CASE NO. S242835

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

PETITIONER AND APPELLANT CITY AND COUNTY OF SAN FRANCISCO'S REPLY BRIEF

DENNIS J. HERRERA, State Bar #139669
City Attorney
CHRISTINE VAN AKEN, State Bar #241755
Chief of Appellate Litigation
PETER J. KEITH, State Bar #206482
Chief Attorney, Neighborhood & Residential Safety Division
1390 Market Street, Sixth Floor
San Francisco, California 94102
Telephone: (415) 554-3908
Facsimile: (415) 437-4644
E-Mail: peter.keith@sfcityatty.org
Attorneys for Petitioner and Appellant
CITY AND COUNTY OF SAN FRANCISCO

CASE NO. S242835

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

PETITIONER AND APPELLANT CITY AND COUNTY OF SAN FRANCISCO'S REPLY BRIEF

DENNIS J. HERRERA, State Bar #139669
City Attorney
CHRISTINE VAN AKEN, State Bar #241755
Chief of Appellate Litigation
PETER J. KEITH, State Bar #206482
Chief Attorney, Neighborhood &
Residential Safety Division
1390 Market Street, Sixth Floor
San Francisco, California 94102
Telephone: (415) 554-3908
Facsimile: (415) 437-4644
E-Mail: peter.keith@sfcityatty.org
Attorneys for Petitioner and Appellant
CITY AND COUNTY OF SAN FRANCISCO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes & Ordinances

State Cases

Federal Cases

Other References

ISSUE PRESENTED FOR REVIEW

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 state universities do not dispute that their parking customers owe San Francisco parking taxes, but they argue that San Francisco cannot require them to collect and remit those taxes amounting to at least $4 million per year. The universities are wrong. California law does not countenance such tax avoidance.

Here, the universities' theory is that, notwithstanding San Francisco's constitutional power to tax and the absence of any constitutional provision or statute limiting it, they enjoy an implied superiority over California cities, which bars a city from obtaining their assistance in tax collection. But the universities' theory of "hierarchical sovereignty" is inconsistent with the California Constitution – and so is their absolutist position about city tax collection. "Hierarchical sovereignty" is not the rule in California; instead, the Constitution allocates the state's sovereign power between the Legislature, cities, and other state agencies. Under this framework, state universities are not the equivalent of the state itself; rather, like other state agencies including cities, the universities' share of California's sovereign power is defined by specific constitutional provisions and statutes. And charter cities themselves exercise California's sovereign power granted to them by the Constitution; and when they do so, they are not constitutionally subordinate to the

Legislature or other state agencies. When it comes to charter city revenue measures, this Court has consistently required any asserted limitation on city revenue power to be express – not implied from abstractions like "hierarchical sovereignty." And there is no express limitation here.

San Francisco's tax ordinance properly requires the state universities to undertake de minimis, ministerial steps to collect and remit city parking taxes owed by the universities' parking customers. This Court should direct that a writ of mandate be issued, ordering them to do so.

ARGUMENT

I. The universities' central argument for "hierarchical sovereignty" misunderstands California law – understating charter cities' share of the state's sovereign power, and overstating the universities' share.

In the Opening Brief (at 18-20), San Francisco explained that its parking tax and parking tax collection requirement were exercises of San Francisco's sovereign power granted by the California Constitution. And given the absence of an express conflict between parking tax collection and any other constitutional provision or statute, the state universities cannot assert sovereign immunity from collecting the taxes owed by their parking customers. (Opening Br. 21-29.)

In response, the state universities argue a theory of "hierarchical sovereignty" (CSU 38), under which the universities' purported sovereignty implicitly overrides any city tax collection requirement, because the universities are superior and synonymous with "the State" itself (Hastings 44) while cities are "subordinate political entit[ies]" (Regents 8). The universities' theory, however, is not supported by the California Constitution or this Court's decisions construing it.

A. In California, sovereignty belongs to the people – not any particular unit of government – and the people enacted a Constitution that allocates sovereign power between cities, the Legislature, and other state agencies like the universities.

From the abstract principle that sovereignty belongs to "the State," the universities have discerned an implied constitutional declaration that one kind of state agency – a state university – is always superior to another kind – a charter city. But that is not the case.

