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CASE NO. ____________

SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner and Appellant,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

After A Decision By The Court of Appeal
First Appellate District,
Division One
No. A144500

San Francisco Superior Court
(The Honorable Marla J. Miller)
No. CPF-14-513-434

SUPREME COURT
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Deputy

PETITION FOR REVIEW

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ISSUE PRESENTED

Can a city require state universities that operate paid parking lots within the city to collect and remit city parking taxes owed by their customers?

INTRODUCTION

The City and County of San Francisco levies a tax on people who pay to park in a parking lot. Parking lot operators in San Francisco are required to collect the parking tax from their customers at the time of payment, and to remit these tax payments to San Francisco at the end of each month. The respondent state universities – the Regents of the University of California (UC Regents), the Board of Directors of Hastings College of the Law (Hastings), and the Board of Trustees of the California State University (CSU Trustees or SFSU) – operate more than two dozen parking lots in San Francisco where they charge for parking. They collectively take in millions of dollars at their paid parking operations. But they refuse to collect the more than $4 million per year in parking taxes that are due and owing from their customers.

San Francisco sought a writ of traditional mandate to compel the universities to collect and remit the parking taxes owed by their customers. The Superior Court denied the writ. The Court of Appeal affirmed, in a split decision. The majority held that a state agency need not collect city taxes owed by its customers when the agency is engaged in a "governmental" rather than "proprietary" activity, and that the universities' activity here was "governmental." Consequently, the universities were not required to collect their customers' taxes.

This decision creates a troublesome conflict about the role of state agencies in collecting and remitting city taxes that their customers owe. Irrigation districts selling electrical service can be required to collect a local utility users tax (*City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 508-509 (*City of Modesto*)); water districts selling water and sewer services can be required to collect a local utility users tax (*Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24, 26 (*Eastern Mun. Water Dist.*)); and the State Parks Department can be required to collect a local transient occupancy tax when it sells lodging to overnight guests of the Asilomar conference center. (Attorney General Opinion No. 81-506, 65 Ops.Cal.Atty.Gen. 267, 268-271 (1982).) But, under the majority's decision, state universities selling parking space cannot be required to collect a local city parking tax. (Opn. at pp. 14-16 & fn. 3 [acknowledging disagreement with all three authorities].) As Justice Banke observed in dissent, "the majority's opinion leaves the law in some disarray." (Dissent at p. 2.) Courts are not applying a consistent legal rule.

Under the majority's rule, a state agency's duty to collect taxes from its customers turns on whether a state agency selling a taxable service is acting in a "governmental" or a "proprietary" capacity. And when the agency's capacity is "governmental," customers' taxes go uncollected. This "governmental vs. proprietary" test largely fell into disuse after this Court rejected its application to governmental tort immunity more than 50 years ago, noting its "illogical" results. (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 217.) And the test has not improved with age – the outcomes are equally unpredictable when applied to tax collection obligations. Not only that, a "governmental" finding results in de facto tax immunity for a broad swath of the tax base – a result contrary to modern

legal principles that uphold equal taxation of the government's employees, customers, and contractors, on the same footing with everyone else.

By contrast, other authorities follow the legal rule that a city's "power to tax carries with it the corollary power to use reasonable means to effect its collection" – and it is reasonable for a state agency to collect and remit a city tax imposed on its customers (while deducting the typically minor administrative expenses of tax collection). (*City of Modesto*, *supra*, 34 Cal.App.3d at p. 508.) This rule avoids the uncertainty of the "governmental vs. proprietary" test, and yields predictable results. Beyond predictability, this rule ensures fair taxation and avoids marketplace distortion. It does so by including in the tax base government employees, customers and contractors. That approach is consistent with modern rules of intergovernmental tax immunity applied by this Court and the United States Supreme Court. (See, e.g., *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 398 (*Weekes*) [state employees must pay city's employee license tax on same footing as private employees], citing *Graves v. N.Y. ex rel. O'Keefe* (1939) 306 U.S. 466, 486-487 (*Graves*).)

