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,

Respondent,

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 BRIEF ON THE MERITS

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ERB DECISION

MISCELLANEOUS

Question Presented

This case is about the Los Angeles City Council's right to manage its budgetary affairs in an emergency. The question framed by this Court is:

> "Could grievances challenging the imposition of furloughs on employees covered by a ratified Memorandum of Understanding be referred to arbitration in accordance with the agreement, or was arbitration barred as an improper delegation of the city's discretionary salary-setting and budget-making powers?"

The City submits that, to answer this ultimate question, two preliminary questions must be answered:

First, can a public employer be compelled to arbitrate a dispute about emergency budgetary acts deemed necessary by the local governing body to meet a financial crisis, where such matters are (1) not included within the definition of a grievance contained in the governing Memoranda of Understanding (MOUs), (2) exempted from arbitration under the local employee relations ordinance and the management rights provision of the governing MOUs, and (3) are not contemplated by the department-oriented grievance procedure contained with the governing MOUs?

Second, did the Engineers and Architects Association (Association) waive its asserted right to proceed to arbitration by first bringing its claims in two other forums?

I. INTRODUCTION.

This case concerns the scope of an arbitration agreement contained in several ratified MOUs between the City and a recognized employee organization. It also concerns whether the submission to arbitration of a city council's decision to impose mandatory furloughs in a financial emergency constitutes an unlawful delegation of a local city council's discretionary powers.

Association filed multiple proceedings challenging the City Council's emergency furlough decision, including this petition to compel arbitration of over 400 separate grievances. The Court of Appeal remarked that the arbitration agreement contained in the governing MOUs was ambiguous about whether the parties had agreed to arbitrate this particular type of dispute, but it held 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 p. 3).[1]

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[1] Our references to "Slip Op." are to the typed Court of Appeal opinion. Our other record references include "Pet." for the City's petition for a writ of mandate filed in the Court of Appeal; "PFR" for the Association's Petition for Review; "OBOM" for the Association's Opening Brief on the Merits;: "1RJN" for the City's Request for Judicial Notice filed on

If the emergency furlough grievances proceed to arbitration, the City will be forced to arbitrate the propriety of legislative acts and policy choices made by its City Council, matters it never agreed to arbitrate. Additionally, Association will ask the arbitrator to overturn the City Council's fundamental policy choices regarding insolvency and essential public services. Such delegation of the powers of the purse would completely eviscerate the City Council's authority to manage its finances in an emergency.

The Court of Appeal correctly decided this case. In doing so, the Court of Appeal appropriately rejected Association's attempt to narrowly frame the emergency 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.

November 10, 2010; "2RJN" for the City's Second Request for Judicial Notice filed on January 12, 2011; "3RJN" for Association's Motion for Judicial Notice filed on September 26, 2011; "4RJN" for the City's Motion for Judicial Notice filed on December 12, 2011; and, to be consistent with Association's references, we use "AA" to refer to the exhibits submitted to the Court of Appeal with the City's mandate petition.

II. STATEMENT OF THE CASE.

A. History of the dispute.

1. The City diligently attempted, albeit without success, to address the budget crisis with Association and other unions before the City adopted the furlough plan.

In February 2007, Association and the City signed the applicable MOUs. (1AA 87, 147, 212; 2AA 278.)[2]

Starting in 2008, as the economy began to slow and tax receipts diminished, the City Administrative Officer — the City's chief labor negotiator — tried to meet with all City unions to discuss the budget and the decline in revenue. Although some of the City unions agreed to meet to discuss remedies for the budgetary problems, Association refused. (PET 7; 9AA 1902-1904; 3RJN, Ex. 2; and see City of Los Angeles Employee Relations Ordinance, Los Angeles Administrative Code §§ 4.800-4.890 (Ordinance), specifically Ordinance §4.870(e)(1).)

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. (Pet. 7.)

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[2] The relevant terms are the same in all the MOUs. A reference to one MOU includes references to all the MOUs at issue. (Slip Op. at p. 3, fn. 1.)

As of May 12, 2009, the City and the other unions had not agreed on any cost-saving measures. (Pet. 7.) On May 12, 2009, the Mayor wrote to City Council, with a copy to Association and the other unions, asking it to adopt a resolution declaring a state of fiscal emergency (Emergency Resolution), and to adopt an urgency ordinance allowing City management to implement reduced workweeks for civilian employees (Reduced Work Schedule Ordinance). (Pet. 8; 9AA 1905.)

On May 18, the City Council adopted both the Emergency Resolution and the Reduced Work Schedule Ordinance. (Pet. 8-9.) The Emergency Resolution describes with specificity the City's fiscal condition, declaring among other things that:

> [D]ue to developments in the worldwide and national financial markets, and an unprecedented downturn in the national and regional economy, the City of Los Angeles faces an approximate $529 million General Fund deficits for the 2009-10 fiscal year . . . .
>
> [T]he City's on-going revenue sources have plunged by nearly $300 million over the last year [¶] . . . [¶]
>
> [W]ithout effective action, the budget deficit is estimated to grow from $529 million to over $1 billion by the end of fiscal year 2010-11 due to declining

> General Fund revenues and increases to pension and retirement costs [¶] . . . [¶]
>
> [W]ithout effective action to address these budgetary shortfalls in 2009-10, the City will inevitably face a cash flow crisis, raising the prospect that the City will have insufficient cash to meet its obligations . . . .
>
> [I]f the City is unable to borrow cash on a short-term basis for the 2009-10 budget through the issuance of Tax and Revenue Anticipation Notes, the City will run out of cash by the end of August 2009 . . . thus making it likely that the City will miss payroll and other essential service payments [¶] . . . [¶]
>
> [W]ithout imposing the furlough days more than 2,100 additional layoffs would be required to balance the 2009-2010 budget [¶] . . . [¶]
>
> [I]mmediate and comprehensive action to reduce current spending must be taken to ensure that essential services of the City are not jeopardized and public health and safety are preserved[.] (8AA 1752-1754.)

On May 22, after the Emergency Resolution and the Reduced Work Schedule Ordinance were passed, the City Administrative Officer again asked Association and the other unions to meet as soon as possible to discuss the effects of the new work rules. (Pet. 9-10.) While other unions agreed to early meetings, Association declined and was unavailable until June 18. (Pet. 10.) Although Association attended the June 18 meeting, no agreements were reached. (Pet. 11.)

On June 26, the City negotiators suggested that Association agree to a short deferral of the contractual wage increases scheduled for July 1 in order to create an opportunity to negotiate cost-saving alternatives to furloughs. In exchange for the wage increase deferral, the City offered to defer furloughs for Association's members during the negotiating period. The City's offer included full retroactivity of the wage increases if negotiations were unsuccessful. Association rejected the City's offer. (Pet. 11-12.)

2. Beginning in July 2009, furloughs were implemented for many civilian employees, not only those represented by Association.

On July 1, 2009, Association's members received their contractual wage increases. (Pet. 12.) On July 5, the City implemented furloughs for its civilian employees, including Association's members. The mandatory furloughs for employees represented by Association amounted to eight hours per each two week pay period. Under a negotiated cost-saving agreement, employees represented by the Coalition of City Unions were

furloughed 3.5 hours per pay period in fiscal year 2009-2010.[3] (Pet. 11-12.)

B. The Charter and the Ordinance.

The current Los Angeles City Charter (Charter) was enacted by the electorate in 1999. (3RJN, Ex. 1; 4RJN, Ex. 2.) Among other things, the Charter obligates the City Council to enact an annual balanced City budget, subject to the Mayor's veto (Charter §§ 312-315), and requires appropriations in the budget as a prerequisite to the approval of any demand on the City treasury. (3RJN, Ex. 1.) Under section 262 of the Charter, the Controller may not approve any demands in excess of the appropriated amounts. (4RJN, Ex. 2.) The appropriation requirement is reinforced by section 320, which provides "[n]o department, bureau or office of the City government shall make expenditures or incur liabilities in excess of the amount appropriated therefore." Under section 291, the City Council must receive regular reports concerning the City's finances, and section 219

[3] The Coalition of City Unions (Coalition) is a group of City employee unions, other than Association, which have joined together for coalition bargaining with the City. (Pet. 11.) Unlike Association, Coalition agreed to defer their contractual wage increases during the negotiations. Those negotiations ultimately resulted in an agreement with salary concessions and reduced furlough hours. (Pet. 11.)

provides that City Council "shall set salaries for all ...employees" and that "collective bargaining shall be conducted in accordance with procedures established by ordinance." (4RJN, Ex. 2; 1RJN, Ex. 1.)[4]

The Ordinance establishes procedures governing collective bargaining in the City. (3RJN, Ex. 2.) Section 4.859 of the Ordinance is a statutory reservation of certain management rights, as follows:

> *City Management Rights.* Responsibility for management of the City and direction of its work force is vested in City officials and department heads whose powers and duties are specified by law. In order to fulfill this responsibility it is the exclusive right of City management to determine the mission of its constituent departments, offices and boards, set standards of services to be offered to the public and exercise control and discretion over the City organization and operations. It is also the exclusive right of City management to take disciplinary action for proper cause, relieve City employees from duty because of lack of work or other legitimate reasons and determine the methods, means and personnel by which the City's operations are to be conducted and to take any necessary actions to maintain uninterrupted service to the community and carry out its

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[4] Association asserts that section 219 of the Charter expressly prohibits the "unilateral reduction of salaries set by MOU." (OBOM 5-6.) The actual language of section 219 does not support this construction. (3RJN, Ex. 1.) What it does say is that collective bargaining shall be conducted in accordance with procedures adopted by ordinance, and the Ordinance itself contains provisions exempting the City Council's acts from the scope of the negotiated grievance procedures. (3RJN, Ex. 2, Ordinance §§ 4.875, 4.880, 4.801.)

