No. A154986

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

Robert Zolly, Ray McFadden, and Stephen Clayton,

Plaintiffs and Appellants,

vs.

City of Oakland,

Defendant and Respondent.

Appeal from the Superior Court of Alameda

Honorable Paul D. Herbert

Case No. RG 16 821376

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CITY OF OAKLAND; AMICUS CURIAE BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: A154986
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APPELLANT/ PETITIONER: Robert Zolly, Ray McFadden, and Stephen Clayton RESPONDENT/ REAL PARTY IN INTEREST: City of Oakland	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS ***(Check one):*** ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party ***(name)***: League of California Cities

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 26, 2019

Lutfi Kharuf
(TYPE OR PRINT NAME)

/s/ Lutfi Kharuf
(SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CITY OF OAKLAND; AMICUS CURIAE BRIEF

The League of California Cities, in accordance with Rule 8.200, subdivision (c), of the California Rules of Court, respectfully requests permission to file the accompanying *amicus curiae* brief in support of the Defendant and Respondent City of Oakland in this appeal.

The League of California Cities (the "League") is an association of 478 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 geographical divisions of the League 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 League and its member cities have a substantial interest in the outcome of this appeal, which seeks reversal of the trial court's order upholding the franchise fees charged by the City of Oakland to waste collection and disposal, organics, and recycling service providers subject to franchise agreements with the City. Appellants' position jeopardizes the longstanding ability of cities to negotiate franchise fee contracts for valuable franchise rights, including the right to use city property, to transact

business, provide services, use the public street and/or other public places, and to operate a public utility. Such fees are common throughout the state, and have remained a stalwart and vital source of funding for municipal services, supported by over a century of franchise fee jurisprudence and despite over 40 years of voter-driven initiatives restricting local revenues. According to the November 1, 2016 edition of ***Western City,*** a significant portion of all unrestricted city revenues available to California cities was attributable to franchise fees.[1] (Coleman, ***A Primer on California City Revenues, Part One: Revenue*** Basics (November 1, 2016) Western City.)

California voters have already driven significant limiting legislation on local revenues. Such legislation does not address franchise fees. Appellants argument that an additional level of scrutiny should be applied to franchise fees is not found in the California Constitution and is based on Appellants' misreading of ***Jacks v. City of Santa Barbara*** (2017) 3 Cal.5th 248 (a case involving a factually and substantively distinct charge). Further, it would put vital municipal revenue at risk, despite the fact that franchise fees are generally the product of negotiated agreements.

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[1] The range of municipal services, paid for by franchise fees and other discretionary revenue, is broad and includes (without limitation) law enforcement, animal control, fire protection, parks, recreation, public works, planning and land use, water, wastewater, solid waste, library services, arts, housing assistance, and economic development. The demands on cities continue to increase with the costs of public pension obligations, stormwater and environmental compliance requirements, and other increased regulation.

Many cities rely on franchise fee revenue in some form. The League wishes to assist this Court in understanding the historical basis for cities' reliance on franchise fees, and the importance of franchise fee revenue to the stability of municipal finance. The League believes its perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. The League's counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation and does not seek to duplicate that briefing. We 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 ***amicus curiae*** brief.

No party or counsel for a party in this appeal authored any part of the accompanying ***amicus curiae*** brief. No person or entity other than the League and its attorneys in this matter made any monetary contribution to fund preparation of the brief.

Dated: November 26, 2019

Respectfully submitted,

BEST BEST & KRIEGER LLP

By:/s/ Lutfi Kharuf

LUTFI KHARUF
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

BRIEF OF AMICUS CURIAE
LEAGUE OF CALIFORNIA CITIES

I.

INTRODUCTION

Cities in California are no different from cities in other states. Like their counterparts throughout the nation, California cities provide essential municipal 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, economic development, public pension obligations, stormwater and environmental compliance requirements, and other increased regulation. They provide these services in order to enhance the quality of life for their residents, protect their most vulnerable, and otherwise maintain local health and safety.

They also grant franchises, which, throughout the country are viewed as "a special privilege granted by the government to particular individuals or companies 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.).)

Unique to California, however, is a forty-plus year history of increasingly stringent, 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' ability to generate revenue and fund essential municipal services. Cities are increasingly strapped for discretionary revenue.

It is significant that the voters have not sought to interfere with other historic sources of revenue-raising measures, which are essential to cities' financial health and ability to provide basic services. In contrast to directly imposed taxes and fees, 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 Cnty Taxpayers Ass'n v. Bd. 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.).) Such fees have been recognized by California jurisprudence for over a century, and despite over forty years of restrictions on local revenue, have remained unaffected.

