No. S242835

In the Supreme Court of California

City and County of San Francisco,
Petitioners and Appellees

vs.

Regents of the University of California, et al.,
Respondent and Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division One
Case No. A144500

Affirming a Judgment of Dismissal Following
an Order Denying a Writ of Mandate
San Francisco County Superior Court, Case No. CPF-14-513-434
Honorable Marla J. Miller, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES

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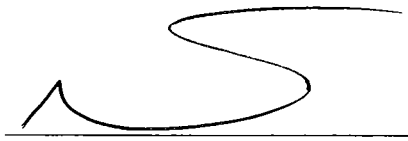
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

No entities or persons need be listed in this certificate under California Rules of Court, rule 8.488.

DATED: July 5, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC



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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities (the "League"), respectfully requests permission to file the attached amicus curiae brief. This application is timely made within 30 days of the filing of the reply brief on the merits.

Counsel for the League have reviewed the parties' briefs and believe additional briefing would assist the Court. The League has a substantial interest in this case because the cities it represents are beneficiaries of parking taxes and other so-called "third-party taxes" levied on one party but remitted by another. Although local government revenue streams vary, local parking tax revenue constitutes a significant fraction of city discretionary revenue, funding essential services for city residents, businesses and property owners. The League therefore has an interest in the orderly administration of local parking taxes.

The League writes to offer an alternative legal framework for decision and to urge the Court to reverse the lower court and affirm San Francisco's power to collect its taxes from those who park in State parking lots in that City.

The League believes the brief will aid this Court and respectfully requests leave to file it.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 474 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, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies cases of state or national significance. The Committee has identified this case as of such significance.

The League is interested in this case because its member cities host a wide range of State and other governmental facilities, which play a large role in the economies and finances of these cities. The power of cities to collect taxes and other revenues from customers and guests of State and other governmental agencies is fundamental to their ability to fund municipal services and to maintain a healthy environment for the activities of the State and its employees, customers, and visitors.

Moreover, cities have an interest in clear boundaries between State and local authority in this area. The distinction between governmental and proprietary activities the lower courts applied

here has its roots in outdated principles of sovereign immunity. That legal framework neither produces predictable results nor serves the constitutional principles in issue. The League writes to offer two alternatives to that framework, each more suited to the task and more rooted in precedent than the theoretical distinction between proprietary and governmental activities of State entities.

DATED: July 5, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
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INTRODUCTION

The League writes to demonstrate the broader policy context in which this Court determines the boundary between local revenue authority and State autonomy in its participation in local economic activity. In addition to the parking taxes in issue here, this case implicates other third-party taxes — like hotel bed taxes and utility users taxes — as well as assessments and fees for municipal services charged to private parties who occupy State lands.

The League urges this Court to abandon the antiquated test which distinguishes government from proprietary functions in favor of a plainer, more predictable test better tied to the relevant values articulated by our Constitution. Such a test might look to the balancing of interests that has developed to resolve disputes between local governments about tax collection or to charter city preemption analysis. Such analysis, of course, can identify local measures that function as a concealed effort to regulate the State and its entities or to tax the State or its agencies, as opposed to private parties who engage in economic transactions with the State as tenants or customers. Either a balancing approach or a preemption analysis will produce more predictable, consistent law that generates less litigation, promotes stability in government finance and operations, and avoids unwarranted license for State agencies to confer immunity from municipal revenue measures on selected few participants in local marketplaces, distorting economies, distracting

those agencies from their primary purposes, and impoverishing local governments.

ARGUMENT

I. PARKING TAXES ARE A SIGNIFICANT LOCAL REVENUE SOURCE AND SELECTIVE IMMUNITY FROM THOSE TAXES WILL DISTORT MARKETS AND DISSERVE PUBLIC POLICY

Parking taxes account for a significant fraction of the general fund revenues of many cities. For example, in fiscal year 2014–2015, Santa Monica and Oakland received nearly $11 million and $18 million in parking tax revenue, respectively, amounting to approximately 4% of their discretionary revenues.[1] On average, parking taxes made up nearly 2% of California cities' general fund revenue.[2] Other major recipients of such taxes include such diverse cities as Los Angeles, Pasadena, South San Francisco, Ontario, San Clemente, Berkeley, San Bruno, Inglewood, Santa Cruz, Arcadia, Malibu, Salinas, Delano, and Millbrae.[3]

Many cities host State facilities. These include the 10 campuses of the University of California, serving approximately 283,700

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[1] Parking Tax Revenues by City <http://californiacityfinance.com/index.php#OTHERTAX> (as of July 20, 2017).

[2] *Ibid.* [data from State Controller's reports and cities' annual reports to Controller].