> mission in emergencies; provided, however, that the exercise of these rights does not preclude employees or 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; provided, however, that employees in the representation unit Police Officers, Lieutenant and Below or their representatives may not raise such grievances.

Section 4.875 of the Ordinance says it applies "to all departments, offices and bureaus of the City," and section 4.880 says "the rights, powers and authority of the City Council, in all matters...shall not be modified or restricted by this chapter." Section 4.801 defines a "Grievance" to mean

> Any dispute concerning the interpretation or application of a written memorandum of understanding or of departmental rules and regulations governing personnel practices or working conditions. An impasse in meeting and conferring upon the terms of a proposed memorandum of understanding is not a grievance. (3RJN, Ex. 2.)

C. The governing MOUs do not mandate a 40 hour week.

The MOUs do not mandate the number of hours of employment. They set the hourly wage scale and calculate the wages employees will earn if they work certain hours. No employee is guaranteed 40 hours of work per week, and the MOUs specifically

acknowledge that employees may work part time or scheduled overtime. The MOUs specify the benefits to be provided to employees who work a 72 hour bi-weekly shift — the shift mandated by the furlough ordinance at issue here. (1AA 112-114.) The MOUs include a management rights provision substantially similar to that contained in section 4.859 of the Ordinance. (1AA 93.) Like the Ordinance provision, the contractual reservation of management rights limits the employees' rights to raise grievances regarding the exercise of the City's reserved management rights to the practical consequences such decisions may have on terms and conditions of employment.

D. History of the litigation.

1. Association filed a civil lawsuit for declaratory and injunctive relief.

On July 9, 2009, Association filed an action in Superior Court seeking declaratory and injunctive relief along with an Application for a Temporary Restraining Order; *Engineers and Architects v. City of Los Angeles*, Los Angeles Superior Court Case No. BC417398 (Complaint). The Complaint sought a declaratory judgment that the furloughs violated the wage and hour provisions of the MOUs and an

injunction preventing the City from imposing the mandatory furloughs. The TRO was denied, and Association ultimately dismissed the Complaint. (Pet. 12-13.)

2. The grievances at issue allege the same theory as the civil lawsuit.

Beginning in July 2009, Association's members filed over 400 individual grievances challenging the City Council's discretionary policy decision to impose furloughs in a financial emergency. The City asked Association to consolidate the grievances into one group grievance, but Association refused. (4RJN, Ex.3; Slip Op. at p. 10, fn. 8.) The City denied the grievances on multiple grounds. (Pet. 12.)

On or about April 29, 2010, Association filed the underlying action, County of Los Angeles Superior Court Case no. BS 126192, seeking an order compelling the arbitration of the approximately 408 emergency furlough grievances. (Pet. 13.)

The trial court granted Association's request and the City filed a petition for writ of mandate, challenging the trial court's order compelling arbitration.

3. The City's Employee Relations Board upheld the City's right to unilaterally implement the emergency furloughs prior to completion of the bargaining process.

On June 15, 2009, Association filed an unfair employee relations practice claim (Claim) with the City's Employee Relations Board (Board), alleging that the City Council's decision to impose furloughs in response to a financial emergency violated the City's bargaining obligations under the Ordinance.[5] (Pet. 10-11.) The Claim went to hearing between January and March 2010, resulting in a proposed decision from a Board hearing officer which upheld the City's unilateral implementation of the emergency furloughs. (9AA 1896-1930.)

During the administrative proceeding, Association asserted that the City's June 26, 2009 offer to defer the furloughs was conditioned upon Association's agreement to permanently give up the July 1, 2009 wage increases for employees represented by Association. Association also alleged the City did not offer it the same terms as the City had offered to other unions. The Board's hearing officer

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[5] Under the Meyers-Milias-Brown Act, Government Code sections 3500-3511 (MMBA), the City is authorized to establish its own labor board. (Gov. Code § 3509(d).)

concluded, "There is no evidence that the City ever demanded that the Union completely give up its [wage increases]" in exchange for a deferral of furloughs. (2RJN, Ex.21, at p. 10.) The hearing officer also ruled that the City "did not act in bad faith by refusing to offer the same deal on furloughs that it reached with the Coalition unions. An employer is under no obligation to offer the same deal to all bargaining units." (9AA 1915.)[6]

Following oral argument by the parties, and discussion among the Board Members, the Board remanded the matter to its hearing officer with questions. (3RJN, Ex.3, at p. 1-2.) The hearing officer filed a supplemental report, and the matter was again considered by the Board. At that time, the Board adopted the hearing officer's conclusion that the City's unilateral implementation of furloughs pursuant to the Emergency Resolution was permissible under the Ordinance and the MMBA and was not an unfair employee relations practice. (3RJN, Ex.3. at p. 2.) Regarding Association's conduct, the Board concluded "Claimant's conduct . . . exhibits an absence of the requisite effort to mitigate damages thorough engaging in effects

[6] Association now renews its claims (OBOM 10, fn. 4), but cites no evidence contradicting the Board hearing officer's conclusions.

bargaining." (3RJN, Ex.3, at p. 2.) Association did not attempt to overturn the Board's decision, and it is now final.[7] (See discussion, *infra*, Section VI.)

4. The Court of Appeal's opinion.

On March 11, 2011, 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.

First, the Court of Appeal rejected Association's argument that the arbitrator should determine whether the emergency furlough grievances were subject to arbitration, holding that "[w]ith no clear and unmistakable provision that the arbitrator determines arbitrability, the issue is one for the courts." (Slip Op. at p. 13.)

Second, the Court of Appeal ruled that the governing MOU was ambiguous about whether the emergency furloughs are arbitrable. (*Id.* at pp. 13-19.)

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[7] Association could have appealed the Board's decision by bringing a petition under Code of Civil Procedure §1094.5. (*Los Angeles Police Protective League v. City of Los Angeles* (1985) 166 Cal.App.3d 55, 65; disapproved on other grounds in *Laurel Heights Improv. Assn. v. Regents* (1988) 47 Cal.3d 376, 427.) It did not do so, and the time limits have now passed. Having not sought review, the decision "has become final, and it is not subject to attack by [Association] at this late date." (*Id.)*

Third, the Court of Appeal rejected Association'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 p. 23.)

III. THE LEGISLATIVE STRUCTURE SETS BOUNDARIES FOR GRIEVANCE ARBITRATION.

A review of the legislative backdrop against which the governing MOUs were negotiated and ratified compels the conclusion that discretionary policy decisions of the elected officials fall outside the scope of the parties' arbitration agreement.[8]

A. The Charter is the City's Constitution.

The Charter governs and limits the actions of the City Council in the same fashion that the California Constitution governs and limits the ability of the California Legislature. Just as the Legislature is

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[8] It is a cardinal principle of contract interpretation that the parties are presumed to contract against the backdrop of relevant law. (*Edwards v. Arthur Andersen, LLP* (2008) 44 Cal.4th 937, 954.)

without authority to legislate in derogation of Constitutional limitations (e.g., *California State Personnel Bd. v. California State Employees Association* (2005) 36 Cal.4th 758, and cases cited therein), the Charter sets the outside limitations for actions by the City Council.

In *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-71 (*Domar Electric*) this Court characterized municipal charters as "the supreme law of the City." (See also *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 161.) Other courts have similarly stated that a city's charter is the equivalent of a local constitution, and that a charter is to a city what the state Constitution is to the state. (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017.) Consequently, "a municipality may not amend or repeal its charter by ordinance." (*Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1351-1352; see *Lucchesi v. City of San Jose* (1980) 104 Cal.App.3d 323, 328.) Any act that is violative of, or not in compliance with, the charter is therefore void. (*Domar Electric, supra,* 9 Cal.4th at p. 171.)

