

Case No. S262634

**IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

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**ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON**

*Plaintiffs-Appellants,*

v.

**CITY OF OAKLAND**

*Defendant-Respondent*

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**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF;  
AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES  
AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES  
IN SUPPORT OF PETITIONER CITY OF OAKLAND**

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After a Published Decision from the Court of Appeal  
First Appellate District Court Case No. A154986  
Alameda County Superior Court Case No. RG16821376

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**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN  
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Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities and the California State Association of Counties (collectively “Amici”) respectfully request permission to file the attached amici curiae brief in support of Petitioner City of Oakland (“Petitioner” or “City”).

The League of California Cities (“Cal Cities”) is an association of 476 California cities united in promoting the general welfare of cities and their residents. Cal Cities is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 geographical divisions of Cal Cities from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

The California State Association of Counties (“CSAC”) is an association of 58 California counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the federal government. CSAC’s long-term objective is to significantly improve the fiscal health of all California counties so they can adequately meet the demand for vital public programs and services.

Petitioner’s franchise fees are not unlike franchise fees paid by private entities to cities and counties statewide under negotiated franchise agreements. Petitioner’s briefs demonstrate that its franchise fee complies with California law. Amici wish to further demonstrate to the Court that both the legal and practical framework within which franchise agreements exist, provides ample rights and protection for citizens while limiting the costs for municipal services. Franchise agreements are legislative actions subject to referendum, and political and market forces further restrict the fees charged for municipal services provided through franchises.

Additionally, Amici are concerned about the significant economic impacts that the appellate court’s decision will have on municipalities statewide that are already suffering from significant revenue shortfalls, exacerbated by the COVID-19 pandemic. The appellate court’s decision exposes existing franchise fees to needless, repetitive and expensive litigation, to the detriment of vital and fundamental public services.

Amici have a substantial interest in the outcome of this case. Many cities and counties rely on franchise fee revenue, and the appellate court's decision puts this revenue at risk. Amici wish to assist this Court in understanding the historical basis for municipalities' reliance on franchise fees, and the importance of franchise fee revenue to the stability of municipal finance. Amici believe their perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. Amici's counsel examined the briefs on file in this case and are familiar with the issues involved and the scope of their presentation and do not seek to duplicate that briefing. Amici believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the filing of the accompanying *amici curiae* brief.

No party or counsel for a party in this case authored any part of the accompanying amici curiae brief. No person or entity other than the amici curiae and their attorneys in this matter made any monetary contribution to fund preparation of the brief.

Dated: March 22, 2021

Respectfully submitted,

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/s/ Lutfi Kharuf

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*California State Association of Counties*



# **BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER**

## **INTRODUCTION**

While Petitioner's and Respondents' briefs discuss the central legal issues relating to the City of Oakland's franchise fee, Amici's brief provides context for franchise agreements, and focuses on the legal and practical framework within which franchise agreements exist, as well as the potentially dire consequences for cities and counties if the appellate court's ruling is not overturned.

Cities and counties grant franchises for the provision of certain municipal services. Across the country, a franchise is viewed as "a special privilege granted by the government to particular individuals or companies [(“franchisees”)] to be exploited for private profit as such franchisees seek permission to use public streets or rights-of-way in order to do business with a municipality's residents, and are willing to pay a fee for this privilege. Innumerable business activities of a public nature are the proper subject of a franchise, such as the right to supply city inhabitants with natural gas, to collect wharfage and dockage tolls, and to operate a community antenna television service. Bridge franchises are frequently granted. Further, generally, the grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services is a franchise.” (12 McQuillin Mun. Corp. § 34:2 (3d ed.).)

Franchise revenues provide general revenues to cities and counties, which may be used for general governmental purposes and are not restricted in how they may be spent. Such revenues allow cities and counties to provide essential public services such as law enforcement, animal control, fire protection, parks, recreation, public works, planning and land use, water, wastewater, solid waste, library services, arts, housing assistance, homelessness mitigation, economic development, and public pension obligations. Cities and counties provide these services in order to enhance the quality of life for their residents, protect their most vulnerable, and otherwise maintain public health and safety.

