Case No. B291341

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

In Re County Inmate Telephone Service Cases

From the Superior Court of Los Angeles County
Coordinated Proceeding No. JCCP 4897
Hon. Carolyn B. Kuhl

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT COUNTIES; PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208 of the California Rules of Court.

DATED: October 21, 2019 THOMAS E. MONTGOMERY,
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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

On Appeal From the Judgment of the
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TO THE HONORABLE PRESIDING JUSTICE:

Proposed Amici Curiae California State Association of Counties ("CSAC") and the League of California Cities ("the League") hereby make this application to file the accompanying brief pursuant to California Rules of Court, Rule 8.200(c).

CSAC is a non-profit corporation. Its membership consists of all 58 of California's counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide, and has determined that this case is a matter affecting all California counties.

The League is a non-profit association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The

Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide significance. The Committee has identified this case as being significant to cities across the state.

The Court's decision in this matter will significantly impact CSAC's and the League's interests, and the interests of California municipalities generally, because the contract structure that the Inmates challenged below—the outsourcing of a non-essential function to a private third-party, which in turn pays a municipality for the right to operate—is commonplace across the state. Local governments use such contracts to provide a broad variety of services, including parking, towing, sanitation, restaurants, shops, and concessions, and they do so for good reasons. Such contracts delegate provision of services to third-party companies that have greater expertise and that can operate more efficiently than municipalities themselves could; and charging those companies on a revenue sharing basis transfers the risk of loss to the companies while obtaining market value for the use of government property, thus maximizing stewardship of taxpayer funds. Conferring standing on consumers to challenge the price they paid for a good or service provided by a third party vendor as a government "tax" would disrupt the operations of local governments across the state, and would require them to opt for less efficient, more costly mechanisms for providing goods

and services.

As CSAC represents all counties throughout the state, and as the League represents 478 cities throughout the state, they are uniquely situated to offer context for the Court and to provide insight into the practical consequences of the plaintiff/appellants' reasoning. Because CSAC and the League will be affected by this Court's decision and may assist the Court through its unique perspective, they respectfully request the permission of the Honorable Presiding Justice to file this brief.

Pursuant to California Rules of Court, Rule 8.200(c)(3), CSAC and the League confirm that its counsel authored the proposed amicus brief in its entirety, and did not receive any monetary contribution to fund the preparation or submission of the brief.

DATED: Oct. 21, 2019 Respectfully submitted,

THOMAS E. MONTGOMERY,
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[PROPOSED] ORDER

The application of the California State Association of Counties and the League of California Cities for permission to file a brief as Amicus Curiae having been read and filed, and good cause appearing: IT IS HEREBY ORDERED that California State Association of Counties and the League of California Cities is permitted to file the proposed brief attached to this application as Amici Curiae; and PERMISSION IS HEREBY GRANTED to any party to this appeal to serve and file an answering brief within ____ [*number*] days thereafter.

Dated: _____ _____
Presiding Justice

AMICUS BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENTS

I. INTRODUCTION

The contract structure that the plaintiffs ("Inmates") challenged below—a municipality's outsourcing of a function to a private third-party, which in turn pays a percentage of revenues for the right to operate—is commonplace throughout the state. Cities and counties use such contracts to provide a broad variety of services, including parking, restaurants, shops, and concessions.

Local governments use these revenue-sharing contracts for good reasons. Such contracts delegate provision of goods and services to third-party companies that have greater expertise and can operate more efficiently than the counties themselves could. And compensating such companies on a revenue-sharing basis aligns the interests of the parties, while transferring the risk of loss to the private companies. The purpose of such payment structures is not to fleece citizens. Rather, it is to produce optimal results and effectively steward public funds.

Construing the service charges at issue here—charges for telephone calls made by or to the Inmates—as a "tax" would require cities and counties to opt for less efficient, more costly mechanisms for providing services. And conferring standing on consumers to challenge the price they paid for a good or service to

a private third-party as a "tax" would open the litigation floodgates, broadly disrupting the operations of local governments statewide.

Amici curiae respectfully request that this Court affirm the trial court's decision below.

