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April 15, 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***
Supreme Court Case No. S262634

To the Honorable Tani Gorre Cantil-Sakauye, Chief Justice of California, and to the Honorable Associate Justices of the California Supreme Court:

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the Courts and the Legislature. As an organization representative of the plaintiff's trial bar throughout California, Consumer Attorneys is interested in protecting the rights of California citizens and upholding California's constitutional provisions.

Mike Arias and I are both former Presidents of Consumer Attorneys, and jointly submit this letter on behalf of Consumer Attorneys. Pursuant to California Rules of Court, rule 8.520(f), Consumer Attorneys respectfully request permission to file this amicus curiae letter brief in response to the Court's March 11, 2022 request for Supplemental Letter Briefs on the issue of: (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?

Respectfully, the parties on this appeal have lost the "trees for the forest." In sum and substance, the franchise fees at issue in this case constitute a charge for the exclusive "monopoly" to haul trash in the City of Oakland– and not for use of the roads. Thus, the charges fall under the exemption category of Art. XIII C, §1, subd. (1)(e)(1).

It should be beyond cavil that the right to a monopoly is the *sine qua non* of a "specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged." Cal. Const., art. XIII C, §1(e)(4).

Any incidental use of the roads by the haulers in connection with its "monopoly" to haul trash cannot transform the franchise fees from a payment for "specific benefits" into one for "use of the roads." On its face, such argument must be rejected based upon the requirement that

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Article XIII C must be "liberally construed to effectuate its purpose of limiting government revenue and enhancing taxpayer consent." (*Silicon Valley Taxpayers' Assn. v. Garner* (2013) 216 Cal.App.4th 402, 408.) Indeed, such "game playing" would easily extend to claims that most charges for a "specific benefit" constitutes "use of the roads", such as:

- A local government could enact ordinances requiring citizens in a geographic zone to only use "one contractor" for home construction – and impose a 10% "franchise fee" that is passed through to local government (even though it incurs no related costs) – arguing that this payment for "use of roads" to get to (and from) worksites.
- A local government could create the exclusive franchise for one company to sell ice cream throughout Los Angeles, and impose a 10% franchise fee on the gross revenues of all ice cream sold – – arguing that this payment for "use of roads" to get to (and from) buildings where the ice cream is delivered.

Under each of these examples, the franchisee's use of the roads would be incidental to the "specific benefits" conferred. But these examples (or the myriad of others) demonstrate that such contentions would directly contradict the spirit, intent and language of Prop 26. By its terms, Article XIII C prohibits a local government from creating "profit centers" for the conveyance of "specific benefits." That is why Art. XIII C, §1(e)(1, 2) defines such charges as "taxes" unless the charges "do not exceed the reasonable costs to the government of conferring the benefit." The City of Oakland simply cannot create a "profit center" by imposing franchise fees for the conveyance of the "specific benefit" of a monopoly.[1]

The City of Oakland's retort that there can be no costs incurred by a governmental entity in conveying a monopoly is not true. That is because the City of Oakland likely incurs some costs to implement this program – including its supervision to make sure that the trash haulers are providing services that comply with its contractual provisions, comport with all recycling programs and with ACWMA Ordinance 20012-01 (Alameda County's Mandatory Recycling Ordinance).

It must also be stressed that the City of Oakland has attempted in its briefing to create a "stalking horse" by inferring that the enforcement of Art. XIII C, §1(e)(1) would eliminate the ability of governmental entities to create franchises. That is not true – franchise fees are permitted, so long as they comply with California Constitutional provisions such as Art. XIII C,

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1 Amici agrees with Howard Jarvis Taxpayers Foundation that the City of Oakland cannot circumvent the Prop 26 proscriptions by claiming the franchise fees are to pay for use of the public roads that all of the public is allowed to use. However, our arguments that the franchise fees are for a "specific benefit" – and thus should be categorized under the first exemption – is independent of such considerations.

§1 (*i.e.*, either qualify for the exemption provisions or satisfy the Constitution's voting requirements).