To begin with, under California law sovereignty is not the property of any particular branch or agency of California government. Rather, "the people" of the state have the ultimate "sovereign power." (*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 514; Gov. Code § 100 ["The sovereignty of the state resides in the people thereof...."].) And the California Constitution is the people's instrument for transmitting their sovereign power. "[T]he entire sovereignty of the people is represented in the [constitutional] convention." (*Livermore v. Waite* (1894) 102 Cal. 113, 117 [constitutional amendment procedures].) "The Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded." (*People v. Parks* (1881) 58 Cal. 624, 635 [applying single-subject rule to determine constitutionality of statute].)

Because all sovereign power is delgated through the Constitution, CSU's statement that "[a] city is not a sovereign, having only those powers expressly delegated to it" (CSU 35) is true only in the most trivial sense – because it applies to every agency and branch of California government. The Constitution defines and limits the power of the Legislature itself: "The power given to the legislature is a grant of power. It has it not without the constitutional provision. The grant is given to be exercised in the mode conferred on the legislature by the constitution. It is so limited by

the people acting in the exercise of their highest sovereign power." (*Oakland Paving Co., supra*, 69 Cal. at p. 514 [Legislature bound by constitutional provisions for municipal improvement contracts].)

Just as the Legislature is an instrumentality of the state but not itself the sovereign, neither are state universities: "'The university, while a governmental institution and an instrumentality of the state, is not clothed with the sovereignty of the state and is not the sovereign.'" (*Regents of Univ. of Cal. v. Superior Court (Regan)* (1976) 17 Cal.3d 533, 536, quoting *Estate of Royer* (1899) 123 Cal. 614, 624.)[1] Rather, the universities are agencies of the state whose powers are defined by the Constitution or statutes. In that regard, they are no different from cities. "All public corporations exercising governmental functions within a limited portion of the state—counties, cities, towns, reclamation districts, irrigation districts—are agencies of the state...." (E.g., *Union Trust Co. v. State of Cal.* (1908) 154 Cal. 716, 729 [State of California not liable on bonds just because bonds were issued by an agency exercising state power].)

The state universities' lack of territorial limits does not make them "more sovereign" than a territorially defined charter city. Even the Legislature is not superior to a charter city exercising its constitutional power: "Ordinances and regulations enacted by such city in pursuance of its charter have the same force and effect within the limits of the city as laws passed by the Legislature. They both spring from the same source – the state Constitution, enacted by the people in their sovereign capacity." (*Ex parte Zhizhuzza* (1905) 147 Cal. 328, 335–336 [validity of Oakland garbage collection requirements]; *Ex parte Braun* (1903) 141 Cal. 204, 209

[1] Two of the universities discuss *Regan* (Regents 45; Hastings 26) but neither addresses its rejection of the universities' claim to sovereignty.

[charter city's taxing power is "actually conferred upon it by the sovereign power"].)

B. The universities' concept of "hierarchical sovereignty" is not part of California law.

Because charter cities, the Legislature, and other state agencies are empowered by the same Constitution, California courts do not resolve disputes between them based on a theory of "hierarchical sovereignty." If they did, the proponents of the "higher" power would win every dispute. Instead, California courts rely on the text of the California Constitution. And if there is no genuine conflict between a constitutionally authorized local ordinance and a state statute or constitutional provision, then the local ordinance is enforceable. Even with a genuine conflict, this Court anchors its analysis in the term "municipal affairs," asking whether a conflicting statute embodies a "statewide concern" that transcends "municipal affairs" and is narrowly tailored to address that statewide concern. If not, the conflicting city law prevails. (E.g., *Johnson v. Bradley* (1992) 4 Cal.4th 389, 400, 404 [upholding charter city authority to adopt public financing election laws conflicting with state statute].)