Thus, the City may not agree to an MOU which purports to impair the obligations of the City's elected officials under the Charter to take all necessary actions to carry out the City's mission in an emergency. The action would be *ultra vires*, and the agreement *void ab initio*.

B. The Charter obligates the City Council and the Mayor to make public policy decisions.

Under the Charter, as discussed, *supra*, the City Council and the Mayor are obligated to set public policy, evaluate budgetary needs, and to set priorities for limited resources. The Mayor has responsibility for submitting to City Council a proposed balanced budget for the upcoming fiscal year, which includes appropriations for salaries and other personnel payroll expenditures. The City Council then has the obligation to enact an annual City budget, subject to the Mayor's veto. (3RJN, Ex.1, Charter §§ 312-315.)

As this Court has long recognized, the adoption of a budget is a discretionary legislative function involving interdependent political, social and economic judgments. (*Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 302.)

A budgetary appropriation is a prerequisite to payment of any demand on the City treasury as the City Controller has no authority under Charter section 262 to approve demands in excess of the amounts appropriated. (4RJN, Ex. 2.) The annual appropriation requirement is "a measure of fiscal control designed principally to protect the city and its taxpayers from incurrence of liabilities in excess of specifically appropriated and encumbered funds in the treasury." (*Flora Crane Service v. Ross* (1964) 61 Cal.2d 199, 209-210.) Section 320 of the Charter prohibits departments from incurring liabilities in excess of the appropriated amounts. (4RJN, Ex. 2.) In construing similar, but less express language pertaining to Counties, the Attorney General stated that the language "was intended to restrict officers to their appropriations." (15 Cal.Ops.Atty.Gen. 259, 263 (1950).)

Courts have affirmed the principle that governments may limit their liabilities to the amounts appropriated, and that contracts purporting to require expenditures in excess of those amounts may not be enforced. (*Sutton v. United States* (1921) 256 U.S. 575.) In *McCafferty v. Board Supervisors* (1969) 3 Cal.App.3d 190, the court

reiterated that a municipality may not make expenditures or incur liabilities exceeding the amounts appropriated in the annual budget, relying upon Government Code sections 29120-29122 which are substantially similar to Charter sections 320 and 262. (*Id.* at p. 193.)

C. The Charter's annual appropriation requirement is implied by law in the relationship between the City and Association.

Through the annual budget process, the City's elected officials retain ultimate control over the appropriation for salaries required by the governing MOUs. Therefore, monies available for salaries are dependent upon a duly enacted appropriation. (4RJN, Ex. 2, see Charter §§ 262(a)(4), 320.) This appropriation requirement necessarily comprises an element of the relationship between the unions and the City. (*See also White v. Davis* (2003) 30 Cal.4th 528, 571 (*White*) ("employment rights of state employees reasonably must be viewed as including a condition that actual payment of an employee's salary is dependent upon the existence of an available appropriation").)

In its dealings with the City, Association is charged with the knowledge that the City Council must approve appropriations to fund the salary provisions of the MOUs on an annual basis. (*Katsura v.*

City of San Buenaventura (2007) 155 Cal.App.4th 104, 109; *Sutton v. United States, supra,* 256 U.S. at p. 579 ("Those dealing with [a public agency] must be held to have had notice of the limitations upon [its] authority.").) In view of the Charter's balanced budget and annual appropriation requirements, the City Council's initial approval of the MOUs or its appropriation of funds in prior annual budgets cannot be construed "as a continuing appropriation authorizing the Controller to pay salaries set forth in [the MOUs] in a new fiscal year without [the] enactment of an applicable appropriation in that year's budget act." (*White, supra*, 30 Cal.4th at p. 573 (upholding annual appropriation requirement).)

The City Council implemented the furlough program as a method of reducing City expenditures for the 2009-2010 Fiscal Year. (8AA 1744-1754.) The adopted City budget reduced the appropriation for City employee compensation to more accurately reflect the City's tax receipts. The MOU hourly wage rates remained in effect, but employees' total hours were reduced. As a result of the Council's actions, the City Controller was prohibited under Charter section 262 from approving payrolls in excess of the salary

expenditure appropriations. (*Domar Electric, supra,* 9 Cal.4th at p. 171.)

D. The City's police powers cannot be limited by MOU.

Association's assertion that the City is entitled to exercise its discretion only once, by approving the governing MOUs in 2007, (OBOM 30, 42; PFR 23-24), is inconsistent with the broad public policy preserving cities' police powers from encroachment by contract. California courts have ruled that the California Constitution gives to cities broad police powers to promote the public welfare. In *Richeson v. Helal* (2007) 158 Cal.App.4th 268 (*Richeson*), a case concerning zoning rights, the court reviewed a claim that a city had contractually restricted its ability to make future zoning changes. (*Id.* at p. 277.) The court found that such a restriction was contrary to the city's police power, and its sovereign right to protect the general welfare of the people under the California Constitution. The court held that a city's police power under this constitutional provision is as broad as that of the state Legislature itself, and cannot be eliminated by contract. (*Ibid.*) Thus, even *assuming arguendo,* something in the governing MOUs expressly prohibited the City from exercising its

authority to enact necessary remedial measures in an emergency, *which it does not*, it would be *ultra vires* and beyond the City's power to waive its right and obligation to do so. As the court explained in *Richeson, supra*, 158 Cal.App.4th at p. 280:

> The City could not contract away its police power in such fashion . . . . The police power ... cannot be barred or suspended by contract or irrepealable law. It cannot be bartered away even by express contract.' [Citations.] It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.

Similarly, in *City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768, the court held that local governments cannot divest themselves by contract of the right to exert their governmental authority. (*Id.* at p. 1778.) Here, Association is asserting that the City has lost the right to take all necessary actions in an emergency by virtue of the governing MOUs. This is an untenable position.

The conclusion that the City has not, and cannot, relinquish its rights and obligation to respond to emergency conditions is furthered by section 4.880 of the Ordinance, which preserves the "rights powers and authority of the City Council in all matters." (RJN, Ex.2.) This

reservation of the City Council's rights, powers, and authority in all matters means that the Council has maintained its police power to take all acts it deems necessary in emergency situations to safeguard the peace, safety, and health of the citizenry. No MOU can divest the City Council of this authority and obligation.

Glendale City Employees Assoc. v. City of Glendale (1975) 15 Cal.3d 328 (*Glendale*) is not to the contrary. In *Glendale*, this Court found that the requested relief was ministerial in nature. 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. To the contrary, this Court found that Glendale had failed to do what was reasonable under the circumstances. Here, the Mayor and the City Council in fact did all that was reasonable under the circumstances, and acted only as a last resort when it became clear that the City's receipts would not cover the MOU salary costs, at least not without violence to the City's obligation to provide necessary services to the citizenry.

IV. THE ORDINANCE AND GOVERNING MOUS LIMIT THE CLASS OF DISPUTES WHICH MAY BE SENT TO ARBITRATION.

The right to arbitrate exists only as a matter of contract. Thus, the City cannot be compelled to arbitrate a particular dispute *unless* it has agreed to it in the first place. (*Granite Rock Company v. Int. Brotherhood of Teamsters* (2010) 130 S.Ct. 2847 (*Granite Rock*); *Gilbert Street Developers, LLC v. LA Quinta Homes, LLC* (2009) 174 Cal.App.4th 1185, 1191.) As the MOU provisions make clear, the City never agreed to arbitrate a decision by the City Council to relieve employees from duty to meet a financial emergency.

A. The governing MOUS expressly recognize that decisions involving the exercise of reserved management rights are exempt from arbitration.

Contrary to Association's assertions (OBOM 27), the Ordinance does not mandate arbitration of this dispute. Under the Ordinance, City management is relieved from arbitrating anything but the practical consequences of the exercise of its reserved management rights. (Slip Op. at pp. 18-19, fn.17, citing Ordinance § 4.859.)

The statutory exemption from arbitration of decisions involving the exercise of reserved management rights is also contained within the governing MOUs. When the management rights language from section 4.859 of the Ordinance was incorporated into the MOUs, the right to relieve employees from duty because of lack of funds was *added* to the list of reserved management rights. (Slip Op. at p. 18; 1AA 93, 153, 218; 2AA 284.)

The arbitration clause contained in the governing MOUs must be read in harmony with the negotiated management rights provision; such construction is pivotal to the determination of whether a particular dispute is subject to arbitration. (Code Civ. Proc. §1281.2; *Balandran v. Labor Ready* (2004) 124 Cal.App.4th 1522, 1529, citing Civ. Code §1641.)

