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April 18, 2022

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

Re: ***Zolly v. City of Oakland*** **- S262634**
Court-Requested Supplemental Amicus Briefing

Madam Chief Justice and Associate Justices:

Amici curie Reuben Zadeh, Mable Chu and Herbert Nadel respectfully submit this supplemental brief at the Court's invitation. Thank you for the opportunity to respond to the following questions of the Court.

(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?

Subdivision (e)(4) may not be applied to the fees paid under the waste management contracts. In our amicus brief we pointed to Vehicle Code section 9400.8 to establish the rule that California cities may not charge fees for the use of city streets for their primary purpose of transportation; and that, therefore, local governments may not point to exemption 4 as a basis to avoid the classification of so-called "franchise fees" paid by solid waste disposal companies (and passed on to resident customers) from classification as taxes. The Notes to Vehicle Code section 9400.7 re-emphasize this prohibition:

> Note — Stats 1989 ch 1337 provides: SEC. 4. Nothing in this act shall be construed to allow local governments to impose fees not otherwise authorized by statute.

Section 9400.8 provides in pertinent part: "Notwithstanding any other provision of law, … no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra

legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989." *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1615. The language of Vehicle Code section 9400.8 seems abundantly clear, particularly when supported by the note in section 9400.7. Thus, on the plain and ordinary meaning of the text alone, the conclusion seems clear that local governments may not charge for the use of city streets, and that, therefore, the City may not point to the fourth exception of Proposition 26 to avoid classification of charges as taxes.

In *County Sanitation District*, the appellate panel goes on to say "By adopting Vehicle Code section 9400.8, the Legislature expressly prohibited a county from "impos[ing] a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads … ." *Id.* at 1619. "Accordingly, Vehicle Code section 9400.8 must be construed to prohibit a local agency from imposing fees or charges on legal loads that are hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear to the roads." *Id.* at 1622. The decision goes on to explain the clear preemptive language of the statute, the absence of exceptions to the rule of section 9400.8, all in light of this Court's rules of statutory construction. *Id.* at 1622.

There is still more support for the proposition that California prohibits local governments from charging for the use of city streets for transportation. Long before section 9400.8 became law, Vehicle Code section 35795 authorized only the Department of Transportation, and not local agencies, to assess fees for permits, with the exception of fees for oversize and overweight vehicles. *See the* August 7, 1989 *Opinion of the Legislative Counsel of California #21014*, to the Chair of the Assembly Committee on Transportation on the expected effects of Senate Bill 286 (1989), which became Vehicle Code sections 9400.7 and 9400.8 at page 5, paragraph 1.

The Legislative Counsel's studied opinion was that sections 9400.7 and 9400.8 effected no change in the ability of municipal governments to charge fees for the use of city streets because, under then-existing law, local governments also lacked authority to charge fees for the use of public streets for the transportation of loads within legal weight and size limits (noting a different position taken by the Los Angeles City Attorney). In support of this conclusion, the Legislative Counsel pointed to Vehicle Code section 21 as a clear basis for the State's plenary

power over street and road traffic matters, as well as this Court's statement that "the delegation of power to prescribe traffic rules is strictly construed." (*Opinion,* supra, p.3 para 3-4 and p.4 para. 2, quoting Rumford v. City of Berkeley (1982) 31 Cal.3d 545, 550.) Vehicle Code section 21 provides, in pertinent part:

> (a) Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the state and in all counties and municipalities therein, and a local authority shall not enact or enforce any ordinance or resolution on the matters covered by this code, including ordinances or resolutions that establish regulations or procedures for, or assess a fine, penalty, assessment, or fee for a violation of, matters covered by this code, unless expressly authorized by this code.
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> (*General Provisions enacted by Stats. 1959, Ch. 3; amended by Stats. 2010, Ch. 616, Sec. 1. (SB 949) Effective January 1, 2011. Operative July 1, 2011, by Sec. 6 of Ch. 616.*)

With this understanding of the long-standing prohibition (or lack of authority) of local governments to charge permit or other fees in return for the use of city streets, the legislative history of Senate Bill 286 merely fleshes out the story. Senate Bill 286 was introduced in January of 1989 as a bill to allow fire departments to exceed weight limits during training exercises. (Fire trucks previously had been allowed to exceed weight limits only during actual fire emergencies.) However, by July, the California Trucking Association ("CTA") had intervened seeking an addition to the bill prohibiting local charges for use of city streets. The CTA's concern arose from a claimed $4 billion in annual increased fuel and weight taxes. (See Legislative History Report and Analysis Re Senate Bill 286 by Legislative Intent Service, Inc., referencing Exhibit #16a, Document A-29). The truckers sought to ensure that they would not be subject to local use fees in addition to the large tax increases. Opposing these limitations on local traffic restrictions and use fees were the cities of Los Angeles and San Jose and the California League of Cities. The bill was re-written in the Assembly and passed into law in the fall of 1989.

The resulting provision of the Vehicle Code, section 9400.8, together with the note to 9400.7, make clear that California cities may not charge permit or other fees for the use of public streets to haul legal loads. However, long before the enactment of section 9400.8, California law was clear that cities are not

authorized to charge permit or other fees for the use of public streets, as made clear by Vehicle Code section 21 and the decisions of this Court. There is no legal basis on which the City of Oakland may point to exemption 4 as a justification for the exaction of franchise fees from solid waste handlers.