In contrast, the universities' theory of implied "hierarchical sovereignty" relies on cases addressing state sovereignty under the *federal* Constitution. (Regents 38-40; Hastings 27, 44; CSU 34-35.) For example, the universities quote language from *Board of Supervisors of Sacramento County v. Local Agency Formation Comm'n of Sacramento County* (1992) 3 Cal.4th 903, that cities and counties "are mere creatures of the state and exist only at the state's sufferance." (*Id.* at p. 914.) But this language expressed a principle of *federal* equal protection law – namely, deference to

state constitutional procedures for local government formation. (*Id.* at pp. 914-916; see Cal. Const. art. XI, § 2.) Similarly, *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6, observed that for purposes of federal equal protection, federal due process, and federal contract clause law, cities and counties are "subordinate political entities" without cognizable *federal* rights against the state. Cases construing other specific federal provisions are inapposite. (See *Printz v. United States* (1997) 521 U.S. 898, 918-919 [Tenth Amendment reserves state sovereignty]; *M'Culloch v. State* (1819) 17 U.S. 316, 361 [Supremacy Clause precludes direct state taxation of federal instrumentality].) Also unhelpful is *Johnson v. Gordon* (1854) 4 Cal. 368, 372 (CSU 34), an antebellum decision by this Court holding the Judiciary Act of 1789 unconstitutional because it allowed the United States Supreme Court to review the decisions of California state courts, in derogation of California's sovereignty. "'The war killed that decision as it did the one in the Dred Scott case, and both are buried in the same grave.'" (*Watkins v. State* (1945) 199 Ga. 81, 89-90, 33 S.E.2d 325, 331, quoting 1909 Report of Georgia Bar Association [discussing similar Georgia decision and *Johnson v. Gordon*].) Ultimately, these decisions are not relevant here, because they concern city-state relations under the federal Constitution. But under the California Constitution, only *some* subdivisions (such as redevelopment agencies) are limited to the powers conferred by the Legislature and genuinely "subordinate" (e.g., *California Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 255-256, cited by Hastings 28), while others like charter cities have constitutionally conferred powers. The answer to the question here must come from the

California Constitution, not the universities' theory of implied "hierarchical sovereignty."[2]

C. No constitutional or statutory bar prohibits San Francisco from requiring the state universities to collect the city parking taxes owed by their customers.

San Francisco exercised its constitutional share of sovereign power to impose a tax on parking customers and to require parking operators – including the state universities – to collect parking tax.

Much about this exercise of power is not disputed by the universities. They have never disputed that San Francisco's ordinance by its terms requires them to collect parking taxes from their customers. Indeed, an oversight in San Francisco's original 1970 parking tax legislation was promptly corrected in 1971, with an amendment providing that parties exempted from paying parking tax – like the state universities – were nevertheless required to collect the parking tax from their customers, a requirement that still exists today, CT024. (S.F. Ord. No. 9-71 (1971), revised § 601; legislative history [*attached infra*, subject of Request for Judicial Notice].) It appears that CSU (at 23), in stating that San Francisco "recently" amended its ordinance to require tax collection by the universities, overlooked this 1971 amendment.

---

[2] Some cases cited by the universities in support of their "hierarchical sovereignty" theory involve areas – unlike city parking taxes – where the Legislature enacted statutes to occupy the field in an area of statewide concern. (E.g., *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 667 [tort claim statute preempted city's tort claim presentation requirements].) Other cases the universities cite have nothing to do with city power. (E.g., *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 467 [city not a "political subdivision of the State" under then-existing Civil Code § 3287 providing for recovery of prejudgment interest].)

And the universities have never asserted that San Francisco's filing of this writ action in 2014 was estopped in 1983, when the then-San Francisco Tax Collector's enforcement efforts against the Regents fizzled without explanation – a subject on which the universities dwell though it is without any consequence. (Regents 15; Hastings 19; CSU 24.)[3]

The state universities do not even dispute that it was a valid exercise of San Francisco's constitutional power to enact the parking tax and require tax collection. (Regents 17-20; Hastings 36; CSU 42.) Rather, all that the state universities dispute is whether San Francisco may exercise *its* constitutional power to require *them* to collect parking taxes owed by their San Francisco customers.

