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

Cal.2d at pp. 156-157); liquor businesses (*Ainsworth, supra*, 34 Cal.2d at p. 472); and attorneys (*In re Galusha* (1921) 184 Cal. 697, 699). Similarly, lower courts have held that local taxation of state contractors and licensees is not forbidden "regulation" of state activities or property. (See *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623 (*Oakland Raiders*) [holding that charter city license tax on professional sporting events at university stadium was not "regulation"]; *City of Los Angeles v. A.E.C. Los Angeles* (1973) 33 Cal.App.3d 933 (*A.E.C. Los Angeles*).) These cases acknowledge that imposing local taxes may "[have] a collateral effect of regulating an activity" but the collateral effect "does not make that tax any less a revenue-raising measure." (*Oakland Raiders, supra*, 65 Cal.App.3d at p. 628; see also *A.E.C. Los Angeles, supra*, 33 Cal.App.3d at p. 940 [fact that taxing a state contractor increased the costs to the state did not transform the local tax into an impermissible regulation].)

On the question of tax collection, this Court has reached the same conclusion: even if a city lacks power to regulate an entity, a city still may exercise its revenue power to require that entity to collect third-party taxes owed by its customers. Thus, even though a city cannot regulate utility companies' provision of services, it may nonetheless require them to collect and remit a city's tax on utility users. (*Rivera, supra*, 6 Cal.3d at p. 139.) "[T]he requirement that the utility company supplying a particular utility service collect the utility users' tax and remit to the city does not constitute forbidden or conflicting regulation of the utility." (*Ibid.*)

Similarly, although a city cannot regulate liquor retailers, it can require them to collect and remit third-party taxes. As this Court explained in *Ainsworth*, just because tax collection requires an entity to do something, it is not a regulation of the entity. The question, rather, is whether a tax

collection "requirement conflicts in the sense of 'regulation' such as the constitutional provision reserves to the state and withdraws from the municipality." (*Ainsworth, supra*, 34 Cal.2d at p. 476.) Tax collection requirements do not "contemplate[] a control exercised in the sense of such regulatory measures as 'restrictions as to the class of persons to whom liquors may be sold, and as to the hours of the day and the days of the week during which such places of sale may be open.' (30 Am.Jur. 271.)" (*Ainsworth, supra*, 34 Cal.2d at p. 476.) Thus, this Court concluded that tax collection was not regulation "in any sense comparable to the use of the term." (*Id.* at p. 477.)

Lower courts have applied *Rivera* and *Ainsworth* to hold that a city may exercise its revenue power to require a state agency to collect city taxes owed by state agency customers. (See *City of Modesto, supra*, 34 Cal.App.3d at pp. 508-509 [electricity taxes]; *Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24, 26 (*Eastern Mun. Water Dist.*) [water and sewer taxes]; Attorney General Opinion No. 81-506, 65 Ops.Cal.Atty.Gen. 267, 268-271 (1982) [hotel taxes].)

These cases make sense, because tax collection is not regulation. It would be one thing if San Francisco were purporting to require that the state universities offer (or not offer) parking, provide a certain number of parking spaces, operate during limited (or unlimited) hours, or accept all forms of payment including credit cards. That is regulation. But the modest requirement to collect and remit tax payments does not impact the universities' discretion to operate their garages as they see fit, other than indirectly and minimally. Such a tax collection requirement is not regulation "in any sense comparable to the use of the term." (*Ainsworth, supra*, 34 Cal.2d at p. 477.)

C. The constitutional and statutory provisions cited by the universities do not limit San Francisco's taxation or tax collection requirements.

Because a charter city's constitutional power to raise revenue is essential, this Court has also held that any constitutional or statutory limitation on local revenue-raising power must be express, and will not be implied. "[T]he power of taxation is vested" in a charter city "as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited." (*Ex Parte Braun* (1903) 104 Cal. 204, 209-210.) Accordingly, another constitutional provision can limit this power – but only where it does so in plain terms. "Because the tax power is so fundamental, state intent to preempt it must be clear." (*Pines, supra*, 29 Cal.3d at p. 662; accord *Ainsworth, supra*, 34 Cal.2d at p. 472 [holding that the "effect [of another constitutional provision] upon 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"]; see also *A.B.C. Distributing Co. v. City and County of San Francisco* (1975) 15 Cal.3d 566, 571.)[3]

Here, the constitutional and statutory provisions that the universities rely on do not express limit charter cities' revenue powers, and accordingly cannot preclude San Francisco from imposing tax collection requirements on them. UC Regents and Hastings have relied on article IX, section 9 of

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[3] Just like California constitutional law rejects implied limitations on the taxing power of charter cities, federal constitutional law rejects implied limitations on the taxing power of states. (See *Graves v. New York* (1939) 306 U.S. 466, 487.) ["[Federal immunity from state taxation] is not ... to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."].)

the California Constitution, which vests the UC Regents with "full powers of organization and government" and "the powers necessary or convenient for the effective administration of [the University of California's] trust," including "the management and disposition of the property of the university." (Cal. Const., art. IX, § 9, subds. (a), (f).) But nothing in this provision curbs city revenue power, as *Oakland Raiders* holds. (*Oakland Raiders, supra*, 65 Cal.App.3d at p. 626.) Nor have this Court's decisions ever suggested that the constitutional sovereignty of the UC Regents embraces immunizing its customers from taxation, or immunizing UC Regents from tax collection.

