CITY OF OAKLAND

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April 25, 2022

Honorable Tani Cantil-Sakauye, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Zolly v. City of Oakland*, Case No. S262634

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Petitioner City of Oakland ("Oakland") replies to the supplemental letter briefs of amici curiae Howard Jarvis Taxpayers Association ("HJTA" and "HJTA Supp. Br."), Consumer Attorneys of California ("Consumer Attorneys" and "Consumer Attorneys Supp. Br."), and Reuben Zadeh, Mable Chu, and Herbert Nadel ("Zadeh Amici" and "Zadeh Amici Supp. Br.") (collectively "Three Amici"). Disagreeing with both parties, and with Amici League of California Cities and California State Association of Counties (the "League") and the Legislature of the State of California (the "Legislature"),[1] the Three Amici contend that (1) Cal. Const., art. XIII C, § 1, subdivision (e)(4) ("Exemption 4") does not apply to the Oakland franchise fees at issue here, and (2) instead those fees should be analyzed as, among other things, a "privilege granted directly to the payor that is not provided to those charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege" under Cal. Const., art. XIII C, § 1, subdivision (e)(1) ("Exemption 1").[2]

[1] See *generally* League Amicus Br. & Supp. Br.; March 22, 2021 Legislature Br. 9, 12-13.

[2] HJTA also contends the Oakland franchise fees may be analyzed under subdivision (e)(3) ("Exemption 3") as "a charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits…and the administrative enforcement and adjudication thereof." (HJTA Supp. Br. 4.) HJTA fails to explain how Oakland's contractual grant of an exclusive waste-hauling franchise and the contract

I. The Three Amici Misunderstand the Nature of the Franchise Property Interests Involved, Which Categorically Are Not a "Tax."

A. Oakland's Franchise Fees Are Voluntary Contract Consideration That Fall Outside Article XIII C.

At the outset, as noted in Oakland's Opening Supplemental Letter Brief and prior briefing on the merits, the Three Amici misunderstand the franchise here. Oakland's franchise fees are not fees "imposed on" taxpayers, but contract consideration the waste-hauling franchisees voluntarily agree to pay to purchase an exclusive and long-term, multi-billion dollar franchise to provide waste-hauling services to Oakland residents. Accordingly, the franchise fees at issue are not "imposed" on the franchisees (or taxpayers) so as to bring them within Article XIII C's threshold definition of "tax."

Contrary to the Three Amici's assertions, Proposition 218 and Proposition 26 sought to prevent governments from imposing fees disguised as regulatory or other cost-recovery measures where, in fact, the government costs being recovered represented only a small percentage of the fees imposed on taxpayers. By contrast, this case involves the *sale* of a valuable government *asset*—an exclusive franchise—not recovery of incidental costs incurred by Oakland in carrying out regulatory functions or providing other city services. (See *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].) When Oakland sells such an asset, it is lawful for Oakland to maximize its return.

Like any other asset or property the city may offer for sale, the waste-hauling franchises command considerable contract consideration. Their negotiated consideration takes into account, among other things, the substantial, long-term investment required by the private waste-haulers to enter into the Oakland and greater Bay Area market—such as development of a "transfer station" and of a landfill costing several hundred million dollars each—as well as the overall potential revenues to be earned over a ten- to twenty-year franchise term (several billion dollars over twenty years).[3] The Three Amici ignore these market realities. In doing so, they fail to acknowledge that the Oakland franchise fees are paid as contract consideration for valuable property rights, not "taxes" disguised as "imposed" fees.

These facts likewise differentiate this case from *Jacks* and render its pre-Proposition 26 "reasonable relationship to value" standard inapplicable here. In *Jacks*, unlike here, the franchisee had not voluntarily assumed a contractual obligation to pay the challenged surcharge nor negotiated its amount. Thus, the *sine qua non* of a true franchise arrangement—the payment of contract consideration in exchange for franchise property rights—was lacking in *Jacks*. (See, e.g., Oakland Opening Brief ("OB") 42-44 & fn. 9.)

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consideration exchanged for that property interest has anything to do with "regulatory costs" or "investigations, inspections, and audits" such that Exemption 3 might conceivably apply.

[3] Oakland's franchise with Waste Management of Alameda County for mixed materials and organics is for ten years, and with California Waste Solutions for recycling is for twenty years. (1 JA 141; 2 JA 326.)

B. To the Extent Oakland's Fees Are Subject to Article XIII C, the Three Amici Wrongly Assert That Exemption 4 Does Not Apply.