The plain and ordinary meaning of the language of exemption 4 further bolsters this view. Exemption 4 applies to the use of municipal "*property*," not to the use of municipal *territory*. "[G]iving the word "property" its ordinary meaning[1] in the view of both a drafter of the initiative and a voter in the election booth, we do not believe that either the drafters or the voter considered public streets as the type of public "property" intended by the fourth exemption. The drafters and voters would have considered "property" to comprise public assembly rooms and concert venues, not the public streets, which are for public use, including the motor vehicles of all who have paid state registration fees.

And, even if exemption 4 were applicable to exempt a portion of franchise royalties from classification as taxes, at some level, the courts would set a reasonableness limit on the amount of fees that could be justified under this exemption. Addressing exemption 1, the amicus letter of the CAOC past presidents argues persuasively, by hypothetical, that to justify enormous annual charges as fees for permission (or permits) to use public streets is a mere pretext for charging a fee for a monopoly. In the same way, courts would view a $50,000 fee for an evening's use of a small public meeting room as so unreasonable that it could not be believed to be truly a fee for the use of municipal property. The courts would view such a "use fee" as a mere pretext for the exaction of a tax.

Thus, we agree with the CAOC amici that the City's pointing to the use of roads as a justification for the fees it exacts for the sale of business monopolies is

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[1] *Professional Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037 (quoting *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122); "[i]n interpreting a voter initiative ..., we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the [initiative], giving the words their ordinary meaning.' [Citation.] The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall ... scheme. (*People v. Rizo* (2000) 22 Cal.4th 681, 685, 94 Cal.Rptr.2d 375, 996 P.2d 27.)"

mere pretext. *A fortiori*, the urgings of the City and its amici that business property *other than streets* form additional bases for the application of exemption 4 rings of that same, familiar pretext tune.

(2) Are any other exemptions within article XIII C applicable to these fees?

The City of Oakland has granted two solid-waste handlers exclusive rights to operate certain solid waste handling services within the city, demanding multi-million-dollar payments in return. These fees far exceed any conceivable cost to the city of supervising the operation. (1) Thus, the city does not seek to justify these fees by pointing to its costs of administration and supervision; (2) nor can the city justify the fees as reasonably valued rental charges for the use of municipal real property for the fixed placement of equipment or facilities; (3) and the city has demanded fees so large that they cannot be characterized as license fees.

Article XIII C, § 1(e)(1) defines the scope of its coverage as follows:

> (1) 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.

The plain language of the provision strongly suggests that the intent of the drafters was directed toward arrangements like the subject contracts. And the impressions of typical voters on the initiative would certainly have included arrangements like these within the territory covered by exemption 1. Furthermore, the courts have used such similar language in describing franchises and other grants of contract rights to local contractors that the language used by the drafters appears to have been based on the expressions of California courts. (*See, e.g., Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 705; *Copt–Air v. City of San Diego (1971)* 15 Cal.App.3d 984, 987-989.)

Local governments and their supporters have argued that franchise fees cannot be considered taxes where they are obtained through a negotiated bargain expressed by a commercial contract, rather than being unilaterally imposed by the city. This argument misses the following obvious points: (1) Today, such

charges can only be imposed through commercial contracts; and (2) The charges described in exemption 1 undoubtedly embrace fee-based, so-called "municipal franchises" such as the contracts that form the subject matter of the Court's review.

In ancient times[2] a monarch could grant a franchise for the occupation and use of land and command payment of a franchise fee. But, today in California, the duty to pay a franchise fee does not arise in the absence of a promise by the grantee, given in exchange for the grant of the franchise. Thus, the grant of a government franchise, and the grantee's promise to pay franchise royalties, does not occur outside the territory of a bargained-for-exchange commercial contract. Thus, to interpret exemption 1 as excluding bargains made through a commercial contract would violate this Court's first principal of statutory construction by rendering the rule absurd and ineffectual.[3]

What may or may not constitute a franchise under California law may vary depending on the purpose of a court's scrutiny. (*See and c.f., e.g., Saathoff* and *Copt Air, supra.*) And in some cases, a statute may authorize exclusive franchising without authorizing franchise fees. For example, California Public Resources Code sections 40058 and 40059 grant cities the authority to grant non-exclusive or exclusive franchises to trash haulers, without a hearing or competitive bidding, and also grant the cities the authority to establish the prices of charges to resident customers… but these provisions do not grant the cities the right to exact franchise fees in return for the grant of the franchise. Our concern here is only with what municipal fees may be justified as non-taxes under the test of *Jacks* and what fees may be exempted from classification as taxes under the Proposition 26 amendments.

In requiring fees in exchange for the grant of these exclusive rights to do business, the city embarked upon the royal business enterprise: the exaction of fees in exchange for the grant of a privilege to conduct business. On the face of exemption 1, the plain meaning of the language addresses precisely this business arrangement. Cities may require a fair price for the easement-like use of

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[2] Prior to the Council of Trent in 1562.

[3] *See, e.g.,* *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27.

municipal real property. But, when cities attempt to manufacture so-called assets by alternately withholding and granting rights to conduct business within their borders, they fall subject to the costs-of-administration limitation of exemption 1.

Respectfully Submitted,

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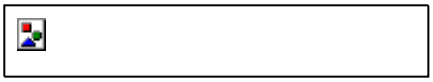

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Dated April 19, 2022

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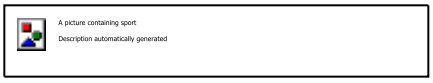

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