The appellate court's opinion disregards existing legal limitations and citizen protections with respect to franchise agreements. Based on its misreading of *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 and article XIII C, section 1(e)(4) of the California Constitution, the appellate court restricted fees for use of government property, including franchise fees, by announcing a confusing standard lacking any constitutional basis.<sup>1</sup>

The appellate court's opinion ignores the practical and economic limitations that already exist to reasonably constrain franchise fees. Franchise agreements include a collection of bargained-for rights and

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<sup>1</sup> The Court of Appeal for the First Appellate District, Division Two in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435 (*Bay Area Toll Authority*), noted its disagreement with the Court of Appeal's conclusion in *Zolly*. This Court has granted review of *Bay Area Toll Authority* pending disposition of this case. (*Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (2020) 269 Cal.Rptr.3d 787.)

obligations between parties with different interests. Franchisees provide service for profit and, therefore, have an incentive to pay lower franchise fees to maximize profitability. Cities and counties are governed by officials elected by citizens to protect their interests and, therefore, have an incentive to maximize public benefits provided by franchisees – both by ensuring low service rates and generating general revenue to provide public services. Moreover, the award of a franchise is a legislative act, subject to referendum petition. This means that citizens, if they believe the franchise agreement is unreasonable, can overturn the legislative action awarding the franchise. Negotiating a franchise agreement takes into account a franchisee's profit potential, a franchisee's capability to perform dependably over the contract term, allocation of market risk, the ability and willingness of customers to pay rates for services provided, the political will of elected officials, and accountability to voters who could elect new officials at the next election.

Additionally, the appellate court's opinion jeopardizes municipal revenues and the longstanding ability of municipalities to freely negotiate franchise fees, 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. Such fees are common throughout the state, and have remained an important source of funding for public services, supported by over a century of franchise fee jurisprudence. Franchise fees have survived

over 40 years of voter-driven initiatives restricting local revenues. The appellate court's opinion puts these vital municipal revenues at risk.

Should this Court uphold the appellate court's opinion, Amici's members will be deprived of important rights as owners and managers of government property. In addition, the opinion will open the door for legal challenges to all compensation for the use or purchase of government property, whether by franchise agreement or otherwise, resulting in expensive litigation over not only issuance of franchises and concessions, but virtually every arrangement for the access, use, or possession of government property. The far-reaching consequences of the appellate court's opinion are not only harmful to the ability of cities and counties to provide public services, they are a constitutionally unfounded departure from longstanding history. In light of existing regulation of franchise agreements and the practical limitations on franchise fees, the restrictions the appellate court imposes on franchise fees are entirely unnecessary.

## **ARGUMENT**

### **I. FRANCHISE AGREEMENTS ARE LEGISLATIVE ACTS, SUBJECT TO CITIZEN REFERENDA, AND REGULATED BY STATE LAW PROTECTING CITIZENS**

Respondents seek to restrict solid waste franchise fees with an overly myopic view of the existing economic, political, and legal forces that naturally constrain the amount of these fees. Propositions 13, 62, 218, and 26

substantially regulated all forms of taxes, regulatory fees, property-related fees and assessments, and fees for services, products, and regulatory activity. Such initiatives never endeavored to regulate franchise fees, which are rooted in a long tradition of California law. No legislation or constitutional amendment has been adopted to limit franchise agreements the way the appellate court does.

Importantly, the award of a private solid waste franchise is a legislative act of the local governing body, subject to a referendum petition. A successful referendum prevents the local agency from approving substantially the same action for a year. This gives citizens ultimate control over franchises, whether or not they deem the franchise reasonable.

#### **A. Overview of Local Regulation of Solid Waste Services**

Article XI, section 7 of the California Constitution authorizes cities and counties to enact and enforce ordinances and regulations related to solid waste that are not in conflict with general state laws. The primary state law relating to solid waste is the California Integrated Waste Management Act of 1989 (“Act”), which begins at Public Resources Code section 40000. The Act provides rights and imposes requirements, restrictions and conditions on local regulation of solid waste services.