Both Management Rights clauses vest the City with the "exclusive" responsibility "for the management of the City and direction of its workforce." In recognition of this responsibility, the parties agreed that except as "specifically" provided in the MOUs, "no provisions in [the] 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 that they had prior to the effective date of the MOU." (3JRN, Ex. 2; 1AA 93, 153, 218; 2AA 284.) In addition, the governing MOUs recognize that City management retains the exclusive management right to "relieve employees from duty" because of "lack of funds," as well as the discretion to "take all necessary actions to maintain uninterrupted service to the community and to carry out its mission in emergencies." (1AA 93, 153, 218; 2AA 284.)

Thus, the MOUs unambiguously reserve to City management the authority and responsibility to take all action necessary to meet an emergency situation, and to use all of its pre-existing authority to do so, unless *specifically* restricted by the terms of the MOU. It is undisputed that the pre-existing authorities include the reserved management rights under the Ordinance (3RJN, Ex.2, Ordinance §§ 4.859, 4.880), as well as the City Council's discretionary salary-setting and budget-making authority under the Charter. (3RJN, Ex. 1, Charter §§ 219, 310-315; 4RJN, Ex. 2, Charter §§ 320, 262.)

In *Engineers & Architects v. Community Development Department* (1994) 30 Cal.App.4th 644, 652-653 (*Engineers*), the

court interpreted this Management Rights clause to exclude from arbitration a decision to relieve an employee from duty because of lack of funds. (*Id.* at p. 655.) The court held that a layoff due to lack of funds was a management decision within the City's prerogative pursuant to the Management Rights clause and not subject to arbitration. (*Id.* at pp. 650, 654-55.) The reasoning in *Engineers* applies here.

B. The "practical consequences" language in the Management Rights provision limits the scope of arbitrability.

Both Management Rights provisions limit "the employees' rights to raise grievances regarding the exercise of the City's reserved [management] rights to those grievances which pertain only to the practical consequences of the City's decisions." (Slip Op. at pp. 13-15; RJN, Ex. 2, Ordinance § 4.859; 1AA 93, 153, 218; 2AA 284.) That is, City management retains the right to take all actions deemed necessary in an emergency, while the employees retain the right to grieve the "practical consequences" of such emergency decisions — not the decisions themselves. As the Court of Appeal explained, "[N]o other construction of section 1.9 makes sense. If employees had retained the right to grieve the management decisions themselves,

section 1.9 would have so provided, rather than indicating only that they retained the right to grieve the practical consequences." (Slip Op. at p. 15.)

As with any other provision, the MOU grievance provisions must be construed in the context of the entire MOU, including the "practical consequences" language contained in the negotiated Management Rights clause. By expressly limiting grievances to the "practical consequences" of "decisions on these matters," this phrase must be read as specifically excluding the decisions themselves from the grievance procedure. The phrase "decisions on these matters" refers to the list of rights specifically reserved to management, and logically includes decisions about (1) the existence of an "emergency" involving a "lack of funds"; and (2) the actions that are "necessary" to meet such emergency conditions. The "practical consequences" language compels the conclusion that the parties never agreed to arbitrate a management decision to relieve employees from duty via mandatory furloughs, where, as here, such action was deemed "necessary" by the City Council to "maintain uninterrupted service to

the community and carry out the [City's] mission in [an] emergenc[y]." (1AA 93, 153, 218; 2AA 284.)

The difference between grievances challenging the emergency furlough decision *itself*, and grievances regarding the practical effects of the furloughs is similar to the distinction between decisional and effects bargaining. That distinction was explained in *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, in which this Court held that, under the MMBA's "organization of service" exception, a public entity may unilaterally decide that financial necessity requires some employee layoffs. However, the entity must bargain over implementation and effects of that decision on remaining employees. (*Id.* at pp. 621-22.) This distinction is important here where the governing MOUs limit grievances about emergency decisions by management to the "practical consequences that decisions on these matters may have on wages hours and other terms and conditions of employment." (See also *International Association of Firefighters, Local 188 v. Public Employee Relations Board* (2011) 51 Cal.4th 259, 276-277 (reaffirming the decisional-effects bargaining distinction).)

C. The department-oriented MOU grievance procedure does not cover discretionary actions of the City Council.

The six-step MOU grievance procedure provides for arbitration of some disputes between employees and departmental management (1AA 103-108, 163-168; 2AA 228-233, 293-298), and is consistent with section 4.865 of the Ordinance, which authorizes management to negotiate grievance procedures. (3RJN, Ex. 2.) However, a "grievance" is limited to "departmental rules and regulations," and the negotiated grievance procedure is aimed at resolving disputes that can be addressed by "the head of the department, officer or bureau". Nothing in the grievance definition, or the department-oriented procedure, suggests that the City Council's exercise of its discretionary powers and policymaking authority may be challenged via a "grievance". Indeed, the entire structure of the *negotiated* grievance and arbitration procedure shows that it applies only to matters within the control of individual departments.[9]

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[9] (See *Service Employees International Union v. City of Los Angeles* (1994) 24 Cal.App.4th 136, 140 (holding that this MOU grievance procedure does not authorize cross departmental grievances); *Los Angeles Police Protective League v. City of Los Angeles* (1988) 206 Cal.App.3d. 511 (same).)

Grievances are initiated by an informal discussion between employees and their supervisors, not with City Council. The Ordinance establishes advisory arbitration for some departments, and binding arbitration for "all other City departments". (3RJN, Ex. 2, Ordinance § 4.865(4).) It contains no provision for arbitration of City Council decisions. When more than one "employee in a department" is aggrieved, Association may file a grievance on behalf of all the employees. (1AA 104.) Thus, even combined grievances are limited to employees in a single department. The procedure is inapplicable to City wide disputes, or those that cannot be resolved by an individual department.

Contrary to Association's assertion (OBOM 4), the Ordinance does not mandate that all labor disputes be adjudicated by binding arbitration. Indeed, some types of labor disputes are specifically excluded from the grievance definition.[10] (*Service Employees*

[10] The procedure excludes coverage of disputes "for which an administrative remedy is provided before the Civil Service Commission" as well as impasses in meeting and conferring. (1AA 103.) Arbitration of grievable disputes is dependent upon a timely written request for arbitration (1AA 107).

International Union v. City of Los Angeles (1994) 24 Cal.App.4th 136, 140.)

Section 4.875 of the Ordinance specifies that "This chapter shall apply to all departments, offices and bureaus of the City"; all of which are subordinate to the City Council. (3RJN, Ex.2.) Ordinance section 4.880(b) states that the City Council's powers and authority are not curtailed by the grievance procedures established pursuant to "this chapter" that, under section 4.875, are applicable to all City "departments offices and bureaus."

In determining the scope of the parties' arbitration agreement, this Court is required to "'give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made.' [citations omitted]." (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1523 ("*RN Solution*").) Even a broad arbitration clause will not cover every type of dispute that might arise. "'However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.' (Civ. Code

§1648)." (*RN Solution, supra*, 165 Cal.App.4th at p. 1532.) "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute.*" (*Granite Rock, supra,* 130 S.Ct. at p. 2847, 2856, original italics.)

In a 1988 published opinion that foreshadows the current dispute, the City Attorney concluded that this grievance procedure did not cover disputes with City Council. The opinion states, "The [Ordinance] does not contemplate a grievance process to contest the largely economic decisions over which the Council has authority." (4RJN, Ex. 1 at p. 15, LA City Attorney Opinion No. 85-28 (July 26, 1988).)

The MOU and Ordinance definitions of a "grievance" cannot reasonably be interpreted as covering the discretionary policy decisions of the City Council. Such a construction is beyond the plain meaning of the language, and contrary to the reservation of authority found in sections 4.875 and 4.880(b) of the Ordinance. (3RJN, Ex.2). The grievance definition, coupled with the department-oriented structure of the six-step procedure (1AA 103-108, 163-168; 2AA 228-233, 293-298), and the reservation of management rights under the

Ordinance and MOU Management Rights provision, leads to the inexorable conclusion that the discretionary acts and policy choices of the City's elected officials are beyond the scope of the negotiated grievance procedure.

D. The public policy favoring arbitration cannot substitute for agreement to arbitrate a particular dispute.

Association argues that the grievance procedure contained under a collective bargaining agreement is a central component of a "system of industrial self-government," citing *John Wiley & Sons v. Livingston* (1964) 376 U.S. 543, 550 (*John Wiley & Sons*), *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169 (*Posner*), and *O'Malley v. Wilshire Oil Company* (1963) 59 Cal.2d 482, 490. (OBOM 19.) Association's recitation of these historic (and largely private sector) cases suggests that the presumption of arbitrability attaches to a particular dispute from the very existence of an arbitration clause within the agreed upon MOU. Not so.

