No. S192828
(2nd Civil No. B228732)
(L.A.S.C. Case No. BS126192)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondents,

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest.

After a Decision by the Court of Appeal, Second Appellate District, Division Three, Case No. B228732

ANSWER TO PETITION FOR REVIEW

CARMEN A. TRUTANICH, City Attorney (SBN 86629x)
ZNA PORTLOCK HOUSTON, Senior Assistant City Attorney
JANIS LEVART BARQUIST, Deputy City Attorney (SBN 133664)
JENNIFER MARIA HANDZLIK, Deputy City Attorney (SBN 193037)
200 North Main Street, 800 City Hall East
Los Angeles, CA 90012
Telephone: (213) 978-7151
Facsimile: (213) 978-8315

Attorneys for Petitioner City of Los Angeles

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200 North Main Street, 800 City Hall East
Los Angeles, CA 90012
Telephone: (213) 978-7151
Facsimile: (213) 978-8315

Attorneys for Petitioner City of Los Angeles

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I. INTRODUCTION.

In May 2009, faced with a deficit exceeding $500 million, an impending cash flow crisis and employee payroll costs representing approximately 80 percent of its annual budget, the Los Angeles City Council declared a fiscal emergency and enacted, as an urgency measure, a reduced work schedule ordinance authorizing a plan to furlough City civilian employees up to 26 days per fiscal year, effective July 1, 2009.

In June 2009, the City Council approved, and the Mayor signed, a Fiscal Year 2009-2010 budget which, when compared to previous years, included significantly reduced salary expenditure appropriations.

Prior to establishing and implementing the furlough plan, the City gave Petitioner Engineer and Architect Association ("EAA") and all of its other civilian unions, notice and an opportunity to negotiate over the furloughs. EAA refused to engage in these negotiations, and rejected every opportunity to avoid furloughs and/or layoffs. Effective July 5, 2009, furloughs of one day per 80 hour pay period were implemented for many civilian employees, including EAA represented employees.

Many EAA employees filed grievances, challenging the furloughs as violating the wage and hour provisions of the applicable memoranda of understanding (MOU) between the City and EAA. The grievances were rejected on various grounds, including that the Council action authorizing the furloughs was not subject to the MOU grievance and arbitration procedure. EAA requested arbitration of these disputes. The City refused to arbitrate the grievances, and EAA filed a petition to compel over 400 separate grievances. The trial court granted the petition, concluding that the furlough grievances were arbitrable. The Court of Appeal disagreed, concluding that "any agreement to arbitrate the issue of furloughs would constitute an improper delegation of discretionary policy-making power vested in the City Council."

As this Court has long recognized, the adoption of a budget is a legislative function and, under the separation of powers principle, courts are generally reluctant to interfere in the budgetary process. (*Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 302 ["Enactment of a state budget is a legislative function, involving interdependent political, social and economic judgments"]).

If these furlough grievances go to arbitration, EAA will ask the arbitrator to usurp and overturn the City Council's fundamental policy choices to avoid insolvency and maintain essential public services through the use of mandatory employee furloughs. Such delegation of the City Council's powers of the purse would completely eviscerate the City Council's authority to manage its finances in an emergency.

EAA's Petition for Review (PFR) mischaracterizes both the Court of Appeal's decision and the factual background. The PFR ignores the context in which this dispute arose, the legal authority for a municipal declaration of emergency and the legal authority for the reduction of salary appropriations and the implementation furloughs as a method of dealing with the undisputed and enormous budgetary deficits.

EAA wildly exaggerates the scope of the Court of Appeal's decision, and its doomsday prophecies wrongly argue that the decision will change the law of public sector labor relations. To the contrary; the Court of Appeal's decision is firmly based in long standing decisional and statutory law.

The Court of Appeal correctly decided this case. In doing so, the Court of Appeal appropriately rejected EAA's attempt to narrowly frame the furlough grievances as involving merely a dispute over the "terms of an existing labor agreement." The Court of Appeal's decision preserves the rights of local agencies to act swiftly in a fiscal crisis to preserve essential public services.

Accordingly, Respondent City of Los Angeles respectfully submits that review by this Court is not warranted and this petition should be denied.

II. STATEMENT OF THE CASE.

A. The City of Los Angeles Faced an Unprecedented Fiscal Emergency.

This lawsuit arises out of the City's attempt to solve its serious and unexpected budget crisis. Prior to establishing and implementing the furlough plan, the City gave EAA, and all of its other civilian unions, notice of its fiscal emergency and an opportunity to help solve the problems. Prior to implementing the furlough plan, the City offered to negotiate the effects of the furloughs. EAA refused to engage productively in these negotiations, and rejected every opportunity to avoid furloughs and/or layoffs. The factual background, the history of the City's negotiations with its unions,

including EAA, relating to why and how the City imposed furloughs, as well as the statutory and Los Angeles City Charter (Charter) framework is fully set forth in the City's Petition for Writ of Mandate (PWM) and will not be repeated in its entirety here.

The City's budgetary authority and obligations are set forth in its Charter. In addition to obligating the City Council to adopt a yearly balanced budget, and set employee salaries, the Charter obligates the City Controller to determine, prior to approving any demand on the City Treasury, that "the appropriation for the goods or services has been made." Charter §262. These limitations apply to employee salary expenditures. See Charter §§212, 310-315, 320. See PWM ¶¶ 5-7.

B. The City of Los Angeles Attempted to Negotiate a Solution Prior to Acting Unilaterally.

The City attempted to engage City unions, including EAA, in negotiations designed to deal with the burgeoning budgetary problem beginning in 2008. While other unions agreed to discuss remedies for the budgetary problems, EAA declined to attend any of the meetings and refused to discuss such matters with City management. PWM ¶¶ 8-12.