[3] *Ibid.*

students and 198,300 employees[4] and offering 125,626 parking spaces.[5] In fiscal year 2015–2016, "auxiliary enterprises" such as student housing, food service operations, and **parking** accounted for $1.43 billion annually.[6] The California State University ("CSU") includes 23 campuses, serving 478,638 students[7] and nearly 50,000 employees.[8] In this 2017–2018 fiscal year, the CSU system is projected to offer 161,113 parking spaces, generating $118.1 million in revenue.[9] The State's footprint in large cities like San Francisco, Los Angeles, and Sacramento is obvious. However, State facilities are ubiquitous and include 169 field offices of the Department of

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[4] University of California, The UC System <https://www.universityofcalifornia.edu/uc-system> (as of July 20, 2017).

[5] University of California, Budget for Current Operations: 2017–2018 <http://www.ucop.edu/operating-budget/_files/rbudget/2017-18budgetforcurrentoperations.pdf> (as of Aug. 6, 2017).

[6] University of California, Annual Financial Report: 2015–2016 <http://finreports.universityofcalifornia.edu/index.php?file=15-16/pdf/fullreport-1516.pdf> (as of Aug. 6, 2017).

[7] The California State University, Total Enrollment by Sex and Student Level, Fall 2016 <http://www.calstate.edu/as/stat_reports/2016-2017/f16_01.htm> (as of July 20, 2017).

[8] The California State University, Employee Headcount by Occupational Group <https://www2.calstate.edu/csu-system/faculty-staff/employee-profile/csu-staff/Pages/employee-headcount-by-occupational-group.aspx> (as of July 20, 2017).

[9] The California State University, Parking Program <https://www2.calstate.edu/csu-system/about-the-csu/budget/2017-18-support-budget/supplemental-documentation/Pages/parking-program.aspx> (as of Aug. 6, 2017).

Motor Vehicles[10] and other offices of State government in every corner of California.

Parking revenues from State facilities are substantial. In San Francisco alone, more than $4 million in parking taxes is at stake. (CCSF Reply at p. 10.) The University of California, San Francisco admits in its Answer to the Petition that it collects $17.1 million in parking revenues annually and that nearly half its facilities are open to the general public — not just students, faculty, and staff. (UCSF Answer at p. 10, citing 2 CT 341:9–25, 2 CT 341:22.) Smaller cities hosting large facilities, like Santa Monica, risk a larger percentage of general fund revenues here.

For some taxes, state immunity from direct taxation is constitutional. (E.g., art. XIII, § 3(a) [property taxes].) It is not, however, universal. (Rev. & Tax Code, § 7211 [State obligated to administer sales and use taxes].) Nor is there apparent justification to empower the State and its myriad agencies — some (like the UC) with little oversight by the Governor and Legislature — to confer that immunity on others. The risk of distortion of local markets is great. In some ways, allowing the State and its agencies to confer its tax immunity on third parties raises policy concerns like those this Court recently examined as to Indian tribes. (*People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 255–256 [payday

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[10] Hennessy-Fiske, *Sickouts Shuts Down 2 DMV Offices*, L.A. Times (Aug. 16, 2008) <http://articles.latimes.com/2008/aug/16/local/me-dmv16> (as of July 20, 2017).

lenders not "arm of tribe" immune from regulation] ("*Miami Nation*").)

II. THIRD-PARTY TAXES EXTEND BEYOND PARKING TAXES

The third-party parking tax at issue here is analogous to other local revenue measures in which another person is required to collect a local tax from the tax payor — typically a customer, tenant, or guest of the tax collector. For example, utilities collect utility user taxes from ratepayers (*City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504); hotels collect transient occupancy taxes from guests (*In re Transient Occupancy Tax Cases* (2016) 2 Cal.5th 131); a tavern collected a tipplers' tax from its customers (*Scol Corp. v. City of Los Angeles* (1970) 12 Cal.App.3d 805); and the State and its agencies are subject to sales taxes as other retailers are (Rev. & Tax Code, § 7211). Accordingly, this case has implications for other third-party taxes.

III. THE DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY ACTIVITY IS ANTIQUATED AND UNWORKABLE

The theory of sovereign immunity prevents an individual from suing the government in tort for injuries arising in the discharge of governmental duties and activities, without the government's permission. The theory "originated in the fiction that

the king can do no wrong," and the State, as the sovereign entity, was immune from suit. (*People v. Superior Court of City and County of San Francisco* (1947) 29 Cal.2d 754, 756–757.) To mitigate the harshness of sovereign immunity, common law excepted harms resulting from a local government's "proprietary" or "corporate" functions as opposed to purely governmental or State-delegated functions. (E.g., *Davoust v. City of Alameda* (1906) 149 Cal. 69, 70 [applying governmental/proprietary distinction to determine tort liability for operation of power plant]; *Chafor v. City of Long Beach* (1917) 174 Cal.478, 488 [same as to operation of auditorium].)