The voters had many opportunities to address franchise fees, as they have addressed taxes and other sorts of fees and charges. In fact, Proposition 26 specifically addressed fees and charges imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property. The drafters and voters chose not to restrict franchise fees when voting to amend the Constitution. With such solid Constitutional support and judicial history, franchise fees are a stalwart of municipal finance, and continue to fund essential municipal services.

On August 27, 2014, and September 29, 2014, after years of competitive bidding, negotiations, and even litigation, the City of Oakland (the "City") granted an exclusive franchise to California Waste Solutions, Inc. ("CWS") for residential recycling collection services, and to Waste Management of Alameda County ("WMAC") for mixed materials and organics collection services, collectively. Each franchise award was contingent on the parties' further negotiation and execution of contracts evidencing the agreed upon terms of the parties. Each franchise provided for the payment of a franchise fee to the City, as a negotiated contractual

term in exchange for valuable franchise rights, including the right to transact business in and with the City, use the public street and/or other public places, and to operate a public utility (collectively, the "Franchise Agreements").[2]

After three unsuccessful attempts in the Superior Court to plead a cause of action, Appellants Robert Zolly, Ray McFadden and Stephen Clayton ("Appellants") are now asking this Court to read into the California Constitution rules and limitations that simply do not exist, and would interfere with the contracting ability of cities to the detriment of city residents. Appellants are calling on the Court to disregard the contracting abilities of cities, and instead read into the Constitution a requirement that fully negotiated contracts effectuating the intent of the contracting parties should be open to challenge and subject to judicial review. In doing so, Appellants are asking this Court to throw into tumult a vital component of municipal finance.

Appellants ask the Court to take this giant leap based on their misreading of the Supreme Court's decision in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 ("*Jacks*"). *Jacks* involved a charge that was

[2] The ordinance authorizing the WMAC franchise provides that the franchise fees are charged "[i]n consideration of the special franchise right granted by the City to [WMAC] to transact business, provide services, use the public street and/or other public places, and to operate a public utility for Mixed Materials and Organic collection services." (2 Joint Appendix 331; RB 41.)

factually and substantively distinct from the franchise fees at issue in the current case.

If this Court were to adopt Appellants' interpretation, the effect on California cities would be significant. In the face of already limited discretionary revenues, such a reading of ***Jacks*** would open franchise fee agreements across the state to litigation. Such a reading would also undermine negotiations that have already been in place for years, thereby disrupting significant portions of discretionary municipal revenue and further stripping cities of local control over revenue.

Had the California voters wished to restrict franchise fee revenues, they would have explicitly done so. Despite forty years of voter-driven restrictions on local revenue, no such restrictions on franchise fees have been put in place. To avoid widespread, disruptive effects that would place at risk a vital revenue source that California cities rely on for providing essential municipal services, this Court should reject Appellants' interpretation of ***Jacks*** and its request that this Court read into the Constitution a requirement that courts interfere with the contracting authority of cities.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The League adopts the Factual Background and Procedural Background as set forth in the City's Respondent's Brief (RB 12-25.)

III.

ARGUMENT

A. DESPITE FORTY YEARS OF VOTER-DRIVEN RESTRICTIONS ON LOCAL REVENUE, FRANCHISE FEES, AN IMPORTANT SOURCE OF LOCAL REVENUE, HAVE REMAINED UNTOUCHED.

Over the last forty years, California voters have significantly limited and restricted local revenues. The consequences for cities' ability to maintain the same levels of municipal services have been significant. Cities no longer have presumed legislative authority and deferential review over their funds. Rather, they have had to adjust to the presumption that voter approval is required to fund government, with specific cost of service limitations often applicable.

Noticeably absent from these efforts to restrict local revenue, however, was any attempt to restrict franchise fees, despite many opportunities to do so. Cities have come to rely on franchise fees as a stable component of municipal revenue, necessary to fund essential municipal services.

1. Proposition 13 Nearly Halved Local Discretionary Revenue And Restricts Adoption Of Special Taxes, But Does Not Regulate Franchise Fees Or Contractual Payments.

