No. S192828

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES,

Petitioner,

v.

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

Respondent.

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest

Court of Appeal of the State of California
Second Appellate District, Division 3
Case No. B228732

Appeal from Superior Court of Los Angeles
Honorable Gregory Alarcon
Civil Case No. BS126192

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

This case raises a question central to the right of all California public employees and their unions to enforce arbitration clauses in their collective bargaining agreements in disputes over the interpretation and application of their contract-bound terms and conditions of employment. Specifically:

Whether a charter city may arbitrate disputes over collectively-bargained wage and hour provisions without unlawfully delegating its discretionary budgeting and salary-setting authority to the arbitrator?

I

INTRODUCTION

For over seventy years, this Court has recognized that grievance arbitration clauses in collective bargaining agreements are binding and enforceable. In the public employment context, this Court has further recognized that such agreements, commonly known as "memoranda of understanding" or "MOUs," protect public employees from abrogation of their contractual rights.

Disputes arising from the interpretation or application of MOUs have traditionally been resolved through arbitration, in accordance with parties' agreements and strong California public policy favoring arbitration of labor disputes. The court of appeal's decision in this case upends that settled law and established practice, and, along with it, eradicates that prompt and equitable means of resolving labor disputes.

This case arises from a series of grievances filed by members of the Engineers and Architects Association ("EAA") seeking an arbitrator's determination whether the City of Los Angeles' ("the City") reduction of their contractual wages and hours through imposition of furloughs violated the wage and hour provisions of the parties' MOUs. The Second District Court of Appeal held it was unlawful for the City to agree to arbitrate that issue. In spite of the broad arbitration clause in the MOUs, as well as the fact that the Los Angeles Administrative Code mandates arbitration of

contractual labor disputes, the court reasoned that "any agreement to arbitrate the issue of furloughs would constitute an improper delegation of discretionary policymaking power vested in the City Council." (Slip Op. at pp. 3, 26.) That holding contravenes long-established California law and policy on the enforceability of MOUs and grievance arbitration, and would presumably require public employees to instead file lawsuits in the superior courts to enforce labor agreements.

The court of appeal's decision appears to have been driven by a concern that the MOUs' grievance procedure was not the appropriate mechanism to challenge a *city-wide* policy decision made under city charter powers to ostensibly address a declared fiscal emergency. But, as detailed below, EAA members' grievances sought merely to enforce the wage-and-hour terms of *their* MOUs, not to challenge the City's discretionary power to make policy.

The court was also apparently troubled that the arbitrator's remedy might undo city-wide policy by restoring EAA members' wages and hours to what they were under the MOUs. But the application of the City's furlough policy to other city employees would be unaffected by arbitration of the grievances. And with respect to EAA members, that concern goes to the merits of the parties' underlying dispute and the scope of the MOUs' arbitration clause—both of which are reserved to the

arbitrator. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372-373.)

More fundamentally, the court of appeal ignored this Court's precedents establishing that wage and hour provisions in MOUs are binding and enforceable, as are arbitration clauses therein, and that cities cannot use their charter powers to abrogate the contractual rights of their employees. (*Glendale City Employees' Assn., Inc. v. City of Glendale ("Glendale")* (1975) 15 Cal.3d 328; *Taylor v. Crane* (1979) 24 Cal.3d 442.) Grievance arbitration gives effect to collective bargaining agreements, and public employees are entitled to enforce their MOUs through that bargained-for—and in this case mandatory—process. This means that, for grievance arbitration and collective bargaining agreements to have any meaning, an arbitrator must have the power to enforce contractual wage and hour agreements negotiated with and ultimately ratified by city governments. An arbitrator's enforcement of those agreements does not "unlawfully delegate" municipal authority, but instead restores the wages and hours the City negotiated and then bound itself to by ratifying the MOUs.

The court of appeal shoehorned its concerns into an ill-considered unlawful delegation theory that has no application here. First, cities are authorized to arbitrate labor disputes, and the City's Administrative Code requires it. Second, the City already exercised the discretion the court wrongly found was being delegated: it ratified the

MOUs (which set employees' wages and hours) and it enacted the furloughs ordinance (which reduced them). The question presented by the grievances is whether the second act conflicts with the first and, if so, what the proper remedy would be.

The court of appeal found an unlawful delegation because it conflated "grievance arbitration" with "interest arbitration." But these two dispute resolution methods are distinct: in *grievance arbitration*, the arbitrator performs the quasi-judicial function of interpreting and enforcing the terms of the parties' existing contract; in *interest arbitration*, the arbitrator performs a legislative function by deciding what contractual terms will govern the parties' future relations and conduct, traditionally after bargaining impasse. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 341-342.) Arbitration of EAA members' grievances triggers only the quasi-judicial function of determining whether the City's furloughs ordinance violated the MOUs. Any remedy would not bind the parties to *new terms*; rather, it would merely enforce the old ones the City already agreed to and ratified.

The City justified its refusal to honor the arbitration clause by pointing to its assertedly-reserved powers and declaration of fiscal emergency. But that ignores an express charter limitation prohibiting

unilateral reduction of salaries set by MOU. (See LA City Charter, art. II, section 219.[1]) More importantly, those considerations are only relevant to the merits of the parties' underlying dispute. They are no defense to arbitration itself, and are irrelevant to whether arbitration would result in an unlawful delegation. There is no blanket "fiscal emergency" exception to the enforceability of collective bargaining agreements, and such an exception would be unconstitutional under state and federal law. (See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296.) Even in a declared fiscal emergency, a government employer "is not completely free to consider impairing the obligations of its own contracts on par with other policy alternatives." (See *id.* at p. 308.)

This Court should reverse the court of appeal's decision and remand to allow arbitration of the grievances to proceed. No arbitrator has yet adjudicated the merits of the parties' dispute, let alone directed any remedy. By contrast, affirming the court of appeal's decision would encourage public employers to legislate their way out of MOUs and shield themselves from arbitral review, in contravention of the strong public policy of averting labor strife and favoring resolution of labor disputes through arbitration. It would also create a sweeping exception to the

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[1] Relevant selections from the LA City Charter are attached as Exhibit 1 to EAA's Motion to Take Judicial Notice ("MJN"), filed herewith.

enforceability of MOUs, because a government employer in fiscal straits could subsequently rewrite the parties' agreement and then charge that any remedy enforcing its original terms unlawfully exercised governmental powers. As Justice Tobriner asked in *Glendale*: "Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement?" (15 Cal.3d at p. 336.)

II

FACTS

Petitioner Engineers & Architects Association is the recognized representative for approximately 5000 employees working for the City of Los Angeles in numerous bargaining units. (AA 1:2.) At all relevant times, the wages, hours, and terms and conditions of employment of these employees were governed by four MOUs negotiated between EAA and the City. (See Slip Op. at p. 3; AA 1:86 – 2:338.) In accordance with the Meyers-Milias-Brown Act (Government Code section 3500, *et seq.*) ("MMBA") and Los Angeles Administrative Code section 4.870, subd. (c)(1),[2] the City Council exercised its discretion and ratified all four MOUs.

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[2] The Los Angeles Administrative Code contains the Employee Relations Ordinance, §§ 4.800-4.890 ("ERO"). (See MJN, Ex. 2.) Section 4.870, subd. (c) provides: "Memorandums [sic] of understanding on matters

(See AA 1:86 – 2:338.) Each of the MOUs contains substantive provisions setting forth a standard 40-hour workweek (Article 5.1) and salary schedules based on the 40-hour work week (Article 6.1). (See, e.g., AA 1:112-114.)[3]

A. In Accordance With the Los Angeles Administrative Code, the Parties' Agreements Mandate Arbitration of "Any Dispute Concerning the Interpretation or Application" of an MOU

The MOUs ratified by the City Council contain grievance and arbitration procedures designed to resolve disputes arising from the interpretation or application of the MOUs. The arbitration clause, set forth in Section I of Article 3.1 of the MOUs, provides:

> A grievance is defined as ***any dispute*** concerning ***the interpretation or application of this written MOU*** or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU.

(See, e.g., AA 1:103 [emphases added]; Slip Op. at p. 6.) The MOUs expressly preclude interest arbitration in the grievance process (see *id.* ["An impasse in meeting and conferring upon the terms of a proposed MOU is

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concerning which the City Council is the determining body shall become effective when approved by the City Council."