In 2009, the City faced an approximately $530 million General Fund deficit for the 2009-2010 Fiscal Year that had to be addressed to balance the City's budget. PWM ¶ 13.

On May 12, 2009, the Mayor asked City Council to declare a fiscal emergency, and to adopt an urgency ordinance allowing City management to implement reduced workweeks. That same day, the City Administrative Officer (CAO), the City's official labor negotiator, advised City unions, including EAA, in writing of the proposed furlough plan. EAA did not respond. PWM ¶¶ 14, 15.

On May 18, 2009, the City Council adopted both the Emergency Resolution and the Reduced Work Schedule Ordinance. PWM ¶¶ 16, 17.

On May 22, 2009, the CAO invited EAA to negotiate over the impacts of the proposed furlough plan. EAA did not respond. PWM ¶ 18.

The Fiscal Year 2009-2010 (FY 09-10) budget significantly reduced salary expenditure appropriations and assumed that civilian employees would be subject to 26 mandatory, unpaid furlough days. PWM ¶ 19.

The CAO met with many of the City's civilian unions on June 5, 2009 in an effort to identify cost-saving alternatives to furloughs, and to discuss the impacts of the furlough plan. EAA did not attend this meeting. PWM ¶ 20.

EAA refused to meet prior to June 18, 2009 and rejected the CAO's offer to attend meetings starting June 15, 2009 regarding the impacts of individual department furlough implementation plans. PWM ¶ 21.

On June 15, 2009, EAA filed Unfair Employee Relations Practice (UERP) Charge No. 1768 with the City's Employee Relations Board (ERB). This charge alleged that the City's decision to impose mandatory furloughs was unlawful. PWM ¶ 22.

No agreements were reached between the City and EAA on June 18, 2009. PWM ¶ 23.

On June 26, 2009, City's representatives again met with EAA. The City suggested that EAA agree to a short term deferral of the July 1, 2009 contractual cost of living allowances (COLAs) to create an opportunity to negotiate cost-saving alternatives to furloughs. In exchange, the City offered to defer furloughs for EAA employees

during the negotiating period. EAA rejected the City's offer. PWM ¶ 25.

C. Furloughs Were Implemented Beginning in July, 2009 for Many Civilian Employees, Not only EAA Represented Employees.

On July 1, 2009, the contractual COLAs for EAA members were implemented and on July 5, 2009, mandatory furloughs for EAA represented employees in the amount of 8 hours per two week pay periods were also implemented. Other civilian employees who were either unrepresented or represented by non-Coalition, non EAA, unions were also furloughed pursuant to the City Council action.[1] Under a negotiated cost saving agreement, Coalition represented employees were furloughed 3.5 hours per pay period in fiscal year 2009-2010. PWM ¶¶ 24, 26, 27.

EAA filed a Complaint for a Declaratory Judgment and an Application for a Temporary Restraining Order on July 9, 2009. *EAA v. City of Los Angeles*, Los Angeles Superior Court Case No. BC417398. The Complaint sought a declaratory judgment that the

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[1] Coalition of City Unions (Coalition" unions) represented employees were furloughed in accordance with an agreement their unions negotiated, beginning in the fall of 2009. See PWM ¶ 24. For these employees, the number of furloughs was reduced because those employees made other salary concessions, reducing the need for unpaid furloughs. EAA had rejected the concept of salary concessions.

furloughs violated the wage and hour provisions of the MOUs. The application sought a TRO to prevent the City from imposing the mandatory furloughs. The application for a TRO was denied. Thereafter EAA filed an appeal from that decision, but never perfected the appeal. Ultimately, EAA dismissed the complaint. PWM ¶ 28.

EAA members filed approximately 408 individual grievances challenging the City Council imposed mandatory furloughs. The City denied the grievances on multiple grounds including that the Council action authorizing the implementation of the furloughs was not subject to the MOU grievance and arbitration procedure, and that EAA's decision to file UERP No. 1768 prior to the filing of individual grievances, constituted a waiver of the right to arbitrate the furlough dispute under the MOUs. PWM ¶¶ 29, 30.

On or about April 29, 2010, EAA filed the underlying action, BS 126192, seeking an order compelling the arbitration of the approximately 408 grievances. PWM ¶ 31.

D. EAA MOUs Contain Provisions Recognizing the City's Right to Act in an Emergency, Limiting the Subject of EAA Grievances When the City Acts Pursuant to These Rights, and Limiting EAA's Right to File Multiple Actions Concerning the Same Subject Matters.

The EAA MOUs contains a provision expressly recognizing the City's management right "to take all necessary actions to maintain uninterrupted service to the community and to carry out its mission in emergencies [.]" That provision also expressly provides that ". . . the exercise of these rights does not preclude employees and their representatives from consulting or raising grievances about the *practical consequences that decisions* on these matters may have on wages, hours and other terms and conditions of employment." thus limiting grievances concerning such decisions to complaints about the practical consequences of emergency decisions.

The MOU grievance and arbitration procedure contains an election of remedies provision. Article 3.1, Section II.A. provides:

> Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternate remedy.

Because EAA's UERP filing in June, 2009 predated the filing of the 408 grievances, its filing constituted a binding election of forum and a "waiver of the alternate remedy" being sought in this proceeding.

E. The Procedural History Includes EAA's Three Attempts to Overturn the City Council's Budgetary Authority to Impose Furloughs.

This law suit is EAA's third attempt to overturn the City's efforts at balancing its budget through the use of mandatory employee furloughs.

