No. B253474

In the Court of Appeal, State of California

SECOND APPELLATE DISTRICT, DIVISION SIX

ROLLAND JACKS, et al.,
Plaintiffs and Appellants

vs.

CITY OF SANTA BARBARA,
Defendant and Respondent.

Appeal From the Superior Court of the State of California
County of Santa Barbara. Case No. 1383959
Honorable Thomas Anderle, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: November 3, 2014

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") respectfully requests permission to file an amicus curiae brief in support of Respondent City of Santa Barbara. This application is timely made within 14 days after the filing date of the reply brief on the merits.

The League is an organization that represents local governments that have a substantial interest in this case because they are bound by the provisions of Proposition 26, article XIII C, section 1, subdivision (e) of the California Constitution,[1] and because most, if not all, of those governments derive revenues from franchise fees. These local governments rely on franchise fees to fund essential services to their residents, businesses, and property owners.

The trial court's conclusion here reinforces a principle of substantial importance to the League and the public its members serve. Specifically, the judgment finds that Proposition 26 cannot be applied retroactively to invalidate continued collection of fees assessed by ordinances passed before its effective date. This is consistent with the conclusion of the First District in *Brooktrails Township Community Services District v. Board of Supervisors of*

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[1] All further references in this brief to articles and sections of articles are to the California Constitution.

Mendocino County (2013) 218 Cal.App.4th 195, and a contrary finding would substantially reduce franchise-fee funding of vital local government services, encourage litigation, and threaten the financial health of cities and counties around our State. The League believes it can aid this Court's review by providing a broader legal framework for this issue than is provided by the parties' briefs.

The League's amicus counsel have examined those briefs and are familiar with the issues and the scope of the presentations. The League respectfully submits that additional briefing would be helpful to clarify that franchise fees have never been considered taxes, no matter who ultimately bears their economic burden. Proposition 26 sets no limit on what the City can charge market participants for the use of public property; and Proposition 26 does not apply retroactively to invalidate the franchise fee pass-through in this case even if it did.

Therefore, and as further amplified in the Interest of Amicus portion of the proposed brief, the League respectfully requests leave to file the brief combined with this application.

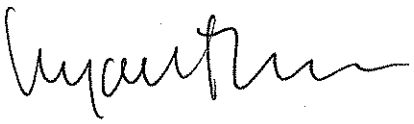
IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 473 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.

DATED: November 3, 2014

COLANTUONO, HIGHSMITH & WHATLEY, PC



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INTRODUCTION

The franchise fee at issue here was agreed upon after two sophisticated entities, the City of Santa Barbara (the "City") and Southern California Edison ("SCE"), negotiated an agreement to extend the term of SCE's electricity franchise in the City. SCE sought to pass through to its customers part of the fee it paid the City for the privilege of using the City's rights-of-way — the "franchise fee" — and does so with approval of the Public Utilities Commission ("PUC") which regulates investor-owned utilities like SCE to prevent abuse of their monopoly power. Neither that SCE chooses to list this fee on its bills as it does utility taxes nor that the PUC authorizes SCE to pass this cost through to consumers converts this franchise fee into a tax. The economic incidence of taxes, fees and assessments varies from place to place and time to time depending on the relative market power of buyers and sellers. For example, this Court bears the economic burden of sales taxes on its purchases, even though that tax is an excise on the privilege of selling. Accordingly, legal analysis turns on the fixed, legal incidence of a revenue measure rather than its arguable, variable economic incidence.

Because this revenue measure is a matter of contract between the City and SCE, it is voluntary — not "imposed" — and therefore

not subject to Propositions 13, 62, 218, or 26,[2] each of which is limited to revenue measures that are "imposed" by government on unwilling payors. SCE could have walked away from the franchise or negotiate a different deal, but did neither. Indeed, franchise fees of the type SCE has agreed to pay in this case, and the PUC has allowed SCE to pass on to consumers, are authorized by statute, and a long line of cases finds them to be fees rather than taxes, no matter who bears their economic burden.