In its ground-breaking decision, *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, 214, 216 ("*Muskopf*"), this Court abrogated common law sovereign immunity, holding: "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." The Court observed that "a series of sporadic statutes" had rendered the law hopelessly inconsistent and complex and the antiquated theory unworkable. In response, the Legislature adopted the Tort Claims Act of 1963, Government Code sections 810–996.6. Now known as the Government Claims Act, it requires all government liability arise by statute and claimants to comply with its claiming procedures.

The League respectfully submits that the disarray in the law of inter-governmental tax immunity arises from the continued use of the distinction between governmental and proprietary activities of

government agencies developed in tort cases — and in a very different economy than California now enjoys. (E.g., *Morrison v. Smith Bros.* (1930) 211 Cal. 36, 39 [applying governmental / proprietary distinction to tort liability of East Bay MUD].)

Indeed, both this Court and the U.S. Supreme Court have criticized the distinction between governmental and proprietary functions as unworkable in other settings. The U.S. Supreme Court rejected it in the context of 11th Amendment immunity and noted its rejection elsewhere. (*Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 543 ["The [governmental/proprietary] distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause."].) And, as noted, this Court noted the instability of the scope of "proprietary activities" when rejecting the propriety / governmental distinction in *Muskopf*.

The debate among the parties at bar demonstrates the impracticality of the governmental / proprietary distinction to resolve parking tax disputes. The parking to be taxed includes not just State entities' employees and students. It extends to customers of those agencies, their tenants, and nearby businesses. It extends to guests of those with business with the State. Indeed, in some cases, a State agency is merely trying to make extra money to fund its activities — as with the sales of a booster club at a collegiate sports venue. What proportion of the parking fees disputed here are for

governmental as opposed to proprietary activity? Will it take expert testimony to do the accounting? Does it matter if the parking is outside a classroom building, a dormitory, a retail venue, or a facility which serves the public? Need a State agency exclusively occupy the facility or would a facility with nominal State agency presence and many private-party tenants also benefit from the rule? The governmental / proprietary distinction is useful to answer none of these questions.

The distinction also asks whether an activity is "uniquely" governmental. (*Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 537; *Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066, 1081.) There is nothing uniquely governmental about buying and selling parking. Both public and private actors do so. The distinction does not provide a clear answer even in this case, as the opinions of the Justices of the Court of Appeal below demonstrate.

Moreover, in *Weekes v. City of Oakland* (1978) 21 Cal.3d 386 ("*Weekes*"), this Court did not ask whether it was proprietary or governmental for the State to pay its employees — the payroll tax was due from employees and enforced, notwithstanding that paying government employees is plainly a governmental activity. There is no way to square *Weekes'* holding —no tax immunity for employees — with a test which distinguishes governmental from proprietary activities of government, much less from "uniquely" governmental

activity. The proprietary / governmental rule reflects ideas about the proper role of government from an earlier time, well before "public-private-partnership" became a trope.

IV. A TEST WHICH RESPECTS ALL THE VALUES AT STAKE HERE WOULD BETTER SERVE THE LAW

The constitutional values implicated here include:

(1) State entities' autonomy from local control when engaging in core regulatory and service-delivery functions;

(2) adequate funding for local governments which must provide streets, public safety services and other facilities and services to support State entities' activity;

(3) a fair and even-handed treatment of participants in local economies that expresses the commitments of Equal Protection; and

(4) the home rule principles of article XI, sections 3 and 5 of our Constitution.

Two bodies of law might assist the Court in framing a more serviceable standard here. Case law describes the power of cities and counties to require other local governments to collect their taxes, but not to tax those other local governments themselves. These tax collectors are typically special districts created to serve State policy. They are no different from the State and its educational entities in any way that matters for the constitutional values in issue here.

(E.g., *City of Modesto v. Modesto Irrigation District, supra,* 34 Cal.App.3d at p. 508–509 [charter city could compel irrigation district to collect utility user taxes]; *Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24 [same as to general law city]; *Edgemont Community Services District v. City of Moreno Valley* (1995) 36 Cal.App.4th 1157 [same].)

Preemption cases are helpful, too — especially those which apply the home rule provisions of article XI of our Constitution — in determining whether a genuine conflict exists between State and local legislation. (E.g., *Bunker Hill Associates v. City of Los Angeles* (1982) 137 Cal.App.3d 79, 858–86 [tax on tenants of tax-exempt landlords did not discriminate arbitrarily or violate State Constitution or LA's charter].)