1. The UERP Charge Decision Upheld the City's Right to Unilaterally Implement the Furloughs.

EAA's original action was UERP Charge No. 1768. The Charge went to hearing. (See document nos. 01728, 1762-1787, ¶ 427). The ERB's hearing officer issued a proposed decision and a supplementary report in that action. (See ex. 13 to Second Request for Judicial Notice (FJN), nos. 01895-1930). The ERB adopted the Hearing Officer's conclusion that the unilateral implementation of furloughs pursuant to the fiscal emergency was permissible under the

Employee Relations Ordinance (ERO) and the Meyers Milias Brown Act (MMBA) and was not an unfair employee relations practice.[2]

2. The Complaint for Declaratory Relief.

EAA made a second choice of forum when it filed its complaint in Superior Court. The complaint for declaratory judgment and application for a temporary restraining order is *EAA v. City of Los Angeles, supra*, BC417398, filed on July 9, 2009. Among the causes of action in the Complaint was a claim that the implementation of furloughs was in violation of the wage and hour provisions of EAA's MOUs – the exact same issue raised by the grievances at issue in this proceeding. Ultimately, EAA dismissed that action. PWM ¶¶ 28, 33.

3. The Emergency Furlough Grievances.

Beginning in July, 2009, EAA members filed approximately 408 individual grievances with their departments challenging the City Council imposed mandatory furloughs. PWM ¶¶ 29, 30.

The Departments denied the grievances on a number of grounds, including the ground that the grievance procedure did not

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[2] Under the MMBA, the City has authority to establish its own labor board with jurisdiction over City unions and allegations of UERPs. Government Code §3509(d). The City's ERB is established pursuant to the City's Employee Relations Ordinance (ERO) Los Angeles Administrative Code ("LAAC") §§4.800-4.890.

extent to Council budgetary actions and that the filing of UERP No. 1768 waived the right to pursue grievances on the same subject matter. PWM ¶¶ 29, 33, 34.

The MOUs' grievance and arbitration provisions contain detailed procedures for handling internal departmental disputes. However, the MOUs and the grievance procedure apply to individual City departments and their respective employees *vis a vis* each other. The grievance process is available only when an employee of a particular department is challenging an action taken by his or her employing department over which that particular department has actual control. Thus, the grievance provisions are not available to employees challenging decisions taken by City officials external to their own employing department *SEIU v. City of Los Angeles, DOT*, (1994) 24 Cal.App.4th 136, 144-145.

4. The Petition to Compel Arbitration.

On or about April 29, 2010, EAA filed the underlying action, BS 126192, seeking an order compelling the arbitration of the approximately 408 grievances. PWM ¶ 31.

The City filed a Response to the Petition to Compel Arbitration which included multiple affirmative defenses. Among other things,

the defenses denied the existence of an agreement to arbitrate the City Council actions at issue, raised the election of remedies defense, the waiver defense, and asked the Court to dismiss the action. (See Response to Petition to Compel Arbitration, documents nos. 01649, 01727-01731.) The trial court granted the petition to compel arbitration, concluding that the issue of furloughs fell within the definition of a grievance found in article 3.1 of the MOUs. The City filed a petition for writ of mandate, challenging the trial court's order compelling arbitration.

F. The Court of Appeal's Opinion.

Division Three of the Second Appellate District granted the City's petition for writ of mandate and remanded to the trial court for further proceedings. *City of Los Angeles v. Superior Court (EAA)* 193 Cal.App.4th 1159 (2011) (*COLA v. Superior Court [EAA]*)

First, the Court of Appeal rejected the Union's argument that the arbitrator should determine whether the emergency furlough grievances were arbitrable, holding that "[w]ith no clear and unmistakable provision that the arbitrator determines arbitrability, the issue is one for the courts." *Id.* at 1168.

Second, the Court of Appeal ruled that the applicable MOU is ambiguous as to whether the emergency furloughs are arbitrable, stating "If these were the only circumstances, we would remand to the trial court for a determination of whether the language in article 1.9 of the MOU, exempting certain management decisions from arbitration, applies to furloughs." *Id.* at 1172.

Third, the Court of Appeal rejected EAA's claim that arbitration of the emergency furlough grievances would not require an arbitrator to engage in fiscal policymaking, holding: "As the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator." *Id.* at 1175.

III. REVIEW IN THIS CASE IS NOT WARRANTED UNDER ANY OF THE CIRCUMSTANCES SET FORTH IN RULE 8.500 OF THE CALIFORNIA RULES OF COURT.

California Rules of Court 8.500, subdivision (b) sets out four circumstances in which review by this Court is warranted: (1) when necessary to secure uniformity of decision or to settle an important question of law; (2) when the Court of Appeal lacked jurisdiction; (3)

when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; and (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

EAA appears to invoke the first circumstance by arguing that review should be granted to settle an important question of law regarding the enforceability of grievance arbitration over MOU wage and hour provisions. (PFR, pp. 1, 13). EAA also appears to be arguing that review is necessary to ensure uniformity of decision, asserting the Court of Appeal's decision cannot be reconciled with existing California public sector labor relations law. (PFR p. 14). As the ensuing discussion will demonstrate, there is no reason to grant review under either theory.

Contrary to EAA's assertion, there is no need to settle an issue of law or to secure uniformity of decisions regarding public policy and arbitration. The Court of the Appeal did not, as EAA contends, create a "sweeping exception" to grievance arbitration agreements. Rather, the Court of Appeal correctly concluded that, under the particular circumstances in this case, arbitration of the City Council's budgetary act to impose furloughs pursuant to a declaration of fiscal

emergency would amount to an improper delegation of discretionary policy-making power vested exclusively in the City Council. This decision is consistent with nearly one hundred years of settled case law.

As to the second ground, the Court of Appeal's decision does not, as EAA asserts, contradict this Court's decisions in *Taylor v. Crane* (1979) 24 Cal.3d 442 (*Taylor*), or *Glendale City Employees' Assn, Inc. v. City of Glendale* (1975) 15 Cal.3d 328 (*Glendale*). *Taylor* involved the grievance arbitration of an individual employee's disciplinary dismissal. It did not involve arbitration of legislative public policy choices or concern a city council's ability to manage its financial affairs in a fiscal emergency. *Glendale* involved neither arbitration nor any delegation. There, city officials ignored a collective bargaining agreement without any legally cognizable reason to consider it invalid. It did not consider whether a public employer could, within an MOU, lawfully delegate to an arbitrator its discretionary fiscal policy making authority or its authority to make new discretionary policy choices pursuant to the MMBA.

