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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This Court should grant review to decide whether or not state universities may avoid collecting city parking taxes owed by customers of their paid parking lots. Review is warranted under both prongs of California Rule of Court 8.500(b)(1). Contrary to the universities, there is no "uniformity of decision" whether state agencies must collect city taxes that are due and owing from agency customers; rather, the majority decision below leaves the law in "disarray." (Dissent at p. 2.) And the universities' arguments about the merits only underscore that this is an "important question of law." Far from denying the fiscal impact of this question, the universities complain about losing the financial advantage they captured by refusing to collect taxes owed by their customers. And the universities emphasize their outsize role in San Francisco and across the state. Finally, the universities do not deny the constitutional significance of this issue, which requires a careful balancing of city authority to raise tax revenue – the "lifeblood of government" (*People v. Skinner* (1941) 18 Cal.2d 349, 356) – from private parties doing business with the state, against state agencies' claims of sovereign immunity. Review should be granted.

ARGUMENT

I. Review is necessary to secure uniformity of decision.

The universities spend considerable energy arguing the merits of their position. But they do not dispel the genuine conflict that exists in the legal authorities.

A. The universities cannot reconcile the majority opinion with *City of Modesto*, *Eastern Municipal Water District*, and Attorney General Opinion No. 81-506, all of which required state agencies selling taxable services to collect city taxes from customers.

Contrary to the majority here, the court in *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 508-509 (*City of Modesto*) held that state agencies must undertake reasonable measures to collect city taxes (there, electricity taxes) owed by agency customers. The court explained that cities enact tax collection measures under their constitutional power to raise revenue, and state agencies were constitutionally obligated to collect those taxes because "the California Constitution is the paramount authority to which even sovereignty of the state and its agencies must yield." (*Id.* at p. 508.) The universities deride this as a "perfunctory alternative holding" and argue against it – but they concede that the majority opinion is inconsistent with *City of Modesto*. (Hastings Opp. at pp. 25-27.[1]) Indeed, the majority itself acknowledged disagreement with *City of Modesto*. (Op. at p. 14.)

Likewise, the universities concede the majority's disagreement with Attorney General Opinion No. 81-506, 65 Ops.Cal.Atty.Gen. 267, 268-271 (1982), which opined that the state[2] was obligated to collect a city hotel tax from guests of the Asilomar conference center, based on *City of Modesto*.

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[1] Both the UC Regents and the CSU Trustees joined Hastings' brief, which is the most detailed of the three opposition briefs.

[2] The universities characterize this opinion as pertaining to a non-profit entity operating a state facility (Hastings Opp. at p. 27 fn.4), but the opinion was not so narrow. Rather, the Attorney General opined that the duty to collect city tax applied *both* to the state itself *and* to any non-profit entity the state might retain to manage state hotel operations: "The City of Pacific Grove may require the collection by the state or its agents a transient occupancy tax for the occupation of rooms at the Asilomar Conference Grounds." (65 Ops.Cal.Atty.Gen. at p. 268.)

But, the universities argue, this conflict "does not warrant review" because Attorney General opinions are non-binding. (Hastings Opp. at p. 27 fn.4.) While non-binding, Attorney General opinions nevertheless represent the disinterested view of the chief legal representative of the State of California. "Though clearly not controlling authority, the opinions of the Attorney General are accorded great respect by the courts." (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 747.) The Attorney General's reliance on *City of Modesto* (at least until commencement of its representation of the CSU Trustees in this litigation) adds weight to this conflict.

The third authority directly conflicting with the majority decision is *Eastern Municipal Water District v. City of Moreno Valley* (1994) 31 Cal.App.4th 24 (*Eastern Municipal Water District*). That decision held, based on *City of Modesto*, that a municipal water district was required to collect city water and sewer taxes. The universities urge this decision does not conflict with the majority opinion because municipal water districts are not "state agencies, but rather 'quasi-municipal corporations' created by local voters pursuant to state law." (Hastings Opp. at p. 25, quoting *Fuller v. San Bernardino Valley Mun. Water Dist.* (1966) 242 Cal.App.2d 52, 62 (*Fuller*).) But under the state Water Code, water districts created by local voters *are* treated as "state agencies," implementing state water policy at the local level.[3] (*Baldwin Park County Water Dist. v. Los Angeles County*

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[3] The limited geographic scope of a municipal water district is no reason to conclude that it is not a state agency. School districts are treated as state agencies for purposes of immunity from local regulation, notwithstanding their local character, as was held in the seminal "immune from local regulation" decision, *Hall v. City of Taft* (1956) 47 Cal.2d 177, 183, which stated: "School districts are agencies of the state for the local operation of the state school system."