[3] The contractual provisions at issue are the same in all four MOUs. (Slip Op. at p. 1, fn. 1.) Article 5.1 provides, in relevant part, "Employees shall be compensated for 40 hours per week at the regular hourly rate for their class and pay grade." (See, e.g., AA 1:113.) Article 6.1 incorporates salary ranges contained in the appendices. (See, e.g., AA 1:114.)

not a grievance"]), and prohibit an arbitrator from augmenting or otherwise modifying the MOUs in any manner. (See, e.g., AA 1:107 ["The decision of an arbitrator resulting from any arbitration of grievances hereunder *shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU*"], italics added.)

This broad arbitration clause is modeled after the Los Angeles Employee Relations Ordinance ("ERO"), as set forth in the Los Angeles Administrative Code. (See ERO Sections 4.801 and 4.865, subd. (a).) In fact, the City's ERO section 4.865 mandates that any MOU with the City must include a grievance procedure that culminates in arbitration. (See *id.* ["Such grievance procedure shall apply to all grievances . . . [and] shall provide for arbitration of all grievances not resolved in the grievance procedure . . . ."].) Like the MOUs, ERO section 4.801 defines a "grievance" as "[a]ny dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions."

B. The City Reduced the Contractual Wages and Work Hours of EAA Members by Enacting a Furloughs Ordinance

On May 18, 2009, the City Council declared a fiscal emergency and adopted an emergency resolution and ordinance proposed by the Mayor, which included mandatory furloughs for virtually all civilian City employees. (Slip Op. at pp. 3-4; 8:1795.) Specifically, the resolution and

ordinance permitted the Mayor to adopt a mandatory furlough of City employees for up to 26 days per year. (*Id.*) Most City departments were to be closed on the second and fourth Friday of each month, with two additional furlough days to be determined later. (See City's Petition for Writ of Mandate, filed with the court of appeal ("PWM") ¶ 14; AA 8:1771.)

After the City imposed the furloughs, the City met and conferred with EAA twice, but only regarding the impact of the City's furloughs plan, not the decision to furlough employees.[4] (Slip Op. at p. 5.)

The City began furloughing EAA's members in July 2009. (AA 1:3; PWM ¶ 27.)

C. EAA Members Filed Individual Grievances Asserting that Furloughs Violated the Wage and Hour Provisions of Their MOUs, All of Which the City Denied and Refused to Arbitrate

The City's furlough of EAA members arguably contravened the express wage and hour provisions of the parties' MOUs. The MOUs provide for 40-hour workweeks in Article 5.1, and the salary schedules

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[4] The City had engaged in separate negotiations with a coalition of city unions representing other City's employees. The City negotiated the decision to impose furloughs with those unions and those negotiations resulted in an agreement to stay the furloughs as to those employees. The City did not offer the same terms of the coalition agreement to EAA; instead it offered only to hold furloughs in abeyance if the union gave up a contractual cost of living adjustment. (See PWM ¶¶ 20, 24-25.)

referenced in Article 6.1 are based on 2080-hour work years—52 weeks of 40 hours. (See, e.g., AA 1:112-114.) Based on the plain language of the MOUs, EAA members' full-time employment was 40 hours per week. Yet, under the City's furlough plan, their workweeks and pay decreased. Instead of being paid for 80 hours per bi-weekly pay period, EAA members' work hours and pay were reduced to 72 hours per pay period. (AA 9:1919; Slip Op. at p. 5.) Annualized, the furloughs resulted in a pay reduction of approximately 10%. (*Id.*)

After the furloughs were implemented, about 400 EAA members filed grievances[5] on the grounds that the City's furlough program violated their contractual salary under Article 6.1 and 40-hour workweek in Article 5.1.[6] (AA 2:340 – 7:1648; Slip Op. at pp. 5-6.) The City denied the

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[5] EAA previously agreed that if this Court allows arbitration to proceed, it would consolidate the grievances. (Petition for Review at pp. 17-18.)

[6] EAA also filed an Unfair Employee Relations Practice ("UERP") Charge on June 15, 2009 with the City's Employment Relations Board ("ERB") contesting the unilateral implementation of furloughs. (Slip Op. at p. 5.) On April 25, 2011, the ERB found the City's refusal to bargain the decision to impose furloughs violated the ERO, and it ordered that the City "shall cease and desist from refusing to meet and confer" with EAA "over the decision to impose furloughs." (MJN, Ex. 3.) As relevant here, that determination established that furloughs are within the scope of bargaining, i.e., that they are *not* a management prerogative.

Separately, and to preserve the status quo, EAA filed an application for a temporary restraining order with the superior court on July 9, 2009. (PWM ¶ 28 [L.A. Superior Court Case No. BC417398].) The application was denied and EAA subsequently abandoned its appeal from that denial and dismissed the action. (AA 9:1888-1893.)

grievances at each level of review and refused to arbitrate them "on the basis that the furloughs were implemented in accordance with City Council action and were therefore not grievable." (Slip Op. at p. 5.)

III

THE TRIAL COURT ENFORCED THE ARBITRATION CLAUSE, BUT THE SECOND DISTRICT COURT OF APPEAL REVERSED, OPINING THAT ARBITRATION WOULD "UNLAWFULLY DELEGATE" CITY POLICYMAKING AUTHORITY

EAA filed the underlying action to enforce the arbitration clause and sought an order compelling arbitration of the grievances in accordance with the parties' agreement. (Slip Op. at p. 6.) In its opposition, the City primarily argued that "furloughs implemented pursuant to a declaration of emergency are not grievable" and that it had "the absolute management right to furlough employees" under the MOUs' management rights clause contained in Article 1.9.[7] (Slip Op. at pp. 6-7.) EAA responded that the

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[7] Article 1.9, which is modeled after ERO 4.859, provides:

> As the responsibility for the management of the City and direction of its work force is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, the right to ... relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons ... take all necessary actions to maintain

parties' arbitration clause encompassed this dispute and, further, that consideration of the City's defenses to arbitration would impermissibly involve an analysis of the underlying merits of the grievances. (AA 9:1933, 1937-1938; Slip Op. at p. 8.)

On September 16, 2010, the trial court issued an order compelling arbitration, agreeing with EAA that the underlying grievances were fully within the scope of the "broad definition of a grievance" under the MOUs and were thus arbitrable. (Slip Op. at p. 8; AA 9:1957-67.) It correctly declined to address the City's defenses because they went to the merits of the grievances. (*Id.*)

Almost two months later, the City filed a Petition for Writ of Mandate in the Second District Court of Appeal, arguing for the first time that the MOUs could not require arbitration of what it characterized as the City's non-delegable powers. On March 25, 2011, the court of appeal granted the petition in a published decision, effectively reversing the trial court's arbitration order. (See Slip Op. at pp. 3, 8.)

> uninterrupted service to the community and carry out its mission in emergencies; provided, however, 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.

(Slip Op. at p. 7; e.g., AA 1:93.)

Preliminarily, the court determined the issue of arbitrability was one for the courts because the MOUs "did not clearly and unmistakably assign the issue to the arbitrator." (Slip Op. at pp. 9-10.) The court framed the issue presented by the parties as whether Articles 1.9 (the management rights clause) and 3.1 (the arbitration clause) of the MOUs permitted arbitration of the City's decision to furlough employees, but it found the MOUs "ambiguous" on this point. (*Id.* at pp. 9-10, 13-17.) The court noted that, although ordinarily it would remand to the trial court for consideration of extrinsic evidence, "it is unnecessary to do so as we will conclude that even *if* the MOU provided that the decision to furlough employees in a fiscal emergency was subject to arbitration, such a provision would be an improper delegation of the City Council's discretionary power."[8] (*Id.* at pp. 18-19 [italics original].)

In its discussion, the court outlined "three different types of improper delegations," but found that "only one type . . . is at issue in this case." (Slip Op. at p. 19.) First, it examined state delegations of municipal power to private individuals under Article XI, Section 11 of the California Constitution, but found that was inapplicable because that section did not

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[8] The court thus assumed, without deciding, that "in the MOUs, which the City Council approved, the City Council had agreed that its decision to furlough employees due to a lack of funds would be subject to review by an arbitrator." (*Id.* at p. 19.)

deal with "a City's delegation of its own power." (*Id.* at p. 20.) The "second type of improper delegation is when a legislative body improperly delegates its own lawmaking power to another actor, such as . . . an arbitrator," but with scant explanation the court decided that, "[w]hile we are concerned with the legislative power of the City Council . . . to pass the ordinance authorizing furloughs, this is not the type of improper delegation that is properly applicable to this case." (*Id.* at pp. 20-21.)

