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File No. 09998.00264

April 18, 2022

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
and the Associate Supreme Court Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Zolly v. City of Oakland*, S262634 – Amici Supplemental Letter Brief

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On March 11, 2022, the Court directed the parties to serve and file supplemental letter briefs addressing the following questions: (1) Does Cal. Const., art. XIII C, § 1, subdivision (e)(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 applicable to these fees?

Both Appellant and Respondent agree that franchise fees, the type of fee paid under the waste management contracts at issue in this case, are subject to Cal. Const., art. XIII C, § 1, subdivision (e)(4) ("Exemption 4") and none of the other six exemptions under Cal. Const., art. XIII C, § 1 applies. Amici curiae League of California Cities and the California State Association of Counties ("Amici") file this letter brief in support of the parties' position that Exemption 4 is the only exemption that applies. This position is consistent with this Court's decision in *Jacks v. City of Santa Barbara*, 3 Cal.5th 248 (*Jacks*). Amici disagree with the position of Amici Howard Jarvis Taxpayers Association ("HJTA") and Consumer Attorneys of California ("CAC") that Exemption 4 does not apply.

I. Exemption 4 Applies to Franchise Fees

Amici agree with both parties to this action that Exemption 4 applies. The only point of contention between the parties is the breadth of the nature of a franchise interest. Amici agree with Petitioner City of Oakland that the property interest conveyed through the grant of a franchise is broader than simply the right to use City streets.

Amici noted in the Amici Curiae Brief of League of California Cities and the California State Association of Counties in Support of Petitioner City of Oakland ("Amici Curiae Brief") that franchise fees are "paid as contract consideration for valuable franchise rights, including the right to use city or county property, to transact business, provide municipal services, use public streets

or other public places, and to operate a public utility." (Amici Curiae Brief, at p. 11.) This position is based on precedent of this Court and others, including most recently in *Jacks*, that "the right to use public streets or rights-of-way is a property interest" and "a franchise is a form of property, and a franchise fee is the purchase price of the franchise." (*Jacks*, at pp. 254, 262.)

Further, treatment of franchises demonstrates that they are a property interest encompassing more than simply the use of public streets. A franchise "is a special privilege conferred upon a corporation or individual by a government duly empowered legally to grant it." (*City of Oakland v. Hogan* (1940) 41 Cal.App.2d 333, 346.) According to the Court of Appeal in *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 (*Santa Barbara County Taxpayer Assn.*), "A franchise agreement is granted by a governmental agency to enable an entity to provide vital public services with some degree of permanence and stability, as in the case of franchises for utilities … A franchise is a grant of a possessory interest in public real property … In sum, franchise fees are paid for the governmental grant of a relatively long possessory right to use land, similar to an easement or a leasehold, *to provide essential services to the general public*." (emphasis added.) CAC narrowly reads *Santa Barbara County Taxpayer Assn.* to limit franchises to possessory interests in land (CAC's Supplemental Letter Brief), but in doing so, disregards the Court of Appeal's recognition that the franchise interest is also for the right to use public property *to provide public services*.

This Court articulated in *Jacks* that the "understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26 … Although Proposition 26 strengthened restrictions on taxation by expansively defining 'tax' as 'any levy, charge, or exaction of any kind imposed by a local government' (Cal Const., art. XIII C, § 1, subd. (e)), it provided an exception for '[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.' (*Id*., subd. (e)(4).)" (*Jacks*, at pp. 262-263.)

The parties to this litigation agree that the franchise fees are for the "use of local government property" and fit squarely within Exemption 4. The historic designation and treatment of franchises and franchise fees, as described above, demonstrate that the property interest conveyed through the grant of franchise rights is broader than the use of public streets. Amici therefore support the reasoning stated by the parties in their supplemental letter briefs filed on April 4, 2022 and their replies filed April 11, 2022, to the extent they agree, and Amici agree with petitioner City of Oakland with respect to the breadth of the property interest conveyed.

Despite this clear precedent and agreement by both parties to this litigation, both HJTA and CAC attempt to mischaracterize the nature of the property interest conveyed through a franchise. HJTA incorrectly contends that that Petitioner is not granting waste haulers the right to enter or use public property because businesses possess such a right for free. (HJTA's Supplemental Letter Brief.) CAC contends, on the other hand, that the property interest conveyed through a franchise is "incidental" to the grant of a monopoly to haul trash. (CAC's Supplemental

Letter Brief.) However, these positions directly contradict this Court's finding that a "franchise to use public streets or rights-of-way is a form of property." (*Jacks*, at p. 262.) As described above, the property interest conveyed through the grant of a franchise is more broad and complex than the use of public streets. (*See, e.g., City of Santa Cruz v. Pacific Gas & Electrict Co.* (2000) 82 Cal.App.4th 1167, 1171 [stating a city franchise grants a utility "the right to use city streets to distribute electricity" and, "[n]ormally the utility is charged a franchise fee as consideration for that privilege"].)