(1962) 208 Cal.App.2d 87, 90 ["The Water Code provides for the formation and regulation of state agencies for the purposes of controlling and distributing water."]; Dissent at pp. 24-25 [identifying Eastern Municipal Water District as a "state entity" and a "state water district"]; cf. *Fuller, supra*, 242 Cal.App.2d at p. 64 [case did not concern immunity, but rather priority of competing water district formation and annexation proceedings].) Thus, the conflict between the majority and *Eastern Municipal Water District* is just as genuine as the conflict with *City of Modesto* and the 1982 Attorney General opinion.

Each of these three authorities held that a state agency must collect city taxes that the agency's customers owe, and these three authorities are in clear conflict with the majority decision below. The universities do not dispel this conflict. And even if the universities could distinguish particular authorities on their facts, what would still be lacking is a "cogent legal framework" (Dissent at pp. 1-2) for harmonizing the majority opinion here with these other authorities.

B. Contrary to the universities, there is a deep conflict whether *Hall v. City of Taft* bars local revenue measures.

The universities' central argument in opposing review is that it was simple, straightforward, and uncontroversial for the majority to construe *Hall v. City of Taft* (1956) 47 Cal.2d 177 (*Hall*) to bar a city from requiring a state agency that sells a taxable service to collect city taxes on the service that the customers owe to the city. (Hastings Opp. at p. 10; Regents Opp. at pp. 13-14.) But in construing *Hall* this way, the majority decision conflicts with several prior decisions.

Other Court of Appeal decisions specifically rejected arguments that the *Hall* bar on local "regulation" applies to local *revenue* measures involving private parties doing business with state agencies. (See *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 626-627 (*Oakland Raiders*) [holding that local tax applied to activities on UC Regents property, notwithstanding *Hall*]; *City of Los Angeles v. A.E.C. Los Angeles* (1973) 33 Cal.App.3d 933, 940 (*A.E.C. Los Angeles*) [holding that local tax on government contractors working on state buildings does not conflict with *Hall*].) In determining that *Hall* was a bar on "regulation" but not taxation, these decisions specifically relied on the revenue-regulatory distinction. That disproves the universities' claim that the distinction between revenue and regulatory measures "never had anything to do with sovereign immunity." (Hastings Opp. at p. 17.)

Likewise, contrary to the majority, *City of Modesto* expressly rejected the argument that *Hall* barred a city from requiring a state agency to collect city taxes owed by customers. (*City of Modesto, supra*, 34 Cal.App.3d at p. 506 [distinguishing *Hall*].) *City of Modesto* explained that the *Hall* decision is bar on local *regulation* of state agencies – but a city tax collection requirement is a local *revenue* measure, not a local regulatory measure. In reaching the conclusion that the *Hall* bar on "regulation" did not apply, the *City of Modesto* court relied on this Court's decisions in *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*). In both *Rivera* and *Ainsworth*, this Court held that local revenue collection measures 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.) That is because tax collection is not regulation "in any sense comparable to the use of the term." (*Id.* at p. 477.)[4]

Under these decisions, neither the incidental clerical and ministerial activity involved in tax collection,[5] nor the indirect economic impact on the state entity, transmutes an obligation to collect a local third party tax into a "regulation." Thus, tax collection does not implicate the *Hall* bar on local "regulation." The majority's very different interpretation of *Hall* conflicts with these past decisions.

C. The universities endorse the majority's incorrect interpretation of *California Federal*, which creates more conflicts with existing law.

