the reasonable cost requirement of article XIII A [section 3,] subdivision (d), did not apply to [subdivision (b), paragraph (4)] based on the plain meaning of the language used in section 3." (*Bay Area Toll Authority*, 2020 WL 3496798, at *11.) The court's analysis was consistent with Oakland's interpretation of the parallel provisions of Article XIII C:

> The first three exceptions [in Article XIII A, section 3, subdivision (b)] to the general definition of "tax" contain language limiting the charge to reasonable costs; the fourth and fifth exceptions do not. 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….[R]eading article XIII A, subdivision (d) of section 3 as applicable to all of the subdivision (b) exceptions would render the express reasonableness language in the first three exceptions surplusage. " 'A construction making some words surplusage is to be avoided.' " [Citations.]

(*Id.* at *12; see Petition at 19-24.) Similarly, the *Bay Area Toll Authority* court agreed with Oakland's position that the burden of proof language in Article XIII A, section 3, subdivision (d) – identical to Article XIII C, section 1, subdivision (e) – "is a burden shifting provision; it does not

impose substantive requirements in addition to those stated" in the preceding exemptions. (*Id.* at *13; see Petition at 22-24.)

In reaching the opposite conclusion as the *Zolly* court on the meaning of these parallel provisions, *Bay Area Toll Authority* criticized *Zolly* for failing to "engage in the textual analysis that leads us to conclude subdivision (d) of article XIII A, section 3, does not impose a substantive requirement of reasonableness beyond that stated in subdivision (b) of this section," and "respectfully disagree[d] with *Zolly* on the interpretation of the burden of proof provision." (*Id.* at *13.) *Bay Area Toll Authority* thus widens a split of authority bearing directly on issues on which Oakland seeks review.

Respondents acknowledge that the state-tax exception at issue in *Bay Area Toll Authority* "mirrors the municipal-tax exception at issue here," but suggest a distinction because *Bay Area Toll Authority* "did not involve a franchise fee." (Answer at 11.) That distinction does not change that two appellate courts reached opposite conclusions regarding the meaning of identical constitutional language. That legal conflict requires this Court's review.

2. Review Is Also Warranted Because *Zolly* Conflates "Cost" with "Value," Leading to Confusion

Respondents contend that Oakland's interpretation of Article XIII C means that Exemption 4 is "limitless" and is thus the lone exemption not

limited by any reasonableness or proportionality standard. (Answer at 10.) But they also concede that Exemption 4 "does not need the word 'reasonable' to provide a meaningful limit on franchise fees because *the value of the relevant asset (i.e., the franchise) is set by the market*." (*Id.* (emphasis added).) Oakland agrees. Imposing a nebulous "reasonable relationship to value" test on such contractually-negotiated fees, or attempting to graft an extratextual "reasonable cost" standard onto Exemption 4, as the *Zolly* court did, is problematic and necessitates review.

Indeed, *Zolly's* application of the provision's "reasonable cost" standards in the context of a franchise fee leads to absurdities because it improperly conflates "cost" with "value." (See Petition at 23-24.) Whereas Article XIII C's first three exemptions include specific cost of service limitations, such as fees or charges for services or products provided by local governments, privileges or benefits granted by local governments, or regulatory activities relating to issuing permits (see Cal. Const., art. XIII C, § 1, subd. (e)(1)-(3)), Exemption 4 includes no such "reasonable cost" restrictions. (Cal. Const., art. XIII C, § 1, subd. (e)(4).)

Despite acknowledging this important textual distinction between Exemptions 1 through 3 and Exemption 4, the *Zolly* court, by conflating "cost" and "value," introduced the requirement that fees for the use or purchase of government property must be reasonably related to the value of the interest conveyed. (See *Zolly*, 47 Cal.App.5th at 86-87; Petition at 22.)

The Court of Appeal relied on subdivision (e)'s statement regarding the government's '"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) (emphasis added)); Petition at 22.) But subdivision (e) does not mention "value"; it merely establishes evidentiary standards where a fee is based on "cost." (See also *Bay Area Toll Auth.*, 2020 WL 3496798, at *11-13.)