The Act allows local agencies to provide solid waste services in three ways: (1) through its own forces, (2) through another local agency, and (3) by agreement with a private solid waste enterprise. (Pub. Resources

Code, § 40058.) Local agencies may combine these service delivery options, such as by collecting waste through their own employees and contracting for hauling and disposal or recycling of the collected waste.

**B. Third Party Franchises Are Subject to Referenda**

Counties may grant franchises or permits for the collection, disposal, or destruction of garbage and refuse, and cities may contract for solid waste collection services under the terms and conditions prescribed by a City Council resolution or ordinance. (Pub. Resources Code, §§ 49200 *et seq.*, 49300.) If a city or county uses a third party for solid waste services, the Act allows the city or county to award exclusive or non-exclusive franchises with or without competitive bidding.<sup>2</sup> (*Id.* at § 40059(a)(2).)

The award of a solid waste franchise is a legislative act subject to referendum. (*Empire Waste Management v. Town of Windsor* (1998) 67 Cal.App.4th 714, 719-721. (*Windsor*)). A referendum is a “right reserved to the people to adopt or reject any act or measure which has been passed by a legislative body.” (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 241.)

In *Windsor*, the town executed a franchise extension with the hauler that was submitted to the voters as a referendum. (*Windsor, supra*, 67

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<sup>2</sup> For counties, “competitive bidding” may require an award to the lowest responsible bidder. (*Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 228.)

Cal.App.4th at p. 717.) After the voters defeated the extension, the hauler sued arguing that the franchise was not subject to referendum because the Act vested sole authority concerning the franchise in the town council. (*Id.*) The court rejected this argument. First, the court noted that awarding a franchise is generally a legislative act. (*Id.* at p. 717, fn. 1.) In addition, while Public Resources Code section 40059 authorized “local governing bodies” to award franchises, this reference to “governing bodies” was not intended to exclude franchises from the voters. (*Id.* at p. 720.) Rather, this reference was a generic reference to local legislative power. (*Id.* at pp. 720-721.)

Second, the court acknowledged that the state had substantially regulated solid waste collection and related services. (*Windsor, supra*, 67 Cal.App.4th at p. 721.) However, Public Resources Code section 40059 expressly notes that cities and counties have authority over “[a]spects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.” (*Id.* at p. 722; see also Pub. Resources Code, § 49300 [authority to award municipal solid waste collection or disposal agreements].) Based on this language, while solid waste may be a matter of statewide concern, cities and counties (and therefore their voters) had authority over local solid waste franchises. (*Windsor*, at p. 723.)

### C. The Risk of Referenda Constrain Franchise Fees

The maximum rates for solid waste services are generally set forth in the franchise agreement, which also sets forth the terms of the negotiated and agreed upon franchise. The approval process of a private solid waste franchise and the possibility of a referendum naturally constrains the amount of franchise fees. As an initial matter, the solid waste franchise must be approved by the local governing body at a noticed public meeting. (Pub. Resources Code, § 40059 [requiring a solid waste franchise to be approved by resolution or ordinance]; Gov. Code §§ 25120 *et seq.* [procedural requirements for a board of supervisors to adopt ordinances], 369931 *et seq.* [procedural requirements for a city council to adopt ordinances]; *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 648 [a resolution passed with the same formality as an ordinance will be binding and effective as an ordinance].) After the county board of supervisors or city council approves the franchise, voters may still challenge the award of the franchise by referendum. A referendum petition must be signed by 10% of a municipality's voters. (Elec. Code, §§ 9237, 9144.) Cities with a population less than 1,000 only need to obtain the signatures of the lesser of 25% of voters or 100 voters. (Elec. Code, § 9237.) If a sufficient number of voters sign a referendum petition, the municipality generally has two options: (1) rescind the franchise or (2) subject it to voter approval. (See, e.g., Elec. Code, §§ 9145, 9241.) If the franchise is rescinded or defeated by the voters, it may



not “be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters.” (Elec. Code, § 9241; but see also *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 323 [“we conclude section 9145's phrase ‘entirely repeal the ordinance’ requires the board of supervisors to (1) revoke the protested ordinance in all its parts and (2) refrain from additional action that has the practical effect of implementing the essential feature of the protested ordinance”].) This restriction could prevent the award of a subsequent franchise to the prior hauler or would at least require sufficient revision for the subsequent franchise to be considered a new action.