The universities contend the majority's construction of *Hall*, which departs significantly from past cases, is proper because the majority relied on *California Federal Savings & Loan Association v. City of Los Angeles* (1991) 54 Cal.3d 1, 11-18 (*California Federal*). But the majority misread

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[4] The universities contend that because both *Rivera* and *Ainsworth* are preemption decisions, they have no significance in a tax immunity case. (Hastings Opp. at p. 26.) That is wrong. The same "regulatory vs. revenue" analysis applies in both types of cases, as *City of Modesto* shows, and as was explained in *A.E.C. Los Angeles*: "While local ordinances may not impose a regulatory scheme upon private persons which operates to impinge upon the sovereign power of the state [citations], revenue measures of general application imposing a nondiscriminatory tax upon persons doing business *in a state regulated activity or with the state*, do not so impinge." (33 Cal.App.3d at p. 940, emphasis added.)

[5] The universities continue to urge that San Francisco's present writ petition seeks to impose requirements on their paid parking lots beyond the duty to collect and remit San Francisco parking tax. (Hastings Opp. at pp. 13-14 & fn.2.) That claim is simply wrong, and was already rebutted in the Petition for Review (at pp. 22-23 & fn.3).

California Federal, creating even more conflicts with existing law – in particular, the law authorizing cities to impose taxes even as to matters that cities are forbidden to regulate.

The majority interpreted *California Federal* to mean this Court has "abandoned" the distinction between local revenue measures and local regulatory measures when it comes to preemption analysis. (Op. at p. 10.) But that reading of *California Federal*, if correct, would mean that municipalities can no longer raise revenue in any area where regulatory authority is reserved to the state. That would amount to a serious change in California law and a repudiation of *Ainsworth*, *Rivera*, and other decisions of this Court authorizing local taxation of sellers (and their customers) that are otherwise subject exclusively to state regulation. Utilities, alcohol distributors, and other businesses subject to exclusive state licensure or regulation would be exempt from any local broad-based tax that happened to reach them (or their customers), such as city business taxes and utility taxes.

California Federal, however, did not do that. To begin with, the legal question in *California Federal* was not whether a local revenue measure transgressed a state bar on local regulation. Rather, *California Federal* involved the question of how to resolve a clear conflict between a state *revenue* measure seeking to impose a uniform tax on financial institutions, and a local *revenue* measure which taxed businesses including financial institutions. (*California Federal, supra*, 54 Cal.3d at p. 14.) This Court explained local revenue measures do not always win these conflicts (*id.* at p. 17), and held that the overriding statewide interest in uniform taxation of financial institutions meant that this local tax measure was preempted. (*Id.* at pp. 23-24.)

But *California Federal* never suggested a different approach to the antecedent question whether a conflict exists between state and local law – let alone the question whether a state bar on local regulation leaves room for local revenue measures. To the contrary, this Court endorsed its long-standing approach of avoiding the invalidation of local laws, by initially ensuring that an apparent conflict between state and local power is a "genuine" one. (*Id.* at pp. 16-17.) And *California Federal* specifically cited this Court's past decisions holding that local revenue measures (including revenue collection measures) did not pose a conflict with a bar on local regulation. (*Id.* at p. 14 & fn.12, citing *Ainsworth, supra*, and *A.B.C. Distributing Co. v. City and County of San Francisco* (1975) 15 Cal.3d 566.)

Thus, *California Federal* did not "repudiate[]" the distinction between revenue and regulatory measures, either in the specific context of preemption or outside of it. (Hastings Opp. at p. 18.)[6] Indeed, *California Federal* had nothing to say about *Hall* or about state immunity from local regulation.[7] But, because the majority read *California Federal* differently,

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[6] Courts still routinely rely on the distinction between revenue and regulatory measures in many legal contexts, applying well established principles to differentiate one from the other. (See, e.g., *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 [noting that Proposition 218 requires determining whether a local measure involving money charges is a revenue measure (tax) or a regulatory measure (fee)]; *City of Cupertino v. City of San Jose* (1995) 33 Cal.App.4th 1671, 1678 [holding that "regional welfare test" governing extraterritorial effects of local measures applied only to regulatory measures, not revenue measures].)

[7] Of course, in *California Federal* this Court acknowledged its important role in resolving constitutional conflicts involving state and local authority, "based on sensible, pragmatic considerations." (*California Federal, supra*, 54 Cal.3d at pp. 17-18.) That general principle certainly applies to this case.

a conflict now exists whether a state bar on local regulation is synonymous with a state bar on local revenue measures.