Zolly's improper conflation of "cost" and "value" has far-reaching implications and conflicts with this Court's decision in *Jacks*, which made clear that franchise fees should not be limited by "costs." (*E.g.*, *Jacks*, 3 Cal.5th at 268 ("a fee paid for an interest in government property is compensation for the use or purchase of a government *asset* rather than compensation for a cost") (emphasis in original); see also *id.* at 269, 273-74.) And of course, "cost" and value" mean very different things. Cost relates to the expenditure required to provide a service, product, or benefit, whereas value relates to what a party is willing to pay and what the market will bear for a particular good or asset.

By conflating these concepts and applying Article XIII C's

"reasonable cost" standards to franchise fees, the *Zolly* court departed from Article XIII C's plain language. Moreover, requiring that franchise fees be tethered to "reasonable cost" would impose a more restrictive reasonability standard than the value-based test in *Jacks*, which acknowledged that "the value of property may vary greatly, depending on market forces and negotiations" and thus may be shown through a broader range of evidence, including "bona fide negotiations concerning the property's value, as well as other indicia of worth." (*Id.* at 269-70.) *Zolly*'s conflation of "cost" and "value" introduces significant and unwarranted confusion requiring review.

3. Respondents' Other Arguments Support Review

Respondents further argue that Oakland's interpretation of Proposition 26 and Article XIII C's amended language is "counterintuitive" because it "would mean that the initiative [Proposition 26] *erased* Proposition 218's limit on franchise-fee amounts." (Answer at 9.) Proposition 218 did not limit franchise fees. (See Petition at 15, 18, 32, 38; *Jacks*, 3 Cal.5th at 262, 267.) But even assuming, *arguendo*, that Proposition 26 conflicts with Proposition 218 regarding the treatment of franchise fees, such a conflict would only *underscore* the need for review.

B. The Court Should Clarify the Proper Application and Interpretation of *Jacks v. City of Santa Barbara*

Oakland's Petition demonstrated that review is needed because there is confusion in the lower courts regarding the reach of *Jacks* beyond its

unique pass-through surcharge facts and to franchise fee contracts that post-date Proposition 26. (Petition at 30-33.) The Superior Court in *Zolly*, for instance, called upon this Court's guidance to clarify the intended scope of *Jacks* and its application to "long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities." (Petition at 32 (citing 2 JA 473).)

This confusion and need for clarification are further underscored by the amicus letters submitted here and the emergence of a separate split in authority regarding the interpretation of *Jacks*, involving the *County Inmate* case. (See June 18, 2020 Amicus Letter of *County Inmate* Plaintiffs and Appellants at 1 (review needed "to review a split of authority over how to interpret the Court's decision in *Jacks*").) *County Inmate* and *Zolly* diverge in their interpretation of *Jacks* and what it means for a charge to be "imposed" on taxpayers in order to constitute a "tax." (*Id.*; Petition at 35-36 & fn. 6.)

This Court recognized that the application of Proposition 26 to franchise fees would need to be decided in a later, appropriate case. (See *Jacks*, 3 Cal.5th at 263 fn. 6 ("We are concerned only with the validity of the surcharge under Proposition 218. Proposition 26's exception from its definition of 'tax' with respect to local government property is not before us."); Petition at 9-10.) *Zolly* is such a case and is the appropriate vehicle for this Court to clarify the meaning and scope of *Jacks*.

C. The Court Should Grant Review to Clarify What It Means for a Charge to Be "Imposed by a Local Government"

The City established a third ground for review, namely, clarification of the meaning of a charge being "imposed by a local government" under Article XIII C's definition of "tax." (Petition at 11-12, 33-36.)