These are not idle restrictions. Solid waste franchises have been subject to referenda petitions. In fact, rival solid waste haulers can, similar to the situation in *Windsor* and this case, finance efforts required to obtain sufficient signatures for a referendum petition. For example, in this case, Waste Management of Alameda County, Inc. initiated a referendum signature collection process after initially losing the franchise award in August 2014.<sup>3</sup> In the City of Milpitas, referendum petitions were successfully submitted with the requisite signatures to challenge solid waste franchises

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<sup>3</sup> *Waste Management Launches Referendum Drive to Win Back Oakland Garbage Contract*, East Bay Express (Sept. 4, 2014.) <<https://eastbayexpress.com/waste-management-launches-referendum-drive-to-win-back-oakland-garbage-contract-1>>; Sebai, *Oakland City Council gives controversial garbage contract to Waste Management*, Oakland North (Sept. 30, 2014.) <<https://oaklandnorth.net/2014/09/30/oakland-city-council-gives-controversial-garbage-contract-to-waste-management>>.

awarded by that city.<sup>4</sup> Similarly, the Town of San Anselmo's award of a franchise to Marin Sanitary Service was subject to, and defeated by, a citizens referendum petition. (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1103 (*Lindelli*).

The very real threat of a referendum petition provides a natural economic, political, and legal check on franchise fees. Ultimately, if a franchise contains unfair or unreasonable franchise fees, voters will have the ability to overturn the franchise award. In fact, the franchise need not contain unreasonable terms for it to be subject to referendum; voters simply may not want to pay the maximum rates set forth therein. Upset voters may have a natural ally in the competitors of the franchisee when submitting a referendum petition. This has real impacts to the awarding agency and the hauler. When a petition receives sufficient signatures, under Elections Code sections 9145 and 9241, the county board of supervisors or city council must either repeal the ordinance or submit the ordinance to voters. If the municipality submits the ordinance to voters, it will incur additional election-related costs. If the franchise is repealed either by the municipality or the voters, then the city or county must seek the services of another hauler or significantly revise the franchise terms with the selected hauler. This

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<sup>4</sup> *Milpitas, California, Exclusive Contract with Waste Management, Inc. for Trash Services, Measure L*, Ballotpedia. (Nov. 2016)  
<[https://ballotpedia.org/Milpitas,\\_California,\\_Exclusive\\_Contract\\_with\\_Waste\\_Management,\\_Inc.\\_for\\_Trash\\_Services,\\_Measure\\_L\\_\(November\\_2016\)>](https://ballotpedia.org/Milpitas,_California,_Exclusive_Contract_with_Waste_Management,_Inc._for_Trash_Services,_Measure_L_(November_2016)>).

economic, political, and legal reality naturally ensures appropriate and fair franchise fees.

#### **D. State Law Does Not Limit Franchise Fees**

California has a history extending over forty years of voter-driven regulation on local revenue, beginning with Proposition 13 in 1978, and including Proposition 62 in 1986, Proposition 218 in 1996, and most recently, Proposition 26 in 2010. These restrictions have severely impacted cities' and counties' ability to generate revenue and fund essential municipal services without first seeking voter approval. Cities and counties are increasingly strapped for discretionary revenue.

Yet, voters have not sought to regulate certain historic sources of revenue-raising measures essential to a municipality's financial health and ability to provide basic services. One such source is franchise fees. Franchise fees have been recognized by California jurisprudence for over a century as unrestricted sources of revenues. 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. (*Santa Barbara County Taxpayers Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949; *Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal.App.3d 660, 666; 12 McQuillin Mun. Corp. § 34:2 (3d ed.).)