As the United States Supreme Court has recently reiterated, "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*

(original italics)." *(Granite Rock, supra,* 130 S.Ct. at p. 2856.) The Supreme Court continued:

> Indeed, the rule that arbitration is strictly a matter of consent--and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it--is the cornerstone of the framework the Court announced in the *Steelworkers Trilogy*. (*Id.* at p. 2857, fn 6.)

Thus, Association's interpretation of the aforementioned cases is at odds with the Supreme Court's interpretation of the same.

Moreover, the Supreme Court has specified that individual agreements depended upon the "common law of a particular industry or of a particular plant." (*John Wiley & Sons, supra,* 376 U.S. at p. 550, citing *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578-579.)[11] Here, the particular industry — the City — has significantly different Charter based laws and rules than those at issue in the private sector cases cited by Association. None of

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[11] In *Granite Rock*, the Supreme Court commented: "Although *Warrior & Gulf* contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause [citations], the opinion elsewhere emphasizes that even in LMRA cases, 'courts' must construe arbitration clauses because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. [citations omitted]." (*Granite Rock, supra,* 130 S.Ct. 2847, at p. 2859, fn. 8.)

those cases involve management rights clauses which limit grievances concerning emergency decisions to the *effects* of those decisions. Nor do they concern ordinances preserving a public employer's authority "in all matters." Significantly, all of the cases recognize the cardinal rule that "an employer has no obligation to arbitrate issues which it has not agreed to arbitrate." (*John Wiley & Sons, supra,* 376 U.S. at p. 547.) Association's interpretation of *Warrior & Gulf* and *Posner* leaves little room for judicial evaluation of the breadth of the agreed upon arbitration clause or the inherent public policy limitations on the scope of arbitral review of municipal budget decisions. Indeed, Association's reliance on these private sector cases fails to recognize the significant legal and policy distinctions between public and private sector employment, as well as the "common law" of this "particular industry."

E. Other grievance and arbitration provisions cited by Association are broader than the governing MOU grievance procedure.

All grievance and arbitration provisions are not identical, and must be scrutinized to determine whether the parties have agreed to arbitrate a particular dispute. While the Court of Appeal characterized

the MOU definition of grievance as "broad" (Slip Op. at p. 14), it is not as broad as that found in many of the cases Association cites. Thus, in *Taylor v. Crane* (1979) 24 Cal.3d 442 (*Taylor*), the grievance procedure defined a "grievance" as

> ... any dispute which involves the interpretation, application, claimed violation or claimed noncompliance with the provisions of the Memorandum of Understanding. . ., or of any *City Ordinance*, Rule or Regulation which may have been or may hereafter be adopted by the City to govern personnel practices or working conditions. . . . (*Id.* at p. 448, emphasis added.)

Unlike the public employer in *Taylor*, the City has not specifically agreed to arbitrate disputes arising under City ordinances, and has not conceded that the MOU grievance procedure covers this dispute. (*Id.* at p. 452.)

Similarly, in *John Wiley & Sons, supra,* 376 U.S. at p. 553, the grievance procedure provided that

> . . . The arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. . . .

Here, the negotiated grievance procedure does not provide that arbitration is the "sole and exclusive remedy...in lieu of. . . .all other remedies." Consequently, it should not be construed to cover disputes over the City Council's exercise of its discretionary powers to take all action necessary to address a fiscal emergency.

V. ARBITRATION OF THIS DISPUTE WOULD IMPROPERLY DELEGATE THE CITY COUNCIL'S DISCRETIONARY POWER.

California cases discussing the validity of the delegation of municipal power turn on the nature of the function delegated and whether discretionary authority has been delegated. In *Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391 (*Schecter*), it was held that while administrative or ministerial functions may be delegated to others, discretionary powers may not be delegated in the absence of express statutory authorization. (*Id.* at p. 396.) This rule is well-established. (See, e.g., *California Sch. Employees Assn. v. Personnel Comm. of Pajaro Valley School Dist.* (1970) 3 Cal.3d 139, 144 ("*CSEA*"); *Stevens v. Geduldig* (1986) 42 Cal.3d 24, 49, fn. 9; *American Federation of Teachers v. Board of Education* (1980) 107

Cal.App.3d 829, 834; *Thompson Pacific Construction v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 539.)

Applying this long standing principle, the Court of Appeal correctly held that, in the absence of statutory authorization, "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 p. 3.)

A. Discretionary powers conferred on municipal corporations and public officers for the public benefit may not be delegated in the absence of statutory authorization.

In analyzing the delegation issue presented by this case, the question is whether the local electorate, through the enactment of the Charter, has authorized the City's elected officials to delegate salary setting and budget making authority to an arbitrator. The need for some form of statutory authorization was explained by this Court, as follows: "[P]owers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*CSEA*, *supra*, 3 Cal.3d at p. 144. See also *San Francisco Firefighters v. City and County of San*

Francisco (1977) 68 Cal.App.3d 896, 901 ("*San Francisco Firefighters*").)

The Court of Appeal correctly relied upon *San Francisco Firefighters*. There, the governing MOU provided for arbitration of grievance regarding the terms and conditions of employment. (*San Francisco Firefighters*, *supra*, 68 Cal.App.3d at p. 900.) The issue was whether the fire commission (and/or the City's elected officials) had the authority to surrender, via the MOU, the fire commission's charter-derived authority and duty to prescribe rules and regulations for the fire department. The court held that it did not, relying upon the rule that discretionary powers conferred upon a municipal corporation or public officer cannot be delegated to others in the absence of statutory authorization. (*Id.* at p. 901.) The court reasoned: "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 p. 903.)

Here, as in *San Francisco Firefighters*, the City's residents by democratic vote in enacting the Charter, have chosen that fundamental

policy decisions involving budget-making and salary-setting be made by the elected officials and not by a politically unaccountable arbitrator. (3RJN, Ex.1, Charter §§ 212, 310-315, 219.) Such authority is exclusively reserved, as a public trust, to the Mayor and the City Council. (See, e.g., *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235 ("essential governmental functions such as the power to adopt budgets "may not be delegated to an executive officer, leaving no discretion for the board").)

B. The rule prohibiting the unauthorized delegation of discretionary power presumes such power must be personally discharged to protect the public trust and confidence.

Discretionary power vested exclusively in a local governing body is *purely personal* to the official membership thereof and, in the absence of statutory authority, may not be delegated to other persons. (*Schecter, supra,* 258 Cal.App.2d at p. 396.) "Where the powers of judgment and discretion are by law reposed in a public officer, the presumption is that such officer was selected because of his fitness and competency to exercise that judgment and discretion, and unless the authority to do so is expressly conferred upon him, he may not delegate his powers and duties to another." (56

Ops.Cal.Atty.Gen.399, 402 (1973), citing *Burkholder v. Lauber* (1965) 216 N.E. 2d 909, 911.)[12] As stated by the court in *Stowe v. Maxey* (1927) 84 Cal.App. 532, "...[F]or better or worse, the people are entitled to the services of their chosen servants to be exercised in the manner and to the full extent of their employment under the law." (*Id.* at p. 544.)

The voters of the City have entrusted the duty and responsibility for managing the City's financial affairs exclusively to the Mayor and the City Council. Arbitral review of such decisions, thus, would violate the trust and confidence reposed by the public in its elected representatives.

In making emergency policy decisions for the City, elected officials must exercise discretion and make policy decisions, balancing public needs in many areas with finite financial resources. Such choices involve "interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the

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[12] Opinions of the California Attorney General....while not binding on [courts], are entitled to great weight. (*Travis v. Board of Trustees of the California State Univ.* (2008) 161 Cal.App.4th 335, 344-345.)

legislative body to weigh those needs and set priorities for the utilization of limited resources available." (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699 (*County of Butte*).) The City Council's expertise in deciding such matters is enhanced by its receipt of the Charter-required status reports regarding City revenue and expenses. (4RJN, Ex.2, Charter § 291(a) and (d); *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 839 (recognizing local governing body's expertise in budget matters).) "Under arbitration, however, all authority is vested in the arbitrator — an individual who may have little knowledge of the dispute and little stake in the outcome, and whose only qualification for substantially shaping the lives of workers and their families may be that he teaches labor law." (*Developments in the Law--Public Employment [Part 2 of 2],* 97 HARV.L.REV. 1676, 1708 (1984).) Arbitral review of acts deemed necessary by the City's elected officials to carry out the City's mission in a financial emergency would interfere with the relationship between the local electorate and their elected representatives. "..[O]fficials engaged in governmental decision making (e.g., setting budgets, salaries, and other terms and condition

of public employment) must be accountable to the citizens they represent." (*Greeley Police Union v. City Council of Greeley* (1976) 553 P.2d 790, 792.)

