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 ANSWER TO AMICUS CURIAE BRIEF FILED BY THE CALIFORNIA CONSTITUTION CENTER

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INTRODUCTION

San Francisco exercised its constitutional power as a charter city to impose a tax on parking customers, and to require parking operators to collect the parking tax owed by their customers. The respondent state universities sell parking at their San Francisco lots, but they refuse to collect the parking taxes owed by their customers.

The universities assert that their refusal to collect millions of dollars in taxes owed by their customers is justified under a theory of "hierarchical sovereignty" – an implied constitutional power of a state agency to disregard any law enacted by a charter city. The universities' theory, however, runs contrary to this Court's repeated holdings that any constitutional or statutory limitation on charter city taxing power cannot be implied, and must be express. Indeed, in 25,000 words of briefing, the universities have been unable to identify any express limitation on charter city authority to impose a parking tax on private parties parking at state universities, or charter city authority to require a university to collect such a tax. And the universities offer no explanation of how it interferes with academics or medicine for a parking cashier who is already collecting parking fees from a customer, to also collect parking tax from the customer.

The amicus brief filed by the California Constitution Center (Center) adopts the universities' "hierarchical sovereignty" theory. But the Center's brief does not aid the universities – if anything, it further illuminates the weaknesses of the universities' theory.

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ARGUMENT

I. The Center's arguments against parking tax collection are just as flawed as the universities' arguments.

San Francisco's reply brief already addressed the major weaknesses in the universities' sovereignty arguments, and the Center's brief repeats these errors.

A. The "hierarchical sovereignty" theory lacks a solid foundation.

Just like the universities, the Center (at 12-14) cobbles a theory of "hierarchical sovereignty" out of quotations taken out of context, from decisions that have nothing to do with the issues here.

The Center relies on decisions about state sovereignty under the *United States* Constitution – which have no bearing on the relationship between charter cities and state universities under the *California* Constitution. San Francisco distinguished many of these federal law cases already. (S.F. Reply Br. 14-15, distinguishing *California Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231; *Board of Supervisors of Sacramento County v. Local Agency Formation Comm'n of Sacramento County* (1992) 3 Cal.4th 903; *Johnson v. Gordon* (1854) 4 Cal. 368.) The additional federal law cases cited by the Center are likewise inapposite. (See *Murphy v. Nat'l Collegiate Athletic Ass'n* (2018) 138 S.Ct. 1461, 1475 [construing Supremacy Clause in U.S. Constitution]; *Martin v. Hunter's Lessee* (1816) 14 U.S. 304, 325 [same]; *Lin Sing v. Washburn* (1862) 20 Cal. 534, 580 [same]; see also *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178–179 [federal deference to state provisions for formation of local governments].)

And while the Center (at 13-14) cites some California law decisions, those decisions dealt with legal issues different from those here. San Francisco's Reply Brief (at 16) distinguished *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, and the other cases cited by the Center are likewise distinguishable. (See *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 636 [in eminent domain action county lacked full powers of a municipal corporation]; *People v. Provines* (1868) 34 Cal. 520, 533 [legislative authority over local government formation procedures]; *People v. Coleman* (1854) 4 Cal. 46, 47 [legislative power to enact taxes]; *City of El Monte v. Comm'n on State Mandates* (2000) 83 Cal.App.4th 266, 279 [for purposes of Cal. Const. art. XIIIB, school districts are defined as local governments]; *Manning v. City of Pasadena* (1922) 58 Cal.App. 666, 669 [cities enjoyed the state's sovereign immunity from liability because they exercised power delegated by the state; superseded by Government Claims Act].) None of these decisions endorsed a free-floating principle of "hierarchical sovereignty" under which cities are subordinate to other agencies of state government by constitutional implication.

B. The state universities' power over property management and internal governance does not bar requiring collection of city taxes owed by private parties doing business with the university on its property.

