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Court of Appeal, Second Appellate District
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B281994

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FIVE

GLENDALE COALITION FOR BETTER GOVERNMENT, et al.,
Plaintiff, Respondent, and Cross-Appellant,

v.

CITY OF GLENDALE,
Defendant, Appellant, and Cross-Respondent.

Appeal from the Superior Court of the State of California
County of Los Angeles, Case No. BS147376
Honorable James C. Chalfant, Judge Presiding

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND ASSOCIATION OF CALIFORNIA WATER AGENCIES TO FILE AN AMICUS BRIEF IN SUPPORT OF THE DEFENDANT CITY OF GLENDALE; PROPOSED BRIEF OF AMICUS CURIAE

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COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION 5	COURT OF APPEAL CASE NUMBER: B281994
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APPELLANT/ PETITIONER: City of Glendale RESPONDENT/ REAL PARTY IN INTEREST: Glendale Coalition for Better Government	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): League of CA Cities; CSAC; Ass'n of CA Water Agencies

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 3, 2018

Benjamin P. Fay
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND DISTRICT, DIVISION FIVE:

The League of California Cities ("the League"), the California State Association of Counties ("CSAC"), and the Association of California Water Agencies ("ACWA") pursuant to Rule 8.200(c) of the California Rules of Court, request permission of the Presiding Justice to file the accompanying amicus curiae brief in support of the Defendant, Appellant, and Cross-Respondent City of Glendale ("the City").

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide

and has determined that this case is a matter affecting all counties.

ACWA is a California nonprofit mutual benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State, monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies warranting ACWA's participation through the amicus brief submitted with this application.

The League, CSAC, and ACWA, and their member cities, counties, and agencies have a substantial interest in the outcome of this case because it raises important questions regarding the application of Proposition 26, which applies to "any levy, charge, or exaction of any kind imposed by a local government." (Cal. Const. Art. XIII C, § 1, subd.(e).) In particular, this case raises the following questions:

1. Whether Proposition 26 requires that a charge that was approved by a city's voters before the passage of Proposition 26 must be resubmitted to the voters;
2. Whether voter approval of a city's charge is only effective if the charge was legally a "tax" when it was approved by the voters;
3. Whether Proposition 26 applies to a city's charge that was in effect before Proposition 26 was passed and has not been changed since then; and

4. Whether it is appropriate for a court to require a city to subsidize its electric customers and to charge them less than the cost of service.

The League, CSAC, and ACWA believe that their perspective on these issues is important for the Court to consider and will assist the Court in deciding this matter. The undersigned counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation. This amicus brief primarily addresses relevant arguments which were not presented in the parties' briefs. The League, CSAC, and ACWA thus request leave to file the accompanying amicus curiae brief.

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represents that he authored this brief in its entirety on a pro bono basis, that his firm is paying for the entire cost of preparing and submitting this brief, and that no party to this action or any other person either authored this brief or made any monetary contribution to fund the preparation or submission of this brief.

Dated: July 5, 2018 JARVIS, FAY & GIBSON, LLP

By: /s/ .
Benjamin P. Fay
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and ASSOCIATION OF CALIFORNIA WATER AGENCIES

AMICUS CURIAE BRIEF

I. INTRODUCTION

In this case the plaintiff, Glendale Coalition for Better Government, is challenging a decision of the voters of the City of Glendale to have their electric utility help support the services provided by their general fund. The voters expressed this decision by amending the City's charter in the 1940s to require the City to make annual transfers from the electric utility to the general fund. For 75 years, the City regularly made these annual transfers, and they became a cornerstone of the City's financial structure.

With the passage of the statewide ballot measure Proposition 26 in 2010, municipal electric rates became, for the first time, subject to a constitutional restriction—now, if electric rates exceed the reasonable cost of providing service, they are deemed taxes that must be approved by the voters. The Glendale Coalition brought this lawsuit challenging the City of Glendale's electric rates, claiming that the cost of the transfers was not part of the reasonable cost of service and therefore the electric rates violate Proposition 26.

The League of California Cities, the California State Association of Counties, and the Association of California Water Agencies are interested in this case because they believe it is important to assert the following points:

1. The will of the local voters should be respected and to the extent possible given effect. Here the plaintiff seeks to frustrate a policy adopted by the voters, arguing that it is an illegal tax that must be

approved by the voters, even though that has already occurred.

2. When considering whether the voters approved a charge that is alleged to be a tax, the question is simply whether the voters approved the charge. It does not matter whether the voters thought the charge was a "tax" when they approved it or whether the charge was a tax under the prevailing law at the time of approval.
3. Proposition 26 is not retroactive and should not be applied, as the trial court did here, to a long-standing charge that was approved before Proposition 26 and has not been changed since the passage of Proposition 26.
4. A court should not deprive a city council of its discretionary legislative role to make budgetary allocations.

