STATEMENT OF PURPOSE

Amicus Curiae Kentucky League of Cities ("KLC") is a membership organization representing 363 city governments throughout the Commonwealth. Each of KLC's member cities are similarly situated to the Appellees, who serve as a mayor and the legislative body members for a city ("City Officials"). All cities have a vested interest in protecting the authority of city officials to fund services through valid user fees and in preventing the imposition of personal liability where it is not statutorily warranted. KLC believes it is uniquely positioned to represent the collective interest of these cities with respect to the common questions of law and fact related to the scope of local government user fee authority and the standard for imposing personal liability upon city officials. This appeal raises significant questions concerning the distinction of a tax versus a user fee. The outcome of this appeal threatens to place unfounded personal liability upon city officials.

KLC's implores this Court to correct the Court of Appeals' erroneous categorization of Audubon Park's sanitation fee as a tax. Upon review of the facts in this appeal, this Court will find that the user fee is proper as defined by KRS 91A.510. And as such, the statutory framework that the Appellant, and subsequently the Court of Appeals, have relied upon to impose joint and several liability upon the city officials is an incorrect application of law.

ARGUMENT

The issues in this appeal are of first impression, specifically, this Court is asked to precisely distinguish the Constitutional definition of a tax versus the statutory definition of a user fee and to consider how each may be applied to finance valid government expenses. This is a question of paramount importance because improperly defining a valid fee as an unconstitutional tax establishes a faulty framework that will impose personal liability upon city officials for expending excess funds for valid governmental purposes. The impact of this decision will be far reaching and could have a "chilling effect" on the operation of local governments and on individuals who may seek to run for office. If the Appellant is successful, city officials will face the threat of being held jointly or severally liable for user fee expenditures, despite an absence of wrongdoing and a lack of statutory authority to impose personal liability.

I. THE SANITATION ASSESSMENT IS NOT A TAX, THUS THE STATUTES RELIED UPON BY THE APPELLANTS ARE NOT APPLICABLE TO THE FACTS OF THIS CASE.

Under Kentucky law the foundation for municipal taxation is *Section 181* of the *Kentucky Constitution*, which states: "The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes." *Ky. Const. 181*. Under this authority, the General Assembly has authorized cities to impose and collect four types of taxes: 1) license fees on stock used for breeding purposes; 2) license fees on franchises, trades, occupations and professions; 3) taxes on tangible and intangible personal property based on income, licenses or franchises, in lieu of ad valorem taxes; and 4) ad valorem taxes. *Ky. Const. 181*.

KRS 91A.510 to KRS 91A.530 sets forth the statutory scheme for "user fees." The statute defines "user fee" as a "fee or charge imposed by a local government on the user of a public service for the use of any particular service not also available from a nongovernmental provider." KRS 91A.510. This statute further strengthens the authority of municipalities to enact fees exclusively to pay for the provision of services to citizens. The authority is limited by KRS 91A.520 which provides that, "user fees shall not generate revenues or profits in excess of the reasonable costs associated with providing a public service." The flexibility of the user fee to fund city services was reinforced by the Kentucky Court of Appeals in *Barber v. Commissioner of Revenue*, which reiterated the importance of allowing cities discretion in the creation and implementation of taxes and fees to provide services. The Court held that, "As a general rule, a city has broad powers to do whatever is necessary for the health, safety and welfare of its residents." Barber v. Commissioner of Revenue, 674 S.W.2d 18, 20 (Ky. App. 1984). In the thirty years that have passed since the enactment of KRS 91A.510, et seq., the Kentucky Legislature has not seen fit to narrow this power, but instead has preserved this trust and allowed elected city officials to decide what is best for their residents. It is clear that the statutory framework for user fees is broad by design. The absence of restrictions speaks volumes to the deference given to city officials to impose fees to finance key governmental services, including sanitation services.

II. THE "SANITATION ASSESSMENT" IS A VALID USER FEE AND THUS GOVERNED BY KRS 91A.510 THROUGH KRS 91A.530.

In this appeal, the Mayor and Council Members of the City of Audubon Park imposed a user fee for the purpose of providing sanitation services to residents pursuant to KRS

91A.510. The fee was codified in the Audubon Park *Code of Ordinances, Section 11-7.03* which states:

> All costs incurred to provide waste collection and disposal by the city shall be paid out of the city's annual tax revenues or by *service charges* to be collected from all persons owning real property located within the corporate boundaries of the City. Such charges shall be fixed by ordinance from time to time enacted in such amounts as can be reasonably expected to yield revenues substantially equal to the cost of operations of the system. (Emphasis added)