Rather, this Court's decisions simply confirm the sovereignty of the Regents regarding academic affairs, internal governance, and employee relations. (See *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876 [permissible for Legislature to authorize Regents to require internal grievance procedure for whistleblowers, given Regents "self-governance"]; *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 327 [similar, requiring whistleblower to exhaust internal remedies]; *San Francisco Labor Council v. Regents of Univ. of Cal.* (1980) 26 Cal.3d 785, 791 [Regents not subject to prevailing wage statute due to autonomy in setting terms of employment]; but see *Regents of Univ. of Cal. v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 623 [upholding PERB decision that medical interns, residents, and clinical fellows have collective bargaining rights, and rejecting argument that "the University's educational mission would be undermined by requiring bargaining"].) Thus, article IX, section 9 does not limit city revenue power.

State law vests certain powers in Hastings, but none of those laws addresses local taxation, or even parking. (See Ed. Code, §§ 92201-92215.)

CSU Trustees has relied on article XX, section 23 of the California Constitution, but that section does not address the subject of city revenue power. It simply authorizes the Legislature to create a state agency "in the field of public higher education which is charged with the management, administration, and control of the State College System of California." (Cal. Const. art. XX, § 23.) CSU Trustees has also pointed to Education Code section 89701, which authorizes it to set parking fees, and which also appropriates its parking fee revenue for certain purposes. But that statute is silent as to local taxation, and therefore does not expressly restrict it. (*Pines, supra*, 29 Cal.3d at p. 662 ["Because the tax power is so fundamental, state intent to preempt it must be clear."].) In any event, it would not make sense to read section 89701, which permits CSU to set parking fees, to preclude parking taxes. (See *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank* (1998) 64 Cal.App.4th 1217, 1227 [rejecting argument that collection of city parking tax would conflict with agency laws governing disposition of parking fees, since parking taxes are not parking fees].)

Finally, the universities have relied on *Hall, supra*, 47 Cal.2d 177. *Hall* stated that a state agency has authority to regulate its own property, and a city cannot control state buildings or how they are constructed. But that much is already evident from the above constitutional provisions and statutes. *Hall* said nothing about limits on city revenue power, this Court has never construed *Hall* to limit city revenue power, and lower courts have construed this decision *not* to limit city revenue power. (See *Oakland Raiders, supra*, 65 Cal.App.3d at p. 626 [rejecting university's argument that *Hall* prevented local taxation of university licensee for use of university stadium]; *A.E.C. Los Angeles, supra*, 33 Cal.App.3d 933 at p.

940 [rejecting state contractor's argument that *Hall* prevented local taxation of private contractors doing work on state buildings, where tax increased the costs to the state].)

D. *California Federal* did not overrule this Court's decisions holding that a city may exercise revenue power even where it lacks power to regulate.

The Court of Appeal majority interpreted this Court's decision in *California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1 (*California Federal*), to mean this Court has "abandoned" the distinction between local revenue measures and local regulatory measures. (Opn. at p. 10.) But that reading of *California Federal*, if correct, would mean that municipalities are now prohibited from raising revenue in any area where regulatory authority is reserved to the state. That would amount to a repudiation of *Ainsworth*, *Rivera*, *Groves*, *Pines*, and other decisions of this Court, all of which upheld cities' authority to levy broad-based local taxes that reach sellers (and their customers) that are otherwise subject exclusively to state regulation.

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 in lieu of local taxes – versus a local tax on 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, *California Federal* reaffirmed that courts must always carefully ensure that an apparent conflict between state and local law is a "genuine" one, to avoid invalidating local laws. (*Id.* at pp. 16-17.) And *California Federal* specifically cited and reaffirmed this Court's past decisions holding that city revenue measures – including tax collection requirements – do not conflict with a bar on city regulation. (*Id.* at p. 14 & fn.12, citing *Ainsworth, supra*, 34 Cal.2d 465, and *A.B.C. Distributing Co. v. City and County of San Francisco, supra*, 15 Cal.3d 566.)

Thus, *California Federal* did not eliminate the distinction between city regulatory power and city revenue power, either in the specific context of preemption or outside of it.[4]

III. Under intergovernmental taxation law, the state universities must collect San Francisco parking tax from their customers.

There is no express conflict between the universities' constitutional and statutory autonomy, and San Francisco's constitutional revenue

[4] Courts continue to rely on the distinction between revenue and regulatory measures in other areas of the law as well. (See, e.g., *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 261 [noting that regulatory fees imposed under the police power do not trigger Proposition 218 requirements applicable to revenue measures]; *City of Cupertino v. City of San Jose, supra*, 33 Cal.App.4th at p. 1678 [holding that "regional welfare test" governing extraterritorial effects of local law applies only to regulatory measures, not revenue measures].)

powers. But the universities nonetheless argue that the economic impacts of a tax imposed on their customers, as well as the administrative burdens of collecting it, unduly infringe their sovereignty. Intergovernmental taxation law addresses precisely these complaints, and application of its principles demonstrates that San Francisco may lawfully impose its parking tax here, and require tax collection.

A. California courts follow intergovernmental taxation law to resolve the conflicts that arise when one government argues that its sovereignty precludes another government from taxing its contractors, employees, or customers.

Intergovernmental taxation law addresses the conflicts that inevitably arise when two sovereigns have concurrent jurisdiction and taxing power, and the tax of one sovereign affects the activities of the other. (See generally *United States v. New Mexico* (1982) 455 U.S. 720, 735.) Originally developed by the United States Supreme Court to address disputes concerning taxing authority and sovereign immunity at the federal-state level, this law has been adopted by California courts to resolve similar tax disputes between state and local government. Under this law, one government may not impose its tax directly upon another. But one government may tax those who do business with another government, even if the effect of its tax is to increase the economic burden on another government or those who do business with it. (See, e.g., *United States v. Fresno County* (1977) 429 U.S. 452, 462.) And one government may require tax collection by the other. (See, e.g., *Moe v. Confederated Salish and Kootenai Tribes of Flathead* (1976) 425 U.S. 463, 482 (*Moe*).)