IV. REVIEW IN THIS CASE IS NOT WARRANTED BECAUSE THE COURT OF APPEAL'S DECISION IS FULLY CONSISTENT WITH EXISTING LAW.

EAA begins its argument with a section discussing the uncontroverted proposition that municipal collective bargaining is a matter of state wide concern, and that therefore the policy choices embodied in the MMBA apply to this situation (PFR pp. 2, 15). Significantly, this case does not involve any City ordinances which conflict with the MMBA. The City has not argued and the Court of Appeal has not ruled that any City practice, ordinance, or MOU provision conflicts with or takes precedence over the MMBA. Indeed, the statutory provision on which the City relies, and which formed the procedural basis for its Emergency Ordinance is found in both the MMBA, *Government Code* §3504.5(b) and in the ERO, LAAC §4.850(b). The Court of Appeal ruled, consistent with all prior decisional and statutory law, that a municipality is without authority to delegate to an arbitrator budgetary and policy making decisions, and accordingly, an MOU arbitration provision cannot grant to an arbitrator the authority to overturn budgetary or policy making decisions, as EAA is attempting to do in this case.

A. The Grievance Procedure Does Not Apply to Cross Departmental Complaints.

The PFR reasserts the same problematic arguments that EAA asserted at the Court of Appeal, namely that the grievances at issue in this case are normal run of the mill wage and hour grievances. In fact, the grievances expressly attempt to overturn City Council's legislative acts applicable to the entire City of Los Angeles, not to decisions made by individual City departments.

As the Court of Appeal noted, the definition of a grievance applies to "departmental rules and regulations governing personnel practices or working conditions", whereas the furlough program was a City wide ordinance, not a departmental rule or regulation. *COLA v. Superior Court (EAA) supra* at 1169, fn.10.

This is not the first case to hold that the arbitration agreement does not extend to cross departmental issues. In *SEIU v. City of Los Angeles, DOT, supra,* SEIU[3] sought to arbitrate a promotional dispute where the grievant was employed at the Department of Transportation (DOT), but was denied a promotion by General Services Department (GSD). After the denial, the grievant filed a grievance with his

[3] SEIU is a member of the Coalition of City Unions, or "Coalition" Unions. The Coalition Unions have submitted Amicus briefs in this case, and SEIU is one of the six signatories to those briefs.

department. However, DOT had not made the promotional decision, and had no way to change GSD's promotional decision. Accordingly, it denied the grievance, and GSD refused to arbitrate the issue. The Court of Appeal upheld the refusal to arbitrate this cross departmental grievance saying:

> "The MOU and ERO recognize that the city is organized into quasi-autonomous departments. The departments, including DOT and GSD, are separate parties to the MOU. Moreover, grievances are defined in both documents as disputes involving wages, hours, or working conditions. Such disputes must be addressed to one's department, the unit which has the ability to address them." *Id.* at 144.

Here, the grievants' departments did not make the decision to impose furloughs, and the employing departments have no authority to overrule City Council's discretionary policy making choices.

Similarly, in *Los Angeles Police Protective League v. City of Los Angeles*, (1988) 206 Cal.App.3d 511, the Court of Appeal upheld the refusal to arbitrate a grievance brought by a Los Angeles Police Department (LAPD) officer concerning the fairness of his Civil Service Commission promotional interview. As in *SEIU v. City of Los Angeles (DOT),* the LAPD was without authority or ability to alter the examinations conducted by the Civil Service Commission.

The Court of Appeal's decision, thus, is entirely consistent with prior decisional law holding that this grievance procedure applies to intra-departmental disputes only, and cannot be used by employees in one City department to challenge or alter actions taken by other sections of the City structure.

B. The MMBA Gives Municipalities the Authority to Enact New Rules When Emergency Circumstances Require Such Actions.

Under the MMBA, the State Legislature has vested discretion in municipalities to impose new terms and conditions of employment in cases of emergency prior to exhausting the collective bargaining process. This power is set forth in Government Code section 3504.5, which, in relevant part, provides:

> In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation. Gov. Code § 3504.5

Section 4.850(b) of the Los Angeles Administrative Code closely follows the language of Government Code §3504.5. Thus, the MMBA and the ERO recognize that in emergencies, municipalities

can act swiftly to change employment regulations, and then later, meet and confer over the effects of those changes.

The City relied on these provisions when it enacted its emergency ordinance and implemented mandatory furloughs for civilian employees. This Court has already noted with approval actions taken pursuant to the MMBA emergency statutory provisions. *See eg: San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 669 citing to *Sonoma County Organization v. County of Sonoma, supra,* 1 Cal.App.4th 267, 274.

C. The MOU's Arbitration Provisions Must Be Harmonized with Existing Legislative Limitations and Cannot Extend to Matters Which Go Beyond the Scope of an Arbitrator's Lawful Authority.