Review is warranted not only because there is a conflict, but also because the conflict concerns a significant question of statewide importance. The proper scope of state sovereignty and city taxing authority, and how to reconcile them, is a question of constitutional significance. Likewise, the fiscal impact of this tax collection question is important statewide. It involves more than the $4 million-plus per year in San Francisco parking taxes at issue in this case. Millions more in tax dollars will go uncollected from customers of state university parking garages in Los Angeles, Santa Monica, Oakland and Berkeley. This question also implicates other local excise taxes like hotel taxes, electricity

taxes, and water taxes. Collectively, these taxes are used by hundreds of California cities to raise revenue to provide essential public services. And across California, state agencies participate in the marketplaces for parking, hotel lodging, water, and electricity. For all of these services taxed by cities, the assistance of service sellers – state agencies included – is essential to collecting taxes owed by customers. A "city has no practical nor economical means of collecting such a tax without the cooperation of the supplier of the [taxed] service." (*City of Modesto*, 34 Cal.App.3d at p. 508.)

Unless this Court grants review, outcomes in these cases will continue to be unpredictable and even illogical, and fiscal uncertainty will prevail for cities, state agencies, and taxpayers. As the dissent stated, "municipalities need to know with some assurance whether third parties who do business with a state entity will essentially receive a pass on a general local tax. It is time for our Supreme Court to squarely address this issue and to state clearly whether or not a state entity can be asked to collect a local tax imposed on third parties doing business with the entity, particularly where, as here, the entity will be reimbursed its costs of doing so." (Dissent, at pp. 2-3.) This Court should grant review.

//

FACTUAL AND PROCEDURAL BACKGROUND

I. San Francisco imposes a general tax on parking customers, which parking operators are required to collect and remit to the city.

San Francisco imposes a parking tax to raise revenue for the City's general fund. (San Francisco Business & Tax Regulations Code (S.F. Tax Code), art. 9, §§602.5, 615 [CT26, 35].) The 25% tax is levied on "occupants" of "parking space" who pay "rent" for a parking space in a "parking station" located in the City. (*Id.*, §§602, 602.5 [CT25-26].) A customer is required to pay the parking tax at the same time he pays the rent charge for parking. (S.F. Tax Code, art. 9, §603 [CT26].) And, correspondingly, a parking station "operator" has a duty to collect the customer's tax payment at the same time the customer pays for parking. (*Id.*, §601, subd. (a) [CT24], §604 [CT26-27]; S.F. Tax Code, art. 6, §6.7-1, subd. (a) [CT54].) At the end of each month, the operator remits its customers' tax payments to San Francisco. (*Id.*, §6.7-1, subd. (d); *id.*, §6.7-2, subd. (a) [CT55-56].)

The S.F. Tax Code provides for several exemptions from paying parking tax, including exemptions for the State of California and other public entities. (*Id.*, §6.8-1, subd. (a) [CT56-57].) However, the S.F. Tax Code explicitly states that even if a parking station operator is exempt from the duty to pay parking tax, the operator is not exempt from the duty to collect and remit parking taxes owed by its customers. (S.F. Tax Code, art. 9, §601, subd. (a) [CT24]; S.F. Tax Code, art. 6, §6.8-1, subd. (b) [CT56].) When it comes to the duty to collect the tax, file returns, and remit parking taxes to the Tax Collector, San Francisco's ordinances do not distinguish between private and public entity parking operators. (S.F. Tax Code art. 6,

§6.7-1, subd. (a); *id.*, §6.7-1, subd. (a) & (d); *id.*, §6.7-2, subd. (a) [CT54-56].)

II. The respondent state universities operate paid parking lots in San Francisco, but they have never collected or remitted San Francisco parking taxes owed by their customers.

Respondent Regents of the University of California (UC Regents or UCSF) is responsible for the operation of the University of California at San Francisco. UCSF operates a medical school and related educational facilities, and several medical facilities in several different San Francisco neighborhoods. (CT339-340.) UCSF operates 15 parking stations in San Francisco that charge fees for parking. These parking stations are located near UCSF facilities throughout the City. (CT338-340.) As of 2014, these parking facilities provided an aggregate 5,750 parking spaces in San Francisco. (CT339.) By February 2015, UCSF was expected to have 1,050 additional parking spaces in San Francisco, in the Mission Bay area. (*Id.*)

UCSF sets its own parking rates. For parking by the public, UCSF charges fees that are in line with the local market. (CT343.) Public parking rates are between $28 and $30 per day at most UCSF parking facilities. Permit parking rates are $161 per month. (CT343.)

UCSF brings in a substantial amount of parking revenue. In fiscal year 2013, UCSF received approximately $17.1 million in parking revenue, against operating expenses, capital costs, and construction bond servicing costs of approximately $12.6 million. The approximately $4.5 million in excess revenue was used to defray shuttle system costs of $9.1 million. (CT341, 343.) The annual amount of taxes that went uncollected and unpaid by UCSF customers in fiscal year 2013, at 25% of the $17.1 million figure, is just under $4.3 million.