Each year beginning in 2007 through 2012, a local ordinance was adopted establishing the fee for the "garbage recycling collection assessment." The City website states that the city assesses each household for garbage, yard waste, recycling, collection and storm damage reserve.[1] The rate was applied as an assessment per month on each household for all single family residences, duplexes, apartment units and commercial units. For the sake of efficiency, the property tax bill was used as a delivery mechanism to assess the user fee. The fee was not based on the percentage of assessed value. The rate fluctuated reflecting the cost of the contract for services with a private garbage collection company and were set as follows:

Ordinance No. 003-2007	Rate: $34.00
Ordinance No. 003-2008	Rate: $40.00
Ordinance No. 003-2009	Rate: $45.00
Ordinance No. 003-2010	Rate: $45.00
Ordinance No. 003-2011	Rate: $45.00
Ordinance No. 003-2012	Rate: $45.00

In asserting that the sanitation assessment is a user fee not a tax, it is essential to consider the character and nature of the fee in question as there is little direction on what exactly constitutes a "user fee" beyond the statutory definition. A measure of clarity may be gleaned from *Greater Cincinnati/Northern Kentucky Apartment Association, Inc. v. Campbell County Fiscal Court*, where an apartment association challenged the

[1] City of Audubon Park, Kentucky. Tax Information. http://www.audubonparkky.org/tax-information.html. Searched May 8, 2017.

assessment of a 911 annual service fee assessed on each occupied individual residential and commercial unit within the county arguing that it was an unconstitutional flat rate tax. Greater Cincinnati/Northern Kentucky Apartment Association, Inc. v. Campbell County Fiscal Court, 479 S.W.3d 603 (Ky. 2015), Reh'g denied (Feb. 18, 2016). The Plaintiff argued that the fee imposed under the ordinance was an impermissible user fee that violated KRS 91A.510 because it was not based on actual use of any particular service and lacked any proportionality to benefit received, and thus was an unconstitutional flat-rate tax. *Id* at 605. The Court rejected this argument and ultimately held that the 911 fee was a valid service fee. In reaching this conclusion, the Court found that a fee must bear a reasonable relationship to the benefit received. *Id* at 606.While the court limited this analysis to 911 fees, the logic is very applicable to sanitation user fees. The sanitation assessment fee in this appeal is paid by citizens who enjoy the benefits of public sanitation services. Thus, if the holding of *Greater Cincinnati* is applied, the user fee in this appeal passes muster because it is reasonably related to the benefit received. It is also noteworthy that in *Greater Cincinnati* the Court upheld the practice of using an ad valorem property tax bill as a vehicle for delivering a user fee charge to citizens, as was done by Audubon Park in this appeal.

The outcome of *Greater Cincinnati* was similar to the precedent established by the Court of Appeals of Kentucky in *Kentucky River Authority v. City of Danville*, where the city challenged a fee assessment by the Kentucky River Authority. Kentucky River Authority v. City of Danville, 932 S.W.2d 374 (Ky. App. 1996). The city argued it received no benefit from the authority and therefore should not have to pay the fees. The crux of the case was the debate over whether the fees in question were special

assessments, taxes or user fees. The Court defined a tax to be, "…an enforced contribution to provide for the support of the government, whereas a fee is a charge for a particular service." Long Run Baptist Ass'n, Inc. v. Louisville and Jefferson County Metropolitan Sewer Dist., 775 S.W.2d 520, 522 (Ky. App. 1989). The true distinction lies in the fact that a tax is a means for a government to raise general revenue with no regard or relationship to any benefit received by the payor. In *Kentucky River,* the Court of Appeals found that because the funds being generated were for a very specific purpose, conserving and controlling the waters of the Kentucky River basin, they were not taxes. *Kentucky River* at 377.

Further honing this distinction, the Court opined that certain services are so fundamental as to benefit all properties within a city/district, not just the individual payor. For example, the court found that, "sewers, lighting and street improvements are, if used by adjoining property owners, benefits which directly accrue to the real property." *Id* at 377. The nuance between direct benefit and indirect benefit is given breadth by the Court's discussion of emission fees. The Court concluded that, "although there may be no direct or immediate benefit to the payor of such fees, the use of the air and the contamination of it are sufficient to justify imposition of the fee." *Id*.