Here, the Mayor and the City Council are ultimately responsible to the citizens of the City; if they perform their duties poorly, they may be replaced by the electorate. Arbitration would remove such policy matters from their discretion. "Unlike the public employer itself, an arbitrator is unelected, unaccountable, and quite possibly ignorant of how citizens feel about the labor dispute and ancillary matters of public concern." (*Developments in the Law—Public Employment [Part 2 of 2]* 97 HARV.L.REV. at p.1708. See also *Ridgefield Park Education Assoc. v. Ridgefield Park Board of Education* (1978) 393 A.2d 278, 287 (the "true managers are the people" and "governmental bodies [must] retain their accountability to the citizenry").)

The management of the City's financial affairs, including the fixing of a budget, involves an exercise of discretionary power and subjective judgment. Under the rule prohibiting the unauthorized delegation of discretionary powers, the City's elected leadership

cannot divest itself of the ultimate authority to control the expenditure of City funds, unless so authorized by the Charter. To hold otherwise, would be the equivalent of a holding that adoption of a labor agreement constitutes an amendment to the Charter. (*City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 105, citing *Thompson v. Board of Trustees* (1904) 144 Cal. 281, 283.)

C. Association's Authorities are Inapposite.

1. The presence of safeguards or standards will not cure an improper delegation of discretionary power.

Association claims that 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. (OBOM 32.) In support of this contention, Association cites *Carson Mobilehome Park Owners' Assn v. City of Carson* (1983) 35 Cal.3d 184, 190 (*Carson*), and *People ex. rel Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 634 (*Sun Pacific*). Such reliance is misplaced, as those cases involved the doctrine prohibiting the delegation of legislative power. *This* case involves the unauthorized delegation of discretionary power. (Slip Op. at p. 21.)

The purpose of the doctrine prohibiting the improper delegation of legislative power is to ensure that the legislative body itself resolves the "truly fundamental issues," and provides adequate safeguards "to assure the proper implementation of its policy decisions." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376-77 (*Kugler*).) "That a third party performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation of legislative authority." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 455.)[13] Thus, in *Kugler,* this Court held that the Alhambra City Council's decision to make the Alhambra firemen salaries on parity with the Los Angeles firemen salaries was the fundamental policy choice; "the implementation of the policy by reference to [another city's] salaries is not the delegation of it." (*Kugler, supra*, 69 Cal.2d at pp. 377, 378, fn. 3, 382.)

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[13] As *Kugler* explains, "The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing rules or regulations to promote the purposes of the legislation and to carry it into effect.... [citation]. Similarly...[the legislative body] can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. [citation]." (*Kugler, supra*, 69 Cal.2d at p.376.)

Similarly, in *Carson*, this Court ruled that an ordinance reflecting the city council's decision that mobile home rent increases be "just, fair, and reasonable" was a fundamental policy decision; the subsequent adjustment of particular rents by a review board based on statutory factors constituted implementation of that policy, not legislative delegation. (*Carson, supra*, 35 Cal.3d at pp. 190-191.) Finally, in *Sun Pacific*, the court upheld a statute which delegated to pest control districts the power to implement the Legislature's decision to control and eradicate citrus pests. (*Sun Pacific, supra*, 77 Cal.App.4th at pp. 633-637.)

Unlike the third parties in *Kugler, Carson,* and *Sun Pacific*, in adjudicating the emergency furlough dispute, the arbitrator's role would not be to apply or implement the discretionary policy decision to impose furloughs in a financial emergency. Rather, as the Court of Appeal recognized, "when considering the claims made in the employee grievances and the nature of 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 the

City Council." (Slip Op. at p. 25.) *Kugler* and its progeny thus have no bearing on this case.

2. Arbitration of operational decisions is permissible.

Contrary to Association's contentions (OBOM 42-43), *Taylor, supra,* 24 Cal.3d 442 and *SEIU v. City of Los Angeles* (1996) 42 Cal.App.4th 1546 (*SEIU*) are equally distinguishable. Whereas the present dispute would require submission to arbitration of policy and planning decisions, *Taylor* and *SEIU* both involved the arbitral review of operational decisions; i.e., "lower level decisions that merely implement a basic policy already formulated." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 685 (discussing meaning of "discretionary" in the context of governmental immunity); see also *Johnson v. State of California* (1968) 69 Cal.2d 782, 794.)

In *Taylor*, this Court held that arbitral review of the decision to discharge an individual employee did not unlawfully delegate discretionary power over personnel matters. (*Taylor, supra,* 24 Cal.3d at p. 452.) Relying on *Taylor*, the court in *SEIU* held that arbitral review of the application of a salary premium to a particular employee's working conditions did not unlawfully delegate the City

Council's authority over economic matters. (*SEIU, supra*, 42 Cal.App.4th at pp. 1554-1555.) Thus, neither case involved the submission to arbitration of a *general policymaking power*. (Cf. *Taylor, supra*, 24 Cal.3d at p. 453.) Instead, the arbitrators were given the power to determine facts and then apply them to the previously established policy. The arbitrators were not, however, called upon to judge the validity of the governing body's underlying policy decision.[14]

As this Court recognized in *Taylor*, submission of policy questions is "more intrusive upon the functions of city government than the arbitrator's authority in this case to resolve an individual grievance." (*Taylor, supra*, 24 Cal.3d at 453, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22 and *San Francisco Firefighters, supra*, 68 Cal.App.3d 896.) Here, submission of the emergency furlough decision to arbitration would seriously intrude

[14] In *Taylor*, the city council's determination that permanent employees may be discharged only for "a cause" was the fundamental policy decision. (*Taylor, supra*, 24 Cal.3d at p.447.) In *SEIU*, the city council's decision to award bonus pay for certain duties was the fundamental policy choice. (*SEIU, supra*, 42 Cal.App.4th at pp.1549-1550.) In each case, arbitration of the application of these policy decisions to a particular employment situation constituted *implementation* of the respective policy, not unlawful delegation.

upon the elected officials' essential governmental function to manage the City's finances.

D. Arbitration of this dispute would seriously intrude upon the Mayor and City Council's discretionary policymaking powers to manage the City's finances.

The Court of Appeal correctly used interest arbitration[15] principles to conclude 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 p. 3.) In doing so, the Court of Appeal declined to mechanically apply a rigid theoretical line between interest and grievance arbitration, concentrating instead on the inevitable impact on City government of allowing arbitration of these grievances to proceed.

The Court of Appeal recognized that "[i]nterest arbitration is problematic from a delegation point of view because it impacts policy matters, not because it is called interest arbitration." (Slip Op. at p. 24.) The Court of Appeal observed

> [W]hen binding interest arbitration is applied in the public sector, it may result in the arbitrator's involvement

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[15] "Interest arbitration concerns the resolution of disputes over the formation of a collective bargaining agreement. (quotation marks and citation omitted)." (Slip Op. at p. 23.)

> in matters that extend beyond those over which labor and management customarily bargain in private sector disputes; binding interest arbitration may push the arbitrator into the realm of social planning and fiscal policy. [Citation]. The obvious reason for this is that costs arising from the terms of a binding interest arbitration award must be paid out of governmental funds. For example, if an interest arbitrator were to accept the demand by a firefighters' union that a local government add an engine company, this might require the 'the building of a new fire house or the purchase of new equipment, ...[and] could very well intrude upon management's role in formulating policy.' [Citation]. A decision in a binding public sector interest arbitration proceeding might therefore require the governmental employer either to cut other items from its budget or to increase taxes. [Citation]. (Slip Op. at pp. 24-25.)[16]

Arbitration here would significantly interfere with the Mayor and City Council's authority and responsibility under the Charter to manage the City's finances and to make basic policy decisions for the protection and benefit of public. (Slip Op. at p. 25.) Through use of the arbitration process, Association seeks to have an arbitrator second-guess the manner in which City Council has exercised its

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[16] Citing *Taylor*, the Court of Appeal noted, "[i]nterest arbitration may constitute 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 ...to resolve an individual grievance." (Slip Op. at p. 25.)

discretionary powers to manage the City's finances during a fiscal emergency. Arbitration of this dispute would thus impermissibly intrude on the power and duty of the City's elected officials to determine how scarce resources are to be allocated with minimal disruption to public services, while ensuring that the City meets all of its financial obligations, not just those pertaining to Association's members. (*California Teachers Association v. Ingwerson* (1996) 46 Cal.App.4th 860, 876.)

Attempting to distinguish the impact of arbitrating this dispute from that of interest arbitration, Association insists the arbitrator would not indulge in policymaking "because the City already did that itself." (OBOM 37.) The Court of Appeal disagreed. "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." (Slip Op. at p. 25.)