Ultimately, this law upholds the sovereign power to tax private parties, over the asserted interest of another government in avoiding such taxation.[5]

California courts apply this law to uphold California state and city taxes on private parties doing business with the federal government. "A state tax upon the property or receipts of a private contractor can no longer be avoided on the doctrine of intergovernmental tax immunity merely because the United States eventually bears the burden of the tax." (*Timm Aircraft Corp. v. Byram* (1950) 34 Cal.2d 632, 636, citing *Alabama v. King & Boozer* (1941) 314 U.S. 1, 9.) ""[T]he fact that the economic burden of the tax will be borne ultimately by the Government does not invalidate it." (*Kaiser Co. v. Reid* (1947) 30 Cal.2d 610, 629, citing *Alabama v. King & Boozer, supra*, *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, and *Graves v. New York* (1939) 306 U.S. 466, 486 (*Graves*).)

California courts also apply this law to tax disputes where the involved sovereigns are a city and a state agency, upholding city taxing

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[5] This has not always been the case. Up until 80 years ago, intergovernmental taxation law imposed considerable restrictions on taxation: a generally applicable tax could not be imposed on employees or contractors of another government, because of the resulting indirect economic burden on the government and its activities. (See, e.g., *Collector v. Day* (1870) 78 U.S. 113, 126 [immunity barred federal income tax on state employees]; *Panhandle Oil Co. v. Mississippi* (1928) 277 U.S. 218, 222 [tax on seller of fuel could not be imposed on seller for fuel sold to United States].) But since the late 1930s, courts have allowed one government to tax private parties transacting with another government, even where taxation makes that government's activities more expensive, or its employees' compensation smaller. (See, e.g., *Alabama v. King & Boozer* (1941) 314 U.S. 1, 9 [overruling *Panhandle Oil Co. v. Mississippi, supra*]; *Graves v. New York* (1939) 306 U.S. 466, 486 [overruling *Collector v. Day, supra*]; see generally 9 Witkin, *Summary of California Law* (10th ed. 2005 & Supp. 2016) Taxation, §§ 10-12, pp. 33-36.) Now, "tax immunity is appropriate in only one circumstance: when the levy falls on the [Government] itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." (*United States v. New Mexico, supra*, 455 U.S. at p. 735.)

power over private parties who do business with the state, notwithstanding arguments that city taxation unduly invades state sovereignty. (*Weekes, supra*, 21 Cal.3d at p. 398, citing *Graves, supra*, 306 U.S. at pp. 486-487; *Oakland Raiders, supra*, 65 Cal.App.3d at 627-628, quoting *Helvering v. Producers Corp.* (1938) 303 U.S. 376, 386-387; *A.E.C. Los Angeles, supra*, 33 Cal.App.3d 933 at p. 940, citing *James v. Dravo Contracting Co., supra*, 302 U.S. at p. 149, *United States v. Allegheny County* (1944) 322 U.S. 174, 186, and *Alabama v. King & Boozer, supra.*)

Because San Francisco's revenue power is an aspect of its constitutional sovereignty, this Court should apply these settled principles here. They are "the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field." (*United States v. City of Detroit* (1958) 355 U.S. 466, 473.)

B. Applying these principles, San Francisco may properly impose its parking tax on the universities' parking customers.

Here, the universities have argued that if their parking garages must collect the taxes owed by parking customers, the universities have two options, both of which lead to a negative economic impact on their activities. One option for the university garages is to add parking tax to their existing parking charges. But then, the universities argue, students and others would have to pay more to park. (CT192.) And higher (tax-inclusive) parking prices would deter qualified students, faculty, and staff, as well as patients, from associating with the university. (CT343.) Not only that, since the universities currently set their parking charges on par with their tax-collecting market competitors, an increased tax-inclusive parking price would drive away parking customers to competing parking

operators. (CT273.) That would lead to a loss in total university parking revenue. The other option for the university garages is to "absorb" the parking tax by lowering their existing parking charges, so that the total tax-inclusive price paid by parking customers would remain the same as the existing "tax free" price. Reducing parking charges, of course, would reduce the universities' parking revenue. Thus, the universities argue, both options lead to the universities' losing parking revenue, diminishing the funds available for worthy purposes such as operating their parking facilities, subsidizing the costs of student parking, and maintaining a shuttle system. (CT192-193, 271, 274, 343.)

Intergovernmental taxation cases, however, have answered and rejected every variety of such "economic impact" arguments, and held that they do not support tax immunity.

1. This Court and lower California courts apply intergovernmental tax principles and decline to immunize the customers and employees of state agencies from city taxes.

In *Weekes,* this Court "conclude[d] that the City of Oakland is not barred from imposing its license tax upon state employees who work within the city." (*Weekes, supra*, 21 Cal.3d at p. 398.) In upholding the City of Oakland's employee license tax – measured as a percentage of employee wages – this Court cited the United States Supreme Court's decision in *Graves, supra. Graves* was an intergovernmental tax decision which held that federal employees must pay state income taxes. This Court's reliance on *Graves* is significant, because *Graves* dismissed economic arguments for tax immunity that mirror the universities' arguments here.

