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April 25, 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 –Reply to Supplemental Amicus Brief of League of California Cities and the California State Association of Counties (collectively "Amici")

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Appellants-ratepayers agree with Amici that this court should analyze the charges here under subdivision (e)(4) of Cal. Const., art. XIII C, § 1 and not the other six exemptions within subdivision (e). Yet near the end of their letter brief, Amici conflate the key difference between the *nature* of a charge and the *amount* of that charge. In addressing the possibility that more than one exemption could apply to a given charge, Amici assert that once "any exemption is found to be applicable[,]" then necessarily the "fee is exempt from the definition of 'tax[.]' " (Amici Supp. Brief, at p. 4; see also *id.*, p. 4, fn. 1.) That reasoning defies the limited nature of all seven exemptions under subdivision (e) as well as the teaching of *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 269 (*Jacks*) that *part* of a charge's amount can be a true franchise fee, which is a not a tax, while the *excess* of that same charge is an invalid tax.

Each of the seven exemptions under subdivision (e) is limited. (Answer Brief on the Merits, pp. 30–32.) These caps reflect voters' intent in passing Proposition 26 to preserve certain governmental charges as nontaxes, but to prevent government from raising unjustified revenue under a nontax label. (See Voter Information Guide, Gen. Elec. (Nov. 2, 2010) analysis of Prop. 26 by Legis. Analyst, p. 58 [noting that Proposition 26 left unaffected some fees and charges]; *id.*, text of Prop. 26, § 1, subd. (e), p. 114 [noting "the recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements"].) This voter concern about the *amounts* of governmental charges was a continuation of what had prompted voters earlier to pass Propositions 13 and 218. (See *Jacks, supra,* 3 Cal.5th at p. 262 [stating that Propositions 13 and 218 were passed to curb "excessive fees, not fees in general"].)

Contrary to Amici, then, identifying the relevant subdivision (e) exemption is only the start—not the end—of the analysis. The government then "bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (Cal. Const., art. XIII C, § 1, subd. (e).) And to carry that burden, the government must prove that the charge's amount is less than the relevant exemption's limits. (See *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212–1214 [holding that a charge could not qualify as a nontax under subdivision (e)(1) unless it satisfies both the aggregate-cost and allocation inquiries of subdivision (e)].)

Thus, just because part of each charge here might be exempt as a franchise fee under subdivision (e), does not mean that each charge's *entire amount* is exempt. By analogizing franchise fees to the types of fees discussed in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, *Jacks* explained that Proposition 218 required a "reasonable relationship" between a franchise fee's amount and the rationale for charging the fee—the value of the franchise. (*Jacks, supra,* 3 Cal.5th at p. 269.) Otherwise, a local government could exploit a valid franchise fee by inflating its amount to raise revenue without getting voter approval. (*Ibid.*) In passing Proposition 26, voters still permitted local governments to impose franchise fees—and still limited those fees to justifiable amounts. (See *id.* at pp. 262–263 ["This understanding that restrictions on taxation do not encompass amounts paid *in exchange for property interests* is confirmed by Proposition 26 … "], italics added.)

So, if Oakland cannot prove that each charge's entire amount is reasonably related to the value of the corresponding franchise, Proposition 26 will bar the excessive amount as not part of "[a] charge i*mposed for* [the] use of … or the purchase … of local government property." (Cal. Const., art. XIII C, §1, subd. (e)(4), italics added.; see also Answer on the Merits, p. 33.) And at this demurrer stage, appellants-ratepayers have sufficiently alleged that Oakland will not be able to carry its burden.

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 700 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 25, 2022

/s/

Paul Katz
Attorney for Appellants

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STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **A154986**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/25/2022

Date

/s/Paul Katz

Signature

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