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 OPENING BRIEF

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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 City and County of San Francisco imposes a parking tax to raise revenue for its general fund. Whenever a customer pays to park in a San Francisco parking lot, the customer owes a parking tax that is added to the parking charge. The parking lot operator collects both with each sale, and then periodically remits its customers' tax payments in a single lump sum to the San Francisco Tax Collector. This arrangement is common; governments routinely require the sellers of taxed goods and services to collect the taxes owed by their customers.

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 sell parking to customers. Their parking operations collectively take in millions of dollars each year. But they refuse to collect the more than $4 million per year in San Francisco parking taxes owed by their customers, asserting that San Francisco's parking tax is an impermissible attempt to regulate the universities in violation of constitutional and statutory protections for their autonomy, and in violation of sovereign immunity principles set out in *Hall v. City of Taft* (1956) 47 Cal.2d 177, 183 (*Hall*).

This Court should reject the universities' arguments. San Francisco's tax-collection ordinance is a valid exercise of its constitutional revenue power under article XI, section 5 of the California Constitution. Because the revenue power is fundamental to charter cities, and because the ability to *collect* taxes is just as important as the ability to *impose* them, this Court and lower courts require any limitations on the revenue power to be expressly stated. Here, the constitutional and statutory provisions that the universities rely on – article IX, section 9 for UC Regents and Hastings, and article XX, section 23 and Education Code section 89701 for CSU Trustees – only constrain a city's exercise of its regulatory police power over state property, and do not expressly limit city revenue power. Accordingly, these provisions cannot constrain San Francisco's authority to impose reasonable tax collection requirements. That result is in line with this Court's past cases holding that cities can tax what they cannot regulate, and can require tax collection by entities that they cannot regulate.

Nor do the universities' more general sovereignty arguments have force. The universities complain that a parking tax on their customers invades their sovereign power, because of the negative economic impact on their parking activities, and the indignity of having to undertake the clerical burdens of tax collection on behalf of another government. But similar complaints arise whenever two sovereigns have concurrent jurisdiction and taxing power, and the tax of one sovereign affects the activities of the other. This Court has resolved similar disputes in the past by applying the principles of intergovernmental taxation law. In broad terms, this body of law holds that one government may not impose a tax directly upon another government, or upon an institution that is a government instrumentality. But one government may impose a nondiscriminatory tax on private parties

doing business with another government, even if the effect of that tax is to increase the economic burden on government or those who do business with it.

These principles – which California courts have applied to uphold city taxation and tax collection from private parties doing business with the state – ensure that private parties do not get tax immunity by virtue of doing business with the government, whether they are employees, contractors, or customers. And they recognize the concurrent sovereignty of cities and the state, both of whom must raise revenue to provide essential public services – services which are enjoyed by everyone in the taxing jurisdiction, including those doing business with another government. Because the economic impact on state agencies whose customers are taxed by local jurisdictions is indirect, and because the administrative burden of collecting taxes is a minimal one that does not genuinely interfere with sovereign power, the intergovernmental taxation cases require even a sovereign to collect and remit another sovereign's taxes. These cases compel upholding San Francisco's parking tax and its collection requirement.

For these reasons, and others discussed below, this Court should reverse, and direct that a writ of mandate be issued requiring the state universities to collect San Francisco parking tax from their customers and remit those funds to San Francisco.

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 its general fund. (San Francisco Business & Tax Regulations Code (S.F. Tax Code),

art. 9, §§ 602.5, 615 [CT026, 035].) The 25 percent 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 [CT025-026].) 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 [CT026].) 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) [CT024], § 604 [CT026-027]; S.F. Tax Code, art. 6, § 6.7-1, subd. (a) [CT054].) 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) [CT055-056].)

The S.F. Tax Code exempts the State of California and other public entities from directly having to pay the parking tax. (*Id.*, § 6.8-1, subd. (a) [CT056-057].) 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) [CT024]; S.F. Tax Code, art. 6, § 6.8-1, subd. (b) [CT056].) 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) [CT054-056].)

San Francisco does excuse public entity operators from several requirements imposed on private parking operators, such as bonding and permitting requirements (S.F. Tax Code, art. 6, § 6.6-1, subd. (h)(2) [CT051]; S.F. Police Code, art. 17, § 1215, subd. (b) [CT099]), and

requirements for installing devices to properly track parking revenue and parking taxes (S.F. Tax Code, art. 22, § 2202 [CT095]).