Prior to 1978, property tax revenue provided the primary source of funding municipal services. In 1974, America experienced rapid inflation and economic stagnation, driving residential property prices up rapidly, coupled with increased assessed valuations for property tax purposes. In light of these economic conditions, the California voters approved Proposition 13 in 1978. Proposition 13 was intended to provide financial relief to California property owners and taxpayers through a package consisting of real property tax rate limitations (Cal. Const., art. XIII A, § 1), a real property assessment limitation (Cal. Const., art. XIII C, § 2), a restriction on state taxes (Cal. Const. art. XIII C, § 3), and a restriction on local taxes (Cal. Const., art. XIII A, § 4). (League of California Cities, *Proposition 26 and 218 Implementation Guide* (2019) pp. 9-12.)

Proposition 13 set the assessed value of real property as the "full cash value" on the owner's 1975-1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. (Cal. Const., art. XIII A, §§ 1, 2; *Jacks,* 3 Cal.5th at 258.) To ensure that tax savings accrued to real property owners, Proposition 13 required two-thirds approval by members of the Legislature

to increase state taxes, and two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes. (Cal. Const., art. XIII A, §§ 3, 4; *Sinclair Paint Co. v. State Bd. Of Equalization* (1997) 15 Cal.4th 866.) Proposition 13's constitutionality was challenged and ultimately upheld, paving the way for its limitations to take effect as to local taxes on July 1, 1979. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208.)

In addition to limiting property tax revenue, Proposition 13 further restricted the ability of local governments to adopt "special taxes" without first obtaining two-thirds voter approval. (Cal. Const., art. XIII A, § 4.) The Legislature subsequently adopted Government Code section 50076 in 1979 to provide some guidance on identifying the sorts of fees and charges generally exempt from the definition of a special tax, including "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

Proposition 13's impact was profound. It converted hundreds of locally-imposed property tax rates of differing amounts to a statewide rate of 1 percent of the full cash value of the real property assessed. Among other things, this resulted in a statewide reduction of property tax revenues by half. (*Sasaki v. County of Los Angeles* (1994) 23 Cal.App.4th 1442,

1451.) "The purpose of Proposition 13 was to cut local property taxes. [Citations.] Its effect was to drastically cut property tax revenue, and thereby sharply reduce the funds available from that source to local governments, and also schools." (*Ibid.*)

In sum, Proposition 13 impacted cities throughout the state by limiting property tax and assessment revenue, as well as placing new voter-approval requirements for taxes imposed in excess of the cost of service, for general revenue purposes. Proposition 13 had a significant financial impact, resulting in a major reduction in local revenue. However, Proposition 13 did not limit the ability of cities to enter into contracts and receive compensation, in the form of franchise fees, for the use or purchase of their governmental property and associated franchise rights. These franchise rights include, without limitation, the right to transact business in and with a city and operate a public utility therein,

2. Proposition 62 Limits Local Taxing Authority For General And Special Taxes, But Does Not Attempt To Regulate Franchise Fees.

Less than a decade later, the voters approved Proposition 62 in 1986. Proposition 62 amended the California Government Code to provide that "all new local taxes be approved by a vote of the local electorate." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 231). Proposition 62 was borne in part out of the recognition

that if special taxes were taxes imposed for a "specific purpose," a definition for a "general tax" was needed. As such, Proposition 62 declared that all taxes are "either general or special" and defined a "general tax" to be a tax imposed for "general governmental purposes." (Gov. Code, § 53721.) Proposition 62 further provided specific procedures and requirements applicable to the calling of an election on taxes.

As was the case with Proposition 13, nothing in Proposition 62 indicated voter intent to regulate negotiated contracts with cities, or franchise fees generally.

3. Proposition 218 Re-Affirms Voter Approval Requirements For Taxes, Imposes Rigorous Procedural And Substantive Requirements For Property-Related Fees, Charges, And Assessments, And Preserves Initiative Power To Challenge Local Revenue, While Simultaneously Leaving Franchise Fees Untouched.

In 1996, the voters approved a sweeping constitutional amendment known as Proposition 218. Proposition 218 amended the Constitution relating to voter approval requirements for general and special taxes and made them applicable to all public agencies, including general law and charter cities. (Cal. Const., art. XIII C, §§ 1, 2.) Additionally, Proposition 218 sought to limit traditional benefit assessments left largely unchecked by Proposition 13. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141; *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 284.)

Proposition 218 created new procedural and substantive requirements that a city must comply with prior to increasing, extending, or adopting a new property related fee, charge, or benefit assessment. (Cal. Const., art. XIII D, §§ 4-6.) With respect to assessments, for example, agencies must determine the proportionate special benefit to be derived by each parcel subject to an extended, increased, or new special benefit assessment, to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. The extended, increased, or new assessment may not be adopted if, after holding a public hearing, a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. (Cal. Const., art. XIII D, § 2(b).) Substantively, the benefit assessment may only be imposed, and must be proportionate to, special benefits conferred upon a parcel. (Cal. Const., art. XIII D, § 2(a).)