But the universities' arguments against San Francisco's taxing power sidestep a key legal principle highlighted in the Opening Brief (at 25). Namely, any limitations on a charter city's power of taxation must be stated "in express terms" in the Constitution or a statute, and will not be implied – as this Court has repeatedly held. (E.g., *Braun, supra*, 141 Cal. at pp. 209-210; *The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 660 ["Because the power to tax is fundamental, state intent to preempt it must be clear."]; *Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 477 (*Ainsworth*) [constitutional limitations on "the plenary power of taxation possessed by a chartered municipality as an essential attribute of its existence ... should not

[3] An estoppel claim would be fruitless here, given that as a matter of law a taxing agency is not estopped from tax collection by previous errors by tax officials (e.g., *La Societe Francaise v. California Emp. Comm'n* (1943) 56 Cal.App.2d 534, 553) – let alone past officials' lack of appetite for years-long court battles like this one. Moreover, while Hastings (at 19) may not have planned to collect San Francisco parking tax when it built its new garage in 2008, there is no evidence of any affirmative representation by any San Francisco official that Hastings did not have to collect parking taxes from its customers – an essential element of an estoppel.

be extended beyond the express terms of the constitutional reservation"].) None of the universities offer a satisfactory rebuttal to this well-established rule of constitutional and statutory construction. The Regents (at 17) characterize the rule as something "argue[d]" by San Francisco – not a legal principle firmly grounded in this Court's precedent. Meanwhile, CSU (at 52-53) argues that this rule should not apply when state agencies are involved – without explaining why that makes a difference. And Hastings (at 42-43) wrongly asserts that *California Federal Savings & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1 (*California Federal*) "repudiated" this express statement rule – even though *California Federal* said no such thing, and the case involved an express statutory statement prohibiting a city tax on financial institutions.

And under this express statement rule, none of the constitutional provisions, statutes, or cases cited by the universities limit San Francisco's constitutional power to require the universities to collect and remit parking taxes owed by their customers.

1. *Hall v. City of Taft* and *In re Means* do not create an implied constitutional bar on city taxation or city tax collection on state property.

The universities argue for an implied constitutional limitation on city power to require a state agency to do *anything*, based on this Court's decisions in *Hall v. City of Taft* (1956) 47 Cal.2d 177 (*Hall*) and *In re Means* (1939) 14 Cal.2d 254 (*Means*). (Regents 26-27, 40; Hastings 21-24; CSU 28-33.) But these cases had nothing to do with taxation or tax collection (whether in holding or dicta), and this Court has never relied on these cases (or the statutes they construed) to limit city taxing power. They fall far short of creating an express limitation on city revenue power.

Means held that constitutional and statutory provisions setting out "a comprehensive plan for the selection of state employees" preempted city licensing regulation of state-employed plumbers. (*Means, supra*, 14 Cal.2d at p. 257.) Like *Means*, other decisions affirm government power to internally regulate its employees. (E.g., *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876; Opening Br. 26.) But a state agency's employee management prerogatives have never been construed to bar city taxation of state employees, or a city tax collection requirement. To the contrary, this Court upheld city taxation of state employees in *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 398 (*Weekes*) (albeit without deciding the tax collection issue).[4] City taxation of state employees is not regulation of state employees.

Turning to *Hall*, that decision held that the Legislature's comprehensive statutory framework regulating the construction of school buildings manifested a statewide concern, precluding a charter city from enforcing its building code regulations against school buildings. (*Hall, supra*, 47 Cal.2d at p. 184 ["The Education Code sets out a complete system for the construction of school buildings."].) *Hall* also stated that the construction and maintenance of school buildings (which were beneficially

---

[4] CSU (at 42-43) mistakenly argues that *Weekes'* holding that state employees were subject to a charter city tax was a result of Revenue & Taxation Code section 17041.5's granting power to Oakland to tax state employees. But CSU misreads both *Weekes* and section 17041.5. The source of Oakland's taxing power was the Constitution – not section 17041.5. (*Weekes, supra*, 21 Cal.3d at pp. 390, 392) And *Weekes* did not rely on section 17041.5 to uphold city taxation of state employees – it relied on *Graves v. People of State of New York ex rel. O'Keefe* (1939) 306 U.S. 466, 486-487, an intergovernmental taxation decision. (*Weekes, supra*, 21 Cal.3d at p. 398.) Section 17041.5 did not grant taxing power, it rather prohibited city income taxes, with a carve-out for city occupation taxes that were "otherwise authorized" by law. (*Weekes, supra*, 21 Cal.3d at p. 391.) Oakland's tax merely fell within the carve-out – but its tax was "otherwise authorized" by Oakland's charter city power. (*Id.* at pp. 393-398.)