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 UC Regents is responsible for the operation of the University of California at San Francisco. UCSF has a medical school and related educational facilities, and several medical facilities in several different San Francisco neighborhoods. (CT339-340.) As of 2014, UC Regents was operating 15 parking stations in San Francisco, selling parking near UCSF facilities. (CT338-340.) As of 2014, these parking facilities comprised 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.*)

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

UC Regents' customers pay a substantial amount of parking fees – and these customers owe a substantial amount of parking tax. In fiscal year 2013, UC Regents received approximately $17.1 million in parking fees, clearing $4.5 million over the expense of operating its garages. (CT341, 343.) But UC Regents did not collect or remit any parking tax – which, at 25% of the $17.1 million figure, was just under $4.3 million in FY2013.

Respondent Hastings operates a graduate school of law in San Francisco, in the Civic Center/Tenderloin neighborhood. In 2006, Hastings built a 395-space parking garage near the school. (CT270-271.) Hastings,

like UC Regents, sets its own rates for parking. And, like UC Regents, Hastings sets its prices for public parking according to the market. Its public parking prices are "generally on par" with the prices 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 prices include both the underlying parking charge and the parking tax. (CT273.) In any case, Hastings' parking prices charged to the public are between $11 and $26 for 2 to 12 hours. And monthly spots are priced at $260 per month for non-students, and $210 for students. Hastings offers a reduced price of $9 for students who park on a daily basis. (CT271.)

Hastings' customers paid $1.8 million in parking fees in fiscal year 2014. Revenue from parking fees exceeded the normal operating costs of the garage, but 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 CSU Trustees is responsible for San Francisco State University. CSU Trustees operates nine parking stations in San Francisco that charge for parking. (CT189-190.) All of CSU Trustees' paid lots are on the SFSU campus in western San Francisco. (CT189.) Parking by the public is allowed by paid permit, with permits priced at $3 for two hours or $6 for the day. Students and employees may purchase semester or annual permits. (CT190.) The prices set by CSU Trustees are "competitive." (CT192.) (Total fees paid by CSU Trustees' customers are not in the record, so the total amount of uncollected parking tax is unknown.)

The three universities' parking operations serve similar purposes. The parking lots provide a place to park for individuals who drive to the universities' various campuses and facilities. (CT271, 341-342, 561.) Revenue from parking fees defrays the costs of parking operations. And excess parking revenue supports other activities, such as the operation of UCSF's shuttle bus system. (CT341, 343.)

III. San Francisco filed this action to compel the state universities to collect and remit San Francisco parking taxes owed by their customers.

None of the universities has ever collected San Francisco parking taxes, filed parking tax returns, or remitted parking tax funds to San Francisco. (CT016, 184, 238, 304.) In 2011 and 2013, the San Francisco Tax Collector demanded that the universities' parking lots begin collecting and remitting San Francisco parking tax. (CT016, 203-204, 286-287, 294-295, 360-362, 373-375.)

When the universities refused, 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.)[1] The San Francisco Superior Court (Hon. Marla J. Miller) denied the writ, on the grounds that the parking tax was an attempted city "regulation" of state property barred by sovereign immunity. (CT556-565.) This ruling similarly barred San Francisco's claim for declaratory and injunctive relief, and judgment was entered for the universities. (CT573-576.)

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[1] San Francisco sought a ruling only on whether the universities were required to collect and remit the parking tax and did not seek a ruling on whether any other San Francisco Code provisions applied to the universities' parking operations. (CT019, 602-604.)

San Francisco appealed. In a 2-1 decision, the First District Court of Appeal (Division One) affirmed, holding that the universities' immunity precluded tax collection because imposition of the parking tax was an impermissible regulation of the universities' governmental functions.[2] The decision was filed on May 25, 2017, and no petition for rehearing was filed. San Francisco timely filed a petition for review with this Court on July 3, 2017, and this Court granted review.

STANDARD OF REVIEW

On review of a trial court's decision on a petition for writ of traditional mandate, the trial court's factual findings are reviewed for substantial evidence, and its legal conclusions are reviewed de novo. (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 226.) Where – as here – the facts are undisputed, the court reviews de novo whether governmental immunity bars a local measure. (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1354 (*Bame*).)

ARGUMENT

I. San Francisco has the constitutional power to raise revenue, which includes the power to enact reasonable tax collection measures such as third-party tax collection requirements.

San Francisco is a charter city with the authority to "make and enforce all ordinances and regulations in respect to municipal affairs,

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[2] The universities also argued in superior court that their exemption from *ad valorem* property taxes precluded imposing the parking tax on their customers. (CT208-229, 243-267, 310-334.) After the trial court rejected that argument, Hastings and CSU Trustees abandoned it on appeal. UC Regents pressed the argument, but the Court of Appeal did not address it. UC Regents did not request review of that question.

subject only to restrictions and limitations provided in [its] ... charter[]." (Cal. Const., art. XI, § 5, subd. (a).) The "power to tax for local purposes clearly is one of the privileges accorded chartered cities." (*Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392 (*Weekes*).) Not only that, "the city's power to levy such tax would include the power to use reasonable means to effect its collection." (*Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 476 (*Ainsworth*).)