Graves outright rejected the claim that equal taxation would affect the recruitment and retention of qualified persons to government – an argument made here by UC Regents. (CT343-344.) But the High Court called the notion of advantage to government by reducing the income tax burden on its employees "a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation." (*Graves, supra*, 306 U.S. at p. 485, citing *Helvering v. Gerhardt* (1938) 304 U.S. 405, 421.) And the case for parking tax immunity is even weaker, given that parking taxes are so much smaller. If the burden of income tax was deemed unlikely to cause government employees to leave for the private sector, then parking taxes are even less likely to cause state university students, staff, or faculty to depart for another university.

Graves rejected another key argument made by the universities here, that their governmental status should confer a financial advantage on them and their constituents. But *Graves* explained that a "higher" government has no entitlement to a financial advantage from immunizing its constituents' from a "lower" government's taxes; and the "higher" government's constituents have no entitlement to a financial advantage premised on not paying their fair share of the tax burden:

> [A]s applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private .... (*Graves, supra*, 306 U.S. at p. 483.)

These points apply equally to parking tax. It is just as unfair to immunize university parking customers from parking tax, where other people who pay to park must pay tax, and where university parking customers enjoy the benefit of city services to the same extent as people who park in other parking lots.

Graves also recognized that a finding of tax immunity curtails the sovereignty of the taxing government. *Graves* contrasted the concrete and immediate revenue loss that tax immunity inflicts on a taxing government, against the speculative benefits to the other government from a finding of tax immunity for its constituents:

> The expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. (*Graves, supra*, 306 U.S. at p. 483.)

Relatedly, *Graves* recognized that whenever two governments have overlapping authority, it is inevitable that taxation by one government will affect the activities of the other. Given this reality, modern intergovernmental tax law establishes the norm of mutual taxation, not mutual immunity. Mutual taxation "is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power." (*Graves, supra*, 306 U.S. at p. 487.) "The state and national governments must coexist. Each must be supported by taxation of those who are citizens of both." (*Helvering v. Gerhardt, supra*, 304 U.S. at p. 422.) These observations, and these principles for resolving these constitutional disputes, are equally applicable to California. Just like the

federal government and the states, California's state agencies and cities must coexist under its Constitution.

Lower courts have also rejected arguments for tax immunity for private parties who do business with the state, notwithstanding the negative economic impact on the state. In *Oakland Raiders*, the First District Court of Appeal rejected a claim of tax immunity for a sports licensee who put on professional sports events at UC Berkeley's Memorial Stadium, where the claim was premised on the reduction in UC Regents' revenue attending the imposition of the tax. As that court put it, "'where it merely appears that one operating under a government contract or lease is subjected to a tax ... on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. ...'" (*Oakland Raiders, supra*, 65 Cal.App.3d at p. 627, quoting *Helvering v. Producers Corp., supra*, 303 U.S. at pp. 386-387.) The mere "fact that a tax may constitute an indirect burden upon an organ of government does not invalidate the tax." (*Ibid.*)

Similarly, in *A.E.C. Los Angeles*, the Second District Court of Appeal held that tax immunity did not bar imposition of a city business license tax on contractors with the state who performed improvements of state property. The court denied immunity even though the city tax on private parties increased the state's costs of contracting. (*A.E.C. Los Angeles, supra*, 33 Cal.App.3d at p. 940 ["[T]he fact that a municipal tax is imposed in a fashion which permits its ultimate economic burden to be passed on to a higher governmental unit does not invalidate it."].)

2. There is no sound reason to depart from intergovernmental taxation principles here.

Under *Weekes* and other decisions, the universities are not entitled to leverage their governmental status into a competitive advantage in the paid parking marketplace. (Cf. *Moe, supra*, 425 U.S. at p. 482 [holding that a tribe's sovereign status did not entitle it to the "competitive advantage" gained by refusing to collect state cigarette taxes from customers].) It is not difficult to discern the competitive advantage that a parking operator secures by refusing to collect taxes from its customers. When an operator refuses to collect, its customers get a tax holiday, while customers of other operators do not. That "tax holiday" allows the non-collecting operator to undercut its tax-collecting competitors on prices – or instead it can appropriate the "tax holiday" for itself, by setting its external prices at the same level as tax-collecting competitors. A parking customer is none the wiser whether $10 paid at the exit gate comprises $8 in parking rent and $2 in tax, or just $10 in parking rent; but the parking operator is acutely aware of the $2 advantage that comes from shorting the city tax collector. A $2 advantage, multiplied across tens or hundreds of thousands of transactions – as here – adds up to millions of dollars.

This analysis is not changed by the universities' argument that *not* collecting parking tax provides them additional funds to support the universities' worthy educational or medical missions, through subsidies for student parking or a shuttle system. Intergovernmental taxation law gives no weight to whether the funds "saved" by a finding of immunity would be spent on causes that are worthy. (See, e.g., *Alabama v. King & Boozer, supra*, 314 U.S. at p. 8 [no immunity for contractor even when "acting for the Government in the accomplishment of the governmental purpose"].) Indifference to the relative "worthiness" of a spending plan makes sense

from an economic standpoint: in every case where the cost of a tax on private parties is passed along to the government, those increased costs necessarily reduce the funds available for spending on any other governmental purpose, no matter how salutary that purpose may be.