Instead, the court addressed what it characterized as the "third type of unlawful delegation": "improper delegation by a public agency or officer of its *discretionary* power. As a general rule, powers conferred upon public agencies and officers which involve the exercise of . . . discretion are in the nature of public trusts and cannot be . . . delegated . . . in the absence of statutory authorization." (*Id.* at p. 21, italics original, internal citation omitted.)

According to the court of appeal, the City could not lawfully agree to arbitration in this case because the City's "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" under the Los Angeles City Charter, and "the City Council cannot delegate this authority to an arbitrator." (*Id.* at pp. 22-23 [citing L.A. Charter, §§ 219, 310-315].) In support, it relied principally on *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, a case the

court characterized as involving a city's "surrender, via the MOU, [of its charter] powers and duties to prescribe rules and regulations over the fire department to an arbitrator." (See Slip Op. at pp. 21-22.)

The court of appeal dismissed the distinction between "grievance arbitration" and "interest arbitration" raised by EAA because it was purportedly "an elevation of terms over substance":

> 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.

(*Id.* at p. 24.) In passing, the court cited but misapplied this Court's decision in *Taylor*, which expressly held that grievance arbitration ***is not*** an unlawful delegation of a charter city's authority. (Slip Op. at p. 25.)

The court then discussed the relief sought in the employees' grievances (and the number of grievances) and concluded that "it is clear that the Union is seeking to have an arbitrator determine issues of discretionary policy-making which have been assigned to the City Council" because "[t]he Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs . . . ."

(*Id.* at p. 25 [italics original].)[9] Hence, the court reasoned, even if the City had agreed to arbitral review of its decision to furlough employees, "such a decision . . . would have been an improper delegation of its salary setting and budget making powers." (*Id.* at p. 25-26.)

This Court granted EAA's Petition for Review. Its review is *de novo.* (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.)

IV

PUBLIC EMPLOYEES ARE ENTITLED TO ENFORCE COLLECTIVE BARGAINING AGREEMENTS THROUGH GRIEVANCE ARBITRATION CLAUSES RATIFIED BY THEIR EMPLOYERS

The principles this Court established in *Glendale* and *Taylor* answer the core questions raised here. First, a collective bargaining agreement between a public employer and its employees is binding and enforceable once ratified by the employer's governing body. (*Glendale, supra,* 15 Cal.3d at p. 344.) Second, a charter city has authority to enter into a binding grievance arbitration clause, so long as not expressly prohibited by its charter. (*Taylor, supra,* 24 Cal.3d at p. 451.) Third, grievance arbitration is not an unlawful delegation of municipal authority when the city has exercised its discretion in the first instance—i.e., by

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[9] In the court's view, grievance arbitration was limited solely to addressing personnel matters. (Slip Op. at pp. 25-26, esp. fn.19.)

agreeing to particular terms in an MOU and then subsequently by acting through its charter powers—when the arbitrator is merely called upon to determine whether that subsequent action violated the parties' pre-existing MOU. (*Id.* at pp. 451-453.) The principles of *Glendale* and *Taylor* are steeped in the Court's jurisprudence on grievance arbitration and collective bargaining and should be re-affirmed.

By contrast, the court of appeal was unduly concerned that the City's agreement to arbitrate impeded the City's exercise of charter powers, and ultimately found those charter powers trumped the MOUs.[10] As explained below, legislating under the color of charter authority does not absolve the City of its contractual obligations, including arbitration of grievances. Under this Court's precedents, because the MOUs were ratified by the City's governing body pursuant to the MMBA—a statewide statutory framework for collective bargaining—the City may not abrogate those agreements through subsequent acts, even where it purports to do so pursuant to its charter powers.

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[10] In fact, the court unwittingly adopted the reasoning of the *Taylor* dissent—i.e., that charter provisions or ordinances reserving ultimate city authority over particular municipal affairs trump collective bargaining agreements entered into pursuant to state law where the city contractually agreed to different procedures. (See *Taylor, supra*, 24 Cal.3d at pp. 454-457 [Richardson, J. concurring and dissenting].)

A. Grievance Arbitration is a Central Component of Collective Bargaining Agreements and Preserving Harmonious Labor Relations

In *Levy v. Sup. Ct.* (1940) 15 Cal.2d 692, this Court affirmed, for the first time, the enforceability of grievance arbitration clauses in labor agreements. Subsequent cases have confirmed that grievance arbitration is an integral part of the collective bargaining scheme because "a collective bargaining agreement is not an ordinary contract" governed by the common law concepts that control private contracts. (*John Wiley & Sons v. Linvingston* (1964) 376 U.S. 543, 550; *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 177-178; *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 492.) Instead,

> it is *more* than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.... A collective bargaining agreement is an effort to erect a system of industrial self-government.... *The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.* Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. ***The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.***

(*O'Malley, supra,* 59 Cal.2d at p. 490 [emphasis added], quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578-

581; *Posner, supra,* 56 Cal.2d at p. 184 [adopting reasoning of *Steelworkers Trilogy* cases[11] for disputes under California law].) In essence, "[t]he resulting contract is essentially an instrument of [self-]government, not merely an instrument of exchange. It is largely for these reasons that collective-bargaining agreements provide their own administrative or judicial machinery—the ascending steps of the grievance procedure culminating in final and binding arbitration." (*Posner, supra*, 56 Cal.2d at p. 177 [quoting Cox, *Reflections Upon Labor Arbitration* (1952) 72 HARV. L.REV. 1492, 1489, internal quotations and ellipses omitted].)

As such, grievance arbitration performs a unique role distinct from ordinary commercial arbitration. "[A]rbitration agreements in labor contracts are primarily designed to prevent strikes and other expressions of unrest by a prompt and equitable settlement of labor disputes, and not merely, as in the case with other arbitration agreements, to avoid the formalities, the delay, the expense, and vexation of ordinary litigation." (*Posner, supra,* 56 Cal.2d at p. 176 [internal quotation marks and citation omitted]; *Levy, supra,* 15 Cal.2d at p. 705 [grievance arbitration "has been one of the most potent factors in establishing and maintaining peace and protection in industry"].) The "unique characteristics of a collective

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[11] See *United Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564; *Warrior & Gulf Navigation, supra,* 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593.

bargaining agreement" include "the number of people affected and the complexity of their interests; the wide range of conduct and enormous variety of problems covered." (*Posner, supra,* 56 Cal.2d at p. 177 [citing Cox, 72 HARV. L.REV. at p. 1489].)

For this reason, grievance arbitration clauses are typically broadly worded—as is the clause in the parties' MOUs (AA 1:103), as mandated by the Los Angeles ERO—and courts respect that broad scope: "The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the *interpretation or application* of a collective bargaining agreement." (*Posner, supra,* 56 Cal.2d at p. 184, fn. 4 [quoting Cox, *Current Problems in the Law of Grievance* (1958) 30 ROCKY MT. L.REV. 247, 261, italics added]; *id.* at p. 182 [because the parties "did not limit the grievance procedure steps to the 'usual employee complaints,' it must be concluded that it was the intention of the parties that arbitration should provide a complete system of industrial self-government"]; *O'Malley, supra,* 59 Cal.2d at p. 492.)

Grievance arbitration has thus traditionally been understood as a "safety valve for troublesome complaints" and complainants, and a pivotal mechanism to maintain peaceful labor-management relations. (See *ibid.*) Thus it is no surprise that "public sector collective bargaining agreements . . . have commonly adopted the system of grievance arbitration developed in private sector public relations." (*Collective Bargaining in the Public*

Sector (1984) 97 HARV. L.REV. 1676, 1719-1720; Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration* (1980) 58 TEX. L.REV. 329 ["Grievance procedures, culminating in binding grievance arbitration, are the means most commonly used to resolve disputes over the interpretation and application of contractual provisions in collective [bargaining] agreements"].) After they recognized collective bargaining rights, many states allowed grievance arbitration of public employee disputes,[12] as does the federal government.[13]

Certainly, grievance arbitration is favored, not only because it fulfills the collective bargaining agreement and has salutary effects on labor relations, but also because it "quickly and inexpensively resolves employment controversies and eases the burdens on the judiciary." (*United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1583.) These public policies favoring arbitration of labor disputes

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[12] See Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law* (1985) 71 VA. L.REV. 1305, 1364 [many states with collective bargaining "grant public bodies authority to contract for binding 'grievance' arbitration of disputes over the meaning of existing collective bargaining agreements"]; *Collective Bargaining in the Public Sector*, 97 HARV. L.REV. at p. 1720 (1984) ["the traditional hostility toward grievance arbitration in the public sector has dissipated as collective bargaining in public employment has burgeoned"].)