Respondent Board of Directors of Hastings College of the Law (Hastings) operates a graduate school of law in San Francisco. Hastings operates a paid parking garage near the law school, in the Civic Center/Tenderloin neighborhood. The garage, at 376 Larkin, was constructed in 2006 with bond financing. The garage has 395 spaces and is open to the public. (CT270-271.)

Hastings, like UCSF, sets its own rates for parking. And, like UCSF, Hastings sets its rates for public parking according to the market. These public parking rates are "generally on par" with the amounts charged by the nearby Civic Center garage, an 843-space City and County of San Francisco garage; however, unlike Hastings, the Civic Center garage's public parking rates include both the underlying parking charge and the parking tax. (CT273.) In any case, Hastings' parking rates charged to the public are between $11 and $26 for 2 to 12 hours. And monthly spots cost $260 per month for non-students, and $210 for students. Hastings offers a reduced rate of $9 for students who park on a daily basis; charging market rates to the public subsidizes reduced rates for students. (CT271.)

Hastings' parking revenue for fiscal year 2014 was approximately $1.8 million. While annual operating costs for its parking garage do not exceed annual revenues, the garage does operate at a loss after allowing for the annual costs of construction bond servicing. (CT271-273.) For fiscal year 2014, the annual amount of tax that went uncollected and unpaid by Hastings customers, at 25% of $1.8 million, was $450,000.

Respondent Board of Trustees of California State University (CSU Trustees or SFSU) is responsible for the operation of San Francisco State University. SFSU operates nine parking stations in San Francisco that charge a fee for parking. (CT189-190.) All of SFSU's paid lots are on the

SFSU campus in western San Francisco. The campus is surrounded by residential areas and the Stonestown shopping mall. (CT189.) Parking by the public is allowed by paid permit, with permits charged at the rate of $3 for two hours or $6 for the day. Students and employees may purchase semester or annual permits. (CT190.) The rates set by SFSU are "competitive." (CT192.) (Total revenue and cost figures for SFSU were not in the record; consequently, the record does not reflect how much in parking taxes goes uncollected from customers of SFSU.)

All of the universities' paid parking operations help ensure that individuals associated with these institutions – whether faculty, students, employees, or visitors (or, in the case of UCSF, patients) – have a safe, convenient place to park near the various campuses and facilities, in San Francisco's dense urban environment. (CT271, 341-342, 561.)

None of the universities has ever collected San Francisco parking taxes, filed parking tax returns, or remitted parking tax funds to the City. (CT16, CT184, CT238, CT304.) In 1983, the San Francisco Tax Collector issued a tax assessment against UCSF for parking taxes owed by its customers. In response to this levy, UCSF asserted sovereign immunity. San Francisco did not pursue the monetary assessment against UCSF, for reasons not disclosed by the record. (CT347-358.) In 2011 and later in 2013, the Tax Collector demanded that the universities' parking lots begin collecting and remitting San Francisco parking tax; unlike in 1983, however, the Tax Collector did not attempt to assess any of the universities for previously uncollected parking taxes or penalties. (CT16, 286-287, 360-362; CT203-204, 294-295, 373-375.) After the universities refused, San Francisco filed this action.

III. Procedural History

A. Trial Court Proceedings

San Francisco sought a writ of traditional mandate (as well as declaratory and injunctive relief) to compel the state universities to collect and remit the parking taxes owed by their customers. (CT007-108.) The San Francisco Superior Court issued an alternative writ directing the universities to show cause why a peremptory writ should not issue requiring them to collect and remit parking tax. (CT155-156.) The universities had two responses: first, that the universities' institutional exemption from real property tax applied to the parking tax imposed on their customers; and second, that sovereign immunity precluded any requirement that they collect taxes owed by their customers. (CT208-229, 243-267, 310-334.)

Following a hearing (CT596-565), the Superior Court (Hon. Marla J. Miller) denied the writ. In a written order (CT556-565), the Superior Court held that sovereign immunity applied. The court ruled that the universities were performing a "governmental" rather than a "proprietary" function, because parking lots benefited their educational mission. The court also relied on the negative financial impact on the universities if they had to adjust their prices to remain competitive with other parking operators' tax-inclusive posted prices. (CT558-564). (The trial court rejected the universities' argument based on their property tax exemption (CT564).) The trial court's ruling also disposed of San Francisco's remaining claims for declaratory and injunctive relief (CT567-570), and final judgment was entered for the universities. (CT573-576.)