Although Proposition 26 is more than seven years old, its meaning and application are still being resolved by the courts. It is therefore critical that these issues be considered by the court when reaching its decision, which will affect cities and counties across the state.

II. ARGUMENT

A. A decision by local voters to impose a charge or "tax" on themselves should be respected.

This case is about the will of the electorate. A city's charter is a decision by the voters of a city on how they want to govern

themselves. It is an expression of "the will of the voters." (*Brown v. Fair Political Practices Com*. (2000) 84 Cal.App.4th 137, 149.) Article XI, section 3, of the California Constitution gives the voters of a city the sole power to create a charter. A charter can only be created by a city's voters, and it can only be amended by that city's voters.

Using this power, in 1941, the voters of the City of Glendale decided that they wanted their electric utility to help support the services provided by their general fund. They amended their city's charter to require the City Council to make transfers from the City's electric utility to its general fund. The voters first set the transfer at 12% of the utility's annual operating revenues, and then in 1946 they increased the transfer to 25%. For the next 75 years, the City regularly made the transfers required by the charter, as directed by the voters.

Ironically, the plaintiff is trying to use the "Right to Vote on Taxes Act"—Proposition 218—which added Articles XIII C and XIII D to the Constitution fifty years later, and Proposition 26, which amended Article XIII C, to frustrate this wish of the Glendale voters.

Like Article XI, section 3, of the Constitution, which gives the City's voters the exclusive power to enact and amend their charter, Proposition 218 gave local voters the exclusive power to decide whether and how they can be taxed. Under Proposition 218, only the City's voters can decide to impose a tax on themselves. (Cal. Const. Art. XIII C, § 2(b).)

Proposition 26 extended this power by broadening the definition of what constitutes a tax, turning into taxes many charges that had previously not been considered taxes, and which therefore must now be approved by the electorate.

When the Glendale electorate approved the transfers in 1941 and 1946, they may not have thought of the transfers as taxes or the proceeds of taxes. Traditionally, rates charged by a municipal utility were only limited in that they had to be reasonable. (*Hansen v. City of Buenaventura* (1986) 42 Cal.3d 1172, 1180.) A municipal utility could provide a return on a city's investment in the utility, and the "profit" could benefit the city's general fund. (*Id*. at 1183.) It may be that the voters considered the transfers to be a reasonable return to the City from the utility. The important question is: What did the voters intend the charter provision to require the City to do? Did they mean for it to cause the rates they paid for electric service to include a charge to fund the transfers? As explained in the City's briefs, the answer is "yes," and seventy-five years of consistent practice confirms that intent.

Time and again, by passing Propositions 13, 62, 218, and 26, the voters of California have affirmed that the local electorate has the ultimate choice on whether and how they should be taxed. [1] If the voters of a city have decided to tax themselves, a court should be very hesitant to override that decision. In the 1940s, the voters of Glendale decided that they want their

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[1] Proposition 13, added to the Constitution in 1978, created the first requirement that local taxes be approved by the local electorate by requiring that special taxes be approved by two-thirds of the electorate. (Cal. Const. Art. XIII A, § 4.) Proposition 62, adopted by the voters of California in 1986, sought to impose broad voter-approval requirements, but because it was statutory and not constitutional, it has generally been held not to apply to charter cities. (See, e.g., *Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137; see also *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37.)

electric utility to help support the services provided by their general fund. The passage of statewide measures 70 years later, requiring voter approval, should not trigger a need to vote again on an issue that was already decided by the Glendale voters.

B. That the transfers were not labeled a "tax" or were not a "tax" when approved by the voters does not change the fact that the voters approved them.

Proposition 26 has expanded the definition of what is a tax to many charges that previously were not considered taxes. Now "any levy, charge, or exaction *of any kind* imposed by a local government" is a tax, unless it fits into one of seven listed categories. (Cal. Const. Art. XIII C, § 1(e); emphasis added.) Before Proposition 26, a charge for electric service would not have been considered a tax. Now a charge for electric service that exceeds "the reasonable cost of service" can be a tax.

When considering whether voter approval for a city's charge before the passage of Proposition 26 constitutes voter approval of a tax under Proposition 26, whether the voters would have considered the charge a tax when they voted for it is not the pertinent question, and whether the charge would at that time have legally been considered a tax is also irrelevant. The important question is what did the voters approve, regardless of its label. The question must be, did the voters approve the charge? This is a derivative of the familiar and oft repeated rule that "[t]he character of a tax is ascertained from its incidents, not its label." (*Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392.)