[13] See Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101, 7121(b)(1)(C)(iii).

are especially compelling when our courts face unprecedented demands on their resources.

This fundamental background has informed our courts' decisions since the advent of public sector collective bargaining in California. (*Glendale, supra,* 15 Cal.3d at p. 340, fn. 17 ["Courts have frequently drawn upon precedents involving private labor-management relations to aid in determining the rights of public employees and employee organizations"]; see also *United Transport Union v. So. Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 813-816; but see *SEIU v. County of Napa* (1980) 99 Cal.App.3d 946 [ignoring *Posner's* acceptance of reasoning in U.S. Supreme Court's *Steelworkers Trilogy*].)

B. Because the MMBA Regulates Municipal Public Sector Collective Bargaining, Cities Cannot Use Their Charter Powers to Abrogate Employees' Collective Bargaining Rights

In 1968, the Legislature enacted the MMBA, which applies, *inter alia*, to charter cities and labor associations representing their employees. A primary purpose of the MMBA is to provide a statewide framework for "resolving disputes regarding wages, hours, and other terms and conditions of employment." (Gov. Code § 3500.) The MMBA replaced the George Brown Act, which only required public employers to "listen to and discuss the demands of the unions," but did not require the parties to endeavor to reach a binding agreement. (See *Glendale, supra,* 15

Cal.3d at p. 335.) By contrast, the MMBA expressly requires municipal employers to bargain in good faith with unions representing their employees over "wages, hours, and other terms and conditions of employment" (Gov. Code § 3505), "with the *objective* of reaching [an] agreement," which, "once approved by the [governing body], will be binding." (*Glendale, supra,* 15 Cal.3d at p. 335-336 [citing Gov. Code sections 3500, 3505.1, italics in original, internal quotation marks omitted].)

Even though the MMBA applies to charter cities, this Court has found that such cities retain authority over matters of exclusively-municipal concern, commonly known as "home rule" rights. (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539; Cal. Const., art. XI, § 5.) A city charter is "the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and *to preemptive state law*." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171, italics added.)

Accordingly, while the "salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws" (*Sonoma County Organization of Public Employees, supra,* 23 Cal.3d at p. 317.), when those salaries are set according to the MMBA's framework, they are enforceable against subsequent municipal attempts to reduce them because "the [collective bargaining] process by which salaries are fixed is

obviously a matter of statewide concern." (*People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* ("*City of Seal Beach*") (1984) 36 Cal.3d 591, 600, fn. 11.) Although "charter provisions, ordinances and regulations . . . inconsistent with the provisions of [state labor law] . . . must give way," the goal of state "legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control . . . but to create uniform fair labor practices throughout the state." (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 290-291, 294-295.)

Thus, "in an unbroken series of public employee cases," this Court has held that collective bargaining rights and agreements under the MMBA "prevail[] over local enactments of a chartered city, even in regard to matters which would otherwise be strictly municipal affairs." (*City of Seal Beach, supra,* 36 Cal.3d at p. 600.) In *Glendale*, this Court affirmed that an MOU with wage and hour provisions "is indeed binding upon the parties" and enforceable notwithstanding a subsequent city ordinance purporting to reduce employees' contracted-for salaries. (15 Cal.3d at p. 332.) Later decisions buttressed the *Glendale* rule. *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 65-66, held that the MMBA's requirement that employers meet and confer with employees applied to the City, even though its own charter only required the City to hold a public hearing before implementing layoffs. *City of Seal*

Beach itself held that a city's authority to propose charter amendments modifying existing terms and conditions of employment was subject to the MMBA. (36 Cal.3d at pp. 598-601.) In *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202, this Court held that a city resolution authorizing revocation of union recognition "impermissibl[y]" interfered with the MMBA, finding that "[t]he scope of local government . . . power . . . is limited by the policies and purposes of the MMBA . . . . The power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are consistent with and effectuate the declared purposes of the statute as a whole." (internal citation and quotations omitted.)

And in *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, this Court held that even the people's referendum power could not undo a ratified MOU. (*Id.* at p. 782 ["If the bargaining process and ultimate ratification of the fruits of [the collective bargaining] procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum"].) The reason for this is because "the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU . . . i.e., the governing body—is the same entity that . . . conduct[s] . . . the negotiations from which the MOU emerges." (*Id.*

[internal citations omitted].) In short, as the product of the MMBA's collective bargaining framework, MOUs cannot be unilaterally changed by cities purporting to exercise charter powers.

C. The Los Angeles City Charter Permits Arbitration of Labor Disputes and the City's ERO Mandates It

The MMBA does not require that charter cities agree to arbitration with their employees,[14] notwithstanding the strong state policy favoring arbitration of labor disputes. Instead, individual charter cities are free to make their own determinations. A "city charter is construed to permit the exercise of all powers not expressly limited by the charter." (*Taylor, supra,* 24 Cal.3d at p. 451.) This is because charters "operate[] not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess." (*Domar Electric, supra,* 9 Cal.4th at p. 170.) Restrictions on a charter city's powers are not to be implied. (*Id.*; *Taylor, supra,* 24 Cal.3d at p. 451.)

In *Taylor*, this Court upheld the City of Berkeley's agreement in an MOU to submit to "final and binding" arbitral review the city manager's imposition of disciplinary action. (*Taylor, supra,* 24 Cal.3d at p. 449, 451-

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[14] See *International Assn. of Fire Fighters v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271 ["the MMBA does not require that an agreement actually result in every instance"].

452.) The arbitration clause was valid, and its application in that manner appropriate, notwithstanding the City's argument that "[disciplinary] discretion is reserved by the charter to the city manager, who may not assign it to another party." (*Id.* at p. 450.) (*Taylor*'s unlawful delegation analysis is discussed at Part V.B, *infra.*)

The *Taylor* court found Berkeley's charter did not expressly prohibit arbitration, and then examined whether arbitration would conflict with other charter provisions. The court found no conflict existed because other charter sections—a broad charter provision giving the city manager "the power and duty to appoint, discipline or remove all subordinate officers and employees of the City" (art. VII, section 28) and another creating a "personnel board" to which employees could appeal disciplinary decisions (former art. IX, section 56)—could be "harmonized with the arbitration agreements." (*Taylor, supra,* 24 Cal.3d at p. 450.) Specifically, section 28 was construed as "vest[ing] in the city manager the *initial discretion*" to discipline and, as to section 56, nothing "in the charter barr[ed] the creation of an alternative form of appeal, such as arbitration." (*Id.* at p. 451, italics added.)

Here, the Los Angeles City Charter does not expressly prohibit grievance arbitration, and its own Employee Relations Ordinance mandates it for disputes over MOU interpretation. The Charter provides that: "The City of Los Angeles shall have all powers possible for a charter City to

have . . . as fully and completely *as though they were specifically enumerated in the Charter, subject only to the limitations contained in the charter.*" (LA City charter, art. I, section 101, italics added.) The Employee Relations Ordinance provides that its "purpose" is "to establish polices and procedures for . . . employer-employee relations in city government . . . and the resolution of disputes regarding wages, hours and other terms and conditions of employment." (ERO section 4.800.) Section 4.865 mandates that any MOU with the City must include a grievance procedure that culminates in arbitration:

> [M]anagement . . . shall meet and confer . . . to develop a grievance procedure for employees . . . to be incorporated into any [MOU] reached by the parties. Such grievance procedure shall apply to all grievances . . . [and] shall provide for arbitration of all grievances not resolved in the grievance procedure . . . .

The arbitration clauses in EAA's MOUs conform to these City ordinances and were separately ratified by the City Council. (AA 1:103; AA 1:86 – 2:338.)

The City Charter also vests in the City general powers to set and administer its annual budget. (LA City Charter, art. III, sections 310-315.) As to the setting of salaries, it provides that the City "Council shall set salaries for all . . . employees . . . . Salaries shall be set by ordinance, *unless otherwise set through collective bargaining agreements approved by the Council . . . .*" (*Id.*, art. II, section 219 [italics added].)