In this appeal, however, the Court of Appeals failed to even consider the character of the fee in question, but rather blindly accepted the Appellants contention that the fee was a tax. In so doing, the Court conducted no analysis. Following the case law cited above, there can be no debate as to the necessity for sanitation services in modern cities. Sanitation assessment fees ensure that the city is able to provide what has become an essential services. Specifically, garbage collection, recycling, yard waste removal and

maintenance of storm drain reserves, all of which are core components of the city's ability to maintain property values, ensure public safety and cultivate a desirable neighborhood aesthetic. Citizens pay the sanitation assessment fee in exchange for the right to utilize these fundamental city services. As reported in *Corpus Juris Secundum*, "a true fee benefits the party paying the fee in a manner not shared by other members of society." 84 C.J.S. Taxation § 3. The sanitation assessment pays for the use of the municipally maintained public sewer system which, while benefiting all citizens to some extent, uniquely benefits all those who occupy a dwelling on property that abuts any public street in the city, e.g. garbage and recycling collection for your home, waste removal to protect property, etc.. *Audubon Park, Kentucky, Municipal Code 13-3.03*. By comparison, a tax must be paid by *all* citizens and entitles him or her to nothing more than the rights enjoyed by all other citizens. The exchange of benefits between those who pay the sanitation assessment and the sanitation services received set this exchange out as a user fee rather than a tax.

The Court of Appeals of Kentucky reached a similar conclusion nearly thirty years prior in, *Long Run Baptist Association v. Louisville and Jefferson County Metropolitan Sewer District*, where property owners challenged the validity of a service charge imposed to form a storm water drainage program. Long Run Baptist Ass'n, Inc. v. Louisville and Jefferson County Metropolitan Sewer Dist., 775 S.W.2d 520, 522 (Ky. App. 1989). The primary consideration of the court was whether the service charge was in fact a tax. The Court found that there was no dispute that the sewer district could impose a charge for services rendered and went on to cite an earlier Kentucky Supreme Court holding that found, "charges for sewer services are not taxes anymore than bridge

tolls or water rents." *Id* at 522 citing Veail v. Louisville and Jefferson County Metropolitan Sewer Dist., 303 Ky. 248, 197 S.W.2d 413 (1946). The sanitation assessment at issue in this case was a valid user fee because there was a direct relationship between the amount paid and the benefit received by the citizen.

III. THE PURPOSE OF THE SANITATION ASSESSMENT, A USER FEE, HAD BEEN ACCOMPLISHED AND A SURPLUS REMAINED. UNDER KENTUCKY LAW, IT WAS UTILIZED FOR OTHER VALID CITY EXPENDITURES.

Just two years ago, this Court considered the constitutionality of the transfer of surplus funds from regulatory agencies into the general fund. In *Klein v. Flannery*, the Appellants, contractors and licensed non-profit organizations, brought declaratory judgment actions against the state alleging that the transfers of fee revenues in the state budget bill were unconstitutional. Appellants argued that these funds should only be used by the collecting agencies for regulatory purposes and that their transfer into the general fund in effect, converted them into unconstitutional taxes and violated *Section 180* of the *Kentucky Constitution*. Klein v. Flanery, 439 S.W.3d 107 (Ky. 2014), as modified (Sept. 26, 2014).

In *Klein*, this Court rejected the Appellant's argument, which is identical to the argument in this appeal Acknowledging that such fees may only be used for the purpose for which they were collected, the Court towed a fiscally practical line by also holding, "…that no constitutional violation occurs when fees incidentally collected in excess of the agency's regulatory expenses are transferred to the General Fund." *Id* at 122. This holding acknowledges the very real impossibility of asking local governments or agencies to predetermine an exact total for a regulatory or service liability and then

impose only such a specific tax as to cover that exact liability. The Court of Appeals panels that reviewed the line of cases consolidated in *Klein,* found that the primary purpose of the fees was to pay regulatory expenses and that the subsequent transfer of the surplus funds to the general fund did not convert the fee into a tax. *Id* at 111. Absent a showing that there was an intent to generate excess revenue when the fee was established, the Court of Appeals held that, "simply because the revenue exceeded the expenditures did not support the trial court's determination that the regulatory fee was somehow converted into an unconstitutional tax." *Id.*

This Court rejected an "overly narrow and mechanical" interpretation of *Section 180* and insisted that the rational approach set forth in *Field v. Stroube* was more in line with the flexibility required to effectively utilize resources and govern. *Klein* at 114. In *Field*, a county had made tax levies for various valid purposes, the goals of the levies had been accomplished and the county had a surplus of revenue. The Appellants argued that the funds could not be diverted for other valid county purposes because that would violate *Section 180*. The Kentucky Court of Appeals disagreed and held that, "when the object to be attained by the levy has been accomplished, and a surplus remains, it ***must*** be treated as a part of the general funds of the county and available for general county purposes." Field v. Stroube, 103 Ky. 114, 44 S.W. 363, 363 (1898). (Emphasis added).