This indifference is also appropriate for a rule that is to be applied by courts. A rule requiring judicial indifference to the merits of governmental spending extricates courts from making classically legislative judgments about the best uses of money. An immunity rule that turned on the worthiness of governmental goals would require courts to weigh the relative merits of the two competing governments' spending plans. After all, a finding that one government's constituents are immune from a tax imposed by another government will reduce the revenue available to the taxing government, affecting its ability to raise revenue for causes it deems worthy. "The expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax...." (*Graves, supra*, 306 U.S. at p. 483.) But, sensibly, the test for tax immunity does not require courts to sit as a super-legislatures, weighing the relative merits of the activity affected by taxation, against the taxing government's activities. As this Court observed, "[m]ost taxes burden the activities they assess, and as judges we do not test the wisdom of legislation." (*Pines, supra*, 29 Cal.3d at p. 663.)

C. San Francisco may properly require the universities to collect the parking taxes owed by their customers.

Just as the economic effects of imposing the parking tax do not support the universities' claim of tax immunity, nor do the clerical duties involved in collecting it.

1. It is a reasonable, valid exercise of city revenue power to require a state agency to collect city taxes owed by agency customers.

In *City of Modesto*, the Fifth District Court of Appeal held that a charter city's constitutional power to enact reasonable tax collection measures prevailed over a state agency's constitutional claim that collecting a city tax infringed its sovereignty. There, a charter city sought to compel a state irrigation district selling electrical service to collect city electrical taxes owed by its customers. The decisive factor in the court's analysis was that the city's constitutional "power to impose a tax is meaningless" if the city cannot impose reasonable requirements to collect the tax – and as a practical reality, utility taxes cannot be collected without the assistance of the seller. (*City of Modesto, supra*, 34 Cal.App.3d at p. 508.) This reality did not change just because the seller happened to be a state agency. Consequently, the court explained, a state agency "must submit to a constitutional mandate; the California Constitution is the paramount authority to which even sovereignty of the state and its agencies must yield. It follows that the collection requirement of respondent's ordinance, though applicable to state agencies, is a reasonable exercise of the city's constitutional power to tax for revenue purposes." (*Ibid.*)

Relying on the same reasoning, other California authorities agree that a state agency selling taxable services can be required to collect city taxes owed by agency customers. The State Parks Department must collect a charter city's transient occupancy tax when it sells lodging to overnight guests of the Asilomar conference center. (65 Ops.Cal.Atty.Gen. at pp. 268-271.) And a general law city levying water and sewer taxes can require a

water district to collect city taxes owed by its customers. (*Eastern Mun. Water Dist., supra*, 31 Cal.App.4th at p. 30, citing Gov. Code, § 37100.5.)[6]

2. Federal law also requires one government to collect taxes that its constituents owe to another government.

Federal law likewise treats mutual tax collection as the constitutional norm.

First, as between federal and state governments, mutual tax collection duties are established by statutes, such as those requiring mutual cooperation in collection of income taxes owed by government employees. (E.g., 5 U.S.C., § 5517.) Those statutes reflect the reasonableness of one sovereign collecting the taxes due to another sovereign.

Second, federal courts have had to adjudicate tax collection obligations as between sovereign tribes and states, where there is no similar cooperative statute. Like the universities here, tribes have disputed the authority of another government to require tax collection – specifically, collection of state cigarette taxes owed by customers of tribal stores on reservations. Just like the universities here, the tribes claimed that requiring tax collection was an interference with their sovereign dignity.

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[6] San Francisco is a charter city, so its revenue-raising authority comes directly from the Constitution. The revenue-raising authority of general law cities, by contrast, is conferred by the Legislature. (Cal. Const., art. XIII, § 24, subd. (a); see *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 247-248.) Nevertheless, the same arguments made here on behalf of charter cities could apply equally to general law cities, because of the Legislature's 1982 enactment of Government Code section 37100.5. That provision grants general law cities the power to levy the same taxes as charter cities, except for taxes on the occupancy of state park campsites. By this provision, the Legislature appears to have consented on behalf of the State to taxation by general law cities on the same footing at charter cities (with the exception noted).

The United States Supreme Court resolved these disputes in favor of tax collection. In *Moe, supra*, 425 U.S. 463, the tribe argued that a state making a tribe its "'involuntary agent' for collection of taxes owed by non-Indians is a 'gross interference with (its) freedom from state regulation.'" (*Id.* at p. 482, quoting tribe's argument.)[7] The Court rejected this argument, weighing the constitutional interests on each side. As for the state's interest in tax collection, "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." (*Id.* at p. 483.) As for the tribe, the Court could discern no real basis for the tribe's abstract claim of "interference" with its "sovereignty," stating "[w]e see nothing in this burden which frustrates tribal self-government." (*Ibid.*) Consequently, "the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." (*Id.* at p. 483.) This federal rule requiring tax collection remains good law. (*Oklahoma Tax Com. v. Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505, 512-513; *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 151.)

This federal rule, and its rationale, is remarkably similar to that of *City of Modesto*: requiring a government to assist in tax collection is not a serious threat to its sovereignty – and it is far less serious than the threat to the taxing government's sovereignty, if its taxes go uncollected.

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[7] Under the federal government's special relationship with tribes (*Moe, supra*, 425 U.S. at p. 483), it has enacted federal statutes precluding states from imposing state taxes directly on individual tribe members. Therefore, the federal cases discussed here involve state excise taxes that are valid as to non-tribal members.

3. A judicial decision declining to require city parking tax collection infringes city sovereignty, far more than ordering collection of tax from parking customers infringes the universities' sovereignty.

Even if this Court finds the universities' sovereignty infringed by collecting the parking tax, it must balance that infringement against infringement on San Francisco's sovereign power to impose taxes. "The expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax...." (*Graves, supra*, 306 U.S. at p. 483.) Consistent with past California decisions, and as a matter of "pragmatic common sense" (*California Federal, supra*, 54 Cal.3d at p. 25), the balance here favors tax collection over tax immunity.

a. Parking tax collection does not involve the essential academic and policy matters that are at the core of university sovereignty.