1. The Statutory Framework Cannot be Ignored.

EAA argues that the City is authorized by the MMBA to enter into MOUs which include arbitration agreements and that once those agreements are finalized, they become binding. (PFR p.16,17). While that proposition is correct as far as it goes, it ignores the fact that parties do not enter into contracts in a vacuum, and are presumed to understand the statutory and legal framework surrounding the subject matter of the contract. As a matter of contract interpretation, the arbitration provisions are properly read in the context of the entire

MOU and the legislative backdrop against which the MOUs were enacted, *United Transportation Union v. Southern Cal. Rapid Transit Dist* (1992) 7 Cal.App.4th 804, 808 (*United Transportation).*

2. *Glendale City Employees' Assn, Inc. v. City of Glendale.*

EAA cites to this Court's decision in *Glendale supra,* 15 Cal.3d 328 for the proposition that in normal circumstances, once an MOU is approved, it becomes a binding contract. However, *Glendale* dealt with a situation where city officials ignored a collective bargaining agreement without any statutory or other legally cognizable reason to consider it invalid. See *California Teachers Association v. Perlier Unified School District* (1984) 157 Cal.App.3d 174, 184 (holding *Glendale* inapplicable to circumstances where noncompliance with MOU provisions is based on a legally cognizable reason). In *Glendale,* there was no claim that the Glendale City Council was unable to appropriate the funds necessary to comply with the agreement or had declared a fiscal emergency. The Court found that, to the contrary, the City Council had failed to do "everything reasonably within its power" under the circumstances. *Glendale,* at 337, fn. 11.

Here, the emergency provisions of the MMBA, the ERO, and the Charter mandated budget process provide authority for the City Council to reduce salary appropriations in response to an unprecedented fiscal crisis, despite previously approved MOU provisions. The MMBA's emergency provisions grant the City the authority to act first, even in the face of arguably contrary contract language. The MMBA itself makes no exception for terms and conditions embodied in an MOU. If the City were barred from responding to an emergency due to MOU language, the emergency provisions would have little or no effect, since the types of issues that would need immediate change in an emergency are the most likely to be covered in an MOU. Prior to implementing the mandatory furloughs, the City Council did "everything reasonably within its power" under the circumstances, short of compromising essential public services. The City Council's decision to reduce salary appropriations pursuant to a declaration of economic emergency is therefore legally and factually distinguishable from the situation involved in *Glendale*.

3. Arbitration of City Council's Public Policy Choices is Not Equivalent to Arbitration of Disciplinary Decisions.

The City has never claimed that arbitration generally is an "imposition", as EAA suggests (PRF p.17), rather that the parties' could not enter into an arbitration agreement overriding the spending and budgeting limitations set forth in the City Charter. *Luchesi v. City of San Jose* (1980) 104 Cal.App.3d 323, 328. EAA's reliance on cases discussing the arbitration of termination disputes, such as *United Transportation, supra, Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, or *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, is misplaced here, where the dispute concerns City Council's ability to legislate in an emergency to preserve public services, not the termination or discipline of one employee. EAA's reliance upon *Cary v. Long* (1919) 181 Cal. 443, 448 (PRF p.17) and its quote about the scope of permissible arbitration, is also misplaced. *Cary v. Long,* which was decided in 1919, relied upon and quoted from a version of CCP §1281 which has long been repealed.[4]

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[4] The current version of CCP §1281 was added in 1961.

In seeking to arbitrate the emergency furlough decision, EAA's proposed role for the arbitrators would be inconsistent with the description of the proper scope of arbitral review set forth in *United Transportation*. There, the Court stated: "the arbitrator's role is confined to interpreting and applying terms which the employer itself has created or agreed to and which it is capable of making more or less precise." *Id* at *814*. In this case, EAA's claim is that the City Council was without authority to enact an emergency ordinance which included furloughs. This claim necessarily requires an arbitrator to rule on matters external to the MOU provisions, and involves issues of municipal authority and policy making going well beyond the scope of the cases upon which EAA relies. Indeed, rather than interpreting and applying existing policies, these grievances are asking the arbitrator to overturn the new policy enacted by City Council, pursuant to its authority in the MMBA and the ERO. Such requests are outside the limited and circumscribed authority of any arbitrator.

D. These Grievances Would Not Quickly Or Inexpensively Resolve Any Conflicts.

Contrary to EAA's suggestion, (PRF pp.13,17) arbitration of these 408 grievances would not be quick, inexpensive, or expeditious. Sending these cases to arbitration would involve hundreds of hearings

covering the same subject matter as that already fully litigated at the ERB. The Court of Appeal recognized that EAA's current claim that arbitration of these grievances would not be unduly time consuming or expensive was a claim of recent vintage, disproven by its consistent rejection of the City's earlier requests to consolidate the grievances. *Id* at 1166, footnote 8.

E. *Taylor v. Crane* is Inapplicable.

1. Arbitral Review of Administrative Functions is Permissible.

EAA's reliance upon *Taylor supra,* 24 Cal.3d 442 is misplaced. *Taylor* involved the arbitration of an administrative personnel decision, not the arbitration of discretionary legislative policymaking. In *Taylor*, the arbitration concerned whether an individual employee had been properly discharged consistent with the standards enumerated in city ordinances, rules, regulations and orders. *Id.* at 445. Thus, the arbitrator's role was confined to the quasi-judicial function of "applying and interpreting [rules] which the employer ha[d] created or agreed to and which [were] capable of making more precise. (citation omitted)" *Id.* at 453.

Given the restricted role of arbitration in *Taylor*, this Court found no unlawful delegation of the city manager's charter based administrative power to discharge employees. *Id.* at 452. In doing so, this Court distinguished interest arbitration cases [*Id.* at 451, fn. 1, and 453, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22 (*Bagley*) and *San Francisco Firefighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896 (*SF Firefighters*)], recognizing that interest arbitration constitutes an improper delegation because it involves "the submission to arbitration of a *general policymaking power* to determine terms and conditions of employment, a matter of public policy....[¶] [Such power] is broader and more intrusive upon the functions of city government than the arbitrator's authority in this case to resolve an individual grievance." *Taylor, supra, at 453 (emphasis in original).*

In distinguishing *Bagley* and *SF Firefighters*, this Court in *Taylor* left intact the well-established rule that "powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and may not be exercised by others in the absence of statutory authorization."