This principle was expanded upon a few years later in *Whaley v. Commonwealth*, which involved a taxpayer who sought to recover tax money alleged to have been illegally collected by the Sheriff for the construction of a turnpike. Whaley v. Commonwealth, 110 Ky. 154, 61 S.W. 35, 36 (1901). Here the Kentucky Court of Appeals once again held that where the specific goal of a levy has been accomplished and

a surplus remains, it may be appropriated for general county purposes without running afoul of *Section 180.* This interpretation allows for necessary flexibility because, "it is impossible to fix accurately a tax rate to meet exactly a liability." *Id* at 38. The language of *Whaley* emphasizes the difficulty of establishing exact liabilities by finding,

> "Exonerations, delinquencies or miscalculation, decrease or increase of valuation by supervisors or boards of equalization, and other unforeseen circumstances, will, in every probability, produce either a surplus or a deficit of tax: and, if a surplus, to hold that it could never be used for any purpose, except that for which it was specifically levied, would tend to, in time, lay up a public fund entirely unavailable for any public purpose. A construction leading to such an absurd result will be repudiated as not having been within the contemplation of the framers of the Constitution." *Id* at 39.

When read together these cases provide a clear course of direction. Where a valid levy is imposed, after the goal is accomplished and a surplus remains; so long as there is a reasonable relation to the expense and the fee imposed, necessity and efficiency require that these funds be used for other valid city/county purposes. Appellants in this case have failed to meet the burden of establishing that the sanitation assessment fee does not bear a reasonable relationship to the cost of administering the program or that there was an intention on behalf of the city officials to generate a surplus to then conspiratorially divert to the general fund. There is no evidence in this case to suggest that the city officials had any intent to generate surplus funds through the sanitation fee. But, even, if the city officials did set the fee amount with that objective in violation of KRS 91A.520, the statutory framework for user fees, as contained in KRS 91A.510, et seq., still does not impose personal liability upon city officials.

IV. EVEN IF THE COURT CAN SOMEHOW CONTORT THIS USER FEE INTO A TAX, THE FACTS OF THE CASE STILL DO NOT SUPPORT A FINDING FOR THE IMPOSITION OF PERSONAL LIABILITY UPON THE CITY OFFICIALS.

In order to enforce public purpose spending requirements, the Kentucky Legislature enacted KRS 92.330. This statute provides that all *taxes and license fees* be levied or imposed by ordinance, that the ordinance must set forth the purpose of the levy and the revenue generated cannot be expended for any other purpose than that specified. KRS 92.340 exists to enforce the requirements set forth above by creating a cause of action against officials who violate KRS 92.330 or KRS 91A.010 (13). If any tax revenue is expended for a purpose other than that included in the original ordinance, any official or legislative body member, who could have acted to prevent the illegal expenditures or who voted to approve the expense, can be found jointly and severally liable for the amount of the illegal expenditure. Appellants argue that the city officials in this case should be held jointly and severally liable for diverting tax revenue from one purpose to another. But, as we have established, the sanitation assessment fee in question is a user fee for services rendered, not a tax and therefore, KRS 92.330 and KRS 92.340 are not applicable.

Through a series of cases, Kentucky courts have provided a framework for determining when personal liability can be imposed upon elected officials for public purpose spending violations. The first major chapter was written by the Kentucky Court of Appeals in 1913 with *Taylor v. Riney*. Here, taxpayers filed suit against members of the fiscal court of the county to enjoin them from paying an accountant who had been employed by the court to investigate the activities of several county officers. Taylor v. Riney, 156 Ky. 393, 161 S.W. 203, 204 (1913). Relevant to this appeal, in *Taylor*, the Court set forth a guiding principle for service in local government, namely that elected

officials are, "invested with a large measure of discretion, and under ordinary circumstances this discretion will not be controlled by the courts, as it is to be *presumed that the fiscal court will act in the discharge of matters under its care in such a manner as to best conserve the interests of the county*." *Id* at 204. (Emphasis added). Here we have a presumption of good faith on the part of local government officials. This deference to local officials and trust that they will make decisions in the best interest of their citizenry, so long as within the bounds of the law, is not an oddity, but rather, is in perfect harmony with subsequent cases dealing with similar issues.

