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Howard Jarvis Taxpayers Foundation
Howard Jarvis, Founder

April 11, 2022

Chief Justice and Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

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

Madam Chief Justice and Associate Justices,

Amicus Howard Jarvis Taxpayers Association submits this supplemental brief at the Court's invitation. Thank you for the opportunity to answer the Court's questions.

I
DOES ART. XIII C, § 1(e)(4) APPLY TO THE FEES PAID UNDER THE WASTE MANAGEMENT CONTRACTS AT ISSUE IN THIS CASE?

No, article XIII C, section 1(e)(4) should not exempt Oakland's franchise fees from the constitution's definition of a "tax."

A "tax" is defined as "any levy, charge, or exaction of any kind imposed by a local government" unless it fits one of seven limited exemptions. (Cal. Const., art. XIII C, § 1(e).) If a charge is not exempt, then it needs voter approval.

Subsection 1(e)(4) exempts charges "for entrance to or use of local government property." For example, a fee to enter a public park, or to exclusively use it for a private event, would be exempt from the "tax" definition and not need voter approval.

Here, however, the City of Oakland is not granting the waste haulers any right to enter or use public property that businesses such as theirs do not possess for free.

California law recognizes a "fundamental right to travel." It is part of our liberty as a free people, a "basic human right protected by the United States and California Constitutions." (*Halajian v. D & B Towing* (2012) 209 Cal.App.4th 1, 11.) "Highways are for the use of the traveling public, and *all* have the right to use them. ... [They] belong to the people of the state, and *the use thereof is an inalienable right* of every citizen. ... The use of highways for purposes of travel and transportation is *not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived*." (*City of Lafayette v. County of Contra Costa* (1979) 91 Cal.App.3d 749, 753 (quoting *Escobedo v. State of California* (1950) 35 Cal.2d 870, 875-876).)[1]

Counsel for Zolly seems willing to accept a double standard when he says, "[a]lthough the public has a common right to use city streets, a city can charge a business for using city streets for private gain." (Zolly letter brief at 1-2.) For this statement, counsel cites *Loska v. Superior Court* (1986) 188 Cal.App.3d 569, 579-580. *Loska* was a criminal case where the defendant challenged, as a violation of equal protection, an ordinance making it a misdemeanor to scalp tickets on a sidewalk or other public place. The court applied equal protection analysis to reject the challenge, but added in dicta that "a legislature has broad powers to control the conduct of commercial activity on public streets and sidewalks." (*Loska*, 188 Cal.App.3d at 579.) As support, the court quoted *San Francisco Street Artists Guild v. Scott* (1974) 37 Cal.App.3d 667, a case in which sidewalk vendors of paintings, clothing, and jewelry challenged an ordinance making it a misdemeanor to sell wares on a sidewalk or other public place without a license from the police department. In upholding the ordinance, the court stated, "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of the public and property, the prime purpose to which streets are dedicated." (*Id.* at 670.)

Both *Loska* and *Street Artists* involved misdemeanor ordinances prohibiting sellers from setting up shop in a stationary location on a public sidewalk so as to impede pedestrian access. (*Loska*, 188 Cal.App.3d at 576 ["such practice has resulted and continues to result in the interference with the normal and lawful flow of vehicular and pedestrian traffic in and around such places"]; *Street Artists*, 37 Cal.App.3d at 674 ["the chief of police had regard for the free flow of pedestrian traffic and has denied permits where this flow would be impeded"].)

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[1] Unless noted otherwise, all emphasis is added.

Neither *Loska* nor *Street Artists* held that people have no right to drive on public streets for business purposes, or can do so only upon payment of a franchise fee. To the contrary, *Street Artists*, quoted by *Loska*, held that municipal authorities have a duty to make their streets "available for movement of the public *and property*, the prime purpose to which streets are dedicated." (*Id.* at 674.)