Arbitration of EAA members' grievances would not conflict with the City's charter powers to set employee salaries and budgets. As in *Taylor*, the arbitration clause can be harmonized with these charter powers because the City retained and exercised its authority to act in the first instance. The City exercised its salary-setting charter powers when it ratified the MOUs (and the charter itself arguably then precluded its subsequent reduction by ordinance [see *id.*]). The City then exercised its budgetary charter powers to enact its annual budget, albeit one that purports to limit employee salaries. The City also exercised its powers to enact an emergency declaration and a furloughs ordinance.

The question posed here is whether *arbitration* over whether subsequent discretionary acts violated the pre-existing MOUs will result in an unlawful delegation (including any potential remedy enforcing the MOUs). It does not, as explained below.

V

ARBITRATION OF DISPUTES OVER MOU INTERPRETATION OR APPLICATION CANNOT RESULT IN AN UNLAWFUL DELEGATION BECAUSE THE GRIEVANCE ARBITRATOR DOES NOT EXERCISE ANY MUNICIPAL POWERS

The court of appeal found an unlawful delegation because, in its view, EAA "is seeking to have an arbitrator determine issues of discretionary policy-making which have been assigned to the City Council," particularly "in the absence of statutory authorization" permitting

such a delegation. (Slip Op. at pp. 25, 21.) That formulation is deeply flawed. There is no unlawful delegation where the City's own ERO mandates grievance arbitration, the City has already exercised its power to make fundamental policy decisions, and adequate safeguards exist against arbitrary action by the arbitrator. An arbitrator enforcing the parties' agreement would not fashion new contractual obligations (i.e., interest arbitration); rather, he or she would merely enforce the salary and work-hours provisions of an MOU, which the City Council ratified and which it has no unilateral authority to change.

A. The Prohibition Against "Unlawful Delegation" Is Intended to Prevent Non-Legislative Persons From Exercising the Power to Make Law or Policy

"An unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190, citing *Kugler v. Yocum* (1968) 69 Cal.2d 371, 376-377.) Such a delegation occurs when the public entity has committed a "total abdication of that [legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made . . . ." (*Kugler, supra*, 69 Cal.2d at p. 384; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 634.)

Thus, where the legislative body makes the basic policy decisions and provides sufficient safeguards to prevent arbitrary use of delegated power, there is no unconstitutional delegation. (*Lockyer, supra*, 77 Cal.App.4th at p. 633; *Taylor, supra*, 24 Cal.3d at pp. 452-453; see also *Collective Bargaining in the Public Sector*, 97 HARV. L.REV. at pp. 1719-1720 ["courts in states that permit public sector bargaining have . . . generally departed from the traditional view that grievance arbitration is an unlawful delegation of authority. Recognizing that the arbitrator is authorized to decide only matters arising under the agreement, these courts have found that delegation of such authority does not unduly infringe on government sovereignty *because the state retains ultimate policymaking power*"—italics added].) As outlined in Part VI, *infra*, the City retained and itself exercised the discretionary salary and budget setting powers the court of appeal believed it was delegating.

Even if the arbitration clauses of the MOUs somehow delegated City powers to the arbitrator, that delegation would not be *unlawful* as long as there were safeguards to prevent abuse of that power. (*Kugler, supra,* 69 Cal.2d at p. 381 ["The need is usually not for standards but for safeguards....The most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards"] [internal quotations and citation omitted].) There are at least two such safeguards here.

First, as recognized in *Taylor*, an award exceeding the arbitrator's authority and purporting to exercise municipal authority can be vacated by the courts. (24 Cal.3d at p. 452; Code Civ. Proc. § 1286.2; see also *Dept. of Personnel Administration v. California Correctional Peace Officers Association* (2007) 152 Cal.App.4th 1936, 1200 ("*CCPOA*") ["courts . . . must vacate an arbitrator's award when it violates . . . statutory rights or . . . a well-defined public policy"].)

Second, as detailed in Part II.A, *supra*, the MOUs (and the City's ERO) constrain the arbitration and the remedies available. Specifically, "[t]he decision of an arbitrator resulting from any arbitration of grievances hereunder shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU." (See AA 1:107.) The arbitrator is thus limited to enforcing the parties' agreement, and his or her remedial order would not involve setting salaries or determining the terms and conditions of employment—i.e., exercising the city's legislative functions—because the City already did that when it ratified the MOUs. The arbitrator's remedy *enforcing* the parties' agreement involves no unlawful delegation because it does not *fashion new contractual terms*.

B. The Court of Appeal Found an Unlawful Delegation Because It Incorrectly Applied an "Interest Arbitration" Analysis to this "Grievance Arbitration" Case

The court of appeal did not meaningfully apply the principles

this Court set out in *Taylor* or *Glendale*. Instead it applied a wholly different body of law on "interest arbitration," which caused it to perceive a delegation problem where none exists.

County of Sonoma v. Superior Court (2009) 173 Cal.App.4th 322, 341–342, explained the crucial differences between interest arbitration and grievance arbitration:

> ***Interest arbitration*** concerns the resolution of labor disputes over the formation of a collective bargaining agreement. It differs from the more commonly understood practice of ***grievance arbitration*** because, unlike grievance arbitration, it focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement . . . . Put another way, ***interest arbitration is concerned with the acquisition of future rights, while grievance arbitration involves rights already accrued***, usually under an existing collective bargaining agreement. An interest arbitrator thus does not function as a judicial officer, construing the terms of an existing contract and applying them to a particular set of facts. Instead, ***the interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations***.

(internal quotations and citations omitted, emphasis added.) Although the court of appeal recited these standards (Slip Op. at pp. 24-25), and apparently recognized the arbitrator would not make law (*id.* at p. 20), it nevertheless applied an interest arbitration analysis.[15]

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[15] Of course, what matters here is not the label attached to the arbitration sought—i.e., "grievance" or "interest" arbitration—but rather the substance and scope of what the arbitrator will be called upon to decide. EAA

As that case noted, interest arbitration cases carry the concern that arbitrators, when determining the substantive content of a binding MOU, are improperly engaged in "social planning and fiscal policy" that is the province of government. (*County of Sonoma, supra,* 173 Cal.App.4th at p. 342 [mandatory arbitration statute impermissibly infringed on county's home rule powers and powers to set compensation of county employees].) Thus, "[i]nterest arbitration is problematic from a delegation point of view" (Slip Op. at p. 24) because it involves "the submission to arbitration of a general policymaking power to determine the terms and conditions of employment"—i.e., the contractual provisions to which a city will be bound.[16] (See *Taylor, supra,* 24 Cal.3d at p. 453.) For this reason, among others, this Court has struck down mandatory interest arbitration requirements as to cities and counties. (See, e.g., *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 27 [general law city could not delegate to arbitrator the duty to set compensation after bargaining impasse]; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278

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submits, however, that the terms are valuable shorthand for the concepts they encapsulate.

[16] Moreover, the distinction between grievance and interest arbitration "has considerable significance because a variety of matters, such as the nature of the decision-maker, the right to and nature of a hearing, the standards applied, and the scope of judicial review, vary between quasi-judicial and quasi-legislative acts." (*Hess Collection Winery v. Agricultural Lab. Rel. Bd.* (2006) 140 Cal.App.4th 1584, 1598.)

[Code of Civ. Proc. § 1299 *et seq.* unlawfully delegated compensation of county employees to arbitrator].)[17]

But all this has nothing to do with the case at bar, which involves *grievance* arbitration—a process far *less* intrusive on the City's prerogatives. As this Court explained in *Taylor*: "The power to set the terms and conditions of public employment [through interest arbitration] is *broader and more intrusive* upon the functions of city government than the arbitrator's authority . . . to resolve an individual grievance. *Grievance arbitration does not involve the making of general public policy.* Instead, 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.* [italics added]; *Hess Collection Winery, supra,* 140 Cal.App.4th at p. 1596 ["Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement"].)

Arbitration of EAA members' grievances would not bind the City to new contractual terms. Any remedy would merely restore the salaries the City set when it exercised its discretionary powers to ratify the

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[17] A charter city willing to submit itself to interest arbitration may, however, do so as long as it is authorized by its charter. (See, e.g., *City of San Jose v. International Assn. of Firefighters* (2009) 178 Cal.App.4th 408; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

MOUs, and would not invent new salaries or terms and conditions of employment. That is, in accordance with the parties' agreement, "[t]he decision of an arbitrator resulting from any arbitration of grievances hereunder *shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU.*" (AA 1:107 [italics added]; AA 1:103 [excluding interest arbitration from the grievance process]; see also ERO Section 4.801 [limiting "grievance" to "[a]ny dispute concerning the interpretation or application of a written memorandum of understanding"].)