Taylor, supra, 24 Cal.3d at 451, fn.1 Thus, under *Taylor*, this rule continues to apply to the arbitration of general policy making powers of the kind involved here.

2. Delegation of Policy Making Choices Without Statutory Authorization is Impermissible.

As with the non-delegable duties discussed in *Bagley* and *SF Firefighters,*[5] here there is no statutory authorization for delegation of the City's emergency powers and fiscal responsibilities reserved. Cf. *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 612, 622, fn. 13 (finding no unlawful delegation where the city charter expressly authorized submission of impasses in negotiations to binding arbitration). Given the nature of the dispute, the arbitrator will necessarily be required to judge the City Council's policy choices to declare a fiscal emergency and to reduce salary appropriations via a new work rule (i.e., the emergency furlough program). Such delegation would impermissibly intrude on the authority of the City Council to determine how scarce resources are to be allocated with minimal disruption to public services, while ensuring that the City

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[5] In *Bagley*, the non-delegable statutory duty was a city's responsibility to set compensation levels for its employees. *SF Firefighters* dealt with a city commission's non-delegable authority under the city charter to establish rules and regulations governing the conduct of firefighters.

meets all of its financial obligations, not just those pertaining to EAA members. See, e.g, *California Teachers Association v. Ingwerson* (1996) 46 Cal.App.4th 860, 876 (adoption of a budget is a legislative function; trial court erred in ordering the county to prepare a budget which did not include pay rollbacks).[6]

Unlike the situation in *Taylor*, arbitration of the emergency furlough grievances would not involve the application or interpretation of standards enumerated in city ordinances, rules, regulations and orders. The Court of Appeal correctly recognized that through the emergency furlough grievances, EAA is seeking to have an arbitrator overturn the City Council's discretionary legislative acts. *COLA v. Superior Court (EAA), supra*, at 1176.[7] The arbitrator will be called upon to second-guess the manner in which the City Council has exercised its legislative judgment pursuant to the MMBA and the

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[6] As the Court of Appeal in *Ingwerson* observed, "The reality is that, in a time when a number of public agencies are experiencing problems meeting their financial obligations, [petitioner] unions like so many other public employee bargaining units are not immune from the cutbacks these agencies may be eventually required to make." *Id.* at 928.

[7] The Court of Appeal noted: "This is not a case where a single employee [as was the case in *Taylor*]... is questioning a departmental decision....This is a challenge to the City Council's [discretionary policy] decision to impose furloughs as a response to the City's financial situation " *COLA v. Superior Court (EAA) supra* at 1176.

City Charter, to declare a fiscal emergency and to enact a balanced budget. Arbitration of such decisions would strip the City Council of its discretion to set fiscal and employment policy, and delegate that discretion to an arbitrator, who is entirely without responsibility to the City, its voters, or taxpayers. *County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699 (budgetary process "involves interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation"); see also *Collier v. City and County of San Francisco* (2007) 15 Cal.App.4th 1326, 1345 (declining to interfere with municipality's judgment in weighing budgetary needs).

V. INTEREST ARBITRATION PRINCIPLES APPLY TO THE EMERGENCY FURLOUGH GRIEVANCES.

EAA argues, incorrectly, that the Court of Appeal erred in applying "an 'interest arbitration' analysis to this 'grievance arbitration' case." (PFR, p. 18). In analyzing the delegation issue, the Court of Appeal appropriately rejected EAA's arguments as "an elevation of terms over substance" COLA *v. Superior Court (EAA)* at 1175. The Court of Appeal correctly recognized that EAA's

characterization of the furlough dispute as "grievance arbitration" was not determinative, stating:

> "The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the Union is seeking arbitration of *policy matters* left to the discretion of the City Council. Interest arbitration is problematic from a delegation point of view because it impacts *policy matters*, not because it is called interest arbitration" *COLA v. Superior Court* (EAA), *supra*, at 1175 (emphasis added).

Applying interest arbitration principles by analogy,[8] the Court of Appeal concluded that EAA "is seeking to have an arbitrator determine issues of discretionary policymaking which have been assigned to City Council." Id at 1176, citing *County of Sonoma v. Sup. Court* (2009) 173 Cal.App.4th 322, 342 (*County of Sonoma*) and *Taylor, supra,* at 453 (interest arbitration may constitute an improper delegation).

The Court of Appeal's reasoning is sound. "The law respects form less than substance." Civ. Code §3528. In this case, arbitration of the furlough grievances would be legislative in nature, resembling interest arbitration. If these arbitrations go forward, the substance of

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[8] In analyzing the delegation issue, the Court of Appeal implicitly disagreed with EAA's contention that "*only* interest arbitration can constitute an improper delegation of discretionary authority." *COLA v. Superior Court (EAA), supra,* at 1175. Certainly, none of the authorities cited by EAA support this proposition.

the controversy will require a quasi-legislative finding. The arbitrator will not, as EAA claims, be asked to "apply existing contractual terms to which the City has already bound itself" (PFR, p. 21)[9], but rather will be called upon to ***validate or overturn*** the City Council's discretionary legislative acts to reduce salary appropriations for 2009-10 in response to a fiscal crisis and to enact a new work rule to accommodate the fiscal realities. *COLA v. Superior Court (EAA), supra*, at 1176.

EAA's attempt to recast the emergency furlough dispute as "grievance arbitration" does not change the ultimate impact of allowing a city council's fiscal policymaking to be arbitrated. As California courts have recognized,

> The nature of the proceeding must be determined from the substance of the action taken regardless of its designation. (citation) The *end attained* and *not the form of the transaction* must be considered by the court in determining its substance and effect. (citation). *Hicks v. Board of Superiors of Orange County* (1977) 69 Cal.App. 228 (emphasis added), citing *State Board of Education v. Levit* (1959) 52 Cal.2d 441, *Edson* v.

