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August 8, 2017

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *City and County of San Francisco v. Regents of University of California,* No. S242835: Amicus Curiae Letter of the League of California Cities in Support of Petition for Review

Honorable Chief Justice and Associate Justices:

INTRODUCTION

The League of California Cities ("the League") submits this letter as amicus curiae in support of the petition for review filed by the City and County of San Francisco. Specifically, the League urges the Court to review the First District Court of Appeal majority's conclusion that sovereign immunity exempts State institutions from the duty to collect city taxes owed by the customers of their parking lots. By relying on the ambiguous distinction between governmental and propriety functions of government agencies drawn from tort law, the majority opinion creates substantial uncertainty as to other local revenues collected by other governments from tax, rate, and fee-payors.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies

those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The Court of Appeal majority effectively exempts customers of the State from local taxation if the State's sale of a taxable service is deemed "governmental" rather than "proprietary" in character. The test is antiquated, produces ambiguous results, and is of little utility in providing guidance to lower courts, State agencies and local government — as Justice Banke's dissent explains. The case has significant implications for the many California cities that host State facilities and collect parking taxes amounting to millions of dollars in general fund revenue for essential local services such as police, fire, transit, road maintenance, etc. The governmental vs. proprietary test imperils collection of other third-party taxes important to local government, such as utility users' taxes, hotel bed taxes, and the like. Accordingly, the League urges this Court to grant review here to clarify this vital area of the law.

THE ISSUE IS OF WIDESPREAD SIGNIFICANCE

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

Many cities host State facilities. These include the 10 campuses of the University of California, serving approximately 283,700 students and 198,300 employees[4] and offering 125,626 parking spaces.[5] In fiscal year 2015–2016, "auxiliary enterprises" such as student housing, food service operations and parking accounted for $1.43 billion

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[1] Parking Tax Revenues by City <http://californiacityfinance.com/index.php#OTHERTAX> (as of July 20, 2017).
[2] *Ibid.* [data from State Controller's reports and cities' annual reports to Controller]
[3] *Ibid.*
[4] University of California, The UC System <https://www.universityofcalifornia.edu/uc-system> (as of July 20, 2017).
[5] University of California, Budget for Current Operations: 2017–2018 <http://www.ucop.edu/operating-budget/_files/rbudget/2017-18budgetforcurrentoperations.pdf> (as of Aug. 6, 2017).

annually.[6] The California State University ("CSU") includes 23 campuses, serving 478,638 students[7] and nearly 50,000 employees.[8] In this 2017–2018 fiscal year, the CSU system is projected to offer 161,113 parking spaces, generating $118.1 million in revenue.[9] The State's footprint in large cities like San Francisco, Los Angeles, and Sacramento is obvious. However, State facilities are ubiquitous and include 169 Department of Motor Vehicle field offices[10] and other offices of State government in every corner of California.

Parking revenues from State facilities are substantial. In San Francisco alone, nearly $5 million in parking taxes is at stake. The University of California, San Francisco admits in its Answer to the Petition that it collects $17.1 million in parking revenues per year and that nearly half its facilities are open to the general public, not just students, faculty, and staff. (UCSF Answer at p. 10, citing 2 CT 341:9–25, 2 CT 341:22.) Smaller cities hosting large facilities, like Santa Monica, risk a larger percentage of general fund revenues here.

THE DECISION IMPERILS OTHER THIRD-PARTY TAXES

The significance of the Court of Appeal majority's decision is not limited to university parking facilities in San Francisco. As Justice Banke notes in dissent, the legal issue affects California cities and their third-party taxes broadly and raises an issue she believes this Court should "squarely address":

> There is no question, however, that the law on whether a municipality can look to a state entity to collect a general local tax imposed on third parties has been far from a paragon of clarity. Respectfully, the majority's opinion leaves the law in some disarray. Yet municipalities need to know with

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[6] University of California, Annual Financial Report: 2016–2015 <http://finreports.universityofcalifornia.edu/index.php?file=15-16/pdf/fullreport-1516.pdf> (as of Aug. 6, 2017).
[7] The California State University, Total Enrollment by Sex and Student Level, Fall 2016 <http://www.calstate.edu/as/stat_reports/2016-2017/f16_01.htm> (as of July 20, 2017).
[8] The California State University, Employee Headcount by Occupational Group <https://www2.calstate.edu/csu-system/faculty-staff/employee-profile/csu-staff/Pages/employee-headcount-by-occupational-group.aspx> (as of July 20, 2017).
[9] The California State University, Parking Program <https://www2.calstate.edu/csu-system/about-the-csu/budget/2017-18-support-budget/supplemental-documentation/Pages/parking-program.aspx> (as of Aug. 6, 2017).
[10] Hennessy-Fiske, *Sickouts Shuts Down 2 DMV Offices*, L.A. Times (Aug. 16, 2008) <http://articles.latimes.com/2008/aug/16/local/me-dmv16> (as of July 20, 2017).