Whether the Glendale voters, when they approved the transfers in 1941 and 1946, thought of them as taxes is irrelevant

because the definition of what constitutes a tax has changed so much since then. The appropriate question is whether the voters approved the transfers with the expectation that they would be paid out of the electric rates.

C. The trial court improperly made Proposition 26 retroactive.

It has been established that Proposition 26 is not retroactive. (*Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 206-07.) Similar to taxes that were enacted before the passage of Propositions 13 and 218, charges enacted before Proposition 26 can remain in effect, even if they would now be considered taxes under Proposition 26. (See *Kehrlein v. City of Oakland* (1981) 116 Cal.App.3d 332, 340 [tax enacted before effective date of Proposition 13 not subject to voter-approval requirement]; Cal. Const. Art. XIII C, § 2, subd.(c) [Proposition 218's voter approval requirement for general taxes only applies to taxes enacted after January 1, 1995]; *Brooktrails Township Community Services District*, *supra*, 218 Cal.App.4th at 207 [recognizing that Proposition 218 was not applicable to existing municipal taxes].)

Consequently, even if the voters had not approved Glendale's charter provisions, if the transfers had instead been enacted as ordinances by the City Council, the City should still be able to continue the transfers, provided they are not increased. For more than seven decades, the transfers have been a core part of the structure of the City's finances for its municipal services. It is well-established that Proposition 26 is not retroactive, and

therefore it should not disturb the City's long-established transfers, unless those transfers are increased.

D. The trial court's remedy improperly deprives the City of discretion over its budget.

The trial court's remedy—ordering a credit to ratepayers equal to the amounts of the transfers—deprives the City of discretion over its budget-making decisions. "The budgetary process entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands." (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699.) "[T]he adoption of a budget is a legislative function, and . . . under the 'separation of powers' principle which is fundamental to our form of government a court is generally without power to interfere in the budgetary process." (*Id.* at 698.) Formulating a budget "is a legislative function which 'may not be controlled by the courts.'" (*Ibid.*)

While Proposition 26 provides that a city cannot charge more than the reasonable cost of service for electric service, it does not require a city to charge less than the cost of service. But the trial court's remedy would do just that. As the City has shown, it has substantial non-rate revenues that could fund much, if not all, of the transfers. By requiring the City to provide refunds equal to the amount of the transfers, the court is not allowing the City to choose to use these other revenues to fund the transfers. Instead, it is requiring the City to use these revenues to subsidize the electric rates—something the City could choose to do as a matter of budgetary policy, but also

something it could choose not to do, also as a matter of budgetary policy. This is not a policy decision that a court should make for a city.

Under the trial court's remedy, the ratepayers would reap a windfall—electric rates at below the reasonable cost of service—at the expense of basic municipal services, such as police and fire. Whether to shift these costs is a discretionary budgetary decision that should be left to the City Councils to make.

E. The appropriate statute of limitations for a challenge to municipal electric rates has been settled.

The appropriate statute of limitations is an important issue in this case, and one that was briefed extensively by the parties. However, as explained by the City in its reply brief, the issue was recently resolved in the published decision of *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, which held that the 120-day statute of limitations in section 10004.5 of the Public Utilities Code applies to cases such as this. The League, CSAC, and ACWA believe this is the correct decision and ask that this Court follow it.

III. CONCLUSION

The electorate of the City of Glendale voted in the 1940s to have their electric utility support the services provided by their general fund through annual transfers from the utility to the general fund. Seventy years later, the voters of California passed Proposition 26, which provides that rates charged by a municipal

electric utility cannot exceed the reasonable cost of providing the service unless approved by the electorate. Because the City's electorate already approved having their electric utility support the general fund through the annual transfers, it should be unnecessary to require the electorate to approve it again.

Dated: July 5, 2018

JARVIS, FAY & GIBSON, LLP

By: /s/ .
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CERTIFICATE OF WORD COUNT

I certify that this brief contains a total of **2,190 words** (excluding the cover page, tables, signature block, and this certification), as indicated by the word count feature of Microsoft Word, the computer program that was used to prepare it.

Dated: July 5, 2018 By: /s/ .
Benjamin P. Fay

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay & Gibson, LLP, 492 Ninth Street, Suite 310, Oakland, California 94607.

On July 5, 2018, I served the within

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND ASSOCIATION OF CALIFORNIA WATER AGENCIES TO FILE AN AMICUS BRIEF IN SUPPORT OF THE DEFENDANT CITY OF GLENDALE; PROPOSED BRIEF OF AMICUS CURIAE

on the parties in this action as follows:

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VIA U.S. MAIL: I caused a copy of the document in an envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 5, 2018, at Oakland, California.

Jennifer Dent