Even assuming, *arguendo*, that Article XIII C may apply to the Oakland franchise fees, the Three Amici still misconstrue the nature of the government property interest in trying to escape Exemption 4. The Three Amici mistakenly characterize Oakland's argument as stating that the franchise fees at issue are not a "tax" under Exemption 4 because they are paid in exchange for the waste-haulers' right to use Oakland's streets. (See HJTA Supp. Br. 1-4 [focusing on the first half of Exemption 4 that concerns charges for "entrance to or use of local government property," and arguing Exemption 4 does not apply because the franchisees do not need "permission" from Oakland "to enter or use public streets"]; Consumer Attorneys Supp. Br. 1-2 [arguing that "use of the roads by the haulers" is incidental and does not exempt the franchise fees as a charge for use of local government property]; Zadeh Amici Supp. Br. 1-4 [discussing use of public streets].)

As Oakland has repeatedly established, the property interests involved here include, but *are not limited to*, the use of city streets and rights of way. Rather, the "local government property" for which the fees are charged is *the franchise itself* because a franchise is property. (See, e.g., Oakland Opening Supp. Br. 2-4; Oakland Answering Supp. Br. 2-3; Oakland's Consolidated Amicus Answer Brief ("Consol. Amicus Br.") 7-13.) Accordingly, to the extent Article XIII C applies, Oakland's franchise fees fall squarely within the language of Exemption 4, which categorically exempts those fees as charges for "the *purchase*, rental, or lease of local government property," *and* the "entrance to or use of local government property." (*Id.*; Cal. Const., art. XIII C, § 1, subd. (e)(4) [emphasis added].)

C. The Three Amici's Rebuttal Arguments and Flawed Analogies Do Not Overcome Exemption 4's Application to the Franchise Property Interests Here.

The Three Amici offer a number of flawed analogies and hypotheticals in an effort to place Oakland's franchise fees outside the scope of Exemption 4. But those efforts fail and only underscore that Exemption 4 applies to the franchise property interests involved here.

First, the Three Amici argue that Oakland's franchise fees should not be exempt because they are paid in exchange for a right to use the streets that is no different from the fundamental right to travel enjoyed by all California citizens. (E.g., HJTA Supp. Br. 1-2 [arguing that the rights bestowed by Oakland on the waste-hauling franchisees are no different than the "common and fundamental right" to use the streets "for purposes of travel and transportation"] [citations omitted; emphasis removed].) HJTA claims other businesses, like ice cream trucks, "possess [this right] for free." (*Id.*) Relatedly, the Zadeh Amici argue that cities are prohibited from charging fees for the use of their streets for the "purpose of transportation," citing to Vehicle Code section 9400.8.[4] (Zadeh Amici Supp. Br. 1.)

[4] Oakland previously established that Vehicle Code section 9400.8 does not apply to franchise fees at all, let alone prevent Oakland from charging franchise fees that encompass, in part, consideration for the right to "use the public street and/or public places" as necessary to carry out

Once again, these arguments overlook that Oakland is not simply permitting the waste-haulers to travel on the roads with their trucks. What the franchise conveys is a property interest to use the streets *for the purpose* of providing a vital public service to Oakland residents. (See Oakland Opening Supp. Br. 2-4; Oakland Answering Supp. Br. 2-3; Oakland's Consolidated Amicus Answer Brief ("Consol. Amicus Br.") 7-13; see also League Supp. Br. 3 [noting that the California Integrated Waste Management Act limits the provision of solid waste service to local agencies or solid waste enterprises, which may be provided by a franchise].) Oakland's exclusive waste-hauling franchises are thus different in character from an ice cream business. Those and other similar businesses use the streets for nonexclusive commercial purposes and do not possess an exclusive franchise like the one at issue in this case.

Second, the Three Amici posit that exempting Oakland's franchise fees as a charge for local government property would open the door to all manner of new fees, rendering Oakland's interpretation of Exemption 4 implausible. (See HJTA Supp. Br. 3-4 [suggesting Oakland could charge anyone for the "privilege" to use its roads for commercial purposes]; Consumer Attorneys Br. 2 [identifying hypothetical franchises and franchise fees involving only incidental use of the roads].) These hypotheticals are of no moment. The concept of a franchise refers to a limited set of public interests, such as public utilities and other vital public services. (See, e.g., *Santa Barbara County Taxpayer Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 949 [a franchise "enable[s] an entity to provide vital public services with some degree of permanence and stability, as in the case of franchises for utilities"]; *id.* [franchises are granted to "provide essential services to the general public"].) When Oakland sold this franchise, its fee represented payment for a broad bundle of property interests that makes up the franchise. It is not, as the Three Amici suggest, akin to a hypothetical charge to use Oakland streets for any general nonexclusive, non-franchise commercial purpose.

The inferences Consumer Attorneys attempt to draw from their hypothetical home construction and ice cream franchises are equally baseless. Cities do not grant exclusive, long-term franchises for nonessential commercial businesses, nor do they exact franchise fees therefrom. These examples are not comparable to the specific waste-hauling utility franchises at issue here.