The *Zolly* Court of Appeal implicitly held that Oakland's franchise fees may constitute a tax "imposed" on ratepayers because they indirectly bear the economic burden of the franchise fees through allegedly increased rates, even though they have no legal obligation to pay them. (*Zolly*, 47 Cal.App.5th at 88 (rejecting Superior Court's ruling that Oakland's negotiated franchise fees are not "imposed" because this Court had "implicitly rejected this argument in *Jacks*").) This reasoning conflicts with *Jacks*, however, which held that "[v]alid fees do not become taxes simply because their cost is passed on to the ratepayers" because "public utilities are allowed to pass along to their customers expenses the utilities incur in producing their services." (*Jacks*, 3 Cal.5th at 270-71.)

The *Zolly* appellate court's decision raises important questions regarding the distinction under California law between who bears the legal versus economic incidence of a fee and how that distinction impacts whether a fee is a "tax." Established case law holds that a fee or tax is imposed only on the party that bears the *legal* incidence (*i.e.*, obligation) of the fee or tax – not a party that bears the economic incidence of the fee or

tax that is passed on as part of a price, rate, or other charge. (See, *e.g.*, *Occidental Life Ins. Co. of Cal. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 847 (legal incidence of sales tax is imposed on retailer, not consumer, notwithstanding retailer's "passing on" of tax to consumer).) *Zolly* is at odds with this recognized distinction.

The recent *County Inmate* decision deepens this conflict. There, the Court of Appeal, Second Appellate District rejected the plaintiff inmates' challenge to certain privately-negotiated commissions as allegedly improper taxes, where those commissions were paid by telecommunications providers to various counties for exclusive contract rights but allegedly passed on to the inmates through increased costs for telephone services. The *County Inmate* court concluded that the plaintiffs' telephone charges did not constitute an illegal tax because although "Plaintiffs may have paid exorbitant charges to the *telephone provider* … they did not make any payment to the *county* and they had no legal obligation to do so."[3] (*County Inmate*, 48 Cal.App.5th 354, 361 (emphasis in original); see also Petition at 35-36.) The *Zolly-County Inmate* split amplifies the need for review and clarification regarding the meaning of the term "imposed."

[3] The fact that *County Inmate* "was decided upon taxpayer-standing doctrine" does not alter the nature or significance of the courts' conflicting interpretations of the same constitutional language, as Respondents argue. (Answer at 11.)

D. Oakland Established the Practical Importance of Immediate Review and Reversal, Which Respondents Fail to Rebut

Finally, *Zolly* will have far-reaching practical impacts on cities and counties throughout California that further call for this Court's immediate intervention. *Zolly* threatens to subject cities and counties to repeated, costly lawsuits, impair cities' and counties' ability to provide essential public services, and harm the most vulnerable among Californians because it jeopardizes the availability of franchise fee revenue critical to cities' and counties' ability to fund public services. (See Petition at 37-41; see also July 8, 2020 The League of California Cities Amicus Letter.)

Likewise, the impracticability of subjecting all current and future California franchise contracts to a nebulous "reasonable relationship to value" test injects an already complicated government contracting process with increased cost and uncertainty, making it more difficult for cities and counties to ensure the provision of essential public services to their residents without interruption. (*Id.*)

Respondents do not refute the devastating consequences that will befall cities and counties throughout the state if critical franchise fee revenue is suddenly diminished as a result of *Zolly*. The potential harm of the *Zolly* ruling has only deepened in recent weeks as cities and counties face new and increasing challenges due to the worsening pandemic and economic recession, which are increasingly viewed as grave, longer-term

events. Respondents provide no counterpoint and no reason why this Court should not grant immediate review of these important, far-reaching issues.

III. CONCLUSION

The City's Petition established three important issues warranting immediate review related to the treatment of franchise fees under the California Constitution's tax and voter approval provisions. After *Zolly* was decided, and after the Petition was filed, the case for this Court's review has only grown stronger due to the emergence of not one, but two, on-point splits in authority and strong amici interest in the issues implicated by *Zolly* and this Petition. Oakland respectfully requests that the Court grant review.

Dated: July 20, 2020

Respectfully submitted,

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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 3,388 words, including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: July 20, 2020

/s/ *Cedric Chao*
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Supreme Court of California

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