Nonetheless, the appellate court has read into the California Constitution rules and limitations that simply do not exist, and would interfere with the contracting ability of cities and counties to the detriment of their citizens. The appellate court erred in its application of a reasonable value requirement for franchise fees, and a separate appellate court noted the error in *Bay Area Toll Authority, supra*, 51 Cal.App.5th 435.

In *Bay Area Toll Authority*, the Court of Appeal for the First Appellate District, Division Two interpreted the reasonable cost requirement of article XIII A, section 3(d) to not apply to charges imposed for entrance to or use of state property, or the purchase, rental, or lease of state property. The Court of Appeal in *Bay Area Toll Authority* noted its disagreement with the Court of Appeal in *Zolly* regarding the application of the reasonable value standard to charges imposed for analogous local government property provisions (“Exemption 4”). This Court has granted review of *Bay Area Toll Authority* pending disposition of this case. (*Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (Cal. 2020) 269 Cal.Rptr.3d 787.) Respondents concede that the reasonableness standard does not apply to Exemption 4.

Respondents, in their answer brief, acknowledged that they “agree with Oakland that the reasonable-cost burden of proof does not apply to the fourth exception” (Resp’ts Answer Br. 35, fn. 11.), yet contend that the franchise fee is limited to a “reasonable” franchise value (Resp’ts Answer Br. 37.). While Respondents repeat the holding in *Jacks*, they fail to explain

the appellate court's blurring of the "reasonable value" standard with "reasonable cost," because it is not possible to establish a constitutional basis where none exists.

## **II. FRANCHISE FEES ARE LIMITED BY NEGOTIATIONS BETWEEN THE PARTIES AND OTHER FACTORS**

### **A. Divergent Interests of Waste Hauler and Municipality Motivate Parties to Negotiate Franchise Fees**

"The issuance of a franchise involves the setting, not the implementation, of public policy; it rests on a determination in the first instance as to which private entity is best suited to provide services for the public." (*Lindelli, supra*, 111 Cal.App.4th at p. 1113.) This determination includes a decision as to which entity is best suited to provide services for the public welfare for the duration of the franchise agreement. (*Id.*) In light of these duties, California law affords substantial discretion to cities and counties to determine if and how solid waste services should be provided. If a city or county decides to utilize private solid waste services, these services may be provided through an exclusive or non-exclusive franchise issued with or without competitive bidding.

Cities and counties seeking to provide municipal service through award of a franchise have a duty to provide for the public welfare. They also have an incentive to provide the highest quality public service at the lowest cost for citizens, while simultaneously receiving compensation for use of

government property and the right to operate a franchise within the city or county.<sup>5</sup> Solid waste haulers, which are private and for-profit entities, also will not seek award of a franchise if there is no potential for profit. Profitability may consider factors such as contract term, the size of the geographic service area, the number of solid waste customers, the suite of solid waste collection services provided to customers and the local agency, the ability to incorporate efficiencies into routes, and the ability to maximize rates while minimizing costs.<sup>6</sup> These opposing interests compel haulers and municipalities to negotiate to maximize respective benefits.

For example, while *Jacks* is not a solid waste franchise case and has facts distinct from this case, the negotiations process in *Jacks* is instructive. The City of Santa Barbara and Southern California Edison (“SCE”) entered into a series of franchise agreements granting SCE the privilege to construct and use equipment along, over, and under the city’s streets to distribute electricity, beginning in 1959. (*Jacks*, 3 Cal.5th at 254-255.)

Each time an agreement was set to expire, the parties were required to renegotiate the key terms to ensure, at least for the purpose of the franchise fee, that the amount represented what the city was willing to accept, and what

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<sup>5</sup> RW Beck, Issue Paper #5 Franchising Collection Services, pp. 5-1-5-2, <https://www.gobroomecounty.com/sites/default/files/dept/dpw/pdfs/Issue%20Paper%20%235%20-%20Franchising%20Final.pdf>

<sup>6</sup> *Id.* at, pp. 5-2-5-4.