Like the universities, the Center (at 15-20, 23-24) overstates the import of decisions recognizing state universities' independence over property management, academic affairs, and internal governance of students and faculty. Contrary to the Center, none of these decisions suggests there is a bar on cities taxing private parties doing business with a state university on university property, or a bar on cities requiring tax

collection by the universities, as San Francisco explained in its past briefs. (S.F. Opening Br. 25-26, distinguishing *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876; *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311; *San Francisco Labor Council v. Regents of Univ. of Cal.* (1980) 26 Cal.3d 785; S.F. Reply Br. 18-22, distinguishing *Hall v. City of Taft* (1956) 47 Cal.2d 177; *In re Means* (1939) 14 Cal.2d 254; *Regents of Univ. of Cal. v. City of Santa Monica* (1978) 77 Cal.App.3d 130; *County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364; *City of Orange v. Valenti* (1974) 37 Cal.App.3d 240[1]; *Los Angeles County v. City of Los Angeles* (1963) 212 Cal.App.2d 160.) Additional decisions cited by the Center are distinguishable on similar grounds. (See *Hamilton v. Regents of Univ. of Cal.* (1934) 293 U.S. 245, 258 [power to set rules for student conduct]; *Smith v. Regents of Univ. of Cal.* (1993) 4 Cal.4th 843, 890 [power to impose mandatory student activity fee]; *City Street Improvement Co. v. Regents of Univ. of Cal.* (1908) 153 Cal. 776, 779 [city special assessments directly against Regents property]; *Berman v. Regents of Univ. of Cal.* (2014) 229 Cal.App.4th 1265, 1273 [power over student discipline]; *People v. Lofchie* (2014) 229 Cal.App.4th 240, 263 [power to define employee conflicts of interest]; *Apte v. Regents of Univ. of Cal.* (1988) 198 Cal.App.3d 1084, 1091 [power over faculty employment decisions]; *Amluxen v. Regents of Univ. of Cal.* (1975) 53 Cal.App.3d 27,

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[1] The Center (at 19-20) maintains that *City of Orange* is like this case because it involved a "parking ordinance." But this similarity is superficial. *City of Orange* involved a city building and zoning ordinance, which among other things happened to require a state building to have a certain number of parking spaces. This case, of course, involves a tax on people who pay to park. The role of parking is an irrelevant coincidence. What is significant is the *difference* between the two cases. While *City of Orange* involved a zoning ordinance enacted for regulatory purposes, this case involves a tax ordinance enacted for revenue purposes.

32 [power to lay off laboratory researcher]; *California State Employees Ass'n v. Regents of Univ. of Cal.* (1968) 267 Cal.App.2d 667, 671 [Legislature did not intend union dues payroll deduction statute to apply to Regents]; *Ishimatsu v. Regents of Univ. of Cal.* (1968) 266 Cal.App.2d 854, 864 [power to set internal employee grievance policy]; *Goldberg v. Regents of Univ. of Cal.* (1967) 248 Cal.App.2d 867, 874 [power over student discipline]; *Wall v. Regents of Univ. of Cal.* (1940) 38 Cal.App.2d 698, 699 [power over retention of faculty member].)

II. The Center's errors underscore the weaknesses of the "hierarchical sovereignty" theory.

A. The Center incorrectly declares the Regents to be the sovereign – ignoring this Court's express statement that they are not.

The Center argues that the University is "a constitutional state sovereign" with the status of the state itself. (Center Br. 19; see also *ibid.* ["the University is the state"].) But that is wrong. The universities are not synonymous with the state itself, and do not enjoy the state's sovereign status. As this Court explained in *Regents of Univ. of Cal. v. Superior Court (Regan)* (1976) 17 Cal.3d 533: "The University is a public corporation but that status alone does not immunize its various functions. ... In *[Estate of] Royer* [(1899) 123 Cal. 614, 624,] we stated, '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.' (Citation.)" (*Regan*, 17 Cal.3d at p. 536 [university does not enjoy sovereign immunity in its investment decisions].) Inexplicably, the Center ignores *Regan*'s express rejection of the Regents' claim to sovereign status. Not only that, the Center (at 23-24) asserts that the *Royer* decision cited in *Regan* has been "limited ... to its factual context" since 1899.

(Center Br. 23-24.) But the Center's claim is simply wrong, given that the 1976 *Regan* decision relied on *Royer* to reject the Regents' claim to sovereignty.

The Regents are not the sovereign. Rather, like every branch and unit of government in the state, the Regents exercise the portion of sovereign power granted by the California Constitution. And outside this limited grant, the Regents are subject to other constitutional provisions allocating sovereign power to other governmental branches and governmental units, including charter cities.

B. The Center incorrectly declares that charter city municipal affairs powers are relevant only in disputes over statutes – ignoring this Court's decisions invoking municipal affairs powers to resolve constitutional disputes like this one.