D. The universities concede that the majority's immunity rulings means the universities do not have to collect the taxes that their customers owe – a result contrary to modern tax immunity law.

According to the universities, it is tough luck for San Francisco that their customers are enjoying de facto immunity from city parking taxes, thanks to the universities' governmental status. (Hastings Opp. at pp. 30-32.)[8] But, as San Francisco's petition explained (at pp. 25-30), California law has adopted modern principles of tax immunity – which reject

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[8] In their opposition to this Petition for Review, the universities assert, for the first time in this litigation, that San Francisco has not shown it has no practical or economical alternative way to collect the parking taxes that their customers owe to San Francisco. (Hastings Opp. at pp. 22-23 & 31.) Not so. San Francisco's Tax Collector submitted sworn testimony on this exact point. "There is no way for CITY to collect the taxes due from transient occupants of parking space without the cooperation of the operators." (Verified Amended Petition and Complaint ¶ 68, CT18.) The universities have never challenged that evidence or contradicted it. The universities' new suggestion – that San Francisco could install license plate readers at respondents' exit gates – is not evidence, let alone contrary evidence. This suggestion is presumably tongue-in-cheek, as it ignores that each customer's parking tax is calculated as a percentage of the amount the customer paid for parking. And there is no existing license plate reading technology that is capable of detecting the amount of money that each customer pays to the gate cashier (whether by cash, credit card, or check), or pays at automatic pre-payment stations in parking garage lobbies, or pays on a monthly basis by mailed check or ACH debit. If such invasive technology existed and could economically be purchased by the City, its use would likely violate federal and California constitutional prohibitions on unreasonable searches, and San Francisco would have to exercise its power of eminent domain to install the equipment on nearby private property. Automatic toll collection works on the Golden Gate Bridge only because the entity collecting the tax owns the facility, and it charges a flat fee for using the facility.

extending the government's own immunity from taxation, to its customers, employees, and contractors.

The universities cite decisions from two other states that are inconsistent with this modern approach. (Hastings Opp. at p. 29.) While these cases are distinguishable,[9] it is noteworthy that the highest court of another state has addressed a state agency's obligations to collect a local third-party tax. That signals the importance of the issue, and supports granting review here.

As for the cases requiring sovereign tribes to collect state taxes owed by their customers, the universities claim that these cases can be explained by a state's broader sovereignty, and are irrelevant. (Hastings Opp. at pp. 27-29.) But that argument is wrong on both counts.

It gets the law on tribal sovereignty wrong. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." (*Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 154.) Notwithstanding this sovereign status, a tribe must still collect state taxes owed by its customers.

And these tribal decisions are relevant because they get to the crux of the question whether a tax collection requirement truly interferes with sovereignty. And it does not, because there is "nothing in this burden which frustrates tribal self-government." (*Moe v. Confederated Salish and Kootenai Tribes of Flathead* (1976) 425 U.S. 463, 483 (*Moe*).) Similarly

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[9] The Colorado decision did not involve a tax on paid parking, but rather a tax on admission to university events. (*City of Boulder v. Regents of Univ. of Colo.* (Colo. 1972) 501 P.2d 123, 127.) And as to the Illinois decision (*City of Chicago v. Bd. of Trustees of the Univ. of Illinois* (Ill. Ct. App. 1997) 689 N.E.2d 125, 130), this Court has previously recognized that Illinois cities have lesser authority than California cities. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140.)

here, there is nothing in the burden of collecting tax from parking customers that infringes on the academic affairs or self-governance of any of the universities.

II. The petition presents an important question of law.

A. Given the role of state agencies in selling services taxed by cities, this issue has a substantial, statewide fiscal impact.

