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April 11, 2022

The Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: *Zolly et al. v. City of Oakland*, Case No. S262634 – Supplemental Reply Brief

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Both the appellants-ratepayers and the City of Oakland agree that Cal. Const., art. XIII C, § 1, subd. (e)(4) applies to the charges here and none of the other exemptions within article XIII C apply. Thus, this reply focuses on the remaining areas of disagreement about the application of subdivision (e)(4) to the charges here.

**Subdivision (e)(4) applies equally regardless of whether the “local government property” here is tangible or intangible.**

Although both sides agree that subdivision (e)(4) applies, their respective supplemental letter briefs arrive at that conclusion in slightly different ways. The ratepayers reason that the charges here are for, at least in part, the “use” of Oakland streets, which are “local government property.” (*Zolly et al. Supp. Ltr. Br.*, at p. 1.) Oakland agrees that the waste-hauling companies’ use of Oakland streets qualifies as a “use” of “local government property” within the meaning of subdivision (e)(4). (*Oakland Supp. Ltr. Br.*, at pp. 2–3.) But Oakland adds the “local government property” can also be the franchise itself and the charges here are the purchase price for that intangible property. (*Id.* at p. 2.)

Whether the “local government property” here is tangible or intangible, though, does not matter. (See *Stockton Gas & Elec. Co. v. San Joaquin County* (1905) 148 Cal. 313, 321 [holding that “the right to use the streets, and the right to take tolls by reason of their use, are inseparable parts of the franchise”].) Subdivision (e)(4) applies equally to a “charge imposed for ... use of local government property” (i.e., Oakland streets) and “the purchase ... of local government property” (i.e., a waste-hauling franchise).

And the parties’ respective positions remain the same regardless: whereas Oakland argues that the exemption within subdivision (e)(4) is limitless (*Oakland Supp. Ltr. Br.*, at pp. 4, 6), the ratepayers contend that the exemption covers only an amount that is reasonably related to the value of the property interest conferred (*Zolly et al. Supp. Ltr. Br.*, at p. 2). In support of its position, Oakland contends there is no need for subdivision (e)(4) to limit franchise fees because they are already “limited by many factors[,]” including companies’ and public officials’ incentives as well as voters’ capacity to remove those officials. (*Oakland Supp. Ltr. Br.*, at pp. 3–4.) Yet a company has every incentive to accede to an exorbitant

franchise-fee amount to get the franchise because the company knows it will recuperate that amount from ratepayers that are forced to use the company's services. (Appellants' Consolidated Answer to Amicus Curiae Briefs, at p. 8, fn. 4.; see also *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 269 [stating that "a publicly regulated utility is a conduit through which government charges are ultimately imposed on ratepayers"].) Moreover, the very purpose of the anti-tax initiatives—and Proposition 26 in particular—was to fortify existing strictures on the taxing power, which the voters believed were insufficient to rein in government's penchant to tax and spend. (Appellants' Consolidated Answer to Amicus Curiae Briefs, at p. 14.)

**The parties agree that the other exemptions within article XIII C, including section 1, subdivision (e)(1), do not apply.**

The ratepayers and Oakland cite several of the same reasons why the other exemptions, including the exemption within subdivision (e)(1), do not apply. (Zolly et al. Supp. Ltr. Br., at pp. 2-4; Oakland Supp. Ltr. Br., at pp. 4-6.) No further discussion is needed.

**Oakland's alternative argument that the charges here fall outside the scope of subdivision (e) entirely because they are not "imposed by a local government" would render much of that subdivision superfluous.**

As an alternative to its argument that subdivision (e)(4) applies, Oakland also argues that "franchise fees are not even subject to Article XIII C" because they are not "imposed by" Oakland and thus do not fall within subdivision (e)'s definition of "tax." (Oakland Supp. Ltr. Br., at p. 3.) Oakland contends that "[a] charge is 'imposed' if it is established by authority or force" and "Oakland's franchise fees are [instead] bargained-for contract consideration[.]" (*Ibid.*) Yet Oakland continues to ignore the answer brief's response that Oakland did establish the charges here by their "authority" under state and local law—as confirmed by the enacting ordinances themselves. (Answer Br. on the Merits, at pp. 45-46.) Indeed, although Oakland correctly cites *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 (*California Cannabis*) for the definition of "impose" in this context (Oakland Supp. Ltr. Br., at p. 3), Oakland omits that "impose" covers a charge that is created, established, or enacted by a local government (*California Cannabis*, *supra*, at p. 944).

Moreover, the structure and text of subdivision (e) undermine Oakland's "imposed by" argument. Subdivision (e)(4) exempts certain charges that are voluntarily assumed by the payor, including those charges for the use, lease, or purchase of local government property. Several other exemptions also cover charges that are voluntarily assumed by the payor, including charges for a specific benefit, for a specific government service or product, and as a condition for property development. (Cal. Const., art. XIII C, § 1, subs. (e)(1), (e)(2) & (e)(6).) But if voluntarily assumed charges fell outside the scope of the definition of "tax," as Oakland argues, there would have been no need for subdivision (e) to carve out exemptions covering certain types of voluntarily assumed charges. And this court should

“not ascribe to the core definitional language a meaning that renders the explicit exemptions thereto meaningless.” (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 152.)

Oakland also cites an opinion of the California Attorney General concluding that Proposition 26 does not apply to a local ordinance requiring a cable-television-franchise holder to pay a public-access fee. (99 Ops. Cal. Atty. Gen. 1, Op. No. 13-403 (2016).) Yet Oakland draws the wrong lesson from that opinion. The Attorney General reasoned that the public-access fee is not “imposed by” the local ordinance because that fee is already “imposed by” a preexisting state statute; the ordinance merely enforces that “preexisting obligation.” (*Id.* at pp. 7-8; see also *California Cannabis, supra*, 3 Cal.5th at p. 944 [holding that “impose” does not mean “collect”].) In any event, to the extent that the Attorney General’s and *California Cannabis*’s interpretation of “imposed by” differ, the latter governs here.

### **Conclusion**

The parties agree that the only relevant exemption is found within subdivision (e)(4). They continue to disagree, however, about whether that exemption covers an *exorbitant* franchise fee—a fee that bears no reasonable relationship to the value of the property right conferred. And Oakland’s alternative argument that the fees here fall outside the scope of article XIII C because they are not “imposed by” Oakland conflicts with the definition of “impose” and the structure and text of article XIII C.

Kind regards,

/s/

Paul Katz of Katz Appellate Law PC  
Attorney for Appellants

**Certificate of Compliance**

Appellants' counsel certifies in accordance with California Rules of Court, rule 8.520(c)(1) and (d)(2) that this supplemental brief contains 1,134 words as calculated by the Word software in which it was written.

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

Respectfully submitted,

Dated: April 11, 2022

\_\_\_\_\_  
/s/

Paul Katz  
Attorney for Appellants

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

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