Neither HJTA nor CAC provide any case law to support their contention that a public agency is prohibited from charging for the use of the public right-of-way, particularly for the purpose of providing public services, and fail to mention how their arguments can be squared with the most common fee imposed on the public to travel in the public right-of-way – tolls (See *Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670 (["the gross receipt charge under the Broughton Act is neither a tax nor a license, but is obviously a toll or charge, which the holder of the franchise undertakes to pay as part of the consideration, for the privilege of using the avenues and highways occupied by the public utility…"]). HJTA attempts to draw an analogy between a business driving on a public street for commercial purposes without charge (such as Amazon, Uber, and Lyft) to a waste management company's use of the streets, to conclude that the latter should not be charged for driving on the public right-of-way, but the analogy is inapt. The California Integrated Waste Management Act limits provision of solid waste service to local agencies or solid waste enterprises (Pub. Resources Code § 40058) and expressly recognizes that solid waste handling services may be provided by a franchise, "under terms and conditions prescribed by the governing body of the local governmental agency," which includes negotiated franchise fees. (Pub. Resources Code § 40059.)

II. CAC and HJTA Incorrectly State That Other Exemptions Under Article XIII C Apply to Franchise Fees

Article XIII C, section 1 provides that a fee or charge that meets any of the exemptions set forth therein is exempt from the definition of a tax. Only Exemption 4 applies to franchise fees; none of the other exemptions apply. HJTA mischaracterizes the nature of article XIII C, section 1 of the California Constitution by arguing that two other exemptions, section 1(e)(1) [for specific benefits or privileges] or section 1(e)(3) [for licenses and permits, and other regulatory activity] apply to franchise fees. CAC argues section 1(e)(1) [for specific benefits or privileges] applies to franchise fees, and any property interest conveyed is merely "incidental." However, those arguments are flawed and at odds with the parties' position. More importantly, they are at odds with this Court's holding in *Jacks* that "a franchise is a form of property, and a franchise fee is the price paid for the franchise." (*Jacks*, at p. 267.)

In distinguishing franchise fees, this Court in *Jacks* expressed that other types of fees discussed in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 – such as the

ones in sections 1(e)(1)-(3) – were "restricted to an amount that had a reasonable relationship to the benefit or cost on which it was based" and based on "reasonable cost" while franchise fees were not. (*Jacks*, *supra*, at pp. 267-268.) On the other hand, franchise fees are "paid for an interest in government property [and] compensation for the use or purchase of a government *asset* rather than compensation for a cost." (*Id*. at p. 268.) In other words, franchise fees are subject to Exemption 4 without limitation as to "reasonable cost." (*See Schmeer v. County of Los Angeles* (2013) Cal.App.4th 1310, 1327 [excepting from the definition of a "tax" charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services under Cal. Const., art. XIII C, § 1, subd. (e), items (1), (2) & (3)].) Similarly, the Court of Appeal in *Santa Barbara County Taxpayer Assn*. made clear that "fees paid for franchises are not taxes, user fees or regulatory licenses." (*Santa Barbara County Taxpayer Assn.*, *supra*, at p. 949.) HJTA's and CAC's position seems to conflict with established case law. HJTA's and CAC's attempts to shoehorn fees paid for a property interest conveyed by a public agency, which is not bound to cost, into separate cost-based exemptions, ignores the historic characterization of the nature of and purpose for franchise fees, as described in detail above.

Furthermore, this Court need not reach the question of whether any other exemption under Article XIII C aside from Exemption 4 applies. The inquiry into whether a fee is exempt from the definition of a "tax" ends once any exemption is found to be applicable.[1] Because franchise fees share the characteristics of a fee imposed under Exemption 4, the fees need only meet the requirements of that exemption to be exempt from the definition of a tax, even if they do not meet the requirements of another.

Sincerely,

Lutfi Kharuf
of BEST BEST & KRIEGER LLP

Enclosures: Certificate of Compliance
Certificate of Service

[1] There may be situations, not presented by this case, where more than one exemption applies. In such situations, the relevant inquiry begins and ends with whether any exemption is found to apply. If the answer is yes, the fee or charge is exempt from the definition of a tax under the Constitution.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.520(c)(1) and (d)(2), the undersigned hereby certifies that the computer program used to generate this brief indicates that it includes 1,791 words, including footnotes and excluding the parts identified in Rule 8.520(c)(3).

Dated: April 18, 2022

Lutfi Kharuf
For BEST BEST & KRIEGER LLP

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Robert Zolly v. City of Oakland
Case No. S262634

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Trial Court Judge
[Case No. RG16821376]
Via U.S. Mail

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 18, 2022, at Sacramento, California.

Claudia Peach

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Date

/s/Joshua Nelson

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