This is so because the arbitrator is only authorized to interpret existing contractual terms to which the City has already bound itself. (*Taylor, supra,* 24 Cal.3d at p. 453; *County of Sonoma, supra,* 173 Cal.App.4th at p. 342 [only interest arbitration "fashion[s] new contractual obligations"]; *Hess Collection Winery, supra,* 140 Cal.App.4th at p. 1596-1597; *Stockton Metro. Transit Dist. v. Amalgamated Transit Union* (1982) 132 Cal.App.3d 203, 210.) In fact, the court of appeal's own formulation of this case squarely falls within grievance arbitration: "The Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs, and that the furloughs were therefore improper." (See Slip Op. at p. 25, italics original.) In making that assessment, the arbitrator will not indulge in any policymaking or salary setting because the City already did that itself.

The court of appeal's decision appears to have been driven by an unarticulated concern that the *remedy* EAA seeks in grievance arbitration will have the same effect as interest arbitration by directing the City to allocate its resources in a particular way.[18] But the court never explained how enforcement of the already-ratified MOU wage and hour provisions would impose *new* terms and conditions on the City or otherwise constitute an exercise of the City's charter authority over salary setting and budget making. Those provisions are binding and enforceable, and the City was not free to simply breach the MOUs under color of charter authority. (See Part IV.B, *supra*; see also LA City Charter, art. II, section 219.)

The arbitrator here will perform the same function that all grievance arbitrators perform in the public sector context: determine whether government action violates a ratified MOU and, if so, fashion an appropriate remedy enforcing the parties' agreement. (See *Taylor, supra,* 24 Cal.3d. at p. 453; *County of Sonoma, supra,* 173 Cal.App.4th at p. 342 *Hess Collection Winery*, 140 Cal.App.4th at pp. 1596-1597.) This Court should hold that is not an unlawful delegation; it merely enforces the terms the government employer already agreed to in an MOU, terms it negotiated

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[18] The court's holding also reflects a concern that the grievances impermissibly challenge a "management decision protected from arbitration." (See Slip Op. at pp. 16, 25-26.) But the court's assumption that furloughs fell within the MOUs' grievance arbitration provision (*id.* at pp. 18-19) foreclosed it from addressing the merits of the City's defenses. (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 372.)

and ratified, and "which it is capable of making more or less precise." (*Taylor, supra*, 24 Cal.3d at p. 453.)

There is no reason to presume *ex ante* that a grievance arbitrator would enter an unlawful remedial order, but, even if he or she did, it could be vacated. "The mere fact that a requested arbitral proceeding *could* result in the issuance of a particular remedial order that would impermissibly infringe upon the nondelegable authority of the government employer should not preclude arbitration when it is possible that the arbitrator also could direct an alternative appropriate remedy." (Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration* (1980) 58 Tex. L.REV. 329, 335, italics added; see also Hodges, *The Steelworkers Trilogy in the Public Sector* (1990) 66 CHI.-KENT L.REV. 631, 673 ["courts faced with pre-arbitration challenges to arbitrability should order arbitration . . . unless it is unquestionably clear that the arbitrator could enter no award that would be consistent with the law"].)

VI

THERE WAS NO DELEGATION OF MUNICIPAL POWERS HERE BECAUSE THE CITY RETAINED AND EXERCISED ITS SALARY-SETTING AND BUDGETING DISCRETION

A. The City Already Exercised Its Policymaking Powers By Ratifying the MOUs and By Enacting the Furloughs Ordinance

This Court should find that, under the circumstances of this case, arbitration here would not be an unlawful delegation because the City of

Los Angeles already exercised its fundamental policymaking discretion by: (1) deciding to enter into and ratify MOUs containing specific salary and work-hours requirements and a grievance arbitration clause; and (2) subsequently deciding to enact the furloughs ordinance.[19] The first is fully authorized by the MMBA, the Los Angeles City Charter, and its Administrative Code, and it is, thus, binding and enforceable. (See Part IV.A, *supra*; *Glendale, supra,* 15 Cal.3d at pp. 332, 339; *Taylor, supra,* 24 Cal.3d at p. 451; LA City Charter art. 11, § 219; ERO §§ 4.830, 4.840, 4.865.) The second might normally fall within the City's prerogatives, but under *Glendale* and *Taylor,* the permissible effect of the ordinance vis-à-vis the salary and work-hours provisions of the MOUs is properly the subject of arbitral review.

The court of appeal instead relied on *San Francisco Fire Fighters v. City and County of San Francisco, supra,* 68 Cal.App.3d 896,

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[19] Furloughs, unlike layoffs, are *not* a management prerogative. (Cf. *International Assn. of Fire Fighters v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 277.) As this Court recognized in *Professional Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1036: "Because . . . the principal effect of an involuntary unpaid furlough on . . . employees is the reduction in the employees' salaries . . . the [government employer's] authority unilaterally to institute such a furlough properly must be evaluated by considering whether [it] possesses the authority unilaterally to reduce . . . employee salaries or wages as a cost-saving measure." Because salaries fall squarely within the MMBA's mandatory scope of bargaining, it follows that the City had no unilateral authority to impose furloughs.

which has little bearing on the issues presented here. *San Francisco Fire Fighters* involved a dispute over a contract provision that the union argued required interest arbitration over "unresolved issues between the parties relating to employment conditions." (*Id.* at p. 900.) The union argued that an arbitrator should formulate terms not covered by the parties' contract, including the right to strike, disciplinary rules, fitness requirements, and conditions of assignment and transfer. (*Id.* at p. 898.) As characterized by the court of appeal in that matter, the issue was "whether the City ... was legally permitted to delegate to an arbitrator, the 'rules and regulation' making power entrusted to the fire commission by the Charter." (*Id.* at p. 901.) The court held that no such delegation was permitted. (*Id.* at pp. 902-904.)

From the foregoing, the court of appeal here determined that the grievance arbitration provisions in the EAA MOUs were unlawful as applied to the City's decision to furlough employees. According to the court, "[a]s the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's [charter-based] discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator." (Slip Op. at p. 23.)[20]

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[20] The court of appeal was aware of the language in L.A. Charter § 219 limiting the City's charter authority to reduce salaries set by MOU (Slip

San Francisco Fire Fighters was correctly decided on its facts because it involved submission to an arbitrator of "rules and regulation making power" in the first instance. (68 Cal.App.3d at p. 901.) This Court has understood that *San Francisco Fire Fighters* involved an unlawful delegation because it would have required delegation of the city's "*power to make rules*" governing the union's members. (See *Taylor, supra,* 24 Cal.3d at p. 453.)

But here, the Los Angeles City Council has already exercised its discretionary authority by ratifying MOUs that EAA contends mandate full workweeks and, later, by deciding to impose furloughs. (AA 1:86 - 2:338.) The only question left for arbitration is whether that second act conflicted with the first and, if so, what the appropriate remedy should be. ***The City did not delegate to the arbitrator its policymaking authority to decide how much to pay its employees or whether to furlough employees; it already made those decisions itself, but the City was not free to disavow or disregard its original decision ratifying the MOUs.*** (*Taylor, supra,* 24 Cal.3d at p. 451, fn. 9 [no unlawful delegation where city manager "did not delegate that discretion but exercised it himself"]; *Glendale, supra,* 15

Op. at p. 22, fn. 18), but it misunderstood its importance by failing to recognize that enforcement of the MOU salaries delegated no authority to an arbitrator because the City had already exercised its discretion and ratified that agreement with those salary provisions.

Cal.3d at p. 339 [MOUs are binding and enforceable on public employers].) Therefore, arbitration over whether the City's furloughs ordinance violated the parties' MOUs cannot result in an unlawful delegation as understood by this Court's precedents. As this Court noted in *Taylor*, "[t]he agreements at issue here [did] not remove that initial discretion. Instead they subject it to binding review by an impartial arbitrator." (24 Cal.3d at p. 451.) Thus, "[i]n view of the . . . restricted role of arbitration in this case . . . [there is] no unlawful delegation of municipal powers . . . ." (*Id.* at p. 453.)