SCE was willing to pay. (*Id.* at pp. 255,269 [“the value of the property may vary greatly, depending on market forces and negotiations”].)

The process in *Jacks*, as well as in this case, are illustrative of the processes cities and counties follow to establish franchise fees. These processes require negotiation between sophisticated parties, culminating in an agreement which includes, among its many terms, franchise fee obligations. Such procedures allow for cities and counties to receive fair compensation for the grant of valuable franchise rights.

Franchise fees are already the product of negotiation between the solid waste hauler and a municipality. This Court in *Jacks* has already stated that bona fide negotiations establish a reasonable value of franchise rights. (*Jacks, supra*, 3 Cal.5th at p. 270.) For Respondents to suggest that a franchise fee is not the product of a bona fide negotiation wrongly assumes that the parties do not have an incentive to negotiate the fee.

#### **B. Limitations on the Amount of Franchise Fees**

Contrary to Respondents’ contention in their answer brief that franchise fees are a way for cities and counties to generate limitless revenue without voter consent (See Resp’ts Answer Br. 32), there are pressures limiting franchise fees.

As set forth above, waste haulers and municipalities have divergent interests with respect to franchise fees. A municipality seeks to provide high quality and dependable public service at low cost to citizens, while receiving

fair compensation for the use of government property. If a franchise fee is too high, it may effectively eliminate the ability of a franchisee to make a fair and reasonable return on its investment. Solid waste haulers will be reluctant to enter into a franchise agreement with limited potential profitability.

This is especially true in light of recent regulatory changes impacting the market for plastics and cardboards for recycling into new products. In January 2018, China enacted a policy to ban the import of most plastics and recyclables.<sup>7</sup> According to 2018 Census Bureau export data, about 157,000 large 20-ft shipping containers (429 per day) of U.S. plastic waste was shipped to China.<sup>8</sup> However, in November 2020, China announced it would cease issuing import licenses for solid waste. Other countries, such as Sri Lanka, Thailand, the Philippines, Malaysia and Turkey have also returned recyclables to exporting nations.<sup>9</sup> The collapse of these markets has deprived the solid waste industry of this important source of revenue.<sup>10</sup>

Similarly, affordability factors into the willingness of municipalities to enter into franchise agreements. If the maximum rates are disproportionate

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<sup>7</sup> Katz, *Piling Up: How China's Ban on Importing Waste Has Stalled Global Recycling*, Yale Environment 360. (Mar. 7, 2019.) <<https://e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling>>.

<sup>8</sup> Rapoza, *China Doesn't Want The World's Trash Anymore. Including 'Recyclable' Goods*, Forbes (Nov. 29, 2020) <<https://www.forbes.com/sites/kenrapoza/2020/11/29/china-doesnt-want-the-worlds-trash-anymore-including-recyclable-goods/?sh=73a342c87290>>.

<sup>9</sup> *Id.*

<sup>10</sup> For example, see Letter from Jo Zientek to the Santa Clara County Board of Supervisors (June 3, 2020.), p. 3 <<https://www.sccgov.org/sites/rwr/Documents/Prop218/BOS%20Off%20Agenda%20Report.pdf>>



to the market and similar local communities, the community may face difficulty attracting businesses and residents. Setting aside the direct political check on a franchise award through a referendum, disproportionate solid waste rates will create political pressure and may result in consequences at the next local election. For these reasons, local elected officials have an incentive to ensure that franchise fees and general solid waste costs remain reasonable.

All of the above factors, together with the realistic possibility of a referendum petition, create legal, economic, and practical limitations for franchise fees. Given that franchise fee jurisprudence supports bona fide negotiations of the franchise fee, the appellate court ruling incorrectly limits the franchise fee with an unworkable reasonableness standard and should be reversed.