Many cities rely heavily on franchise fee agreements to fund vital general fund services, such as police, fire, parks, libraries, and streets and there is no language in Proposition 26 suggesting intent to unsettle those existing agreements. Thus, subjecting pre-2010 franchise fees to Proposition 26 would be contrary to both the language and the stated intent of the measure. Further, Proposition 26 is not retroactive and does not assist Appellants because the City enacted the Ordinance at issue in 1999, 11 years before voters approved the proposition. Proposition 26 cannot defeat application

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[2] Although the parties have litigated only Propositions 218 (articles XIII C and XIII D) and 26 (article XIII C, § 1, subd. (e)), revenues deemed "taxes" may also be subject to Proposition 13 (article XIII A, § 4 [authorizing special taxes on 2/3-voter approval]) and Proposition 62, a statutory initiative requiring voter approval of both special and general taxes (Gov. Code § 52722 [special taxes], § 53723 [general taxes].)

of the Ordinance post-2010 because the City has made no legislative change in the franchise fee and Proposition 26 lacks the language found in the measure it amends, Proposition 218, to have that effect. The different language of the two measures requires different meanings.

Thus, because the law establishes that Ordinance 5135 did not adopt a tax, but instead merely approved a contractual franchise fee for the use of the City's rights-of-way in SCE's for-profit enterprise, there was no error and the Court should affirm.

FACTUAL HISTORY

Amicus adopts by reference the Factual History set forth the City's Respondent's Brief.

PROCEDURAL HISTORY

Amicus adopts by reference the Procedural History set forth the City's Respondent's Brief.

ARGUMENT

I. APPELLANTS INCORRECTLY CLAIM THE FRANCHISE SURCHARGE IS A "USER TAX"

California law long lacked a positive definition of "tax" and the scope of that concept was defined by case law, often cases defining what a tax is not. (E.g., *Sinclair Paint Co. v. State Bd. of*

Equalization (1997) 15 Cal.4th 866 [fee on lead-containing projects to fund health services to children affected by environmental lead contamination was not a tax subject to Prop. 13]; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123 [business improvement district levy was an assessment, not a tax under Prop. 13].) Proposition 26 adopted the first positive definition of "tax" in 2010. (See Cal. Const., art. XIII C, § 1, subd. (e) [defining "tax" as "any levy, charge, or exaction of any kind imposed by a local government" with defined exceptions].[3])

Franchise fees for the use of municipal rights-of-way are not "taxes" under case law or Proposition 26 because they amount to rent for the use of public property and are not imposed as taxes are, but are voluntarily agreed to by utilities for the right to use public property to avoid the cost of private rights-of-way. Just because the City's franchise surcharge appears on SCE's bills to its customers does not make that surcharge a tax; many taxes and fees appear on utility bills — their common means of collection does not place them in the same legal category any more than the common collection of judgment liens and property taxes at a Sheriff's sale makes a judgment lien a tax.

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[3] The cited provision applies to local government. Proposition 26 adopted a substantially identical definition of state taxes as article XIII A, § 3, subdivision (b).

What matters is not the **label** of a revenue measure, but whether "a discrete group receives a benefit (for example, a permit to build or inspection of produce) or a service (for example, providing and administering a rental dispute mediation and arbitration hearing process) or a permanent public improvement (such as a local park or landscaped median islands on a local road) which inures to the benefit of that discrete group." (*Evans, supra,* 3 Cal.App.4th at p. 738.)

Non-tax revenue measures include regulatory and service fees, special assessments and more; each is not a tax because it is charged or agreed on account of a government service or benefit. (See *Evans, supra,* 3 Cal.App.4th at pp. 736–737 [Proposition 13 does not apply to "fees charged in connection with regulatory activities that do not exceed the reasonable cost of providing services necessary to the activity for which the fees are charged"]; Gov. Code § 50076 [post-Prop. 13 statute defining "special tax" to exclude "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged"].)

Because they are voluntary fees for the exclusive use of a portion of public property for benefit of a specific private person, franchise fees are not taxes. Indeed, were the rule otherwise, the tax-limiting purpose of Propositions 13, 62, 218 and 26 would be subverted — assets accumulated at the expense of taxpayers would be exploited for private profit with no recompense to taxpayers and

governments would have to ask more of taxpayers to fund essential services.