[9] EAA argues that if the arbitrator indulges in policymaking, the City would have grounds to petition to vacate any ensuing arbitration award. PFR p. 21, citing Code Civ. Proc. §1286.2 and *Taylor, supra*, 24 Cal.3d at 42. EAA's reliance upon *Taylor* is again misplaced. The result in *Taylor* does not equate to a blanket endorsement of Section 1286.2's adequacy as a safeguard in all cases, and certainly not in the case at bar which, as discussed above, is factually and legally distinguishable from *Taylor*.

Southern Pacific R. R. Co. (1904) 144 Cal. 182, 188-189 and *Cashman v. Root* (1891) 89 Cal. 373, 384).

Here, if EAA prevails in its quest to overturn the furlough decision, the arbitration's decision and remedy will necessarily affect the allocation of public resources and the level of public services. Indeed, the decision and remedy might require the City Council to cut items from its budget, or increase taxes. Such decisions are legislative-political in nature, akin to those made in interest arbitration proceedings. Cf. *County of Sonoma, supra*, 173 Cal.App.4th at 342.[10] Consequently, allowing arbitration of the emergency furlough decision would impermissibly intrude upon the City Council's role in formulating fiscal policy, and usurp the Council's legislative discretion to manage the City's finances in a fiscal crisis to preserve essential public services. *COLA v. Superior Court, supra*, at 1176.[11]

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[10] In *County of Sonoma*, the court of appeal invalidated a State statute requiring counties to submit to binding interest arbitration of economic issues that arose during negotiations with firefighter or law enforcement unions. *County of Sonoma, supra*, 173 Cal.App.4th at 355, citing *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 291.

[11] EAA contends that the Court of Appeal's opinion is defective because "it provides only vague formulations and no guidance to trial courts or other courts of appeal assessing when grievance arbitration impermissibly intrudes into policymaking." (PFR p. 22). In doing so, EAA ignores the Court of Appeal's analysis applying the interest arbitration principles enumerated in *County of Sonoma* to the factual circumstances of this case. 193 Cal.App.4th at 1175-76.

VI. RATIFICATION OF MOU PROVISIONS GOVERNING ORDINARY TIMES DID NOT FORECLOSE THE SUBSEQUENT EXERCISE OF THE COUNCIL'S LEGISLATIVE FISCAL POLICYMAKING POWERS IN RESPONSE TO A FISCAL EMERGENCY.

EAA argues that the Court of Appeal improperly ignored the fact that the City had already exercised its discretion by ratifying the applicable MOUs. EAA claims that under *Taylor*, "the effect of the [emergency furlough] ordinance vis-à-vis the salary and wage requirements in the MOU is properly the subject of arbitrable review." PFR, p. 23, citing *Taylor, supra*, 451-452. As discussed, *infra*, EAA's reliance on *Taylor* is misplaced.

The City Council's initial discretionary act of approving the applicable MOUs did not foreclose further exercise of its legislative discretion in emergency situations. See, e.g., *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d. 86, 98 (Mayor's power to act in an emergency was not limited by charter provisions governing ordinary times). As the Court of Appeal's analysis implicitly recognized, under the City Charter, the City Council retains

ultimate control over salaries and the expenditure of public funds through the annual budget process. *COLA v. Superior Court (EAA), supra*, 193 Cal.App.4th at 1174-75, citing *Professional Engineers in California Government v.Schwarzenegger*, (2010) 50 Cal.4th 989, 1036 (*Professional Engineers*).

In analyzing the delegation issue, the Court of Appeal correctly relied upon *SF Firefighters*. *COLA v. Superior Court(EAA), supra* at 1173-74. In that case, the Court of Appeal held that a city agency's charter power to make rules governing the conduct of city firefighters could not be assigned to an arbitrator in the absence of statutory authorization. *SF Firefighters, supra*, 68 Cal.App.3d at 902-903. The court reasoned: "In the case at bench, the City's people by democratic vote in the enactment of the Charter, had chosen that ... disputes [between the city and its firefighters] be resolved according to rules and regulations adopted by its fire commission, and not by arbitration." Id. at 903.

In this case, as in *SF Firefighters*, the City's residents by democratic vote enacting the City Charter, have chosen that fundamental policy decisions involving budget-making and salary-setting be made by the City Council, and not by an arbitrator. Charter

§§212, 310-315, 219. The Court of Appeal concluded: "Clearly, a mandatory furlough is encompassed within salary setting (see *Professional Engineers, supra*, 50 Cal.4th at 1036) and a furlough imposed in a fiscal emergency is encompassed within budget making." *COLA v. Superior Court (EAA), supra*, 193 Cal.App.4th at 1174. Accordingly, the Court of Appeal correctly ruled that arbitration of the Council's emergency furlough decision would be an improper delegation of discretionary power. *Id.* at 1175.

VII. THE SKY IS NOT FALLING.

EAA's PFR is filled with dire predictions that the Court of Appeal's decision spells the end of public sector labor relations as we know them. Nonsense.

EAA attempts to strike terror in the reader's heart, claiming that the Court of Appeal's decision jeopardizes the enforceability of collectively bargained grievance arbitrations provisions and will "*presumably* require public employees to instead file lawsuits to enforce labor agreements" (PFR, 2, emphasis in original). Notwithstanding EAA's inflammatory rhetoric, the sky is not falling. The Court of Appeal's opinion does not diminish the validity of collectively bargained grievance and arbitration procedures as a

general proposition. Rather, the Court of Appeal's holding is based on a well-established limitation on the presumption of arbitrability; i.e., "the improper delegation by a public agency or officer of its discretionary power" in the absence of statutory authorization. *COLA v. Superior Court (EAA), supra*, at 1173.