State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista (2012) 54 Cal.4th 547, 535–536 (*Vista*) freshly states a four-element test to determine when statute may properly preempt charter city legislation. Its **first element** considers whether an ordinance addresses a municipal affair. San Francisco's ordinance adopting its parking tax is an important source of local revenue. The courts have held that funding local government — and requiring collection of third-party taxes — are municipal affairs (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 13 ["levying taxes to support local expenditures qualifies as a

'municipal affair' within the meaning of the home rule provision of our Constitution"].) Thus, parking taxes are a municipal affair.

Vista's **second element** ask if State and local law actually conflict. Respondents cite Education Code section 89701, subdivision (a), which grants the trustees the authority to set "the payment of parking fees in the amounts and under the circumstances determined by the trustees." (CSU Answer at p. 19.) The statute grants the State universities the authority to regulate the imposition and collection of parking **fees**. But Respondents identify no statute speaking to **tax** immunity generally, much less specifically prohibiting local taxes on third parties or a corresponding duty in State entities to collect such taxes. As the Reply notes, "there are fundamental differences between a city regulation, and a city tax collection requirement." (Reply at p. 24.) Here, the local parking tax is not a regulation, and, thus, there is no conflict between state and local law.

Vista's **third element** asks: in the absence of an actual conflict, does a conflicting State law address a matter of statewide concern? Requiring educational institutions to collect a tax assessed on third parties is not a matter of statewide concern. How is immunity from taxation while participating in San Francisco's thriving market for parking a matter of statewide concern? How would a rule accepting this premise not entitle the State to pursue any money-making venture to fund its services, just as the Miami Nation's attempt to

license its sovereign immunity to a payday lender? (*Miami Nation, supra*, 2 Cal.5th at pp. 255–256.) While well-funded and autonomous State educational institutions are a worthy statewide concern, this does not require they be authorized to extend their own governmental tax immunity to private parties. Would a contrary rule empower CSU to exempt its students from property taxes? Its concessionaries from business license taxes? The State educational entities at bar offer no workable rule to limit the power they seek to confer tax immunity.

The **fourth element** requires a statute to be "reasonably related to resolution" of the asserted statewide concern. Here, there is no need to empower State entities to carve out a large, tax-free zone in local marketplaces to ensure they are well-funded and autonomous. The incursion into local autonomy — an equally fundamental commitment of our Constitution (Cal. Const., art. XI, §§ 3, 5) — is greater than necessary to achieve the State end. State education could be well funded by seizing City assets, too, but that is hardly an appropriate balance of the competing constitutional concerns here.

Either or both of these standards will produce more predictable results than the dated distinction between public agencies' governmental and proprietary activities. Each will encourage legislative adjustment of the State and local spheres in an adaptive and responsive way — the result for which Respondents

argue. Neither requires over-involvement of courts in this balancing of interests and neither empowers State entities with varying degrees of oversight by the politically responsible branches to eviscerate the municipal sphere with impunity. Such rules retain the judicial role of reviewing legislative choices rather than relying on common law presumptions and antiquated notions of the appropriate role for government to police the boundary between the power of State entities and the local governments which host and serve their facilities.

CONCLUSION

This case presents an issue of broad concern to California cities because it involves their ability to fund essential services to State entities' facilities within them — yet these facilities claim to be islands of immunity from local revenue measures. It affects not just parking taxes, but a range of third-party taxes including utility user taxes and hotel bed taxes. As such, a legal framework is needed to evaluate claims of immunity from local taxation that is predictable and respects all the constitutional issues at stake without relying on courts alone to limn the boundary between State and local authority.

The distinction between the governmental and proprietary functions of government is antiquated and unworkable. It provides no predictable results and does not respect all the constitutional values at stake. A more serviceable standard can be developed by resort to either or both of existing case law involving

intergovernmental tax immunity and cases balancing State sovereignty and the home rule power of charter cities in the preemption context.

Accordingly, the League urges this Court to reverse the lower court, affirm San Francisco's power to collect its taxes from those who pay to park in State parking lots, and to develop the law as described here.

DATED: July 5, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC

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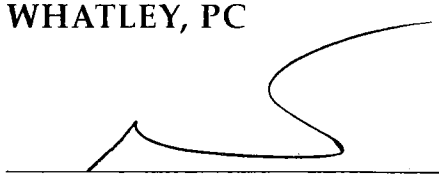
Attorneys for Applicants — Amici Curiae League of California Cities

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 2,896 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: July 5, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC



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PROOF OF SERVICE

City and County of San Francisco v.
Regents of the University of California, et al.
California Supreme Court Case No. S242835

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On July 5, 2018, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

X **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on July 5, 2018, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

City and County of San Francisco v.
Regents of the University of California, et al.
California Supreme Court Case No. S242835

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