Finally, the Three Amici cite no authority in support of the contention that "local government property" as used in Exemption 4 is limited to a "possessory" use or interest in property, or to the "permanent" use of real property. (Consumer Attorneys Br. 3; HJTA Supp. Br. 2-3; Zadeh Amici Supp. Br. 6-7.) Such a limitation would contradict Exemption 4's plain language, which refers only to "property" and does not purport to narrow the exemption to specific forms of property interests. (See 34A Cal.Jur.3d (Feb. 2021 update), Franchises from Governmental Bodies, § 4 ["A franchise is property of an incorporeal and intangible nature[.]"].) Consumer Attorneys' narrow reading of *Santa Barbara* as holding that franchises encompass only possessory interests in land is directly contradicted by that court's acknowledgement that a franchise interest embodies the right to use government property "to provide essential services to

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the waste-hauling franchises. (See June 3, 2021, Oakland Answer to Zadeh Amicus Brief ("Oakland Zadeh Answer Br.").) Oakland incorporates and refers the Court to its prior briefing on that issue.

the general public"—*i.e.*, the same type of property interest being conveyed here. (*Santa Barbara*, 209 Cal.App.3d at 949.)

Waste-hauling and recycling services are frequently the subject of exclusive franchises. (See 12 McQuillin Law of Muni. Corps., Power to grant exclusive franchises—Waste management contracts, § 34:36 [local governments may "offer exclusive franchises respecting the hauling and disposal of nonrecyclable solid waste and recyclable waste"]; 34A Cal.Jur.3d, Franchises from Governmental Bodies, § 6 ["[C]ities may grant exclusive franchises for solid-waste handling services."].) The Three Amici provide no basis to distinguish waste-hauling franchises, or the property interests they encompass, from any other type of franchise for purposes of Article XIII C and Exemption 4.

Ultimately, the Three Amici fail to rebut the fundamental principles that: (1) franchises are property; (2) franchise fees are contract consideration paid in exchange for government property rights; and, thus, (3) franchise fees, like Oakland's here, are exempt from the definition of "tax" either because they are not "imposed," or because they are exempt as charges for the use and/or purchase of government property under Exemption 4.

II. The Three Amici's Contention That Exemption 1 Should Apply to Oakland Franchise Fees Would Yield Absurd Results in Violation of Principles of Construction.

The Three Amici also incorrectly contend that Oakland's franchise fees are subject to Exemption 1, which covers "[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." (Cal. Const., art. XIII C, § 1, subd. (e)(1).) As Oakland and the Zolly Respondents have established, however, Exemption 1 cannot apply to the Oakland franchise fees because those fees are paid in exchange for a government asset (the franchise property interests), not as repayment for government costs. Accordingly, applying Exemption 1's "reasonable cost" limitation to Oakland's franchise fees would yield illogical results in contravention of principles of statutory and constitutional construction. (See Oakland Opening Supp. Br. 4-6; Zolly Opening Supp. Br. 2-4.)

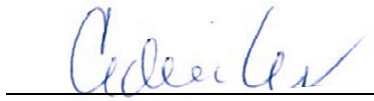
The Three Amici gloss over this incongruity in suggesting that Exemption 1 should apply here. HJTA and the Zadeh Amici simply assume that franchises are a privilege that can be limited to some "reasonable cost" of administration, while Consumer Attorneys contend that Oakland "*likely* incurs some cost to implement this program," such as supervising the waste-haulers to ensure they comply with the franchise contracts. (Consumer Attorneys Br. 2 [emphasis added].) But in selling the franchise, Oakland is not "implement[ing] a program." (*Id.*) It is not providing a service or carrying out a regulatory initiative through which the city itself incurs direct costs. Rather, it is *selling an asset* and exacting market-based contract consideration in exchange for that property interest. As this Court repeatedly confirmed in *Jacks*, franchise fees are not "based on the costs incurred in affording a utility access to rights-of-way" but are paid "for the use or purchase of a government *asset* rather than compensation for a cost." (*Jacks*, 3 Cal.5th at 268, 274-75 [emphasis in original]; see also *id.* at 268 [franchise fees are not "tied to a

public cost"]; *id.* at 269 [contrasting "fees imposed to compensate for the expense of providing government services or the cost to the public of the payer's activities" with "fees imposed in exchange for a property interest"].) Exemption 1's cost-based limitation cannot be harmonized with this understanding of franchises and franchise fees under California law.

* * *

The Three Amici's arguments are inconsistent with the plain text of Article XIII C and Exemption 4, long-standing principles of California law, and this Court's decision in *Jacks*, among other case law. Oakland has established that the franchise fees are paid as contract consideration for valuable property interests, which exempts those fees from the definition of "tax" either because they are not "imposed," or because they are categorically exempt under Exemption 4. The Three Amici have not provided grounds to deviate from the long-standing treatment of franchise fees as non-taxes here.

Respectfully submitted,



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Dated: April 25, 2022

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Cedric Chao

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