If the arbitration of these grievances is allowed to proceed, the arbitrator will not, as Association claims, be called upon to merely "interpret existing contractual terms to which the City has already

bound itself." (OBOM 37.) Rather, the arbitrator will be asked to *validate or overturn* the City Council's discretionary policy decisions to reduce salary appropriations and to implement a new work rule (i.e., the furlough program) to preserve essential public services in a financial emergency. Under the Charter, City departments can only spend money that was specifically appropriated by the City Council in the budget. (4RJN, Ex.2, Charter §§ 262 and 320.) In overturning the emergency furlough decision, the arbitrator would be substituting his or her judgment for that of the City's elected officials, effectively rewriting the City's budget to provide the necessary appropriations. As such, the impact of arbitrating this dispute will be akin to that of interest arbitration, with a decision and remedy that will affect the allocation of public resources, the level of public services, and potentially an increase in taxes. Such decisions are legislative-political, and cannot be delegated to an arbitrator, who is entirely without responsibility to the City, its voters, or taxpayers. (*County of Butte, supra,* 176 Cal.App.3d at p. 699; *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1345 (declining to interfere with municipality's judgment in weighing budgeting needs).)

VI. ASSOCIATION'S CHOICE OF FORUM WAIVED ANY RIGHT TO ARBITRATE THIS PARTICULAR DISPUTE.

A. Association's prior actions seeking relief in two other forums on the same claims are inconsistent with its current demand for arbitration.

By its prior actions in seeking remedies first at the Board, and then in an injunctive and declaratory relief action, Association has waived its ability to arbitrate the emergency furlough dispute. Waiver may be implied from conduct that indicates an intent to relinquish the right. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

In *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), this Court identified factors to consider when a question of waiver of an arbitration process is raised. (*Id.* at p. 1196.) The facts of this case establish the majority of the *St. Agnes* factors.

Association sought arbitration long after the administrative proceeding before the Board was underway. Association has already had the benefit of its discovery of the City's positions, witnesses, documents, and theories – all discovery it would not have *but for* the fact that its Claim was *fully litigated* in the Board proceeding.

A petition to compel arbitration "should be brought within a reasonable time." (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 17.) In *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553 (*Guess?, Inc.*), the court found a waiver of an arbitration agreement in part because of unreasonable delay. There, the petition to compel arbitration was filed nearly four months after the civil complaint. Here, the Association's petition to compel arbitration was filed some 9 months after it had initiated the first of two prior actions for relief.

In the declaratory judgment action, Association specifically asked the Superior Court to hold that the City had breached the governing MOUs. (AA 1853.) If, as in *Guess?, Inc.*, the failure to raise arbitration as an affirmative defense is a waiver of the right to proceed to arbitration, then Association's act of filing a civil lawsuit for breach of contract is also a waiver of arbitration under that contract. (See also *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 996 (10-month delay unreasonable); *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228 (five-and-a-half-month delay unreasonable).)

B. The MOU grievance procedure limits Association to one forum.

The grievance procedure contained in the governing MOUs prohibits multiple filing of claims through an election of remedies provision. If a dispute is filed as an administrative claim before the Board, the same dispute cannot also be filed as a grievance. 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 alternative remedy. (1AA 103, 163, 228; 2AA 294.)

Association's filing of the Claim in June 2009 predated the filing of the 408 individual emergency furlough grievances by its members. As such, Association's action constituted a binding election of remedy and a "waiver of the alternate remedy" being sought in this proceeding. Having fully litigated the relevant issues before the Board, Association is precluded from utilizing the MOU grievance procedure to pursue relief on the same claims. (See

Hallandale Prof'l Fire Fighters, Local 2238 v. City of Hallandale, 777 So. 2d 435 (Fla. 4th DCA, 2001) (by electing to pursue an unfair labor practice charge before the labor board, union was barred from also seeking arbitration on the same claims).)

Association's claim that the MOU election of remedies provision applies only to employees and not to it as the union, is unsupportable given the MOU requirement that a request for arbitration must be made *jointly* by the employee and Association. (1AA 107, 167, 232; Article 3.1 Step 6.) Thus, all of the arbitration demands are elections made by Association. Association is the exclusive representative of its members. With statutorily enforced exclusivity comes responsibility. Accordingly, employees represented by Association are equally bound by the elections of their exclusive representative.

VII. NO CONTRACT CLAUSE VIOLATION IS IMPLICATED IN THIS CASE.

A. Association is estopped from challenging the validity of the City's declaration of financial emergency.

Association's argument that a "fiscal emergency" exception and the City's implementation of the furloughs were in violation of the

Constitutional prohibition against the impairment of contracts is an attempt to litigate the merits of the underlying dispute, and is not related to the arbitrability of the grievances. (OBOM 50-55.) Furthermore, this claim is without foundation either in the record or in the facts or law at issue here.[17]

Association's reliance on this Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 *(Sonoma County OPE)* is misplaced. The *Sonoma County OPE* decision arose in the context of a petition for writ of mandate where the express issue was whether the challenged statute impaired contractual obligations. (*Id.* at p. 302.) The challenged statute had been enacted in response to Proposition 13, and its limitations on the taxing powers of local and state government. (*Id.* at pp. 302, 311, fn. 4.) This Court held that there was no dispute that a contractual impairment was created by the statute, but that the

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[17] Association never raised a Contract Clause issue in its PFR, or at any prior stage of this litigation. Thus, Association has forfeited this argument. (*Perez v. Grajales* (2009) 169 Cal.App.4th 580, 591.) Regardless, Association's impairment of contract claim goes to the merits of the controversy and cannot be reached by the court on a motion to compel arbitration. (Code Civ. Proc. § 1281.2(c).)

parties had not established that a fiscal crisis actually existed. (*Id.* at pp. 304-305, 312.)

In contrast to the situation in *Sonoma County OPE*, the parties here have already litigated the validity of the emergency declaration and the City has proven both that an emergency existed, and that it acted legally in implementing the furloughs. (3RJN, Ex.3.) As such, Association is now collaterally estopped from challenging these administrative findings of the Board. (*Murray v. Alaska Airlines* (2010) 50 Cal.4th 860, 867.)

In three separate decisions, by the Board's hearing officer and itself, the Board held that at the time of the City Council's decision to impose furloughs, the City faced a serious and growing economic emergency. Additionally, the Superior Court rejected Association's application for a temporary restraining order. (Pet. 12.)

In its final decision, the Board ruled that "**An emergency did exist**, which excused the City from the normal duty to complete the meet and confer process before acting on the decision to furlough employees (emphasis added)." (3RJN, Ex.3, at p. 2.) Previously, the Board's hearing officer ruled that in November, 2008, the City's

> budget hole had grown to $110 million, and by April 2009, to $530 million...[there was] a substantial likelihood that serious harm will be experienced unless the City acted immediately. The events that created the City's economic woes were largely unforeseen, and in any event were brought about primarily by external factors beyond the City's control. (9AA 1926.)

The hearing officer further ruled

> Under the circumstances, I find that **evidence establishes that an emergency existed,** within the meaning of Government Code Section 3504.5. (emphasis added). (9AA 1927.)

In his supplemental report, the hearing officer described the City's emergency in greater detail, stating:

> The City established that an emergency, within the broad parameters of the [*Sonoma County OPE v. Sonoma County*, (1991) 1 Cal.App.4th 267 ("*Sonoma County*"] definition, existed. The City faced a budget shortfall of more than $500 million. The size of the budget hole was growing rapidly – it had increased by $400 million in a span of five months. . . Without the furlough plan or comparable savings in personnel costs, the City was facing the prospect of laying off between a third and a half its general fund civilian workforce, which would have resulted in significant reductions in public services. **The City's evidence about the nature of the emergency was essentially unchallenged by EAA.** (emphasis added).....The City provides a wide array of services to its citizens, many of which involve public health and safety. All these services would have been negatively impacted, with the potential for serious harm to citizens. . . . Here, it was the potential of adverse consequences, not only to public health, but also to other

> services, that created the City's right to act without first completing the bargaining process. The City was not required to wait until serious harm occurred. ...Though the emergency was fiscal in nature when the City adopted the furlough plan, it more probably than not would have resulted in the disruption to vital public services without prompt action. (2RJN, at p. 3.)[18]

Association did not appeal from the Board's conclusion that the City faced an emergency in July 2009 when it imposed furloughs. Thus, the record is clear in that, unlike the governmental parties in *Sonoma County OPE,* the City has proven the validity of its declaration of emergency and the necessity of its actions in implementing the furloughs.