B. Court of Appeal Proceedings

On appeal, each side argued that a different legal rule governs state agencies' tax collection obligations.

San Francisco urged that the case was controlled by the rule that a city's constitutional power to raise revenue through taxes includes the power to enact reasonable measures to collect its tax; and it is reasonable to require state agencies subject to the same California Constitution to collect a city tax owed by agency customers. This was the rule in *City of Modesto* (requiring agency to collect city tax on electricity customers), *Eastern Municipal Water District* (requiring agency to collect city tax on water and sewer customers), and Attorney General Opinion No. 81-506, 65 Ops.Cal.Atty.Gen. 267 (1982) (advising that State Park must collect city hotel taxes from guests of the Asilomar conference center).

The universities advocated a competing legal rule: that when a state agency is acting in a "governmental" rather than "proprietary" capacity, the agency cannot be subject to any requirement to collect a city tax from agency customers. The universities relied on a line of cases beginning with *Hall v. City of Taft* (1956) 47 Cal.2d 177, 183 (*Hall*), which hold that a city cannot "regulate" a state agency's "governmental" activities. Here, the universities contended that operating their paid parking lots is a "governmental" activity because making parking available supports the universities' educational mission, and the universities' parking revenue would decrease if the universities had to adjust their rates to remain competitive with other garages that are already collecting parking tax. In response, San Francisco argued that if the "proprietary vs. governmental" rule was controlling, selling parking space to paying customers (and accepting their associated tax payments) was fundamentally a "proprietary"

activity, notwithstanding any associated benefits to the universities' mission. Furthermore, San Francisco argued that the universities' claims of economic advantage from not collecting their customers' tax was a reason to deny immunity, not a reason to grant it.

1. Majority Opinion

In a 2-1 published decision, the First District Court of Appeal (Division One) affirmed. The majority adopted the legal rule proposed by the universities, under which tax collection duties turn on whether a state agency is involved in a "governmental" or "proprietary" activity. Applying this rule, the majority concluded that the universities' operation of paid parking lots is a "governmental" activity. Consequently, the parking tax collection requirement could not be enforced. (Opn. at pp. 7-9.)

In adopting the universities' rule, the majority relied on the *Hall* line of cases holding that a city cannot "regulate" a state agency's "governmental" activities. (Opn. at pp. 5-11.) Although no prior case had construed a third party *revenue* collection measure to violate a ban on local *regulation* under *Hall* or otherwise, the majority nonetheless deemed such revenue measures to be forbidden "regulation." The majority opined that after this Court's decision in *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 11-18 (*California Federal*), "the distinction between tax and regulatory measures has been abandoned." (Opn. at p. 10.) The majority acknowledged that its decision conflicted

with *City of Modesto*, *Eastern Municipal Water District*, and the Attorney General's 1982 Asilomar opinion. (Opn. at pp. 13-16.[1])

2. The Dissent

In a 33-page dissent, Justice Banke began by observing the need for this Court to provide guidance on this important issue. Even before the majority opinion, "the law on whether a municipality can look to a state entity to collect a general local tax imposed on third parties has been far from a paragon of clarity." (Dissent at p. 2.) Now, "the majority's opinion leave the law in some disarray" and without a "cogent legal framework" for determining tax collection obligations. (*Id.* at pp. 1-2.) But "municipalities need to know with some assurance whether third parties who do business with a state entity will essentially receive a pass on a general local tax." (*Id.* at pp. 2-3.) Consequently, the dissent urged, "It is time for our Supreme Court to squarely address this issue and to state clearly whether or not a state entity can be asked to collect a local tax imposed on third parties doing business with the entity, particularly where, as here, the entity will be reimbursed its costs of doing so." (*Id.* at p. 3.)

The dissent then turned to the merits. It began by reviewing the *Hall* line of cases relied on by the majority. The dissent concluded that these cases, barring local "regulation" of state entities, do not address the "more nuanced" issue of whether third-party tax collection is a forbidden "regulation." (*Id.* at pp. 3-9.)

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[1] After the trial court rejected the universities' property tax-based argument, Hastings and CSU Trustees abandoned it on appeal. UC Regents pressed the argument, but the Court of Appeal did not address it.