Here, the City of Oakland does not contend that waste haulers impede pedestrian or vehicular access to public streets. Nor could it so argue. It takes mere seconds for a garbage truck to empty the contents of a toter and move on. And only once a week. By contrast, the ice cream truck comes down the street and stops for customers *daily*. Amazon delivery vans may be up and down that street *multiple times* a day, stopping to drop off packages. Cement mixers, carpet cleaners, roofing contractors, and tree removal companies are examples of businesses that park their rigs on the street, surrounded by orange cones, for *hours* while they conduct business for profit. Yet none of these businesses are required by the City of Oakland to pay a franchise fee.

If this Court were to hold that vehicles operated for business purposes have no right to share the road and therefore can be charged a fee for that privilege, where would it draw the line? For example, Uber and Lyft drivers operate their own cars for business purposes, but often combine personal errands in the same trip. That is also true of home health nurses, salesmen, couriers, estimators, and countless others. What about commuters? Their trip is for a business purpose. Would they be excluded, but carpool vans included? Any such holding would lead to arbitrary results, unintended consequences, and disintegration of the constitutional right to travel.

Amicus contends that counsel for Zolly should not have been so quick to concede that the City is able to charge a fee for business use of public streets and that the fee in this case is therefore partially exempt from the definition of a "tax" under section 1(e)(4). A city *can* charge a fee for using city streets for private gain, but only where the business is taking up residence to a significant degree on that street, such as street vendors do temporarily and utilities do permanently. An example of the latter would be this Court's decision in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, which involved a franchise fee charged to Southern California Edison "to construct and use equipment along, over, and under the City's streets to distribute electricity." (*Id.* at 254.) This Court summarized its holding this way: "Proposition 218 does not limit the authority of government to *sell or lease* its property and spend the compensation it receives for whatever purposes it chooses." (*Id.*)

Garbage trucks are not blocking streets, nor are they given an exclusive right to drive on the street while they are operating. There is no legal justification for denying them access to city streets unless they pay a mega-million dollar annual "fee." Like everyone else, waste haulers have a pre-existing fundamental constitutional right to enter and use public streets. Permission is not needed from the City of Oakland to enter or use public streets. Therefore the subsection 1(e)(4) exemption does not apply. The City's franchise fees are not exempt from the "tax" definition or the voter approval requirements that apply to taxes.

II
ARE THERE ANY OTHER EXEMPTIONS WITHIN ARTICLE XIII C APPLICABLE TO THESE FEES?

Yes. There are two exemptions available to franchise fees. However, the City of Oakland has made no showing that its franchise fees are confined to the boundaries of these exemptions.

Article XIII C, section 1(e)(1), exempts from the "tax" definition "a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged ...." Subsection 1(e)(3) exempts "a charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits ... and the administrative enforcement and adjudication thereof."

Oakland, like many cities in California, does not allow free market competition in the fields of solid waste collection and recycling. To maintain control over things like the size and design of trash containers, the regularity of trash collection, and the destination to which trash is hauled, Oakland awards an exclusive franchise to one company for trash collection and one for recycling.

An exclusive franchise is a "privilege granted directly to the payor that is not provided to those not charged." (Art. XIII C, § 1(e)(1).) A franchise, but for its name, is also basically a license or permit, without which a company cannot solicit customers for trash removal in the City of Oakland.

Either of these exemptions can be applied to the franchise fee at issue. However, both exemptions apply only to the extent the fee does not exceed the limits of the exemption.

Under article XIII C, section 1(e), the City must show "by a preponderance of the evidence that ... the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

The City has made no showing in this case that its franchise fees are cost-based and are reasonably related to the trash haulers' impacts on the City and/or benefits received from the City. Until the City satisfies that burden of proof, it has not established that all or parts of its franchise fees are exempt from the "tax" definition or the voter approval requirements that apply to taxes.

Respectfully submitted,

/s/ Timothy A. Bittle
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DATED: April 11, 2022

/s/ Timothy A. Bittle
TIMOTHY A. BITTLE
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STATE OF CALIFORNIA
Supreme Court of California

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