The Center asserts that decisions construing charter cities' "municipal affairs" powers under article XI, section 5 of the Constitution are irrelevant here, because "the state constitution's charter provisions were intended only to allow cities to shield their purely local matters from one specific branch of the state government – the legislature." (Center Br. 15.) Thus, the Center's argument goes, municipal affairs powers cannot "affect the city's relationship with another state government branch like the University." (*Ibid.*; see also Center 20-21 [same argument].)

The Center is wrong. To begin with, none of the cases cited by the Center hold (or even state in dicta) that municipal affairs powers are relevant *only* in disputes with the Legislature. (See *California Fed. Savings & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 [statute

preempted taxation of certain financial institutions] (*California Federal*)[2]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 225 [home rule powers including taxation could be limited by constitutional amendment]; *State Bar of Cal. v. Superior Court* (1929) 207 Cal. 323, 329 [Legislature's broad authority permits it to create public corporations that are not consistent with Civil Code provisions defining corporations]; *State v. Royal Consol. Mining Co.* (1921) 187 Cal. 343, 349 [noting constitutional limitations on legislative power].)

To the contrary, courts recognize that municipal affairs powers are significant when charter city tax collection requirements are challenged under the Constitution instead of statutes. In *Ainsworth v. Bryant* (1949) 34 Cal.2d 465 (*Ainsworth*), this Court upheld municipal affairs power to require tax collection, against a claim that requiring city tax collection by sellers of liquor conflicted with a constitutional provision granting the state exclusive authority over alcohol regulation and taxation. (*Id.* at pp. 475-476.) Similarly, in *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 139, disapproved on another ground in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 9, this Court upheld the municipal affairs power to require tax collection by a utility, against a constitutional provision making the state the exclusive regulator of utilities. A court of appeal relied on municipal affairs taxation power to rebut a challenge to a city tax by a Regents contractor under article IX, section 9. (*Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 626.) Given these

[2] The Center (at 24) also echoes the universities' mistaken views about *California Federal*'s effect on charter city taxing power – which San Francisco rebutted in its Opening Brief (at 28-29) and Reply Brief (at 24-27).

decisions, San Francisco's municipal affairs powers are relevant to the universities' Constitution-based challenge.

The Center's contrary argument is not supported by the language it quotes out of context from *People v. Lofchie, supra*, 229 Cal.App.4th 240, regarding the applicability of municipal affairs analysis to the Regents. (Center Br. 22.) *Lofchie* is distinguishable because it did not involve a dispute between Regents power and *charter city* power. Rather, *Lofchie* involved a dispute between Regents power and *the Legislature's* power. There, the People criminally prosecuted a Regents employee under Government Code section 1090 for a financial conflict of interest with the Regents. But the *Lofchie* court held that Regents regulations, not Government Code section 1090, controlled Regents employees' conflicts of interest. In reaching this conclusion, the *Lofchie* court declined to adopt the same "statewide concern" test that applies to municipal affairs analysis – instead, the court followed existing law that protected the Regents from legislative interference with their employee relations, even where a statewide concern existed. Thus, the *Lofchie* court's statement that the municipal home rule analysis was not applicable to the Regents simply meant that this was not the correct rule for resolving disputes between the Regents and *the Legislature*. It had nothing to do with resolving disputes between the Regents and *a charter city*, like the dispute here.[3]

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[3] The Center (at 22) also cites *Lofchie* to support its argument that the Regents are implicitly superior to charter cities. But, as explained above, since *Lofchie* involved a conflict between the Regents and the Legislature – not a charter city – any of its language comparing Regents power with charter city power is mere dicta. Not only that, the Center's position is undermined by this Court's dicta regarding the constitutional *similarity* between the Regents and charter cities: "Under article IX, section 9 of the California Constitution, the University of California enjoys an autonomy like that of charter cities under article XI, section 5." (*State*

C. Abstractions about hierarchical sovereignty are beside the point, where the text of the California Constitution provides for city taxing power and does not limit city authority to require state universities to collect city parking taxes owed by their customers.

The Center's convoluted arguments about sovereignty confuse rather than clarify the constitutional issues in this case. Contrary to the Center, no particular agency or branch of government is "the sovereign." Rather, the People are sovereign, and they adopted a Constitution that expressly delegates portions of their sovereign power to different branches and agencies of government – including charter cities. (S.F. Reply Br. 12-14.) "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.) The text of the Constitution is what allocates the people's sovereign power,[4] and the constitutional text – not abstractions about "hierarchical sovereignty" – governs this constitutional dispute.