### **III. FINANCIAL IMPACT OF NEGATIVE RULING**

Franchise fee revenues provide valuable general revenues that are even more vital now in light of the significant decline of other local general revenues due to the COVID-19 pandemic.<sup>11</sup> Unrestricted revenue sources for cities and counties include: property taxes, sales taxes; transient occupancy taxes; business taxes; forfeitures and fines; and, franchise fees.<sup>12</sup> Even with

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<sup>11</sup> Amici acknowledge that the American Rescue Plan will provide much needed assistance to local governments with the impacts of the COVID-19 pandemic. However, as discussed in more detail below, the American Rescue Plan is a one-time infusion of federal funds with restrictions on spending, and is not an ongoing, stable source of revenue upon which cities and counties can rely.

<sup>12</sup> Institute for Local Government, Understanding the Basics of Municipal Revenues in California:

devastated budgets, municipalities are saddled with increased costs to provide municipal services and implement new regulations. Counties carry out the State's safety net programs, and demand for those programs is expected to increase dramatically this fiscal year, at the same time revenue is declining. The State's FY 20-21 budget "assumes a 9.2 percent year-over-year increase in Medi-Cal enrollees, a 51.1 percent increase in CalFresh participation, and a 42.4 percent increase in CalWORKs participating families."<sup>13</sup> In addition, new regulations and mandates relating to organic waste processing, place greater demands on municipal budgets. Over 90% of cities considered layoffs or employee furloughs, or cutting public services; 72% considered both.<sup>14</sup>

Because of across-the-board reductions to local revenues due to the COVID-19 pandemic, the stability of and reliance on franchise fee revenues in a city or county's budget to fund vital services and programs has become more critical. Without franchise fee revenues, a municipality's provision of certain services, such as ongoing utility services to comply with utility shut-off bans, would be significantly hindered, and cities and counties may face harsh consequences. The November 1, 2016 edition of *Western City* included

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Cities, Counties and Special Districts ( 2016 Update) pp. 4-5 <[https://www.ca-ilg.org/sites/main/files/file-attachments/basics\\_of\\_municipal\\_revenue\\_2016.pdf](https://www.ca-ilg.org/sites/main/files/file-attachments/basics_of_municipal_revenue_2016.pdf)>.

<sup>13</sup> Legislative Analyst's Office, The 2020-21 Budget: Overview of the California Spending Plan (Oct. 7, 2020) p. 1 <<https://lao.ca.gov/reports/2020/4263/spending-plan-2020.pdf>>.

<sup>14</sup> League of California Cities. COVID-19 Fiscal Impact on California Cities. (Apr. 23, 2020.) <<https://www.cacities.org/Images/COVID19-Fiscal-Impact-on-CA-Cities-Infographic-FIN.aspx>>.

a primer on California city revenues. The article's author conducted an analysis of local revenues available to California cities using data from the California State Controller's Office as of 2014-15. Based on this analysis, the author found that a significant portion of unrestricted revenues available to California cities was attributable to franchise fees. (Coleman, A Primer on California City Revenues, Part One: Revenue Basics (November 1, 2016) *Western City*.)

According to data compiled from the State Controller's Office and the Department of Finance, for the 2018-19 period, franchise fee revenues for 480 cities accounted for more than \$1.3 billion. For the same period, the general purpose revenues for 482 cities was more than \$34 billion. This means that total franchise fee revenues throughout the state represented almost 4% of total general revenues statewide for the 2018-19 period.

Further, an April 2020 Cal Cities survey showed that cities anticipated a nearly \$7 billion general revenue shortfall due to COVID-19 over two fiscal years – more than five times the amount of total annual franchise fee revenues.<sup>15</sup> The survey anticipated that the \$7 billion shortfall would grow by billions if the COVID-19 stay-at-home orders extended into and beyond Summer 2020.<sup>16</sup> Given that the stay-at-home orders have extended beyond that point and have not yet been lifted, the situation for cities is much more

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<sup>15</sup> *Supra*, at fn. 14.