It is difficult to understand how the universities' governance could be threatened by the ministerial activities involved in parking tax collection. Tax collection requires a cashier or clerical employee to collect tax from a customer along with the customer's payment for the taxed service, and the tax funds must be periodically bundled and remitted to the city tax collector. No claim can be made that these clerical and accounting duties associated with tax collection affect substantive academic issues, internal governance, or the making of university policy.

Indeed, this Court has rejected the view that the UC Regents' sovereignty extends to the financial activities it undertakes as a corollary to its core sovereign functions. In *Regents of Univ. of California v. Superior Court (Regan)* (1976) 17 Cal.3d 533, this Court rejected the UC Regents'

claim that the usury laws could not be applied to its decisions to invest the university's endowment, where the endowment supported the university's educational mission. The Court accepted the premise of the importance of the endowment to the UC Regents' academic mission, but rejected the argument that the UC Regents' financial administration of the endowment was entitled to special sovereign protection:

> In addressing the question whether application of the usury laws to the University would infringe upon sovereign governmental powers, we need not define precisely the extent of immunity, if any, which the University enjoys. 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.)
>
> In choosing to invest its endowment by extending loans to borrowers such as the Regans, the University is acting in a capacity no different from a private university, corporation, or individual investing in a similar manner. The investment decisions the University makes are not uniquely governmental functions. Careful investment of endowment funds does of course provide revenue for the operation of the University, but its investment decisions are not so closely related to its educational decisions to cloak the former with immunity even if the latter are immune. We therefore conclude that the University is entitled to no sovereign protection in its lending decisions. (*Regan, supra*, 17 Cal.3d at pp. 536-537.)

Similarly here, the universities are collecting money from parking customers just like any other entity that sells parking; this activity does not implicate their uniquely governmental academic or clinical functions.

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b. Permitting the universities to avoid parking tax collection is a far more serious infringement on San Francisco's sovereign taxing power.

Any balancing of constitutional interests here must recognize that the taxing power is "fundamental" to sovereignty. (*Pines, supra*, 29 Cal.3d at p. 662.) This Court has recognized that "the power to raise revenue for local purposes is not only appropriate but, indeed, absolutely vital for a municipality." (*Weekes, supra*, 21 Cal.3d at p. 392.) That is because "taxes are the lifeblood of government." (*People v. Skinner* (1941) 18 Cal.2d 349, 356, quoting *Bull v. United States* (1935) 295 U.S. 247, 259.) Taxes fund the "essential public services" provided by government. (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1135.)

As this Court recognized in *Ainsworth* and *Rivera*, the charter city revenue power includes the power to enact measures requiring tax collection. Indeed, for third-party taxes like the parking tax, the power to require tax collection is inseparable from the power to enact the underlying tax. The "power to impose a tax is meaningless" if the tax cannot be collected. (*City of Modesto, supra*, 34 Cal.App.3d at p. 508.) And there is no way for San Francisco to receive the taxes that parking customers owe, unless the parking operators collect those taxes from their customers at the time of sale. (See Part I, *supra*.) Here, the sovereign power to require tax collection is as fundamental as the power to tax. As a practical matter, immunizing the state universities from tax collection duties is no different from granting tax immunity to their customers.

Of course, such de facto tax immunity would conflict with the fundamental principle, reflected in this Court's decisions, that private parties who do business with the government owe taxes just like everyone

else. The unfair and undesirable consequences of tax immunity would follow. (See Sections III.A., III.B., *supra.*) And the damage to city taxing power would be just as severe, "impos[ing] to an inadmissible extent a restriction on the taxing power which the Constitution has reserved" to cities. (*Graves, supra*, 306 U.S. at p. 487.)

The dollar amounts involved here reflect the serious impact that extending immunity would have on cities. Years ago, when the universities were selling far less parking, the annual lost parking tax revenue for San Francisco was over $4.5 million. (CT339, 341, 343.) And beyond San Francisco, a finding of immunity would mean that millions more in city parking taxes will go uncollected from university parking customers in Los Angeles, Santa Monica, Oakland and Berkeley, all of which impose parking taxes. And if the immunity claimed by the state universities is extended to other state agencies selling other services taxed by cities, the dollar impact on city tax revenue will be staggering.[8]

When faced with a dispute over city and state power like this one, it remains "the difficult but inescapable duty of the court to, in the words of one authoritative commentator, 'allocate the governmental powers in the most sensible and appropriate fashion ....'" (*California Federal, supra*, 54 Cal.3d at p. 17, quoting Van Alstyne, Background Study Relating to Article

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[8] By contrast, the administrative costs of tax collection for the universities are minimal. Of the three respondents, only UC Regents presented evidence of those costs, which would entail two additional clerical staff members and a software update. Although these costs are minor – particularly in relation to the amount of tax revenue at issue – the Court could order San Francisco to permit the state universities to deduct their additional administrative costs from tax remittances. That was the court's order in *City of Modesto, supra.* (34 Cal.App.3d at pp. 508-509.) There, administrative cost deductions appear to have been ordered as part of balancing the competing constitutional claims of the city and the state agency. (*Ibid.*) San Francisco conceded below the court's authority to make such an order here. (CT515-516.)

IX, Local Government, Cal. Const. Revision Com., Proposed Revision (1966), p. 239.) Here, the constitutional balance favors city taxing power, over the asserted sovereignty interests of the state universities.