II. THE CITY DOES NOT "IMPOSE" THE FRANCHISE FEE ON SCE OR APPELLANTS

The legal incidence of any revenue measure is determined by the legislation under which it is imposed — legal issues are determined by resort to law rather than market conditions. Thus, that the legal incidence of the franchise fee here is on SCE can be proven by the terms of Ordinance 5135. That Ordinance approves a voluntary agreement between SCE and the City to which Appellants admit they are not parties. (Appellants' Opening Brief, p. 4, fn. 5; Appellants' Reply Brief, p. 19.) Moreover, SCE insisted in its negotiations with the City that it not be obliged to pay the franchise fee unless the PUC authorized SCE to "pass through" part of it to its customers — the City played no part in SCE's decision that the franchise fee appear on its customers' bills. (AA2:345.) By the same token, the State Board of Equalization — which enforces the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue & Taxation Code sections 7200 et seq.) — has no role in determining whether a retailer passes sales tax on to this Court upon its purchase of goods or absorbs the tax itself, perhaps as a "sales tax holiday."

The franchise fee paid by SCE is not a "fee" or "charge" governed by either Proposition 218 (Cal. Const., art. XIII D, § 6) or Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) because it is not

"imposed"; instead, it was freely negotiated between voluntary market participants of comparable market power. (Cf. *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 [defining "impose" as used in Mitigation Fee Act as "to establish or apply by authority or force, as in "to impose a tax"].[4]) No force or authority is involved here — SCE willingly agreed to the franchise agreement after negotiating its terms with the City to obtain use of valuable public rights-of-way in its for-profit business. (See also *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1696, fn. 3 ["the acceptance of a franchise is a matter of contract"].) If anyone "imposed" the fee at issue it was SCE or PUC, not the City: SCE obtained the permission of PUC to pass through a portion of the franchise fee to its customers in the form of a line item on its customers' bills. Yet Appellants brought this suit against the City, not SCE or PUC. Moreover, neither SCE nor the PUC is a "local

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[4] No published authority yet construes the meaning of "impose" in this context, although the Courts have held that "impose" refers to the initial legislative act to create a legal duty to make payment. (E.g., *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 240 ["'imposed' — which in this context means enacted"]; *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194 ["The word 'impose' usually refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation."]; see also *id.* at p. 1194, fn. 15 [collecting cases].)

government" or an "agency" subject to Propositions 218 and 26. (Cal. Const., art. XIII C, § 1, subd. (a) ["defining "local government" for purposes of Article XIII C]; Cal. Const. art. XIII D, § 2, subd. (a) [defining "agency" for purposes of Article XIII D as "any local government defined in subdivision (b) of Section 1 of Article XIII C"].[5])

Even assuming this Court could somehow conclude that the City imposed a tax here, a tax is "imposed" only on its initial legislative adoption — here, in 1999 — and thus any imposition of the "tax" is on SCE, the object of the imposition, not its customers to whom it subsequently passed on the economic burden of the fee. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194–1195 (*Citizens Assn.*) [Proposition 218 did not require tax election on annexation to City because taxes had been "imposed" years earlier in compliance with then-applicable law].) But just as SCE is not a defendant in the case, nor is it a plaintiff. And, again, it is not a local government subject to Proposition 218 or 26.

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[5] Nor is the PUC subject to Proposition 26's limit on state taxes, which applies to statutes, not regulatory actions. (*Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 198 [PUC-mandated public goods charge under pre-2010 statutes not subject to Prop. 26].)

III. PROPOSITION 218 DOES NOT APPLY TO NON-PROPERTY-RELATED FEES

Proposition 218 creates and regulates a new class of fees known as property related fees, which it defines as:

> "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, **imposed by an agency upon a parcel or upon a person as an incident of property ownership**, including a user fee or charge for a property related service.

(Cal. Const., art. XIII D, § 2, subd. (e), emphasis added.) Our Courts have spent some energy over the past 18 years giving substance to this term. (E.g., *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 [housing code enforcement fee not property related fee because participation in rental housing market is voluntary]; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 (*Richmond*) [water connection fee not property related because government cannot predict who will choose to develop property so as to require new service]; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 [fee for continuing water service to existing residential customer is subject to Prop. 218 as a fee for a property related service].) However, the essence of the definition of "property related fee" is clear: the fees subject to Proposition 218 are those imposed on property owners as such or on account of "nothing other than normal ownership and use of property," like

use of the volume of water needed for ordinary residential use of property. (*Richmond, supra*, 32 Cal.4th at p. 427.)[6]

The fee at issue here is not imposed on SCE as a property owner or as an incident of property ownership, but for the privilege of exclusive use of property it does not own — a portion of the **public** right-of-way. Decades of cases regarding franchise fees, the plain language of authorizing statutes, and the nature of franchise fees establish them as creatures of contract and compensation to government for the use of its property.