The universities do not seriously dispute the statewide importance of the issue whether state agencies selling taxable services must collect city taxes that their customers owe. San Francisco's petition highlighted how state agencies participate in the marketplace for services taxed by many California cities. (Petition at pp. 14-17.) And the Regents' opposition brief emphasized the enormous footprint of state universities in San Francisco and other California cities. (Regents Opp. at pp. 6-8.) If the customers of state agencies are going to continue their holiday from city taxes, the fiscal impact will continue to be considerable, with cities losing substantial tax revenue. Indeed, the Regents argue that the indirect fiscal impact on them will be unacceptable, if their San Francisco parking customers are required to actually pay the taxes that they indisputably owe. (Regents Br. at p. 12.)[10]

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[10] The UC Regents lead off their brief with the claim that San Francisco "implicitly conceded" that it could not compel the UC Regents to collect city taxes in 1983, when for unknown and undisclosed reasons the San Francisco Tax Collector did not pursue an assessment for back taxes. (Regents Opp. at p. 5.) Of course, none of the respondents, UC Regents included, have ever asserted that San Francisco could be estopped in 2017 by an unexplained cessation of collection efforts in 1983; and respondents do not propose this as an additional issue for review. Regardless, any estoppel claim would be foreclosed by the well-established "general rule that the government does not lose its revenue because of an erroneous

B. This Court should review this important constitutional issue, which requires striking the proper balance between local and state authority.

None of the parties to this case has a monopoly on constitutional dignity. San Francisco's revenue-raising authority stems from the California Constitution, article XI, section 5. The UC Regents' powers of property management and governance stem from article IX, section 9. And article XX, section 23 authorizes legislation creating the California State University system. The crucial question here is how to resolve the competing constitutional claims of cities and these state agencies, when state agencies opt to sell taxable services to customers who then owe city taxes.

Each side has argued for a different legal rule to govern these claims. Under the rule endorsed by the majority below (and the universities), any local tax collection measure is a regulation, and therefore subject to a "governmental vs. proprietary" analysis when applied to a state agency. And under the governmental vs. proprietary analysis adopted by the majority, a taxed service will be deemed governmental so long as it is authorized by law and useful to the state agency's ultimate mission. (Op. at p. 9.) As a practical matter, under this test the only activities that will ever be treated as proprietary (and therefore subject to local regulation and local taxation) are purely revenue-raising activities, such as renting out vacant government property for swap meets and circuses. (E.g., *Board of Trustees of CSU v. City of Los Angeles* (1975) 49 Cal.App.3d 45; Op. at p. 9.) Correspondingly, many broad-based local taxes will become uncollectable, because the underlying taxed activity is useful to an agency's mission.

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ruling of an administrative official." (*La Societe Francaise v. California Emp. Comm'n* (1943) 56 Cal.App.2d 534, 553.)

San Francisco supports a rule that when a local tax on private parties is determined to be a valid revenue measure rather than a regulatory measure, a state agency is required to take reasonable measures to collect the tax from its customers. The universities criticize this rule as not respecting sovereignty, and as lacking any limiting principle. (Hastings Opp. at pp. 17-18.)

Addressing first the universities' complaint that San Francisco disrespects their sovereignty, to the contrary, given the humdrum clerical tasks actually associated with tax collection, "nothing in this burden ... frustrates ... self-government." (*Moe, supra*, 425 U.S. at p. 483.) And similarly, a broad-based tax does not infringe sovereignty when people who transact their business with a state agency are taxed on the same footing as those who transact their business with a private party. University students, faculty, patients, visitors, and guests who drive are no different from everyone else who needs a place to park when they arrive at their destination. There is nothing uniquely academic or medical about paid parking; construction workers, financiers, and secretaries do exactly the same thing, and they have to pay their local taxes. That rationale undergirded this Court's holding in *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 398, namely: state employees have to pay city employment license taxes, just like everybody else who gets a paycheck. State employees did not get a free pass just because it could correctly be argued that state government must pay its employees if government is to function. Given that rationale for upholding the validity of a local tax on employees of the state, it is anomalous for the majority to have applied the opposite rationale to void collection of a local tax on customers of the state.

Turning to the universities' other criticism, San Francisco's tax collection rule does have limits. A city cannot require a local tax to be collected when a so-called tax is "a façade behind which a regulatory scheme has been hidden." (*Oakland Raiders, supra*, 65 Cal.App.3d at p. 628.) That limitation protects state agencies from improper attempts to invade their internal governance, or from taxes that are suspiciously aimed only at state activities. (Cf. *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1352 [city admissions tax levied only on contractors at agricultural district fairgrounds].)

CONCLUSION

Regardless of what the governing legal rule ought to be, this Court should review this important issue. "[M]unicipalities 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.)

Dated: August 3, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,143 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 3, 2017.

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