II. ARGUMENT

A. Cities and Counties Have Sound Reasons to Use Revenue-Sharing Contracts, And They Are Widely Used In Various Contexts.

The Inmate Calling System rests on a simple contract model. Telecommunications providers (the "Providers") pay a county for access to a market – *i.e.*, the right to provide telephone services to inmates. The Providers recoup their costs and obtain their profits by charging users for the service.

The Inmates disparage this as a "kickback" system in which inmate money is ultimately paid to the County. As the Inmates would have it, the funds paid by the Providers to the County are nothing more than taxes in disguise. In reality, the payment structure could not be more ordinary. As the County Respondents correctly noted, "[a]ll suppliers of goods or services recoup their costs by charging customers. That is the only way any business makes money." Respondent's Brief, p. 6.

Indeed, California cities and counties leverage similar arrangements with private companies in a broad range of contexts. Take, for example, the County of San Diego's contract

with Ace Parking ("Ace") to manage its parking facilities. *See* RJN Exh. A-1, A-2. Rather than managing its own parking facilities, San Diego County's Chief Administrative Officer "made a determination that [Ace] can perform the services more economically and efficiently than the County." Exh. A-2, p. 1 § C. This is because Ace "is specially trained and possesses certain skills, experience, education and competency." *Id.* at § B. *See also* Exh. A-1, pp. 2-3.

There are, of course, a number of different ways a municipality could structure its relationship with a parking vendor. It could collect the parking fees directly, and compensate the vendor through payment of a fixed management fee. Alternatively, a municipality could pay the vendor on a "cost-plus" basis, by reimbursing the company for its expenses (including labor), plus a specified fee or percentage of profit.

Such fee-based and cost-based approaches have two main drawbacks. First, they do not fully align the interests of the contracting parties. The recipient of a fixed management fee has an incentive to reduce its costs aggressively, which could result in decreased service and decreased revenue. Conversely, a party paid on a cost-plus basis has an incentive to increase costs, even if such costs are unnecessary and would not generate increased revenue. These risks can be mitigated through audits and controls, but they cannot be eliminated.

Second, both fixed fee contracts and cost-plus contracts leave the payor (here, the local governments) exposed to a risk of loss. Specifically, if the management fee or cost-plus payment exceeds the revenue generated by the municipal service, the payor would lose money.

In contrast, a revenue-sharing contract, the model employed by eight of the nine contracts in this case (*see* AOB p. 7), aligns the interests of the parties, while minimizing the outsourcing party's risk of loss. Vendors are not incentivized to spend excessively, as they receive a fixed percentage of revenue. Nor are they incentivized to unduly minimize costs, as excessive decreases in service could reduce revenue. Rather, they are incentivized to manage the services optimally, preserving the revenue stream while minimizing costs.

The County of San Diego employs such a revenue-sharing contract with Ace. Under its contract, Ace retains 9% of revenue earned. RJN Exh. A-2, pp. 66-67. The County structured the contract in this way not so it could fleece consumers with a hidden "tax." To the contrary, it employed the revenue-sharing approach because it creates an appropriate set of incentives, and because it protects the County and its residents from the risk of loss.

Revenue-sharing contracts are an entirely legitimate tool for counties tasked with providing a broad range of services to their constituents, some of which must necessarily be outsourced to third-parties. Such contracts can help provide for optimal delivery of services in a wide range of contexts – contracts with parking vendors, sanitation services, towing companies, restaurants, shops, and concessions.

Telephone services for inmates at county jails are no different. Counties, for legitimate reasons, may choose to outsource such services to third-parties. So too do counties have legitimate reasons for favoring a revenue-sharing contract model. Such a model transfers the risk of loss to the Providers, while (i) disincentivizing overly aggressive cost-cutting at the expense of service quality (a risk of a fixed fee model); and (ii) disincentivizing efforts to run up costs (a risk of a cost-plus model). Revenue sharing contracts strike an appropriate balance for delivering such services.