owned by the state) was a sovereign activity which cities could not regulate. (*Id.* at p. 183.) Legislation has since superseded *Hall*'s absolute ban on the enforcement of city building and zoning regulations against state buildings, but a state agency nevertheless retains authority to make "the fundamental decision as to how [its] property will be used." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 869 [Gov. Code § 23004 empowered county to ban gun shows on county property within a city; no conflicting city ordinance].)[5]

But this Court has never construed property management authority to bar city taxes on (or city tax collection from) private parties doing business with the state on state property. Without citing *Hall*, this Court reached the opposite conclusion in *Weekes*, holding that cities do not offend state sovereignty by taxing private parties (state employees) transacting with the state, on state property. And the courts of appeal have upheld city taxation and tax collection on state property, rejecting *Hall*-based arguments for immunity. (Opening Br. 27-28, discussing *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623 (*Oakland Raiders*) [taxation of activities on Regents property]; *City of Los Angeles v. A.E.C. Los Angeles* (1973) 33 Cal.App.3d 933, 940 (*A.E.C. Los Angeles*) [taxation of

---

[5] Several court of appeal decisions cited by the universities do no more than follow *Hall* in holding that state buildings are not subject to city building and zoning regulations (*City of Orange v. Valenti* (1974) 37 Cal.App.3d 240, 244 [zoning regulation of number of parking spaces]; *Vagim v. Bd. of Supervisors of Fresno County* (1964) 230 Cal.App.2d 286, 294-295; *Los Angeles County v. City of Los Angeles* (1963) 212 Cal.App.2d 160, 167; *Town of Atherton v. Superior Court* (1958) 159 Cal.App.2d 417, 428; see also *City of Santa Cruz v. Santa Cruz City School Bd. of Education* (1989) 210 Cal.App.3d 1, 5) or city maintenance regulations for trash disposal (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 637; *Del Norte Disposal, Inc. v. Dep't of Corrections* (1994) 26 Cal.App.4th 1009, 1015; *City of Santa Ana v. Bd. of Educ. of City of Santa Ana* (1967) 255 Cal.App.2d 178, 180).

contractors working on state buildings]; see also *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 506-507 (*City of Modesto*) [tax collection by state agency].)[6] These decisions were correct, because imposing a city tax on private parties arising from certain transactions that happen to occur on state property – and requiring tax collection – is not the equivalent of city regulation of state property.

These decisions undercut the universities' claim that the regulatory-revenue distinction is merely "a preemption doctrine that is not relevant to the immunity analysis." (Hastings 39-42.) To the contrary, courts apply similar principles in both analyses. (E.g., *A.E.C. Los Angeles, supra*, 33 Cal.App.3d at p. 940.) And that is to be expected. Both preemption and immunity claims involve asserted conflicts between state and local authority; and when a genuine conflict exists, courts must determine the relative authority of state and local legislators. Most significantly, just as the existence of a genuine, irresolvable conflict is the starting point for preemption analysis, it is the starting point for immunity analysis. And there is no conflict between *Hall* and charter city tax collection measures, because arguments for implied state sovereignty are insufficient to strip cities of their constitutional power to tax. (*City of Modesto, supra*, 34 Cal.App.3d at p. 508 [explaining that a state agency "must submit to a constitutional mandate; the California Constitution is the paramount

---

[6] By contrast, when a city tax was imposed directly on an instrumentality of the state, one court of appeal decision held it a regulation of the state barred by *Hall*. (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1357-1358; see Opening Br. 49-50.) Two other decisions cited by the universities (Hastings 24; CSU 36-37) relied on *Hall* to bar (non-tax) city charges directly against state property – which the parking tax is not. (See *Regents of Univ. of Cal. v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 136 [city building department fees]; see also *County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 376 [city special assessment against county property].)