That city revenue power, this Court has held, thus includes the power to require a seller of taxable services to collect taxes on the service owed by the seller's customers, and remit those funds to the city. (See *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 139 (*Rivera*), disapproved on another ground in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 9 [upholding the city's requirement that an electrical utility collect utility taxes owed by its customers]; *Ainsworth, supra*, 34 Cal.2d at p. 477 [holding it a reasonable exercise of revenue power for a city to require liquor retailers to collect taxes owed by their customers]).

Requiring sellers to collect taxes from their customers is a reasonable and proper exercise of the revenue power because it is necessary to collection, and it is no exaggeration to say that without this practice, hundreds of millions of dollars of third-party tax revenue would be effectively uncollectable. 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 v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 508 (*City of Modesto*).) For that reason, "third-party tax collection" requirements – so-called because the party that owes the tax is different from the tax-collecting seller that forwards the tax payments to the taxing authority – are ubiquitous and familiar. As this Court has noted, this

collection practice 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." (*Ainsworth, supra*, 34 Cal.2d at p. 477.) And just like those governments, cities throughout California rely on the sellers of taxable services to collect city excise taxes owed by their customers. For city excise taxes like utility taxes, parking taxes, and hotel taxes, the seller of the taxed service simply adds the tax to its charge, and the customer pays both. At the end of each month (or quarter), the seller bundles the tax payments and sends them to the city.

Here, it is undisputed that San Francisco's parking tax is an exercise of its revenue power. (*City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122 Cal.App.4th 74, 91-92.) But San Francisco cannot collect the taxes owed by parking customers without the cooperation of parking operators. (CT18.) It would be cost-prohibitive for San Francisco 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. Accordingly, San Francisco's requirement that the sellers of parking collect the taxes owed by their customers and remit them to the City is a reasonable exercise of the same revenue power exercised by San Francisco to levy the underlying tax.

II. San Francisco can require entities like the state universities to collect taxes even where it cannot regulate them.

Charter cities in California have the constitutional power to impose taxes to raise revenue. This power is distinct from local governments' regulatory police powers, such that limits on the power to regulate do not constrain cities' power to impose collection requirements, even on entities they could not regulate directly. And because the power to raise revenue is fundamental to the very existence of charter cities, this Court has held, any limitation on the revenue power must be expressly stated. Under these related principles, San Francisco is permitted to tax the universities' parking customers and is permitted to impose collection requirements on the universities, because the constitutional and statutory provisions the universities rely on do not express limit San Francisco's revenue power.

A. City revenue power and city regulatory power are different.

The differences between city revenue power and city regulatory power are rooted in different constitutional sources. A charter city's revenue power falls under the "municipal affairs" clause of article XI, section 5, subdivision (a) of the California Constitution – which also provides that such "municipal affairs" enactments "shall supersede all laws inconsistent therewith." The power to regulate, by contrast, is granted to all cities by a different provision, article XI, section 7: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Not only are the constitutional sources of these powers different – they also have different purposes. "The power to tax permits cities to raise revenue for local purposes, while the police power permits cities to promote the health

and safety of their residents." (8 Witkin, *Summary of California Law* (11th ed. 2017) Constitutional Law, § 1102, p. 595, citing *City of Cupertino v. City of San Jose* (1995) 33 Cal.App.4th 1671, 1677.) This Court treats the two powers as distinct, and will uphold a local measure if it is a proper exercise of either power. (See, e.g., *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 103 [testing validity of challenged local measure under both city regulatory power and city taxing power].)

B. A city may exercise its revenue power to impose taxes on activities it cannot regulate, and to require tax collection by entities it cannot regulate.

Because city regulatory power and city revenue power are distinct, limitations on one do not define the limits on the other, as this Court has held. "Local taxes generally do not conflict with state regulatory laws." (*The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 662 (*Pines*).) Thus, city taxation is permissible even as to persons and subjects that cities lack authority to regulate. "Whether or not state law has occupied the field of regulation, cities may tax businesses carried on within their boundaries and enforce such taxes by requiring business licenses for revenue and by criminal penalties." (*In re Groves* (1960) 54 Cal.2d 154, 156 (*Groves*).) Preemptive state regulation does not "prevent local taxation of the persons or activities regulated." (*Pines, supra*, 29 Cal.3d at p. 662.)

Thus, this Court has held that cities are permitted to exercise their revenue power to tax entities and activities that they are forbidden from regulating, such as: subdivision under the Map Act (*Pines, supra*, 29 Cal.3d at p. 662); public utility services (*Rivera, supra*, 6 Cal.3d at p. 139); intercity charter buses (*Willingham Bus Lines, Inc. v. Municipal Court (People)* (1967) 66 Cal.2d 893, 895-896); milk products (*Groves, supra*, 54