Association's belated argument that the City now needs to demonstrate the existence of the emergency ignores the past two years of litigation. Indeed, as the Board's hearing officer pointed out, when given the opportunity to contest the validity of the emergency or the necessity of taking unilateral action, Association left the City's evidence "unchallenged." Association has already had its opportunity to disprove the economic emergency. It failed to do so and is now

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[18] (See 2 RJN, Ex.17, in which the then acting City Administrative Officer explained that the City was then "facing a considerable fiscal crisis and is on the brink of financial disaster." See also 8AA 1743-1754, 1792-1793.)

estopped from challenging this conclusion. (*Murray v. Alaska Airlines, supra,* 50 Cal.4th at p. 867; *Johnson v. Loma Linda* (2000) 24 Cal.4th 61, 69-72.)

Association's citation to *Massachusetts Community College Council vs. Commonwealth of Massachusetts* (1995) 420 Mass. 126 [649 N.E. 2d 708] (*Mass. CCC*), and to *Opinion of the Justices (furloughs)* (1992) 135 N.H. 625 [609 A2d 1204] are inapplicable to the current situation. First, neither court discussed any laws containing provisions comparable to section 3504.5 of the Government Code, the Ordinance, or the Charter sections at issue here. Second, neither government had already proven the validity of the declaration of emergency or the necessity for immediate remedial action. Indeed, neither court believed that an emergency existed and the Massachusetts court commented that the legislature had already appropriated the money "to pay the compensation called for under the collective bargaining agreements". (*Mass. CCC., supra*, 420 Mass at p. 131.) By contrast, the City's tax receipts had unexpectedly plummeted, and it was facing default on its obligations, had it not reduced expenditures. (2RJN, Ex. 17.)

When legislation is challenged as constituting an unconstitutional impairment of contract, the Court must determine whether contract rights have actually been impaired, and if so, to what extent. Here, contrary to Association's assumptions, there has been no determination that the governing MOUs have actually been impaired, and the City disputes any claim of impairment. (8AA 1727.)

In *San Diego Police Officers' Association v. San Diego City Employees' Retirement System* (2009) 568 F.3d 725 (*San Diego POA)* the Court held that public employee salaries are terms of employment, properly subject to revision, and reduction, without violation of the Contracts Clause. (*Id.* at pp. 737-738.) *San Diego POA* arose in the context of negotiations for a new collective bargaining agreement, while the current matter arose in the midst of an existing MOU. However, the furlough ordinance was a proper exercise of managerial authority pursuant to the MMBA and the Ordinance, which authorizes local public agencies to act swiftly to impose new work rules in an

emergency.[19] Thus, like the rules at issue in *San Diego POA*, the MOU provisions dealing with hours of work "are subject to reduction without running afoul of constitutional rights". (*Id.* at p. 737.)

Even legislation which substantially impairs contractual obligations will still be valid if the law is reasonable and necessary to serve an important public purpose. (*San Diego POA, supra,* 568 F.3d at p. 737.) The Board proceeding has also already established that the City's furlough decision was reasonable and necessary under the circumstances and served important public purposes. (8AA 1752-1754; 2RJN, at p. 3.)

Some courts have looked to the timing of the emergency declaration and the date of the contracted obligation in evaluating an alleged unconstitutional impairment of contract. Here, the effective date of the governing MOUs is February 2007, a year prior to the start of the economic downturn which led to the City Council's enactment of the Emergency Resolution and Reduced Work Schedule Ordinance. This timing and the City's multiple attempts, albeit unsuccessful, at

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[19] Board Decision U-214 established that the Emergency Ordinance was in accordance with the MMBA and the Ordinance. (3RJN, Ex. 3.)

negotiating a mutually acceptable solution, show that the City's decision to impose furloughs was not simply "Buyers Remorse."

B. The MMBA and the Ordinance authorize the City to act swiftly to enact new work rules to meet emergency situations.

Under the MMBA, the State Legislature has vested discretion in municipalities to impose new terms and conditions of employment in an emergency prior to exhausting the collective bargaining process. (Gov. Code § 3504.5.) Section 4.850 of the Ordinance closely follows the language of the MMBA. (3RJN, Ex. 2.) Thus, the MMBA and the Ordinance recognize that in emergencies, municipalities can act swiftly to change employment rules, and then later, negotiate over the effects of those changes.

The City relied on these provisions when it enacted its Emergency Resolution and implemented mandatory furloughs for civilian employees. This Court has already noted with approval actions taken pursuant to this MMBA provision. (See, e.g., *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 City Council and Mayor's substantive authority to control the City's finances comes from the Charter.

Association correctly notes that notwithstanding the City's MMBA and Ordinance based procedural right to enact new work rules when faced with emergencies, (OBOM 48-49), these provisions are not a *substantive* grant of authority, citing to *Professional Engineers in California Government v. Schwarzenegger)* (2010) 50 Cal.4th 989 (*Professional Engineers*). The City's substantive authority is found in its Charter, the Ordinance and the governing MOUs. As in *Professional Engineers,* which found Constitutional and statutory authority for the Legislature to control the State's finances and make financial choices when faced with serious economic conditions, the Charter provisions which govern the City's budgeting process provide the substantive authority for the decision by the Mayor and the Council to reduce salary appropriations via mandatory furloughs in response to the City's dire financial condition.

Association attempts to distinguish *Professional Engineers*, asserting that the City's powers under the Charter are more limited than those of the Legislature. (OBOM 50-51.) This argument ignores the Mayor and City Council's substantive authority under the Charter

mandated budget process, and annual appropriation requirement as a limitation on spending. (3RJN, Ex.1; 4RJN, Ex. 2.) Like the Legislature in *Professional Engineers*, the elected representatives of the City retain the authority under the Charter, the Ordinance and the Management Rights provision in the governing MOUs (see discussion, *supra*)[20] to reduce annual salary appropriations in an emergency, regardless of MOU provisions supporting a higher level of pay. This substantive authority, in concert with the emergency procedural powers under the MMBA and Ordinance, give City Council and Mayor together the power to make annual appropriations and annual decisions to fully fund, or not fully fund, MOU provisions.

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[20] Under the Management Rights provision, City management is authorized to take "all necessary actions" to carry out the City's mission in an emergency. (3JRN, Ex. 2, Ordinance §4.859; see also 1AA 93, 153, 218; 2AA 284.) The use of the word "all" confirms that this broad emergency authority was intended to prevail, in an emergency, over other MOU provisions governing ordinary times. (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 95 (upholding mayor's emergency power under the charter to do "whatever else he may deem necessary", notwithstanding other charter provisions vesting power in the board of supervisors.) In ruling on Association's petition to compel arbitration, this Court is obligated to give effect to this broad emergency power.

D. The Board's decision upholding the City's right to unilaterally implement the emergency furloughs is entitled to great weight.

Section 4.880 of the Ordinance establishes the Board to administer the Ordinance. The Board has the duty and authority to investigate and resolve charges of unfair employee relations practices. The Board has already ruled that the City properly used the emergency exception provisions of the Ordinance and the MMBA when it imposed the emergency furloughs. (3RJN, Ex. 3.)

An administrative agency's interpretation of its own statute is entitled to great weight, particularly where, as here, the party now challenging that interpretation had the opportunity to appeal the contested decision, and failed to do so. (*Cal. Teachers' Assn. v. Parlier Unified Sch. District* (1984) 157 Cal.App.3d 174, 179; *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859.)

Board Decision No U-214 was issued at the conclusion of thoroughly litigated case (four days of hearing, post-hearing briefs, two hearing officer reports, exceptions from those reports and two hearings before the full Board). (3RJN, Ex. 3.) The amount of

deference given to an administrative agency conclusion can depend "upon the thoroughness evident in its consideration." (*Karuk Tribe of Northern California v. California Regional Water Quality Control Board* (2010) 183 Cal.App.4th 330, 353.) Here, the record shows that the Board's determination was thorough and extensive. Consequently, its determination is entitled to great weight.

The City's actions were consistent with its legal obligations, and were reasonable under the circumstances. Consequently, there is no unconstitutional impairment of contract.

VIII. CONCLUSION.

Based on the foregoing, the City of Los Angeles, respectfully requests that this Court affirm the Court of Appeal's decision in *City of Los Angeles v. Superior Court (Engineers & Architects Assn.)*.

Dated: December 12, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, **Rule 8.204 (c)(1).**, Petitioner hereby certifies that this Answer Brief on the Merits has been prepared using Times New Roman typeface, 14 point, and that the word count for all included portions is 13,904 as calculated by the Microsoft Word processing system used to prepare the brief.

DATED: December 12, 2011

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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 **December 12, 2011**, I served the foregoing document(s) described as **ANSWER BRIEF ON THE MERITS** 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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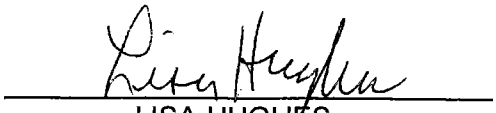
I declare under penalty of perjury that the foregoing is true and correct.

Executed on **December 12, 2011**, at Los Angeles, California.



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