CITY OF OAKLAND

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April 4, 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") responds to the Court's March 11, 2022 questions: (1) Does Cal. Const., art. XIII C, § 1, subdivision (e)(4) ["Exemption 4"] apply to the fees paid under the waste management contracts at issue in this case, and if so, why?; (2) Are any other exemptions within article XIII C ["Article XIII C"] applicable to these fees?

First, to the extent the fees paid under the waste management contracts between Oakland and the private waste-hauling companies are subject to Article XIII C at all (see "imposed by" argument, *infra* 3), Exemption 4 applies because those fees constitute the type of charges for the entrance to, use, purchase, rental, and/or lease of local government property contemplated in this exemption. Here, the "local government property" consists of franchises to provide waste-hauling and recycling services to Oakland residents and the local government property rights and interests embodied in those franchises. (Cal. Const., art. XIII C, § 1, subd. (e)(4).)

Second, based on standard principles of constitutional interpretation, no other exemption in Article XIII C applies.

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I. Exemption 4 Applies and Categorically Exempts the Oakland Franchise Fees from the Definition of "Tax."

A. Oakland's fees at issue are franchise fees paid in exchange for government property.

Exemption 4 applies here because the fees are paid in exchange for the right to enter, use, purchase, rent, and/or lease local government property in the form of a franchise to provide utility services to Oakland residents. Under the relevant ordinances, the fees are paid

> in consideration of the *special franchise right* granted by the City to *Franchisee* to transact business, provide services, use the public street and/or other public places, and to operate a public utility for Mixed Materials and Organics [or Residential and Commercial Recycling] collection services.

(Opening Brief ("OB") 15-16 [emphasis added]; 1 JA 141; 2 JA 326.)

Accordingly, the fees are paid to *purchase a franchise* to provide waste management services to Oakland residents. That franchise is a form of "local government property." (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262) ["A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise."] [citations omitted] (*Jacks*); *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"] (*Santa Barbara*); *City & County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 747 ["A franchise is property."]; 34A Cal.Jur.3d (Feb. 2022 update) Franchises from Governmental Bodies, § 4 ["A franchise is property of an incorporeal and intangible nature, and is considered an estate in real property."].) This understanding of a "franchise" is consistent with how cities and counties across California interpret the term. (See League of California Cities Amicus Brief ("League Br.") 30 ["Franchise fees have been in place and consistently upheld as compensation for the grant of a possessory interest in government property and associated valuable franchise rights, distinct from taxes or other types of fees and charges."].)

The Oakland franchises at issue here comprise a bundle of property interests, including "the right to use the streets *and* the right to take a profit from that use," which "*conjointly* constitute the franchise." (34A Cal.Jur.3d, Franchises from Governmental Bodies, § 3 [emphasis added]; see also 12 McQuillin Law of Municipal Corps., Franchise defined, § 34:2 [a "franchise" is "the grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services"]; Oakland's Consolidated Amicus Answer Brief ("Consol. Amicus Br.") 7-13.) As such, Oakland's franchise fees constitute charges for the "purchase…of local government property."

Oakland's franchise fees also qualify as charges for the entrance to or use of local government property as separately enumerated in Exemption 4. Here, the right to "use the public street and/or other public places" was expressly identified as one part of the franchise property

interests conveyed by Oakland to the private waste-haulers. (See *supra* & OB 15-16; 1 JA 141; 2 JA 326.) Exemption 4 expressly includes such fees.

B. Oakland's franchise fees are a matter of contract, not taxes imposed by a local government.

Exemption 4's application to Oakland's franchise fees also is consistent with the historical understanding that franchise fees are matters of contract, not taxes. (See *Jacks*, 3 Cal.5th at 262 ["Historically, franchise fees have not been considered taxes."]; *Santa Barbara*, 209 Cal.App.3d at 950 ["fees paid for franchises are not taxes"]; *id.* at 949 ["A franchise is a negotiated contract between a private enterprise and a governmental entity for the long-term possession of land.").]; *Tulare County. v. City of Dinuba* (1922) 188 Cal. 664, 670 [franchise fees are "purely a matter of contract"]; *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363 [public body may condition the grant of a franchise on "the requirement of payment of money" which "becomes a part of the contract which the grantee has voluntarily assumed"]; League Br. 19 ["In contrast to taxes and fees that are directly imposed by a local government, franchise fees are the product of contracts between sophisticated and capable parties, negotiated to compensate cities for a possessory interest in or special privilege to use public property and transact business in and with the city."].) As *Jacks* recognized, Proposition 26 "confirmed" the "understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests," such as franchise fees. (*Jacks*, 3 Cal.5th at 262-63; see also *id.* at 263 & fn.6 [implicitly recognizing that Exemption 4 applies to franchise fees]; see also Amicus Brief of the California Legislature 18 ["the decision to include the fourth exception signaled that voters[] intended to *refrain* from closing 'loopholes' around charges like franchise fees and bridge tolls . . . that is exactly what the text indicates, given that the exception is drafted in absolute terms without any caveats"].)