It is not surprising, then, that municipalities across the state use such contracts (or variations thereon) for a wide variety of services. The San Francisco Port Commission charges restaurants and vendors rent as a percentage of their gross revenues. *See* RJN Exh. B, pp. 8, 28, 29. The County of Ventura, at the Channel Islands Harbor, employs a similar model. Hotels,

restaurants, and retail stores pay rent to the county as a percentage of their gross receipts (and, in some cases, the gross receipts of any sublessees). *See* RJN Exh. C, p. 15. Similar contracts abound in cities and counties across the state.

B. Charges Paid to Private Companies Do Not Qualify As "Taxes."

1. The charges are not "imposed" by the counties.

A payment only qualifies as a tax for purposes of Proposition 26 if it is "imposed by a local government." CA CONST. ART. 13C § 1. In this action, the localities have not "imposed' anything on the Inmates. *See* MERRIAM-WEBSTER DICTIONARY (2019) ("Impose. n. to establish or apply by authority."); AMERICAN HERITAGE DICTIONARY (5th Ed.) (2019) ("Impose, v. – To establish or apply as compulsory, levy: impose a tax."). Here, the charges were not dictated or established by the government. Rather, the charges at issue were paid to private third-parties, pursuant to contracts that were freely negotiated by the counties and the Providers. The counties did not "impose" anything, and they certainly did not *unilaterally* impose anything, as envisioned by Proposition 26. *See* CA CONST. ART. 13C § 1. (payment is a tax only if "imposed by a local government."). The plain language controls, and there is no tax here.

2. The charges are not compulsory, and the Inmates receive a benefit in return.

"Ordinarily taxes are imposed for revenue purposes and not in return for a specific benefit conferred or privilege granted." *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436. Stated differently, a payment received by the government only qualifies as a tax if (i) it is compulsory; and (ii) the payor receives nothing of particular value for payment of the tax, that is, the payor receives nothing of specific value for the tax itself." *California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 614.

The payments at issue here do not qualify. The Providers made their payments voluntarily, in accordance with a freely negotiated contract. And they received something of value in return – the right to access and invest in a market that could generate appreciable revenue.

Notably, the payments do not qualify as a tax even under the Inmates' novel view of the case, under which the services providers are effectively disregarded as mere pass-throughs. Even if that were so (and it is not[1]), such that the Inmates are

[1] Here, the counties have ample reason to engage third-party contractors to manage telephone communications. Such communications—from inmates to others outside of the jail or

the payors who make payments to the counties, such payments would not satisfy either prong of the *California Chamber of Commerce* test. First, the payments are not compulsory. There is no requirement that inmates use county jail phone systems. Second, those who choose to use the system receive "something of specific value," *i.e.*, the ability to communicate by telephone.

To be sure, access to jail phone systems is important to many inmates. For some, it may be the most convenient way to communicate with the outside world. For others, it may be among the only viable ways to communicate with the outside world. But that does not make the charges "compulsory." *Cf.* BLACK'S LAW DICTIONARY (11th Ed.) (2019) ("Compulsory, adj. – Compelled; mandated by legal process or by statute."). And for those few inmates who genuinely have no other option—*e.g.*, those for whom in-person visits or written correspondence are not an option, due to geographical separation and/or limitations with literacy or writing—the jail phone system is assuredly

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prison system—cannot be routed through ordinary telephony systems. Rather, such communications must be monitored, logged, and preserved to maintain security and to detect potential crime. This requires technological infrastructure and back-office support that counties may not be equipped to provide. This is precisely why counties outsource a broad variety of their services in various contexts – counties are limited in what they can do directly and rely on the expertise and efficiencies of private industry to complement and support their delivery of services.

"something of specific value." Such payments do not qualify as a "tax" under *California Chamber of Commerce.*

Consider another phone system that is accessible to private parties only if they pay a fee (and a significant one, at that): Courtcall. Pursuant to a contract with the Judicial Council (*See* RJN Exh. D), Courtcall, LLC receives access to a lucrative market for providing telephonic appearances in courts across the state. The state of California sets the fee (currently $94 per call) by rule. *See* CAL. R. CT. 3.670(k)(1). Courtcall, LLC collects the fee directly from users. It then transfers a portion of the fee ($20) to the state. *See* Exh. D, p. 19 § I.D.