* * *

Importantly, these arguments in favor of taxation are not so much arguments about city power versus state power, as they are about the taxing power itself. The taxing power is an essential attribute of sovereignty. Here, San Francisco happens to be the taxing authority, but the same arguments would just as easily support cities' being required to collect a state tax. After all, cities throughout California already withhold state income taxes owed by city employees. Just as it is undesirable to immunize a city from collecting state taxes owed by its employees, it would be undesirable to immunize the state universities here from collecting city taxes owed by their customers.

D. The "proprietary vs. governmental" test does not provide an appropriate or reliable solution to this tax immunity question.

Under the majority's view, a city tax collection requirement is a "regulation" – and because city "regulations" normally apply only to a state agency's "proprietary" activities, a state agency need not collect taxes from its customers when it is involved in a "governmental" activity. (Opn. at p. 5, citing *Hall, supra*, 47 Cal.2d at p. 183.)

Here, the majority concluded that the state universities' paid parking operations were "governmental," and conferred immunity on the universities from tax collection, and de facto tax immunity on the universities' customers. That result is wholly at odds with intergovernmental taxation law, and it reflects the unpredictability of

"proprietary vs. governmental" analysis, an approach fundamentally unsuited to questions of taxation.

1. California decisions do not confer tax immunity on private parties based on whether a tax affects a "governmental" or "proprietary" function.

The universities' arguments to date – as well as the majority below – gave decisive effect to the supposedly "governmental" nature of selling parking. But under modern tax immunity law, when a tax falls on a third party transacting with the government, it does not matter whether the activities being taxed are "governmental" or "proprietary" activities. Taxes may properly be levied even where "governmental" activities are involved.

California tax law is indifferent to whether "governmental" functions are affected by a third-party tax. For example, setting government employee compensation is a core sovereign function. (*San Francisco Labor Council v. Regents of Univ. of Cal., supra*, 26 Cal.3d at p. 791 [Regents not subject to prevailing wage statute due to autonomy in setting terms of employment].) But in *Weekes*, this Court held that sovereign immunity does not bar state employees from being taxed locally based on how much the state pays them. (*Weekes, supra*, 21 Cal.3d at p. 398.) If a city cannot tax "governmental" activities, then this Court never could have upheld the city tax on state employee wages in *Weekes*.

Similarly, the construction and maintenance of state buildings is a governmental activity. (*Hall, supra*, 47 Cal.2d at p. 183.) But sovereign immunity does not bar local taxation of state contractors, based on what a state agency pays them to construct and maintain government buildings. (*A.E.C. Los Angeles, supra*, 33 Cal.App.3d at p. 940 [distinguishing *Hall* as

involving local regulation of construction and maintenance of state buildings].)

And of course, federal decisions follow the same principle of denying tax immunity to private parties, regardless whether the taxed activity is governmental or proprietary. (See, e.g., *Alabama v. King & Boozer, supra*, 314 U.S. at p. 8 [no immunity for contractor even when "acting for the Government in the accomplishment of the governmental purpose"]; *Graves, supra*, 306 U.S. at p. 477 [no immunity for government employees, even though every function performed by the United States government is "governmental"].)

2. The results of proprietary vs. governmental analysis are unpredictable, resulting in uncertainty for government fiscal planning.

This "proprietary vs. governmental" rule requires a different analysis each time a city seeks to require that one of its taxes be collected by a different state agency. After all, different city taxes apply to different activities. And different state agencies have different purposes. In each case, the proprietary vs. governmental rule would require tax authorities (and ultimately the courts) to determine whether the relationship between the city-taxed activity and the state agency's purpose is close enough to make the taxed activity "governmental," at least for that particular agency. That type of analysis will lead to an unpredictable patchwork of tax immunity and tax collection.

Indeed, proprietary vs. governmental analysis is notorious for producing results that are unpredictable and inconsistent. The malleability of this test is one reason why this Court rejected it, noting its "illogical" results in the field of governmental tort immunity. (*Muskopf v. Corning*

Hospital Dist. (1961) 55 Cal.2d 211, 217.) The value of this type of analysis is frequently criticized. "The labels 'governmental function' and 'proprietary function' are of dubious value in terms of legal analysis in any context." (*Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 968.)

By contrast, intergovernmental taxation law yields predictable and logical results. Private parties doing business with the government must pay taxes like everyone else, and a government selling taxable services must collect the taxes owed by its customers.

3. The court of appeal's decision in *Bame v. City of Del Mar* is distinguishable, because it involved a discriminatory city tax levied on an instrumentality of the state, not a broad-based tax levied on its customers.

The universities as well as the majority below relied on *Bame v. City of Del Mar* to deny immunity. *Bame* held that sovereign immunity precluded the City of Del Mar from imposing its admissions tax on contractors who put on exhibitions on fairgrounds property owned by the 22nd District Agricultural Association, a state agency formed for the purpose of holding such exhibitions. (*Bame, supra*, 86 Cal.App.4th 1346, at p. 1355.) Even if *Bame* was correctly decided, there are two key differences between the city tax in *Bame*, and San Francisco's parking tax.