General law cities may grant franchises for the provision of electricity, water, telephone service, gas, and other utilities either through a bidding process under the Broughton Act, first enacted in 1905 (Pub. Util. Code, § 6001 et seq.) or without bidding under the Franchise Act of 1937 (Pub. Util. Code, § 6201 et seq.). Charter cities may use either statutory scheme unless their charters provide otherwise. (Pub. Util. Code, §§ 6001, 6205; cf. Pub. Util. Code, § 6350 et seq. [cities may place a land use surcharge on electricity utilities to

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[6] Pending in another case before this Division is the question whether a fee for a volume of water service beyond that needed for ordinary residential use of property is also a property related fee subject to Proposition 218. (*United Water Conservation District v. City of San Buenaventura* (B251810, argued June 18, 2014, submission vacated by order seeking supplemental briefing Sept. 9, 2014).)

replace franchise fees otherwise lost to changes in the regulatory environment].)

Franchise fees are usually approved by ordinance and their terms are subject to negotiation between the City and the would-be franchisee. (See Cal. Municipal Law Handbook (Cont.Ed. Bar. 2014) § 6.62; *County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418, 421 [companies "awarded gas franchises through county ordinances, which were adopted by the County of Kern" and affirming ordinances' validity]; cf. Pub. Util. Code, § 6001.5 [preempting "**the ordinance** of any chartered municipality insofar as **that ordinance** governs the granting of franchises to construct [oil pipeline] facilities..." emphases added].) Cities may grant franchises of any term under the Franchise Act (Pub. Util. Code, § 6264) and have long had wide discretion on that issue. (See *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363 ["the public body making the grant can prescribe terms and conditions in the granting and for the acceptance of a franchise" including the payment of money]; *People ex rel. Spiers v. Lawley* (1911) 17 Cal.App. 331, 346–347 [franchise agreement construed like any other writing]; *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 [franchise fees not "proceeds of taxation" under article XIII B (Proposition 9's so-called Gann Limit): "A franchise is a negotiated contract between a private enterprise and a governmental entity for the long-term possession of land."].)

Further, State law requires utilities holding a franchise from a general law city to pay a franchise fee of a specified percentage of gross annual receipts from the use of that right-of-way. (Pub. Util. Code, § 6231, subd. (c); see also *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1172–1173 [calculating franchise fees and reviewing their history]; *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1695–1696 [authorizing counties to impose fees under Franchise Act of 1937].)

Thus, a franchise fee voluntarily paid by a utility like SCE is not imposed on a property owner or as an incident of property ownership sufficient to invoke Proposition 218 whether or not the utility has market power (and regulatory permission) to pass the economic burden of that fee in full or in part to its customers. Rather it is a voluntary rental for the use of public property with nearly a century of history in our statutes. It is neither a tax nor a property related fee within the scope of Proposition 218.

IV. PROPOSITION 26 IS NOT RETROACTIVE

Proposition 26 is the latest exercise in direct democracy to limit government funding of public services. But Proposition 26 cannot be read to apply retroactively to defeat the 1999 adoption of Ordinance 5135 — 11 years before the 2010 adoption of the initiative. (See *Brooktrails Township Community Services Dist. v. Bd. of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 198 ["there is nothing in Proposition 26 indicating that it was meant to have a

retroactive application" as to local government]; *id.* at p. 205 ["retroactivity was addressed in Proposition 26, but solely for **state** measures affecting ad valorem taxes," emphasis in original, citing Cal. Const., art. XIII A, § 3, subd. (c)]; *id.* at p. 206 ["The framers of Proposition 26 made no provision directing that it would impose new requirements for the validity of existing local government assessments, fees, or charges."]; *id.* at p. 207 [nothing in ballot arguments for Prop. 26 evidencing intent for retroactive application].)

Nor can Proposition 26 be read to defeat the application of Ordinance 5135 post-2010.[7] Proposition 26 leaves such earlier legislation entirely in force. Proposition 218, by contrast, terminated earlier fee legislation as of July 1, 1997. (See Cal. Const., art. XIII D, § 6, subd. (d) ["Beginning July 1, 1997, all [property related] fees or charges shall comply with this section."].)