<sup>16</sup> *Id.*

dire. The Cal Cities survey regarding the fiscal impact was taken two months after the stay-at-home orders were first issued. It has now been over one year after the stay-at-home orders were first issued, and the shortfall has likely grown.

The City of Los Angeles alone announced in October 2020 that it was facing a \$400-\$600 million shortfall.<sup>17</sup> In January 2021, that projected deficit grew to \$675 million.<sup>18</sup> The city met with employee unions to address the huge shortfall, and considered reducing the police force by several hundred officers. In March 2021, that gap grew to \$750 million.<sup>19</sup> The City of Los Angeles is one example out of the 482 cities and 58 counties facing a budget crisis. While the federal government only recently passed a federal relief package that will provide some local assistance, the funding is one-time, with spending restrictions. It does not solve anticipated continuing local revenue shortfalls since large local revenue streams for cities and counties have shriveled up due to the impact of COVID-19 pandemic on tourism, businesses, and the economy.

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<sup>17</sup> *'This Is Going To Be Brutal': City of Los Angeles Faces \$400-\$600 Million Shortfall*, LAist (Oct. 26, 2020.) <<https://laist.com/latest/post/20201026/City-Los-Angeles-Budget-Shortfall-400-600-million-unions-furloughs-cuts>>.

<sup>18</sup> Zahniser. *L.A., city unions strike tentative deal to delay raises, avoid layoffs and furloughs*, L.A. Times. (Jan. 12, 2021.) <<https://www.latimes.com/california/story/2021-01-12/la-me-los-angeles-city-union-offer-concessions-to-avert-furloughs-layoffs>>.

<sup>19</sup> *Los Angeles expected to receive \$1.35 billion from federal stimulus bill*, KTLA. (Mar. 10, 2021) <<https://ktla.com/news/local-news/los-angeles-expected-to-receive-1-35-billion-from-federal-stimulus-bill>>.

Between 1991 and 2017, the annual average of franchise revenues as a percentage of general revenues in California cities was 5%-7%. Depending on the year, for certain cities, franchise revenues as a percentage of general revenues accounted for as much as 23% - 62%.<sup>20</sup> The reduction of franchise fee revenues would have a significant impact on the ability of cities to offer core governmental programs and services that residents have come to rely on.

As local budget deficits have grown with prolonged stay-at-home orders, cities and counties are relying more heavily on the collection of revenues that were less impacted, such as franchise fees, to support its budget. Unlike other industry sectors such as retail, restaurants, breweries, and gyms, the solid waste industry was deemed an “essential business,” or a business providing essential services to the public, and allowed to continue to operate under the stay-at-home orders. Due to uninterrupted operations during the COVID-19 pandemic, solid waste haulers are more likely able to pay the franchise fees.

Franchise fee revenue therefore provides a stable and important source for funding such essential municipal services. The appellate court ruling places such revenues at risk.

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<sup>20</sup> However, for cities with the highest maximum franchise revenues as a percentage of general revenues in a particular year, those high percentages were generally outliers compared to the city’s historical data.

#### IV. CONCLUSION

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. Franchise fees are charged as a part of freely negotiated franchise agreements. Such agreements are regulated and are legislative acts subject to referenda, a very real threat as demonstrated by previous successful referenda. Franchise fees are also limited by practical realities, including economic and political pressures on municipalities, coupled with the fact that a franchisee will generally not enter into an unprofitable agreement. Despite all of this, the appellate court seeks to create a new limitation on franchise fees not found in the California constitution or state law. In the long history of franchise agreements in California, such a limitation was not deemed necessary by the voters, even after repeated attempts to otherwise limit municipal revenues. Cities and counties are facing unprecedented revenue instability, particularly in light of COVID-19. The appellate court's holding, if allowed to stand, will create a real and immediate harm for cities and counties, and will significantly impair their ability to continue providing vital municipal services by opening every existing franchise agreement up to potential litigation or renegotiation. As such, Amici respectfully request that this Court reverse the appellate court ruling.

Dated: March 22, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it includes 5700 words, including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: March 22, 2021

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