Indeed, a charge may constitute a tax only if it is "imposed by local government" in the first place. (Cal. Const., art. XIII C, § 1, subd. (e).) A charge is "imposed" if it is established by authority or force. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944, citing *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 ["'To impose' generally means to establish or apply by authority or force. . . ."]; see also *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2013) 209 Cal.App.4th 1182, 1194, fn. 15 [discussing dictionary definitions of "impose"].) Oakland's franchise fees are bargained-for contract consideration in exchange for valuable property rights, not charges "imposed by" a local government. Accordingly, the franchise fees are not even subject to Article XIII C. (See OB 45-54; Reply Brief ("RB") 29-33); see also 99 Ops. Cal. Atty. Gen. 1, Op. No. 13-403 (2016) ["the phrase 'imposed *by* a local government' connotes that the local government is using its *own* authority or force to assess and require payment"; local ordinance enforcing payment of a contractual franchise obligation the franchisee voluntarily assumed was not "imposed" by local government and thus not a local "tax"].) But if they are "imposed," then Exemption 4 applies.

Deeming that franchise fees fall under Exemption 4 does not create a "loophole" in contravention of Proposition 26, as Respondents and some amici aver. Instead, franchise fees are limited by many factors: by the sophistication of the companies bargaining for the franchise, by

local officials' incentive to maximize public benefit, by voters' capacity to remove elected officials whose legislative enactments (such as the award of a franchise) they oppose, and by other forces. (See, e.g., League Br. 10-11, 24-25.)

Failing to include the Oakland franchise fees at issue here within the ambit of Exemption 4 would contradict both constitutional text and historical understanding and jurisprudence. Such a holding would upend long-standing case law and other authorities confirming that franchises are property and that fees paid as consideration for such property rights categorically are not taxes. Oakland's franchise fees thus squarely fall within Exemption 4.

II. Applying Any Other Exemption Would Violate Principles of Statutory Construction and Contradict Exemption 4's Natural Reading.

None of the other six exemptions under Article XIII C applies to Oakland's franchise fees either because they are wholly inapplicable on their face, or because they create textual absurdities that violate long-held principles of statutory construction. The second, third, fifth, sixth, and seventh exemptions cannot apply to the Oakland franchise fees by definition. The Oakland fees at issue are not imposed for (1) a "*government* service or product" [Exemption 2] [emphasis added]; (2) "regulatory costs" incurred *by Oakland* in connection with licenses, permits, investigations, inspections, audits, etc. [Exemption 3]; or (3) "as a condition of property development" [Exemption 6]. Nor do the fees constitute a "fine, penalty, or other monetary charge" imposed "as a result of a violation of law" [Exemption 5] or "[a]ssessments and property-related fees" imposed in accordance with the provisions of Article XIII D [Exemption 7]. (See Cal. Const., art. XIII D, § 2, subd. (b) & (e) [restricting "assessments" and "fees" imposed "by an agency," i.e., a "local government," upon "real property…for a special benefit conferred upon the real property" or "upon a parcel or upon a person as an incident of property ownership"].) In addition to these exemptions being clearly inapplicable to Oakland's franchise fees based on their plain meaning, because none of these exemptions has been raised as possibly applying to the Oakland fees, the parties and amici all appear to agree that these exemptions are inapplicable.

Certain amici have suggested the first exemption, covering "[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," might apply. (Cal. Const., art. XIII C, § 1, subd. (e)(1)) ["Exemption 1"].) Whatever superficial plausibility this argument might appear to have, applying the exemption in its entirety creates illogical and inconsistent results that cannot be harmonized with the provision's plain language or standard canons of constitutional and statutory interpretation.

First, applying Exemption 1 to the Oakland franchise fees is illogical because those fees do not have an associated "cost." As a result, the franchise fees cannot be limited to "the reasonable costs to the local government of conferring the benefit or granting the privilege." (Cal. Const., art. XIII C, § 1, subd. (e), para. 1.) Oakland incurred no measurable *cost* from granting the franchises to the waste-hauling companies—rather, it *sold* a government property interest. Recognizing that, unlike government services or regulatory activities, franchises have no

associated government cost, this Court repeatedly confirmed in *Jacks* that franchise fees are paid "for the use or purchase of a government *asset* rather than compensation for a cost," and thus are not "based on the costs incurred in affording a utility access to rights-of-way." (*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"].)

This view comports with the historical understanding of franchises and franchise contracts, under which the government "can prescribe terms and conditions in the granting and for the acceptance of a franchise," including "the requirement of payment of money…which may be fixed *without regard to the cost of supervision or inspection*." (*Contra Costa County*, *supra*, 10 Cal.2d at 363 [emphasis added].) Even the Zolly Respondents conceded that "there is clearly no government cost associated with a franchise fee that could make" a "reasonable cost" requirement applicable.[1] (Answer Brief ("AB") 34-35.) Exemption 1 thus *cannot* apply to Oakland's franchise fees by its plain terms because doing so would "lead to absurd results" and violate principles of construction. (See, e.g., *Howard Jarvis Taxpayers Ass'n v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, 461) (*BATA*); see also OB 31-34.)