Similarly, prior to adopting new or increasing existing property-related fees or charges, cities must hold a noticed public hearing. Notice must be mailed to all affected property owners, and must contain detailed information relating to the proposed fee or charge, including the reason for

the charge, the amount and basis for calculating the charge, and information relating to the public hearing. At the public hearing, if protests are filed by the owners of a majority of separate parcels, the city is prohibited from adopting the new or increased fee or charge. (Cal. Const., art. XIII D, § 6 (a).) Substantively, a property-related fee or charge must not exceed the revenues necessary to provide the property-related service for which they are imposed, must be proportionate to the cost of providing that service on a parcel basis, and may only be used for the purpose of providing that service. (Cal. Const., art. XIII D, §6 (b).)

Importantly, Proposition 218 places the burden of proving compliance with these requirements on the city. As has been the case with Propositions 13 and 62 before it, however, "[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses." (*Jacks*, 3 Cal.5th at 262.) Had the California voters wished to regulate the contracting authority of cities entering into franchise agreements with negotiated franchise fees, such an intent would have been apparent from the Constitutional amendment.

4. Proposition 26 Defines The Term "Tax" For The First Time While Carving Out An Exemption For Charges Imposed For Use Or Purchase Of Local Government Property.

In 2010, the California voters once again restricted local revenues with the adoption of Proposition 26. Proposition 26 was adopted largely in response to judicial interpretation of Proposition 13. Prior to Proposition 26, courts generally upheld regulatory fees that were imposed in an amount necessary to carry out the purposes and provisions of the regulation, did not exceed the reasonable cost of providing the services necessary to the activity on which the fees are based, and were not levied for an unrelated revenue purpose. However, such fees required little more than a tangential relation between the fee payor and the regulated activity.

For example, *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 involved a state fee imposed on makers of lead-containing consumer products to mitigate the environment and public health consequences of lead exposure. The fee required manufacturers to bear a fair share of the cost of mitigating the adverse health impacts of using lead in their products, without any direct connection to special benefits conferred on such manufacturers, or services or products provided to such manufacturers. The California Supreme Court found that such fees could be imposed under the state's police powers, as compensation for the burden the fee payor imposes on society as a whole. (*Id.* at 875-876.) The

Supreme Court specifically reasoned that such fees need not confer benefits or privileges on the fee payor directly, provided the fee bears a reasonable relationship to the burden the fee payor imposes on society. (*Ibid.*)

To prevent the sort of fee upheld in *Sinclair Paint*, Proposition 26 was adopted to, in part, definitively and broadly define the term "tax." Proposition 26 amended article XIII A, section 3 of the California Constitution (adopted by Proposition 13 and relating to state taxes), and article XIII C, section 1 (adopted by Proposition 218 and relating to local taxes). With respect to local taxes, article XIII C, section 1(e) was added to the Constitution to define every fee or charge of any kind as a tax, unless explicitly (or implicitly) exempt. Explicit exemptions include:

> (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost,
>
> (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost,
>
> (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders,

(4) a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property;

(5) fines for violations of law,

(6) charges imposed as a condition of developing property, and

(7) property-related assessments and fees as allowed under article XIII D.

Notably, Proposition 26's fourth exemption applies to a fee or charge "for entrance to or use of local government property, or the purchase, rental, or lease of local government property." Unlike the three preceding exemptions, no limitations or restrictions on charges for use of local governmental property were put in place by the voters.

Additionally, by its very language, Proposition 26 and the limitations on local revenue only apply to the extent a fee or charge is "imposed" by a local government. While Proposition 26 does not define the term "Impose," case law has generally required some element of coercion existing outside of the realm of a contractual negotiation or voluntary payment. When analyzing different fees and charges, courts have looked to the dictionary definition of the term "Impose"to apply where a fee is established or applied by authority or force. (*Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 [citing Webster's

Third Internat. Dict. (1970) to construe "impose" as used in the Mitigation Fee Act.]; *City of Madera v. Black* (1919) 181 Cal. 306, 314–315 [sewer rates are "imposed" because adopted without consent of payors and payment is compulsory]; *Citizen Ass'n of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194, fn. 15 [citing Black's Law Dictionary and Oxford English Dictionary to construe Prop. 218].)