> some assurance whether third parties who do business with a state entity will essentially receive a pass on a general local tax. It is time for our Supreme Court to squarely address this issue and to state clearly whether or not a state entity can be asked to collect a local tax imposed on third parties doing business with the entity, particularly where, as here, the entity will be reimbursed its costs of doing so.

(*City and County of San Francisco v. Regents of University of California* (May 25, 2017, A144500) ___ Cal.App.5th ___ [2017 WL 2288936, Dissent, Slip Op. at p. 2].)

The logic of the Court of Appeal majority's ruling is not limited to parking taxes, but extends to any tax on private parties associated with "governmental activity." Other third party taxes vital to local government include utility users' taxes and transient occupancy taxes. (*In re Transient Occupancy Tax Cases* (2016) 2 Cal.5th 131; *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241.) Each is imposed on a consumer yet collected by the seller. Millions of dollars are at stake as to these taxes, too.

THE PROPRIETARY / GOVERNMENTAL DISTINCTION DOES NOT PROVIDE CLEAR GUIDANCE IN THE REVENUE CONTEXT

The Court of Appeal majority acknowledges that under our Constitution, "San Francisco has broad powers under the home-rule provision, including the power to tax . . . ." (*City and County of San Francisco v. Regents of University of California* (May 25, 2017, A144500) ___ Cal.App.5th ___ [2017 WL 2288936, Slip Op. at p. 3].) However, it concludes, "the doctrine exempting state entities from local regulation prevents San Francisco from forcing the universities to collect and remit city taxes imposed on users of the universities' parking facilities" even if reimbursed their cost to do so. (*Id.* at p. 17.) Sovereign immunity shields hundreds of thousands of ordinary Californians with but small benefit to the State and at great cost to the local fisc. Under the Court of Appeal majority's holding, "the state exemption from local regulation 'is limited to situations where [a state entity] is operating in its governmental capacity' as opposed to engaging in 'proprietary activity.'" (*Id.* at p. 7.)

The Court of Appeal majority distinguishes governmental and proprietary activity, as though these terms have clear and unambiguous meanings. But the distinction is not a clear and administrable standard in the contexts of taxes and fees — as evidenced by Justice Banke's dissent.

The respondent Universities identify their educational and clinical functions as essential governmental activities in blanket fashion, treating classrooms and hospitals akin to stadiums and gymnasiums. (*Id.* at p. 17.) Their parking lots serve the universities' students, employees, visitors, and patients — but they serve the general public, too. (*Id.* at p. 7–8; E.g., UCSF Answer at p. 11.) The Universities argue the parking facilities are more than a source of revenue and directly support the universities' educational and clinical functions, making selling parking a governmental activity exempt from any burden to facilitate local taxation. (*City and County of San Francisco v. Regents of University of California* (May 25, 2017, A144500) ___ Cal.App.5th ___ [2017 WL 2288936, Slip. Op. at p. 17].)The Court of Appeal majority distinguished other third-party taxes, like the utility users' tax, holding that they are more proprietary than governmental. (*Id.* at p. 14.) Yet it is not entirely clear why this is so, nor how this test will apply to different facts.

If parking is essential to the provision of education and clinical services, why not limit its use to students and employees? Why not provide it free or include its cost in tuition? The Universities do not restrict their parking lots to faculty and students, but allow the general public to use many of their facilities, including their largest, such as the enormous Parnassus garage in the bustling Inner Sunset neighborhood. Here, the Universities sell parking in a competitive marketplace — some lots are in much trafficked locations — but seek an unfair advantage that incentivizes use of their parking facilities over others and disincentivizes other modes of transportation. The ability to abet their customers' nonpayment of local taxes — only some of who are students, staff and patients — is a windfall to the Universities as they can charge market prices, without incurring the market's costs. Arguing benefit to its educational mission the Universities claim not just immunity from the duty to collect local taxes, but the unfettered power to enter a marketplace with a decided advantage and to distort that marketplace. It is hard to conceive of any activity that could **not** be argued to support a university's educational mission.

Is Berkeley's hotel tax to apply to private hotels, but not to paying guests at the Faculty Club on the university campus? If so, by what logic? Does it matter the degree of connection between the guest and UC Berkeley? It is far from apparent whether operation of a hotel on a university campus is a "governmental activity." While the majority opinion distinguishes the utility users' tax as "proprietary activity," it is unclear whether its reasoning will shield other local taxes. Many agencies are created

Alternatively, the analysis of *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, upholding a charter city's demand that an independent special district collect its utility users' tax, might provide the rule of decision. That case scrutinized the city's demand for reasonableness and measured the burden on the respondent district before concluding the city's constitutional power to tax must prevail over the district's statutory immunity from municipal regulation. (*Id.* at p. 113–114.)

In any event, the present point is less ambitious — the governmental / proprietary activity distinction is just as unworkable in the context of municipal authority to enlist the cooperation of other government actors in the administration of

PROOF OF SERVICE

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I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On August 8, 2017, I served the document(s) described as **LETTER IN SUPPORT FOR PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on August 8, 2017, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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California Supreme Court Case No. S242835

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