Despite this contract structure, one could not reasonably argue that the CourtCall fee is a "tax" imposed by the Judicial Council. Rather, it is the price that attorneys voluntarily pay for a valuable service. The fact that Courtcall is convenient for its users, and in some cases may be the only way an attorney can appear, does not make it "compulsory."

Moreover, it confers something of "specific value" – the ability to appear telephonically, when a personal appearance would be inconvenient or impossible. Courtcall fees are not a tax, and for the same reasons, the telephone charges at issue are not taxes either.

C. Conferring Standing On The Inmates Here Would Have Far-Reaching Consequences.

If individuals obtain standing simply by paying a charge, a portion of which is later transmitted to the government, standing would be virtually automatic, and municipalities across the state to operate would be constantly subject to litigation. Any citizen who parked a car in a government lot could file suit. Individuals who purchased concessions from county contractors—such as a courthouse restaurant, an airport coffee shop, or a vending machine at a municipal pool—would likewise have access to the superior courts to challenge the prices they paid.

The trial court correctly recognized the problem:

> Plaintiffs' contention that they may sue for a tax refund even though they were not legally responsible for paying the County tax similarly raises the specter of unbridled litigation by the many consumers who pay prices influenced by taxes[2] that affect the vendors' cost of doing business.

8 AA 2213 (Order p. 6).

The court below, if anything, understated the gravity of the problem. The Inmates' logic does not just invite the "specter" of unbridled litigation. Rather, as their proposed approach would apply to countless transactions in cities and counties across the

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[2] The trial court "assume[d] without deciding that the commissions are a tax." 8 AA 2211 (Order p. 4).

state, it would make widespread litigation a virtual certainty.

The Inmates' position is untenable. It would lead to absurd results, and the Court should not indulge it. *Cf. Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 568 (courts should adopt interpretation that "will result in wise policy rather than mischief or absurdity").

D. The Inmates Seek Political Changes That Are Appropriate For Consideration By The Legislature, Not By The Courts.

The funding structure at issue here—*i.e.*, payment by individuals to private companies, which then provide payments to municipalities—are commonplace across the state. Municipalities employ such structures in contracts with all manner of businesses, from a variety of industries.

The Inmates may contend that the funding structure is uniquely invidious in the context of jail phone calls, and that such calls should be treated differently from factually analogous payment structures. But if rules are to be crafted and lines are to be drawn, those finer points should be evaluated and addressed by legislators and regulators. The legislative branch is in a far better position to assess state-wide policy issues, and to create rules and classifications to govern municipal revenues. *See Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1298 ("The Courts of Appeal have neither the power nor the duty to determine the wisdom of any economic policy; that

function rests solely with the legislature."); *Turner Broadcasting System, Inc. v. F.C.C.* (1997) 520 U.S. 180, 195 (legislature "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions").

III. CONCLUSION

CSAC and the League respectfully submit that the Inmates' position would have far-reaching consequences for cities and counties across the state, and would jeopardize their ability to provide quality services in a cost-effective manner. The trial court reached the correct decision, and should be affirmed.

DATED: Oct. 21, 2019 Respectfully submitted,

THOMAS E. MONTGOMERY,
County Counsel, County of San Diego

By: s/*Jeffrey P. Michalowski*
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CERTIFICATE OF COMPLIANCE

(CALIFORNIA RULE OF COURT 8.204(C)(1))

I hereby certify, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Amicus Curiae California State Association of Counties contains 3,011 words, not including tables of contents and authorities, the signature block, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: Oct. 21, 2019 THOMAS E. MONTGOMERY,
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DECLARATION OF SERVICE

I, Diana Gaitan, declare:

I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101. My electronic service address is diana.gaitan@sdcounty.ca.gov.

On October 21, 2019, I served the following documents**:**

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT COUNTIES; PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES; MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PROPOSED AMICUS BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES
in the following manner:

☒ **(Via Truefiling Service)** By submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com, which electronically notifies all counsel as follows:

SEE ATTACHED SERVICE LIST

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

Executed on October 21, 2019, at San Diego, California.

By: /s/*Diana Gaitan*
DIANA GAITAN

In Re County Inmate Telephone Service Cases
Superior Court No.: JCCP 1897
Court of Appeal No.: B291341

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