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[7] The question whether pre-2010 legislation authorizing a fee may be implemented thereafter without compliance with Proposition 26 is pending before the Third District Court of Appeal in *Citizens for Fair REU Rates v. City of Redding* (C071906, argued October 6, 2014, submission vacated for supplemental briefing October 17, 2014. The appellant seeks to overturn the conclusion of the Shasta Superior Court that Redding may continue to include in electric rates a payment in lieu of taxes (PILOT) transfer to the City's general fund authorized by pre-2010 City legislation.

Proposition 26 amends Proposition 218 to add its definition of "tax" to article XIII C, but includes no language like that of article XIII D, section 6, subdivision (d). It therefore has only the retroactivity specified in article XIII C — a rule regarding taxes that ceased to be of interest in 1996. (Cal. Const., art. XIII C, § 2, subd. (c) [requiring voter approval of non-voter-approved taxes adopted in first 11 months of 1996].) Thus, there is nothing in Proposition 26 to overcome the presumption that legislation has only prospective application. (*Myers v. Philip Morris Co.* (2002) 28 Cal.4th 828, 840.) "[A] statute may be applied retroactively only if it contains express language or retroactivity or if other sources provide a clear and unavailable implication that the Legislature intended retroactive application." (*Id.* at p. 844.) Initiative constitutional amendments, of course, are construed under the same canons of construction as are statutes. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316 (*Schmeer*) ["We construe provisions added to the state Constitution by voter initiative by applying the same principles governing the construction of a statute."] [construing Proposition 26].)

The City and SCE made their franchise agreement in 1999, and Proposition 26 did not retroactively invalidate those acts or terminate them, as Proposition 218 does as to property related fees.[8]

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[8] Proposition 218 expressly exempts fees for electric service. (Cal. Const., art. XIII D, § 3, subd. (b) ["For purposes of this article, fees

If Proposition 26 were intended to terminate earlier fees as does Proposition 218 — which it amends — it would have said so. Its silence on this point, as on others, is telling. (See *Citizens Assn., supra,* 209 Cal.App.4th at p. 1191 [noting "there is much in the very structure of Proposition 218 that, if it had been intended to apply to annexations, should have been there but isn't" and quoting Sherlock Holmes' observation in *Silver Blaze* of "the dog that did not bark"].)

If it were the case that every person reimbursing the payer of a tax could challenge it years later, we would have litigation without end. (Cf. *McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441, 1450 [if continued collection of pre-existing tax considered an "imposition" or "extension" of the tax requiring an election, interpretation would "require a local government to annually resubmit taxes previously approved by the voters, even in the absence of any change in the amount or duration of those taxes" and lead to "an absurd result ... clearly not intended by the voters [who approved Prop. 218]"], disapproved of on another ground in *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 816.) This is not — and should not — be the case.

Thus, unlike Proposition 218, Proposition 26 does not defeat the future application of laws in effect when it was adopted that authorize or impose fees which it does not allow to be adopted

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for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership."])

anew. Thus, even if the City's franchise fee could be viewed as "imposed" on SCE or SCE's customers such that Proposition 26 might apply to that fee if newly legislated, it does not dislodge it after the fact.

V. PROPOSITION 26 SETS NO COST LIMIT ON FEES FOR USE OF GOVERNMENT PROPERTY

Moreover, even if Proposition 26 could apply here — retroactively — to a voluntarily agreed fee for use of public property, it would permit the City's fee.

Proposition 26 excludes from its new definition of "tax" "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).) Unlike the first three exceptions to the definition of "tax" — for fees for benefits, services and regulation — this fourth exception includes no requirement that fees be limited to costs. (E.g., *id.* at § 1, subd. (e)(1) [exception for "[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," emphasis added].) Had the drafters of Proposition 26 intended to require a "reasonable costs" limitation on charges paid by owners of utilities such as franchise fees, they would have included the requirement in the text of subdivision (e)(4). (See *Le Francois v. Goel*

(2005) 35 Cal.4th 1094, 1105 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) It is similar in this respect to the fifth exception — for fines and penalties — which is also silent as to a cost-limitation. Indeed, what costs does this Court recover when it penalizes misconduct by sanction? None; the penalty is to change or punish behavior, not to recover costs.

A critic of this view might point to the unnumbered final paragraph of article XIII C, section 1 subdivision (e), which states:

> 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.

(Cal. Const. art. XIII C, § 1, subd. (e) [final unnumbered par.].) On its face, this language can be read to import a cost-limitation into each of the seven exemptions to Proposition 26's definition of tax which precede it.