Similarly, the court in *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 131, 1326–1327 noted that in ordinary usage, "tax" refers to a "compulsory payment" to a government. *Schmeer* involved a challenge to a county ordinance barring plastic bags at retail and requiring retailers to charge $0.10 for paper bags. The ten-cent fee was not subject to Proposition 26 because it was not paid to the government, and therefore was not a "levy, charge, or exaction of any kind imposed by a local government." (Id., at p. 1329.) A franchise fee paid by a franchisee to a franchisor pursuant to an arm's length franchise agreement negotiated between a local government and a franchisee lack the coercive nature of fees subject to Proposition 26.

With Proposition 26 came the culmination of voter-driven regulation and restrictions on local revenues. Despite the significant impacts these regulations and laws have had on local revenue, the voters have not sought

to interfere with franchise fee revenue or the ability of cities to negotiate and enter contracts for fair compensation for franchise rights. Franchise fees remain a stalwart in municipal revenue and provide a vital funding source for essential municipal services.

B. FRANCHISE FEES ARE FEES FOR THE USE OR PURCHASE OF A CITY'S PROPERTY AND VALUABLE FRANCHISE RIGHTS, ESTABLISHED BY NEGOTIATED CONTRACT.

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. As discussed above, such efforts have not regulated franchise fees, which are rooted in a long tradition of California law.

A franchise fee is the negotiated, contracted amount paid by a private utility for valuable franchise rights. A franchise "may be defined, as a certain privilege of a public nature, conferred by grant from the Government, and vested in individuals." (*Truckee & Tahoe Turnpike Road Co. v. Campbell* (1872) 44 Cal. 89.) "The grant of a right to maintain and operate public utilities within a municipality and to exact compensation therefor is a franchise." (*Griffin v. Oklahoma Natural Gas Corporation* (10th Cir. 1930) 37 F.2d 545, 547.)

A franchise to use public streets or rights-of-way is a form of property (*Stockton Gas etc. Co. v. San Joaquin Co.* (1905) 148 Cal. 313,

319), and a franchise fee is the purchase price of the franchise. (*City & Co. of S.F. v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 749.) However, franchise are not limited to the use of public property, and include "a special privilege conferred upon a corporation or individual by a government duly empowered to grant it." (*Copt-Air v. City of San Diego* (1971) 15 Cal.App.3d 984, 987.) As such, franchise fees are firmly established in law to include the right to transact business, provide services, and operate a public utility, in conducting a for-profit business. (*See, e.g., City of Oakland v. Hogan* (1940) 41 Cal.App.2d 333, 346–47 [operation of a public wharf on privately owned submerged lands in Oakland estuary and the taking of tolls was a franchise]; *Truckee & Tahoe Turnpike Road Co. v. Campbell*, 44 Cal. at 90-91 [right to collect tolls on roads was a franchise].) Use of city issued franchises to provide solid waste and recycling services has a long and well established history in California and throughout the country. *(Waste Res. Techs. v. Dep't of Pub. Health* (1994) 23 Cal. App. 4th 299, 304.)

It is similarly established in case-law spanning almost a century that franchise fees are not taxes. (*Santa Barbara Taxpayers, supra,* 209 Cal.App.3d 940.) Franchise fees represent compensation for the privileges granted by the government. (*See, e.g., Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 Cal.l2d 272, 283.) While franchises are a form of

property that may be taxed, the franchise fees in and of themselves are not taxes. (*City & County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 748-749.)

As discussed above, nothing in the anti-tax initiatives ranging from Proposition 13 to Proposition 218 and 26 reflect any intent to interfere in the ability of cities to negotiate contracts for compensation for use of their property and associated franchise rights, including the rights to operate a public utility and transact business in and with the city, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. (See Cal. Const., arts. XIII A, § 3(b)(4), XIII C; *see generally Jacks,* 3 Cal.5th 248.)

C. PLAINTIFF'S INTERPRETATION OF *JACKS* WOULD UNDERMINE OVER A CENTURY OF CONTRACTING AUTHORITY FOR FRANCHISE FEES, AND WOULD PLACE ALREADY LIMITED LOCAL REVENUE AT RISK.

The history of regulation of local revenue, coupled with the solid history of upholding franchise fees as distinguished from taxes (despite plenty of opportunities for the voters to impose additional requirements for franchise fees), have established franchise fees as an important source of local revenue.