The City of Oakland further argues that the monopoly (*i.e.* the franchise) itself must be considered "local government property" for purposes of Prop 26. Largely, the City of Oakland bases this argument upon a reference in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 that franchise fees have not been considered taxes. The fully context of the Court's statement in *Jacks* referred to government franchises that were directly to use of government property. *Jacks,* 3 Cal.5th at 262.

For example, *City and County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 749 related to a franchise for local rail on City streets. Strikingly, in *Santa Barbara County Taxpayer Assn v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940 the Court fully defined a franchise as being for a possessory interest in public real property, similar to an easement:

> **A franchise is a negotiated contract between a private enterprise and a government entity for the long-term possession of land. Franchise fees are paid as compensation for the grant of a right of way, not for a license or tax nor for a regulatory program of supervision or inspection.** (*City & Co. of S.F. v. Market St. Ry. Co., supra*, 9 Cal.2d at p. 749; and see Contra *Costa Co. v. American T. B. Co.* (1937) 10 Cal.2d 359, 361-363. Regulation of most franchises is vested in the Public Utilities Commission, not local government entities. (*County of Sacramento v. Pacific Gas & Electric Co.* (1987) 193 Cal.App.3d 300, 313.
>
> In sum, franchise fees are paid for the government 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. (See *Cox Cable San Diego, Inc. v. City of San Diego* (1987) 188 Cal.App.3d 952, 966; *Gov. Code* § 50335 authorizing local government entities to convey easements to utilities on the basis of contractual negotiations, and not costs.)

Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors, 208 Cal.App.3d at 949 (emphasis added).

In other words, the "historic" reference to franchises has been to those which convey a possessory interest in real property.

Moreover, *Jacks* is a pre-Prop 26 case. That is important because Prop 26 was specifically designed to address historic abuses by local governments that disguised "new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements." (Voter Info. Guide, Gen. Elec. (Nov. 2, 2010) text of Prop.

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26, § 1, subd. (e), p. 114.) That is why courts have repeatedly ruled that Article XIII C must be liberally construed so as "to effectuate its purpose of limiting local government revenues and enhancing taxpayer consent" (*Silicon Valley Taxpayers' Assn. v. Garner*, 216 Cal.App.4th at 408.) This liberal construction of Article XIII C is critical to this Court's analysis of the City's proffered construction of Article XIII C.

Significantly, one of the key new innovations of Prop 26 was to go beyond the "form" (*i.e.*, "the historic abuses by local governments that disguised 'new taxes as 'fees' . . ."), and instead provide for an additional category in the consideration of whether a charge can be considered a tax. The City of Oakland's proposed interpretation of "local government property" to include the "franchise" as local government property would be an overly expansive interpretation of Cal. Const., art XIII C that would directly contradict – and potentially eviscerate – the inclusion of the additional category of "specific benefits" under Prop 26. By the City's logic, any local government could nullify the new Prop 26 rules governing "specific benefits" under subd (1)(e)(1) by just labeling them as part of a "franchise," a construction that is contrary to the general rules governing the construction of statutes. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)

Indeed, this Court cautioned in *Jacks* that trial courts should not place "form over substance" when evaluating whether a charge is a tax. *Jacks*, 5 Cal.5th at 269. And this ruling was before the fundamental changes in Cal. Const., Art XIII C set forth above (pursuant to Prop 26.) In fact, this Court in *Jacks* noted that a charge labeled as a "franchise fee" could be deemed a tax.

In sum, the mandated liberal construction of Art. XIII C to limit local government revenues and enhance taxpayer consent simply cannot be reconciled with the parties' proposed construction of Cal. Const., art. XIII C, subd (1)(e)(4). The franchise fees at issue on this appeal should be categorized under the Cal. Const., art. XIII C, subd (1)(e)(1) charge for a "specific benefit."

Respectfully Submitted,

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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 1,589 words, including footnotes and excluding the parts identified in Rule 8.520(c)(3).

Dated: April 15, 2022

Brian S. Kabateck

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Supreme Court of California

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