Doing so, however, would violate two canons of construction. First, it would render surplusage the language in each of the first three exemptions to Proposition 26's definition of tax limiting

government to its costs to confer benefits, provide services, and to regulate. (Cal. Const., art. XIII C, § 1, subd. (e)(1)–(3).) "Our goal is to interpret the language of the statute—not to insert what has been omitted or omit what has been inserted." (*Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1100.)

Second, it would embrace an absurd result — no fine or penalty could be imposed that did more than recover the costs a government can be said to incur in imposing the penalty, for the fifth exception, too, is devoid of language limiting government to cost recovery but would have that restriction imposed via the final unnumbered paragraph of section 1, subdivision (e):

> (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.

(Cal. Const. art. XIII C, § 1, subd. (e)(5).) Absurd interpretations are to be avoided: "A statute must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*People v. Zambia* (2011) 51 Cal.4th 965, 968–969, internal quotations and citations omitted.)

Thus, rather than read the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) to import a cost-limitation into the fourth and fifth exceptions to Proposition 26's definitions of

tax, it is more sensible to read that language merely to assign to government the burden to prove compliance with the cost-limitation principle when it otherwise applies. In short, even if Proposition 26 applied to Santa Barbara's franchise fee here, it would not limit that fee to the City's cost to provide rights-of-way for SCE's use.

Proposition 218 has been so interpreted and, as *Citizens Assn.* teaches, Proposition 26 ought not to be interpreted otherwise without a clear indication in its text that another meaning was intended. (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 639 [Prop. 218 case; "Private utilities pay public authorities 'franchise fees' to use government land such as streets, or for rights-of-way to provide utility service."]; *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 [Prop. 9, Gann Limit case: "Franchise fees are paid as compensation for the grant of a right of way, not for a license or tax nor for a regulatory program of supervision or inspection" and are "similar to an easement or leasehold"].)

The rationale of each of Propositions 13, 62, 218, and 26 is to protect tax- and rate-payers, not sophisticated business contractors such as SCE. (E.g., *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 235 [stated purpose of Proposition 218 "was to 'protect taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.'"]; *Schmeer, supra,* 213 Cal.App.4th at p. 1323 [stated purpose of

Proposition 26 "to ensure the effectiveness" of Propositions 13 and 218 by further defining tax "for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees'"].) Proposition 26, in particular, was concerned with free-riders — those who benefit from fees paid by others. (See *id.* at pp. 1324–1325 [citing Prop. 26's changes to Cal. Const., art. XIII C, § 1, subds. (e)(1) and (e)(2) exempting from definition of "tax" only those charges "for a specific benefit conferred or privilege granted directly to the payor that is **not provided to those not charged**" and "for a specific government service or product provided directly to the payor that is **not provided to those not charged**," emphases added].) Making those who profit from the use of public resources pay for that use for the benefit of taxpayers is entirely consistent with that objective.

In this regard, it is noteworthy that there is no identity of the rate-payers who buy SCE's electric service and the taxpayers who fund the City's streets. Power is consumed by businesses and tenants who own no property, by tourists and other visitors, tax-exempt governments and non-profits and others who contributed none of the capital that the City uses to construct and maintain its street system. Franchise fees allow these "free riders" to pay some portion of the cost to construct and maintain public works infrastructure from which they benefit.

VI. PETITIONERS' VIEW WOULD ENDANGER A CRUCIAL FUNDING STREAM FOR CALIFORNIA CITIES

Franchise fees make up a significant percentage of many cities' annual revenues, and defining franchise fees as taxes requiring voter approval would result in significant revenue losses for many cities. According to data gathered by the State Controller, California cities derived $1.015 **billion** in revenues from franchise fees in fiscal year (FY) 2011–2012, the last year for which data are available. (Motion for Judicial Notice in Support of Brief of Amicus ("MJN"), Exh. A at p. 14.) This averages $61.40 per capita. (*Id.* at p. 39.)

Cities vary greatly from the average figure. The median city received 5.8 percent of its general revenues from franchise fees in FY 2011–2012. (MJN, Exh. A at p. 64.) Many cities, of course, relied much more heavily on franchise fees as a percentage of general revenues that fiscal year, including these:

- Hemet – 41.7%
- Needles – 29.7%
- Jurupa Valley – 26.2%
- Lodi – 26.0%
- Azusa – 20.0%
- Arvin – 19.3%
- Pittsburg – 19.1%
- Monte Sereno – 17.9%

- Adelanto – 17.4%
- Fort Bragg – 16.8%

(MJN, Exh. A at pp. 64–76.)