In another gross exaggeration, EAA claims that the Court of Appeal's decision, "if allowed to stand, creates a sweeping and unacknowledged exception to grievance arbitration clauses any time an employee's grievance 'impacts policy matters' " (PFR, at p. 4) that "could easily be construed so broadly as to eliminate grievance arbitration altogether." (PFR p. 13). This hyperbole wildly overstates the effect of the Court of Appeal's ruling. This decision does not prohibit employees from grieving the usual disputes with their employing department. Rather, it holds that an arbitration procedure cannot be used as a vehicle to overturn a city council's discretionary acts of legislative fiscal policymaking. *COLA v. Superior Court (EAA), supra*, at 1176 ("When considering the claims made in the employee grievances and the relief sought by the Union, it is clear that the Union is seeking to have an arbitrator determine issues of

discretionary policymaking which have been assigned to City Council.").

By glossing over the unique emergency circumstances of this case, EAA's PFR creates an impression that the decision was written in a factual vacuum. Not so. The Court of Appeal's holding expressly recognizes that this case arose in the context of an unprecedented fiscal crisis facing the City. *COLA v. Superior Court (EAA), supra*, at 1175 ("As the decision to impose mandatory furloughs due to a fiscal emergency is an act of the City Council's discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator."). Thus, the Court of Appeal's holding is based on a very narrow set of facts and will not have the "disastrous" or "far reaching consequences" predicted by EAA. (PFR p. 2).

EAA cries that the Court of Appeal's decision will "give an incentive to cities desiring to undo certain provisions of pre-existing and duly-ratified MOUs to enact conflicting legislation or simply disregard their terms." (PFR p. 26). In doing so, EAA entirely ignores the statutory authorization for the City Council's declaration of a fiscal emergency, and its implementation of a new work rule (the

emergency furlough program) as a budget balancing measure. The MMBA itself recognizes that changes in terms and conditions of employment may be justified in the context of an emergency, and makes no exception for terms and conditions embodied in the provisions of an MOU. Gov. Code §3504.5. As this Court recognized in *Professional Engineers, supra,* such emergency provisions provide authority for a public employer to take action without exhausting the meet and confer process, "when the employer possesses the authority from some other source to take a particular action relating to matters within the scope of representation." *Professional Engineers, supra*, 50 Cal.4th at 1032-33 (interpreting an "emergency" exception in a labor relations statutory scheme parallel to the MMBA). As the Court of Appeal's decision recognizes, in this case, the substantive authority for the emergency furlough program emanates from the City Council's salary setting and budget making powers under the City Charter.

VIII. CONCLUSION

Based on the foregoing, Respondent City of Los Angeles, respectfully requests that this Court deny Real Party of Interest and Amicus Unions' Request for Review of the Court of Appeal's decision in *City of Los Angeles v. Superior Court (EAA)* (2011)193 Cal.App.4th 1159.

Dated: May 24, 2011

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
ZNA PORTLOCK HOUSTON, Senior Assistant City Attorney
JANIS LEVART BARQUIST, Deputy City Attorney
JENNIFER MARIA HANDZLIK, Deputy City Attorney

By _____
JANIS LEVART BARQUIST
Deputy City Attorney

and

By _____
JENNIFER MARIA HANDZLIK
Deputy City Attorney

Attorneys for Petitioner City of Los Angeles

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, **Rule 8.204 (c)(1).**, Petitioner hereby certifies that this Answer to Petition for Review has been prepared using Times New Roman typeface, 14 point, and that the word count for all included portions is 8,046 as calculated by the Microsoft Word processing system used to prepare the brief.

DATED: May 24, 2011

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
ZNA PORTLOCK HOUSTON, Senior
Assistant City Attorney
JANIS LEVART BARQUIST,
Deputy City Attorney
JENNIFER MARIA HANDZLIK,
Deputy City Attorney

By _____
JANIS LEVART BARQUIST
Deputy City Attorney

Attorneys for Petitioner City of Los Angeles

PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 800 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On **May 24, 2011**, I served the foregoing document(s) described as **ANSWER TO PETITION FOR REVIEW** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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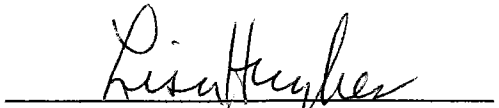
I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 24, 2011**, at Los Angeles, California.



LISA HUGHES

SERVICE LIST

Attorneys for Petitioner & Real Party in Interest ENGINEERS AND ARCHITECTS ASSOC.
Gary M. Messing, Esq. (SBN 075363)
Gregg McLean Adam, Esq. (SBN 203436)
Jonathan Yank, Esq. (SBN 215495)
Gonzalo C. Martinez, Esq. (SBN 231724)
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Adam N. Stern, Esq. (SBN 134090)
Lewis N. Levy, Esq. (SBN 105975)
LEVY, STERN, FORD & WALLACH
3660 Wilshire Blvd., Suite 600
Los Angeles, CA 90010

Attorneys for Amicus Curiae, AFSCME DISTRICT COUNCIL 36, et al.
Ellen Greenstone, Esq. (SBN 66022)
Jonathan Cohen, Esq. (SBN 237965)
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101-3115

Attorneys for Amicus Curiae, LEAGUE OF CALIFORNIA CITIES
David W. Tyra, Esq. (SBN 116218)
Meredith H. Packer, Esq. (SBN 253701)
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4407

Pro Per Respondent
Clerk of the Court
Los Angeles Superior Court
For: Honorable Gregory Alarcon
111 North Hill Street
Los Angeles, CA 90012

Attorney for Respondent, SUPERIOR COURT OF LOS ANGELES
Frederick Bennett
Superior Court of Los Angeles
111 North Hill Street, Room 546
Los Angeles, CA 90012

Clerk
California Court of Appeal
Second District, Division Three
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Attorneys for Amicus Curiae, SEIU, LOCALS 521 and 1021
Vincent A. Harrington, Jr., Esq. (SBN 71119)
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091