First, the city admissions tax in *Bame* was not imposed on patrons of the district who purchased tickets for entry – individuals who would be analogous to the parking customers on whom San Francisco's tax is levied. Whether or not the patrons could be made to pay a city tax was a question that the *Bame* court expressly reserved. (*Id.* at p. 1355.) Rather, the City of Del Mar's admissions tax was imposed directly on the exhibitors. And

because the exhibitors were standing in the shoes of the district to perform the very governmental purpose for which the district was formed, they were immune. (*Id.* at pp. 1357-1358.) This holding can be harmonized with the rule stated in *United States v. New Mexico*, which confers immunity on an "agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." (455 U.S. at p. 735.) San Francisco's parking tax, however, is not imposed on a state agency or its instrumentality, it is imposed on customers.[9]

Second, the city admissions tax in *Bame* was defective because it discriminated against the state's activities. The city tax was "'paid 100% by contractors who put on events at [the] Del Mar Fairgrounds'; the tax is not collected by the City at any other location." (*Bame, supra*, 86 Cal.App.4th at p. 1352, quoting stipulated facts, alterations in *Bame*.) The City of Del Mar, to put it bluntly, appeared to be soaking the state. And while the court in *Bame* did not rely on the discriminatory character of the tax to invalidate it, it certainly could have. Here as well, San Francisco's tax is distinguishable: the parking tax is nondiscriminatory. It is imposed on customers of public and private parking operations alike, throughout San Francisco – not solely at a single operation by a state agency.

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[9] The "agency or instrumentality" doctrine reserves governmental immunity for institutions like the American Red Cross that are virtually an "arm of the government." (*Department of Employment v. United States* (1966) 385 U.S. 355, 359-360; see *M'Culloch v. State* (1819) 17 U.S. 316, 361 [Bank of the United States is an instrumentality].) "[A] finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: To resist the state's taxing power, a private taxpayer must actually 'stand in the Government's shoes.'" (*United States v. New Mexico, supra*, 455 U.S. at p. 736.) Thus, private contractors performing crucial work for the government are not immune "instrumentalities." (*Ibid.*) And employees of the government or its instrumentalities are not immune. (*Graves, supra*, 306 U.S. at p. 485.)

4. Even if the "proprietary vs. governmental" rule applied, the majority should have concluded that selling parking is a proprietary activity.

Here the "proprietary vs. governmental" analysis could have and should have gone the other way, because selling parking is a proprietary activity.

The majority took an overly expansive view of what amounts to "governmental" activity for a state agency. The majority viewed as governmental any state agency activity authorized by law that also supports the agency's main purpose. (Opn. at pp. 9.) But that definition of "governmental" is virtually boundless, resulting in immunity for any state agency activity other than purely revenue-raising activity. Rather, under this Court's decision in *Regan*, only an activity that is "closely related" to core governmental functions is considered governmental; it is not enough that the activity be useful to and support the university. (*Regan, supra*, 17 Cal.3d at p. 537.)

Even though state agencies engage in many activities that further their ultimate purpose, "it does not follow inexorably" that the activity affected by the particular legislation "partake[s] of the sovereign nature of the principal activity." (65 Ops.Cal.Atty.Gen. at p. 274.) Thus, the Attorney General opined that where a state park rents vacation cabins, those activities are considered proprietary rather than governmental, notwithstanding that those cabins are "authorized by law" and "declared to be in the 'public interest' (Pub. Res. Code, § 5003.1, *supra*) and serve the public convenience." (65 Ops.Cal.Atty.Gen. at p. 274 [opining that Revenue & Taxation Code section 7280 grants authority to counties to require state to collect tax from occupants of state-run hotels].)

Applying these principles here, selling parking is not "closely related" to the universities' core governmental functions. The universities' core function is not to sell parking. And it is not enough for the universities to show that having parking lots provides access to their facilities, or is useful to their employees, students, or patients. (Hastings, of course, functioned for well over a century without its new parking garage, yet still managed to graduate distinguished attorneys.)

Rather, the most significant factor in this analysis is that the universities are selling parking to paying customers. When public agencies engage in commercial transactions in the same field as private entities, they are typically held to be acting in a "proprietary" rather than "governmental" and immune capacity – even when those transactions are arguably in furtherance of the agency's purposes, and even when they are performed "without profit." (65 Ops.Cal.Atty.Gen. at p. 274.) In charging for parking, respondents are "acting in a capacity no different from" other parking operators who sell parking. (*Regan, supra*, 17 Cal.3d at p. 536.) Even though the universities do not have the goal of selling parking for profit, this does not make their parking operations "governmental." The fact that respondents are selling parking at all is a far more significant indicator that they are engaged in a proprietary activity, as this Court explained in *Chafor v. City of Long Beach* (1917) 174 Cal. 478:

> Again it is important to note that the true test does not rest upon the determination as to whether or not the municipality is reaping a monetary gain. A very large class of cases arises where this fact is established, as where parts of public buildings, such as a city hall, are leased or rented to private individuals, when it is uniformly held that the city in doing this thing is acting in a private capacity. But while it is true that the exaction of a rent or the making of a private profit is a very potent factor in determining the character of the act, the converse is not true. In other words, the act does not become governmental merely by virtue of the

> fact that the city from the performance of it reaps no direct pecuniary return. It may be and is equally a private, proprietary act if no financial return at all be exacted, or if the financial return which is exacted does not amount to a profit on the enterprise. (*Id.* at p. 483; see also *Rhodes v. City of Palo Alto* (1950) 100 Cal.App.2d 336, 342 [holding that operating a parking lot for the benefit of patrons of a government-owned theater is a proprietary, non-immune activity].)

Thus, even if the "proprietary vs. governmental" test applied – which it should not – the universities are required to collect city parking tax from customers of their paid parking operations.

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: December 1, 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 12,525 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 December 1, 2017.

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PROOF OF SERVICE

I, MORRIS ALLEN, declare as follows:

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On December 1, 2017, I served the following document(s):

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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 December 1, 2017, at San Francisco, California.

MORRIS ALLEN