Santa Barbara County cities, in particular, rely significantly on annual franchise fees:

- Buellton – $202,981 (4.3% of total general revenues)
- Carpinteria – $627,107 (9.2%)
- Goleta – $1,185,154 (8.4%)
- Guadalupe – $142,900 (10.2%)
- Lompoc – $610,968 (4.5%)
- Santa Barbara – $3,689,441 (4.4%)
- Santa Maria – $3,787,686 (8.8%)
- Solvang – $208,006 (4.1%)

(MJN, Exh. A at pp. 24, 73–74.)

Moreover, the Legislature recently saw fit to protect and expand the opportunities for local agencies to generate revenues from franchise fees. Assembly Bill No. 2987, passed nearly unanimously by the Legislature in 2006 and signed by Governor Schwarzenegger soon after, enacted the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), which simplified the process for cable television providers to obtain franchises by allowing them to obtain a statewide franchise from the PUC, to use local agencies' rights-of-way to expand cable infrastructure to underserved areas, and then to remit franchise fees to local agencies.

(See MJN, Exh. B at pp. 1–2.[9]) AB 2987 was intended to "[p]rotect local government revenues and control of public rights-of-way," indicating that the Legislature recognizes the importance of this funding stream. (Pub. Util. Code, § 5810, subd. (a)(2)(C); see also *id.* at subd. (b) ["Legislature recognizes that local entities should be compensated for the use of the public rights-of-way and that the franchise fee is intended to compensate them in the form of a rent or a toll"].)

Thus, changes to the long-standing classification of franchise fees as matters of contract between sophisticated parties — and thus not "taxes" requiring voter approval under Propositions 13, 62, 218 and 26 — would affect the public fisc of cities large and small, rich and poor, everywhere in California, and would be contrary to the intent of the Legislature, which has long recognized franchise fees as an important local revenue source. Such a change should not be made without plain evidence the voters who adopted Propositions 218 and 26 intended that outcome. (*Citizens Assn., supra,* 209 Cal.App.4th at pp. 1189–1199 [Prop. 218 interpreted to preserve Prop. 13 precedents which it does not plainly overrule].)

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[9] The PUC's website explaining the impact of DIVCA and containing relevant reports and analyses is located at: <http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/videofranchising.htm> (as of October 30, 2014).

CONCLUSION

Courts have long held franchise fees to be creatures of contract, not taxes; as payments made by utilities to public entities for the privilege of using public infrastructure to pursue private profit. That the PUC has allowed SCE — at SCE's insistence — to collect the franchise fee in issue here on utility bills does not make them taxes any more than this Court's payment of sales taxes on its purchases alters its tax-exempt status; nor does the fact SCE collects this franchise fee because the City passed an ordinance change the conclusion.

Many cities rely heavily on franchise fees to fund police, fire, library, parks, streets, and other essential government services. Newly subjecting these fees to voter approval as taxes under Propositions 218 and 26 would reduce this revenue stream to the public's detriment. Moreover, such a result would be contrary to the plain language and intent of these propositions to protect taxpayers rather than to reward free-riders. For all these reasons, Amicus League of California Cities respectfully urges this Court to affirm the trial court's judgment for the City.

DATED: November 3, 2014

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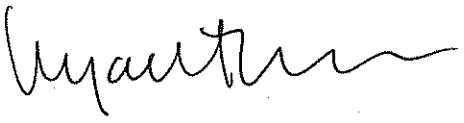
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing Brief of Amicus Curiae in Support of Respondent contains 5,108 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000 word limit set by rule 8.204(c)(1) of the California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: November 3, 2014

COLANTUONO, HIGHSMITH & WHATLEY, PC



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PROOF OF SERVICE

Rolland Jacks, et al. v. City of Santa Barbara,
Appellate Court Case No. B253474
Santa Barbara Superior Court Case No. 1383959

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On November 3, 2014, I served the within document(s):

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service listed below.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 3, 2014, at Los Angeles, California

Pamela Jaramillo

SERVICE LIST

Rolland Jacks, et al. v. City of Santa Barbara,
Appellate Court Case No. B253474
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