Kentucky courts have not hesitated to hold city officials to a high standard of ethics and integrity and have imposed personal liability where warranted. In *Newport v. McLane*, city commissioners voted to adopt a resolution to transfer funds from the sinking fund into the general fund. The commissioners defended their actions by arguing they acted as a legislative body and exercised discretion vested in them by virtue of their office, in other words, they claimed legislative immunity. The Court held that they had no right to divert the funds but *that the liability extended only to the extent of the loss actually suffered by the city*. City of Newport v. McLane, 256 Ky. 803, 77 S.W.2d 27, 33 (1934) (Emphasis added). The *McClane* Court established the precedent that if money was diverted to satisfy valid obligations of the city, then there is no liability on the part of those who made the decision to divert the funds.

The *McClane* premise was echoed by the Kentucky Court of Appeals in *City of Newport v. Rawlings*, where the board of commissioners had levied certain taxes which were collected and paid into the treasury, but part of the funds were not paid to the accounts as specified. City of Newport v. Rawlings, 289 Ky. 203, 158 S.W.2d 12, (1941).

The city alleged that the city manager, treasurer and auditor were in violation of *Section 180* of the *Kentucky Constitution*. Ultimately, the court agreed with the city, but held that when determining personal liability for the diversion of public funds, the purpose of the diversion and whether the funds were used for valid expenses must also be considered. *Id* at 12. The *Rawlings* Court held ordinarily there is a presumption that the official performed their duty and the expenses were used for valid claims, but where there is evidence that money levied for one purpose is expended in paying invalid claims against city, those responsible for the unlawful diversion and illegal payments are personally liable. *Id*. Audubon Park utilized the excess sanitation assessment fees to pay valid government obligations. Thus, the necessary juncture of a wrong and resulting damages, required in Kentucky law, is not present and the standard for imposing personal liability for elected officials has not been met.

The ordinance imposing the sanitation assessment in this case was valid. In *Duncan v. Combs*, the Court of Appeals considered the predecessor to KRS 92.330, Section 3175 of the Kentucky Statutes of 1903, which provided that all taxes and license fees shall be levied or imposed by ordinance, and that the purpose of the levy must be specified and that revenues should not be expended for other purposes. Duncan v. Combs, 131 Ky. 330, 115 S.W. 222, 223 (1909). Here a taxpayer sought to hold the mayor, auditor and members of the council liable for "misappropriated" funds. The Court discussed at length the statute (the predecessor for KRS 92.330 and KRS 92.340) which imposed personal liability upon members of a council that voted to spend money collected under an invalid ordinance. The void ordinance failed to specify the purpose for which the tax was being levied in violation of *Section 180* of the *Kentucky Constitution*.

That scenario is quite different than the imposition of personal liability upon officers of a city for applying tax revenues collected under a *valid ordinance* for one public purpose to another valid governmental use. *Id*. The latter is the scenario by which the Appellants seek to impose personal liability upon the city officials in this case. (Emphasis added).

No damages have been shown in this case. The user fees were expended for valid governmental purposes and there have been no questions raised about the legitimacy of any of the expenses. All relevant case law, as cited above, provides that if the money is used to pay valid debts and obligations of the levying entity then the city and officials would have the right to set off such payments against the claims against them personally. In this case, if that well-established principle is applied, the officials would be left with no outstanding debt to be paid by a recovery in this case. Daily v. Smith's Adm'x, 297 Ky. 689, 695, 180 S.W.2d 861, 864 (1944). Any recovery would be circuitous and completely unnecessary. In fact, the litigation expenditures for this case have harmed the city and the taxpayers more than the alleged wrong.

CONCLUSION

In an opinion that is otherwise laden with error, the Court of Appeals did get one thing correct. It is undisputed that the city expended the surplus revenue from the sanitation assessment on other valid, non-sanitation related expenses. However, one issue should be completely dispositive of the entire case - the sanitation assessment in question *is not a tax*. Thus, *Section 181* and KRS 92.330 do not apply. Since the fee is not a tax, the KRS 92.340 provisions holding the officials jointly and severally liable are also not applicable. Under the proper governing statute for user fees, KRS 91A.520, there is a complete absence of penalty provisions. And pursuant to related case law, the Appellants bear the burden of showing that the diversion of funds caused damage to the city or that the funds were used for an invalid purpose. The facts in this case do not support either of those conclusions. *Amicus Curiae,* KLC, respectfully urges this Court to adopt a ruling that preserves the flexible nature of user fees and that protects city officials from being threatened with unfounded personal liability.

Respectfully Submitted,

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