Second, applying Exemption 1 to the Oakland franchise fees would be inconsistent with Proposition 26's purpose. The first three exemptions were enacted in response to *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*). (See, e.g., *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322 [Proposition 26 "was largely a response to *Sinclair Paint*"].) *Sinclair Paint* "summarized three categories of charges that are fees rather than taxes": (1) "special assessments [which] may be imposed in amounts reasonably reflecting the value of the benefits conferred by improvements"; (2) "development fees, which are charged for building permits and other privileges…'if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer'"; and (3) "regulatory fees…imposed under the police power to pay for the reasonable cost of regulatory activities." (*Jacks*, 3 Cal.5th at 260-61.) Proposition 26 was intended to codify these categories "in significant part." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210 fn. 7.); *Jacks*, 3 Cal.5th at 262 ["*Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits is reflected in Proposition 26."].) Accordingly, Exemption 1 was intended to codify that special assessments and similar fees are not "taxes" when limited to the reasonable cost of providing the benefits funded by those special assessments. Exemptions 2 and 3 similarly were intended to codify exemptions relating to the other fees *Sinclair Paint* addressed.

Moreover, there is no indication that the standards addressed in *Sinclair Paint*, as codified in Exemption 1, were intended to apply to franchise fees. Franchise fees were not

[1] In their amicus answer brief, the Zolly Respondents suggested in passing, for the first time on this appeal, that Article XIII C's first exemption and its "reasonable-costs limit" "arguably" may apply to Oakland's franchise fees to the extent they pay "for something other than the use of 'public streets or rights-of-way.'" (Zolly Amicus Answer Br. 7-8 fn.3.) This contention contradicts the Zolly Respondents' prior concession.

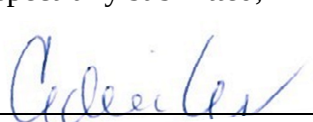
discussed in *Sinclair Paint* and cannot be "reasonably related to specific costs" or "benefits conferred by improvements" like the special assessments, development fees, and regulatory fees *Sinclair Paint* addressed. Indeed, the only post-Proposition 26 case to have analyzed whether a franchise fee is exempt as a charge for the purchase or use of government property applied Exemption 4 straightforwardly to the challenged property use charges. (*City of Del Mar v. Time Warner Cable Enters., LLC* (S.D. Cal. Aug. 28, 2017) No. 3:17-cv-00186-CAB-(NLS), 2017 WL 3705833, at *4.)

Finally, even if Exemption 1 somehow still could be construed to encompass the Oakland franchise fees, other principles of construction dictate that Exemption 4 must control in the event of such a conflict. Where two provisions overlap and cannot be reconciled, the more specific language controls over the general. (58 Cal.Jur.3d Statutes (Feb. 2022 update) § 116 [courts must "give effect to the special provision alone in the face of the dual applicability of the general provision and the special provision"].) Under this principle, even if both exemptions might otherwise apply, Exemption 4 would control over Exemption 1 because Exemption 4 specifically applies only to government property transactions, whereas Exemption 1 applies more generally to any privilege or benefit with an associated cost.

Relatedly, courts construing constitutional language must "give meaning to every word…if possible" and must avoid "an interpretation which has the effect of making [constitutional] language null and void." (*Office of Inspector General v. Sup. Ct.* (2010) 189 Cal.App.4th 695, 708.) Applying Exemption 1 in lieu of Exemption 4 would violate this principle. If this Court were to apply Exemption 1 to Oakland's franchise fees notwithstanding that Exemption 4's natural reading plainly covers those fees, that effectively would render Exemption 4 "null and void." Under such a construction, an argument could be mounted that any charge for the use or purchase of government property—such as park entrance fees, bridge tolls, or amounts paid to purchase government land or buildings—confers a privilege or benefit to the user and thus should be analyzed under Exemption 1's "reasonable costs" limitations rather than Exemption 4's categorical exclusion for government property charges. Exemption 4 must be given effect here, lest it be rendered meaningless.

Exemption 4's natural reading plainly encompasses Oakland's franchise fees, which are categorically exempt from the definition of "tax." Such a reading is consistent with Article XIII C's plain language, voter intent, and the historical treatment of franchises and franchise fees.

Respectfully submitted,



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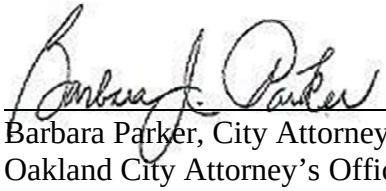

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Dated: April 4, 2022

/s/ *Cedric Chao*
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STATE OF CALIFORNIA
Supreme Court of California

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/s/Cedric Chao

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