In fact, the dissent observed, this Court's past decisions have not treated a third-party tax collection requirement as a "regulation." Rather, this Court has allowed cities to impose tax collection requirements even where cities are legally forbidden to regulate the collecting entities (such as public utilities and liquor retailers). (*Id.* at pp. 9-11 & 23, discussing *Rivera v. City of Fresno* (1971) 6 Cal.3d 132 (*Rivera*), disapproved on another ground in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 9, and *Ainsworth v. Bryant* (1949) 34 Cal.2d 465 (*Ainsworth*).) Under these cases, local third party tax collection requirements do not "conflict[] in the sense of 'regulation' … reserve[d] to the state and withdraw[n] from the municipality." (*Ainsworth, supra*, 34 Cal.2d at p. 476.)

The dissent concluded that this more nuanced issue of tax collection by a state agency was directly – and correctly – addressed in *City of Modesto*, *Eastern Municipal Water District*, and the Attorney General's 1982 Asilomar opinion. (Dissent at pp. 13-17, 20-21, 24-25.) These authorities properly relied on this Court's decisions holding that third-party tax collection is different from "regulation." And requiring state agencies to collect a local tax was a safeguard against private parties gaining a de facto tax exemption by doing business with the government. Tax exemption for those who transact with the government has been uniformly rejected by California courts, which follow modern intergovernmental tax immunity law. This law, originally developed by the United States Supreme Court to deal with federal-state taxation conflicts, has been adopted by California courts seeking a consistent and modern approach to resolving these tax questions. (Dissent at pp. 11-13, 17-21, 24-25, 30-33.)

The dissent would have adopted San Francisco's proposed rule – requiring the universities to collect the parking tax owed by their customers, and allowing the universities to deduct their administrative compliance costs from the remittances.

C. Petition for Review

The decision was filed on May 25, 2017, and no petition for rehearing was filed. This petition for review is timely filed per California Rule of Court 8.500(e).

REASONS FOR GRANTING REVIEW

Review is "necessary to secure uniformity of decision" and "to settle an important question of law." California Rule of Court 8.500(c)(1).

I. The rule governing whether a state agency must collect a local tax owed by agency customers is an important question of law.

A. The answer to this question has broad and deep fiscal impact for cities, taxpayers, state agencies, and the marketplace.

To raise revenue to fund essential public services, most California cities rely on excise taxes on customers who purchase certain services, including parking, hotel occupancy, and utility services such as electricity, water, gas, sewer, or telephone. For all of these taxed services, cities must rely on the service seller to collect and remit the taxes owed by their customers. A "city has no practical nor economical means of collecting such a tax without the cooperation of the supplier of the [taxed] service." (*City of Modesto*, *supra*, 34 Cal.App.3d at p. 509.) And there is no sensible alternative approach: it would be cost-prohibitive for taxing authorities to post revenue agents next to cashiers throughout the jurisdiction, to collect

tax in $1 or $5 or $10 increments across thousands of separate transactions; and it would be unrealistic and impractical to expect each taxpayer to show up at the tax collector's office to self-report and pay these small sums. Consequently, requiring intermediaries to collect and remit excise taxes is "'a familiar and sanctioned device'" and "'a common and entirely lawful arrangement.'" (*Ainsworth, supra*, 34 Cal.2d at p. 477, quoting *General Trading Co. v. State Tax Com.* (1944) 322 U.S. 335, 338 and *Monamotor Oil Co. v. Johnson* (1934) 292 U.S. 86, 93.) It has ready parallels in "withholding taxes and social security taxes for the United States government, unemployment taxes and numerous excise taxes for the state." (*Ibid.*) And of course, this assistance in collecting customers' taxes is no less crucial when the seller is a state agency.

The question whether state agencies must collect city taxes affects many cities, and many taxes. State agencies participate in the marketplace for services taxed by many California cities. Like here, state agencies sell parking – and parking customers are taxed by more than a dozen California cities, including several of California's largest and most densely populated cities, such as Los Angeles, San Francisco, Oakland, Berkeley, and Santa Monica. State agencies likewise offer hotel lodging (as in Asilomar), and hotel customers are taxed by more than 400 California cities. State agencies sell electrical service (as in *City of Modesto*), and electricity customers are taxed by more than 150 California cities. State agencies also sell water service (as in *Eastern Municipal Water District*), and water customers are taxed by more than 80 California cities.[2] Given the number

[2] Data on the number of California cities imposing various taxes, and the annual revenue from those taxes, is compiled from official sources at