In fact, the court of appeal in *SEIU v. City of Los Angeles* (1996) 42 Cal.App.4th 1546, relying on *Taylor*, flatly rejected the City's argument that a grievance arbitrator's interpretation of City-enacted legislation constituted an unlawful delegation of municipal authority over employee salaries. As here, the City in that case relied on its charter powers to set employee salaries to argue that arbitration improperly delegated the city council's authority over economic matters. (*Id.* at pp. 1553-1554.) The court found that the City had already "exercised its initial discretion to fix salaries for all employees by enacting [the legislation]. The only task left to the arbitrator is '*to interpret and apply terms which the city council itself has created or agreed to* and which it is capable of making more or less precise.'" (*Id.* at p. 1554 [quoting *Taylor, supra,* 24 Cal.3d at p. 453, internal brackets omitted].) The *SEIU* court ordered arbitration of the grievance. (*Id.* at p. 1555.)

The *number* of grievances also does not transform this case into an interest arbitration case infringing on city policy matters. (See Slip Op. at pp. 25-26 ["Grievance after grievance argued that that the furloughs were improper . . . . This is not a case where a single employee, or class of employees, is questioning a departmental decision to change their schedules or cut their pay"].) If this Court orders arbitration, EAA will agree to consolidate the grievances. More fundamentally, what matters in an unlawful delegation analysis is the *nature* of the purported delegation, not the number of grievants involved. "[U]nless the delegation removes *all* authority from the [government entity] originally directed to exercise that power, courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it." (*Bagley, supra,* 18 Cal.3d at p. 28, Mosk. J., dissent, internal citations omitted.) The overwhelming majority of grievances demonstrate that employees seek to arbitrate whether the furloughs imposed on them violated their MOUs—which they are entitled to do under the MOUs' grievance procedure.[21]

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[21] See e.g., AA 2:340-370, 375-493, 497-499, 503-508, 512-535. To be sure, certain grievance denials attached to EAA's complaint characterized the grievances as challenging the City's authority to violate their MOUs. (E.g., AA 3:591-617.) However, the grievance arbitration process is itself constrained by the terms of the parties' MOUs. Further, the perfunctory grievance denials were all drafted by the City's own management employees and not by the grievants themselves. (See, generally, AA 2:340-7:1648.)

B. The Arbitrator's Remedy Cannot Overturn City Policy

If EAA members are successful at arbitration, the arbitrator will enter a remedial order enforcing the MOUs. That order will not overturn City policy because: (1) the arbitrator need not invalidate the city-wide furloughs ordinance to find for EAA and he or she could merely enter an order mandating that EAA members' work schedules be returned to normal; (2) any remedial order would simply restore the salary provisions which the City already agreed to and ratified in the MOUs; and (3) any order that overstepped would be vacated.

First, EAA has never challenged the City's authority to promulgate a furlough ordinance and to apply it to employees not covered by a conflicting MOU. However, that general authority to legislate does not permit the City to vitiate or abrogate terms of an MOU it negotiated and ratified pursuant to the MMBA. (*Glendale, supra,* 15 Cal.3d. at pp. 332, 339.) Thus, although the City may retain authority to legislate and apply salary reductions to other employees, it may not *give effect* to such reductions when that would contravene a duly-ratified MOU. An arbitrator's order would thus not invalidate the furloughs ordinance citywide, but it may direct that the City not enforce it against EAA members. (Cf. MJN, Ex. 3.)

Second, the arbitrator will not decide what salary EAA members should be paid. The City already decided that when it ratified the MOUs.

Because the City retained and exercised its fundamental policymaking authority over employee salaries when it set them in the MOUs, arbitration would result in no unlawful delegation, let alone one that could overturn city policy. Moreover, the charter *expressly* limits the City's authority to modify those salaries after they were set in the MOU. (LA City Charter, art. II, section 219.) Arbitration merely enforces the parties' agreement.

Third, any arbitration award that purported to overturn city policy, exercise legislative powers, or add new terms to the parties' MOUs would be vacated as exceeding the arbitrator's jurisdiction. (*Taylor, supra,* 24 Cal.3d at p. 452; Code Civ. Proc. § 1286.2; *CCPOA, supra,* 152 Cal.App.4th at p. 1200; AA 1:107 ["The decision of an arbitrator . . . shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU"].)

C. This Court Should Reaffirm That Collective Bargaining Agreements and Grievance Arbitration Clauses Are Enforceable, and Hold That Grievance Arbitration In This Case Will Not Result in an Unlawful Delegation

This Court should reaffirm the principles it established in *Glendale* and in *Taylor* that MOUs ratified by a government employer are binding and enforceable, including arbitration clauses governing disputes arising from the interpretation or application of such contracts. *Glendale* recognized that MOUs are binding, notwithstanding subsequent contrary action by the government employer. *Taylor* established that employees can

enforce MOUs through grievance arbitration and that such arbitration does not unlawfully involve delegation of governmental authority, so long as the arbitration is authorized and the government employer retains the authority in the first instance to exercise its relevant powers. Arbitral review in those circumstances exercises no legislative or policy making powers, and is open to vacatur if it does.

This Court should find that this case is governed by these principles and that, even in times of fiscal emergency, a public employer may be compelled, pursuant to a ratified grievance arbitration clause, to arbitrate whether its unilateral reduction of employee wages and work hours violates a pre-existing and binding MOU. And an order by an arbitrator restoring salaries to their pre-furlough levels cannot be deemed an unlawful delegation because such an order would merely enforce the salaries the city already negotiated and ratified in the MOU.

VII

THE LAW DOES NOT SUPPORT A "FISCAL EMERGENCY" EXCEPTION TO THE ENFORCEABILITY OR ARBITRABILITY OF MOUS

The court of appeal seems to have assumed, and the City will likely argue, that the City has authority to reduce contractual employee salaries "due to a fiscal emergency" (Slip Op. at p. 16, 23), notwithstanding the MOUs. That argument goes to the underlying merits of the dispute between the parties that is properly the subject of arbitration. Regardless,

there is no authority for a blanket "fiscal emergency" exception to collective bargaining agreements, and such an exception would be unconstitutional.

A. The MMBA Has No "Fiscal Emergency" Exception

The City has previously argued that Government Code section 3504.5 and Section 4.850(b) of the Los Angeles Administrative Code (which tracks the statutory language) provide substantive authority for enacting its furloughs ordinance. The City misapplies those laws. Section 3504.5[22] merely *tolls* the MMBA's notice and meet-and-confer requirements and is not a grant of substantive authority to enact legislation contravening existing MOUs.

As this Court explained with reference to Government Code section 3516.5,[23] a directly parallel provision in the Ralph C. Dills Act

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[22] Section 3504.5, subd. (b), 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.

[23] Section 3516.5, in relevant part, provides:

> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated

(Gov. Code § 3512 *et seq.*),[24] "the statute's plain language makes it clear that the provision was not intended to, and does not, constitute a source of *substantive* authority for the [public employer] to take any particular . . . action regarding the terms and conditions of employment." (See *Professional Engineers, supra,* 50 Cal.4th at p. 1032, italics original.) This Court rejected the state employer's argument that the statute itself provided the authority to furlough employees covered by an MOU, even though furloughs were implemented in a fiscal emergency, holding that such a provision "cannot properly be interpreted as providing . . . [the] authority to institute the mandatory unpaid furlough program . . . ." (*Id.* at p. 1033.)

The City has also previously argued that *Glendale* does not apply when an employer has a "legally cognizable reason" to ignore the MOU, such as an inability "to appropriate the funds necessary to comply with the agreement." (Answer to Petition for Review at p. 23, citing *CTA v. Parlier Unif. School Dist.* (1984) 157 Cal.App.3d 174, 184.) *Parlier*, which involved teachers asking the court to declare invalid a portion of

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> representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

[24] The Dills Act governs labor relations between the State of California and labor associations representing its employees.

their MOU that was unlawful *ab initio*, does not so hold; nor does its reasoning support the City's argument.

Moreover, the City's argument ignores the spirit and reasoning of *Glendale*. There, this Court not only affirmed the binding nature of an MOU, but it expressly held that "mandamus lies to enforce [a] memorandum of understanding." (*Glendale, supra,* 15 Cal.3d at p. 343-345 ["the city entered into an understanding which . . . became a valid and binding agreement upon approval by . . . the council. That agreement . . . is definitive, and admits of no discretion."") These legal principles establishing the enforceability of the MOUs' arbitration and wage and work hours provisions contemplate no exception for fiscal emergencies.