Despite this long history, Appellants argue that the Court should nonetheless interject additional scrutiny and judicial review into franchise agreements. To be clear, what Appellants are requesting of this Court is

tantamount to undermining the wisdom of cities to negotiate fees for the grant of franchise rights, including use of government property, the right to transact business, provide services, and operate a public utility. Appellants ask the Court to place every negotiated franchise agreement in California at risk, despite the fact that the California voters, after forty years of restricting local revenues, have chosen to leave franchise fees untouched.

The implications of Appellants' position would be significant. A new standard of review would replace the traditional ability of agencies to negotiate contract amounts. Second, large swathes of general fund revenues would be compromised, placing municipal services at risk. Third, if additional standards were placed on the ability of cities to negotiate franchise fees, revenue stability associated with franchise fees would be eliminated, limiting the abilities of cities to finance infrastructure and potentially placing existing debt at risk.

1. Judicial Scrutiny Would Replace Cities' Traditional Ability To Negotiate Franchise Fees.

California law[3] affords substantial discretion to cities to determine if and how solid waste services should be provided. If a city decides to utilize private solid waste services, these services may be provided through an exclusive or non-exclusive franchise issued with or without competitive

[3] See Pub. Resources Code, § 40059. In addition, many charter cities have specific procedures in their charters for awarding franchises or otherwise providing municipal services.

bidding. Oakland utilized a competitive bid process to award the Franchise Agreements. This involved public bidding, review at many levels of the City's staff and governing body, and bona fide negotiations between WMAC, CWS, and the City to establish the terms of each franchise agreement. (RB, 12-25.) However, while Oakland's Franchise Agreements took several years to go through the public bidding process, to negotiate, and to pass enabling ordinances, the overall process is not uncommon amongst California cities.

In addition, even if cities do not publicly bid new or amended solid waste franchises, the franchise fee is the result of intense negotiations. For example, while not a solid waste franchise, *Jacks* is instructive. The City of Santa Barbara and 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 back in 1959. (*Jacks*, 3 Cal.5th at 254-255.) Each such agreement included a term, after which the agreement was renegotiated. (*Ibid.*)

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 SCE was willing to pay. (*Id.* at 270 ["the value of the property may vary greatly, depending on market forces and negotiations"].)

The process in *Jacks*, as well as in Oakland, are illustrative of the processes cities follow to establish franchise fees. These processes often involve public bidding and intense negotiations between sophisticated parties, culminating in a negotiated agreement which includes, amongst its many terms, franchise fee obligations. Such procedures allow for cities to receive fair compensation for the grant of valuable franchise rights. Interjecting an additional layer of scrutiny, as Appellants are requesting the Court to do in spite of no such requirement existing in the Constitution, would undermine these processes.

2. California Cities Rely On Franchise Fee Revenue To Fund Essential Municipal Services, And Additional Scrutiny Would Replace Cities' Traditional Ability To Negotiate The Terms Of Franchise Agreements, Including Franchise Fees.

As has been described ***supra***, in an environment of increasingly stringent regulations on local revenues dating back to Proposition 13 in 1978, through Proposition 26 in 2010, franchise fees have remained untouched. Consequently, they have become a stalwart in municipal finance. These revenues have become especially important where new and increased regulation on California cities drive increases to the costs of providing municipal services. For example, new and increased requirements relating to clean water and stormwater in California place greater demands on discretionary revenues.

The November 1, 2016 edition of *Western City* included 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 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.)

Franchise fee revenue therefore provides a stable and important source for funding such essential municipal services. Appellant's request of this Court would place such revenues at risk.

IV.

CONCLUSION

Franchise fees are a stalwart of municipal finance, and cities across the state rely on them for the provision of essential municipal services. 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. With over forty years of regulation and voter-driven initiatives restricting municipal revenues, California voters have consistently chosen not to interfere with franchise fees as a source of revenue, instead leaving franchise fees to the discretion and negotiating ability of the contracting

parties. Appellants' position would interject additional judicial scrutiny where no such scrutiny constitutionally exists, opening every franchise fee arrangement to challenge. Doing so would put local revenues at risk, and would be highly disruptive to the ability of California's cities to fund essential municipal services.

Dated: November 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c), of the California Rules of Court, I certify that the foregoing Amicus Curiae Brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 5,063 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: November 26, 2019

/s/ Lutfi Kharuf
LUTFI KHARUF

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On November 26, 2019, I served the following document(s):

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CITY OF OAKLAND; AMICUS CURIAE BRIEF

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 26, 2019, at San Diego, California.

Kathleen McCracken