And San Francisco is constitutionally authorized to use its share of the state's sovereign power to require the state universities to collect the city parking taxes owed by their customers. Focusing on the constitutional text, a charter city's taxing power is "actually conferred upon it by the sovereign power" through the "municipal affairs" clause of article XI, section 5. (*Ex parte Braun* (1903) 141 Cal. 204, 209.)

This Court has repeatedly construed this text in resolving disputes about municipal affairs taxing power. And a consistent interpretive

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Building & Construction Trades Council of Cal. v. City of Vista (2012) 54 Cal.4th 547, 563.)

[4] The Center allows that the Constitution can allocate sovereign power to charter cities. (Center Br. 19 ["Cities lack sovereign power unless the state constitution grants them a limited measure of the state's sovereignty."].) But the Center never addresses the implications of the Constitution's grant of sovereign taxing power to charter cities.

principle persists, 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. (*Id.* at pp. 209-210.) "Because the power to tax is fundamental, state intent to preempt it must be clear." (*The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 660; accord *Ainsworth, supra*, 34 Cal.2d at p. 477 [any constitutional limitations on "the plenary power of taxation possessed by a chartered municipality as an essential attribute of its existence ... should not be extended beyond the express terms of the constitutional reservation."].) This rule requires an express textual limitation to curb charter city revenue authority. Not only is this approach faithful to the Constitution, it also has the benefit of "carefully insuring that [a] purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." (*California Federal, supra*, 54 Cal.3d at p. 17.) And here, there is no express constitutional or statutory limitation on charter city authority to impose a parking tax on private parties parking at state universities, or charter city authority to require the universities to collect such a tax.

Rejecting this Court's approach, the universities and the Center (at 19) assert that San Francisco's power to require tax collection cannot be exercised against the state universities. They instead invoke a canon that governmental entities are not normally included in the general language of a statute. But that rule of construction does not apply to constitutional provisions allocating sovereign power between different government agencies or branches. As stated in one of the cases cited by the Center (at 21): "In interpreting the constitutional provisions ... dealing with the sovereign powers of the state and vesting such sovereign powers in certain departments, ... there is no room for the application of the rule that the state

is not affected in the exercise of its sovereign powers by the general language of statute or constitution applicable to private citizens and alone apparently applicable to the state because of the comprehensive character of the terms used." (*State v. Royal Consol. Mining Co.* (1921) 187 Cal. 343, 349.) Sutherland expresses the same principle: "The traditional rule excluding government from being subject to statutes imposing burdens has had a great influence in statutory interpretation. It is questionable, however, whether the rule continues to command the same influence today. To appraise its influence, it is pertinent to distinguish between situations where the right of sovereignty is asserted against an individual and those where it is interposed against another agency of government." (3 Sutherland Statutory Construction § 62:3 (7th ed. 2017).)

What remains, then, is the "ad hoc" inquiry, "informed by pragmatic common sense," into whether it is a "municipal affair" for a charter city to require state universities to collect the city parking taxes their customers owe. (*California Federal, supra*, 54 Cal.3d at p. 25.) The universities and the Center decline even to engage in this analysis, and for good reason: because taxation and tax collection are a municipal affair, and neither common sense nor any "transcendent interest" (*id.* at p. 15) supports the universities' refusal to collect city taxes owed by their parking customers. (S.F. Reply Br. 29-31.) It does not interfere with academics or medicine for a parking cashier, who is already collecting parking fees from a customer, to also collect city parking tax from the customer. (*Ibid.*; see also S.F. Opening Br. 42-43.) And intergovernmental taxation law – which California follows – denies any transcendent interest in one government aiding private parties to avoid taxes owed to another government. (S.F. Opening Br. 29-41.) Regrettably, the Center ignores this body of law, even

though it supplies "the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field" of disputes about taxation and sovereignty. (*United States v. City of Detroit* (1958) 355 U.S. 466, 473.) These legal principles apply here, and they counsel requiring the state universities to collect the city parking taxes owed by their customers.

CONCLUSION

This Court should reverse, and direct that a writ of mandate be issued directing the state universities to collect San Francisco parking tax from their customers and to remit those funds to San Francisco.

Dated: August 22, 2018

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By: _____
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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 3,284 words up to but not 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 22, 2018.

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PROOF OF SERVICE

I, CATHERYN M. DALY, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On August 22, 2018, I served the following document(s):

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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

Executed August 22, 2018, at San Francisco, California.

Catheryn M. Daly.

CATHERYN M. DALY