B. The City Has No Authority to "De-Fund" MOUs on a Yearly Basis

The City also maintained that the MOUs "did not foreclose further exercise of its legislative discretion in emergency situations" because, "under the City Charter, the City Council retains *ultimate control* over salaries and the expenditure of public funds through the annual budget process." (Answer at pp. 35-36, italics added, citing Slip Op. at p. 22 and *Professional Engineers, supra,* 50 Cal.4th at p. 1036.) The analogy to *Professional Engineers* is invalid because the City's powers over MOU funding are ***more limited*** than those of the state Legislature.

While it is true that the City generally has the authority to set its own budget on an annual basis, unlike the Legislature, it has *no authority* to refuse to "fully fund" MOUs in its annual appropriations. As this Court explained in *Professional Engineers*, Government Code section 3517.7[25] allowed the state Legislature to de-fund the MOUs in that case. "By reducing the appropriation for employee compensation, the Legislature no longer had 'fully funded' the provisions of the MOU's supporting the higher level of pay that previously had been approved, and thus, under sections 3517.6 and 3517.7, the provisions of the applicable MOU's that supported the higher level of pay . . . prior to the implementation of the furloughs no longer were effective." (50 Cal.4th at pp. 1043.) There is no equivalent to Government Code section 3517.7 under the MMBA, City Charter, or Administrative Code.

C. A "Fiscal Emergency" Exception Would Violate The State and Federal Constitutions

A blanket "fiscal emergency" exception is also of dubious constitutional validity. In *Sonoma County Organization of Public Employees, supra*, this Court struck down duly-enacted legislation where it "impair[ed] the obligation of contracts in violation of article 1, section 10,

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[25] Section 3517.7 provides, in relevant part: "If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act."

of the United States Constitution and article I, section 9, of the California Constitution."[26] (23 Cal.3d at p. 302.) That case found that a statute (Gov. Code § 16280) prohibiting payment of contractual cost of living increases due under local public employees' MOUs unconstitutionally impaired their contractual rights, even though it was enacted in response to the fiscal crisis facing California municipalities after the enactment of Proposition 13. (*Id.* at pp. 313-317.)

This Court found that the one-year elimination of contractual cost of living adjustment was "a severe, permanent, and immediate change in [union members'] rights under the contract" that "elevated" the necessary constitutional scrutiny. (*Id., supra,* 23 Cal.3d at p. 309 [internal quotation omitted].) Relying on U.S. Supreme Court precedent, this Court also found that

> complete deference to a legislative assessment of reasonableness and necessity is not required because the government's self-interest is at stake . . . . "[A] State is not completely free to consider impairing the obligations of its own contracts on par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course could serve its purposes equally well."

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[26] U.S. Const., art. I, section 10 provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." Cal. Const., art. I, section 9 provides: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed."

(*Id.* at p. 308 [quoting *U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1, 30-31].) It found that the Legislature's declaration of "fiscal crisis" alone was insufficient. (*Id.* at p. 310 ["Here respondents rely upon the existence of a fiscal crisis as justification for the impairment, but they have not met their burden of establishing that such a crisis existed."].)

Sonoma County Organization of Public Employees established that an emergency declaration alone is not enough for a government employer to unilaterally rewrite or abrogate its own contractual obligations. In the present case, there can be no question the furloughs substantially impaired the contractual rights of EAA members because they purported to eliminate employees' right to full salaries for one year. (See *id., supra,* 23 Cal.3d at pp. 308-309; cf. *Professional Engineers, supra,* 50 Cal.3d. at pp. 1032-1044 [furloughs impair contractual salaries absent legislative ratification]; see also *Massachusetts Community College v. Massachusetts* (1995) 420 Mass. 126, 131-132 ["Opinions dealing with mandatory State furlough[s] . . . although not unanimous on other points, have agreed that a unilateral reduction in contractually established, future State employee salary obligations constitutes a substantial impairment for Contract Clause purposes"], collecting cases.)

Because of the degree of impairment and the fact that "government is attempting to modify governmental financial obligations," the City's decision to impose furloughs is subjected to heightened

constitutional scrutiny. (*Sonoma County Organization of Public Employees, supra,* 23 Cal.3d at p. 310.) Assuming the City can sustain its burden of establishing a fiscal crisis (*id.* at p. 310), it must further demonstrate that furloughs were "a reasonable [and necessary] measure" directed at resolving that crisis (*id.* at p. 312). Los Angeles' bare declaration of fiscal emergency is not enough to justify furloughs violating the MOUs.

Other courts that have considered the reasonableness and necessity of furloughs have found they unconstitutionally impaired public employees' contractual rights because legislative bodies have numerous options to address fiscal emergencies other than violating contracts with their employees. (See, e.g., *Massachusetts Community College, supra,* 420 Mass. at pp. 134-137 ["the furlough program fails the reasonableness test"; collecting cases holding that "legislative attempts to abrogate bargained-for compensation for [government] employees" have been barred under the contracts clause]; *Opinion of the Justices (Furlough)* (1992) 135 N.H. 625, 635-636 ["The legislature has many alternatives available to it, including reducing non-contractual State services and raising taxes and fees. Although neither of these choices may be as politically feasible as the furlough program, the State cannot resort to contract violations to solve its financial problems."].)

Thus, to survive constitutional scrutiny, the City cannot merely declare a "fiscal emergency," but must further demonstrate that furloughs were a *reasonable* and *necessary* response in light of less drastic measures because "impairing the obligations of its own contracts" is not "on par with other policy alternatives." (See *Sonoma County Organization of Public Employees, supra,* 23 Cal.3d at p. 308; *U.S. Trust Co., supra,* 431 U.S. at pp. 30-31; see also *Opinion of the Justices (Furlough), supra,* 135 N.H. at p. 635-636 ["The contract clause, if it is to mean anything, must prohibit the State from dishonoring its existing contractual obligations when other policy alternatives are available," internal quotation and citation omitted].)

Public employers in financial straits cannot lawfully use a "fiscal emergency" declaration to justify unilateral re-writing of existing contractual obligations to their employees. The California Constitution and the U.S. Constitution guarantee those employees' contractual rights, notwithstanding contrary city action.

VIII

THIS COURT SHOULD DIRECT THE COURT OF APPEAL TO DENY THE CITY'S WRIT OF MANDATE AND REMAND TO THE TRIAL COURT TO ENFORCE THE GRIEVANCE ARBITRATION CLAUSE

If this Court holds there is no unlawful delegation, it should direct the court of appeal to deny the City's petition for writ of mandate and to remand the case to the trial court to enforce its order compelling arbitration. Further fact-finding by the trial court regarding the scope of

arbitrability is unnecessary. (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 372 [courts defer to the arbitrator in resolving scope of arbitrability]; see Slip Op. at p. 18 [considering remand].) As the trial court rightly concluded, the City's "management rights" argument opposing arbitration is a substantive defense that requires construction of the MOUs—an issue left to the arbitrator. (*Id.* at p. 372) The arbitrator can make that decision and, more importantly, that is what the parties bargained for.

IX

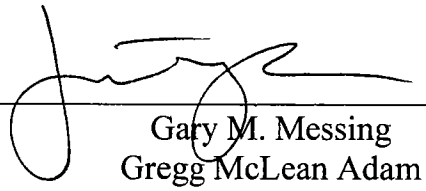
CONCLUSION

For all these reasons, this Court should find that grievance arbitration does not result in an unlawful delegation under the circumstances of this case. It should thus reverse the judgment of the court of appeal and direct it to enter an order denying the City's writ of mandate

and to remand the case back to the trial court for enforcement of the trial court's order compelling arbitration of EAA members' grievances.

Dated: September 26, 2011

CARROLL, BURDICK & McDONOUGH LLP

By 

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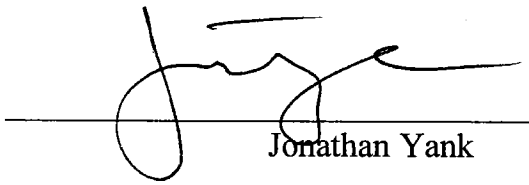
WORD COUNT CERTIFICATION

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the attached brief contains 11,340 words, as determined by the computer program used to prepare the brief.

Dated: September 26, 2011



Jonathan Yank

City of Los Angeles v. Superior Court of Los Angeles (Engineers & Architects Association, Real Party in Interest), California Supreme Court, No. S192828

PROOF OF SERVICE BY UNITED PARCEL SERVICE (UPS) – NEXT DAY

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On September 26, 2011, I served the enclosed:

OPENING BRIEF ON THE MERITS

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 26, 2011, at San Francisco, California.

Carrie Takahata