Case No. S162647

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, Plaintiff/Appellant, v. OPERATING ENGINEERS LOCAL UNION NO. 3, et al. Defendants/Respondents.	NO. S162647 Sixth Appellate District Case No. H030272 (Santa Clara County Superior Court Case No.: 1-06-CV064707)

OPENING BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Sixth Appellate District
[Case No. H030272]

RICHARD DOYLE, City Attorney (#88625)
GEORGE RIOS, Assistant City Attorney (#77908)
ROBERT FABELA, Sr. Deputy City Attorney (#148098)
SUZANNE HUTCHINS, Deputy City Attorney (#199781)
Office of the City Attorney
200 East Santa Clara Street
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for Plaintiff/Appellant CITY OF SAN JOSE

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ISSUE FOR REVIEW

On June 18, 2008, this Court granted the Petition for Review of the Appellant City of San Jose ("City"). The City's Petition for Review sets forth the following issue for review:

Does the Superior Court have initial jurisdiction to entertain a request by a local public entity seeking immediate injunctive relief, pursuant to the common law doctrine under *County Sanitation District Number 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, to enjoin certain public employees from participating in an impending work stoppage that poses an imminent threat to the public's health and safety; or else is the local public entity first required to seek an administrative decision from the Public Employee Relations Board that the Board will seek such relief from the Superior Court on behalf of the local public entity?

I. INTRODUCTION

On March 4, 2008, the Sixth District Court of Appeal upheld a Santa Clara County Superior Court decision declining to hear a request for an injunction designed to prevent an immediate threat to the public health and safety, finding that the California Public Employment Relations Board ("PERB") had exclusive initial jurisdiction over the matter. Appellant City of San Jose ("City") seeks a reversal of the appellate court's decision on the grounds that PERB's jurisdiction extends only to claims arising from the Meyers-Milias-Brown Act ("MMBA"), **not** to claims made pursuant to a common law right aimed at protecting the public health and safety. Furthermore, PERB's jurisdictional reach is limited with regard to matters affecting a local public entity's inherent police powers or "local concerns,"

such as those presented in this case, thus giving further justification for overturning the lower court's decision.

In Government Code Section 3509, the Legislature has limited PERB's exclusive jurisdiction to "complaint[s] alleging any violation of [the MMBA]." Courts have interpreted Section 3509 more broadly than a literal reading of the language would suggest, but have limited PERB's jurisdiction to claims that implicate the MMBA; that is, claims based on conduct either "arguably protected" or "arguably prohibited" by the MMBA.

Despite this, under the Court of Appeal's flawed analysis, virtually every matter in which a strike or labor dispute is somehow involved, PERB would be deemed to have exclusive initial jurisdiction, regardless of whether the MMBA is implicated. Such an interpretation contradicts the language of section 3509 as well as the cases that have broadly interpreted it.

In cases where a public entity seeks to enjoin certain public workers from participating in a work stoppage, the legal basis of such a claim is not the MMBA. Rather, it is the common law principle recognized in the 1985 California Supreme Court case of *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n* (1985) 38 Cal. 3d 564, 586, wherein a plurality of this Court held that public employees had a right to strike under common law, "unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." This Court held that if it is so demonstrated, the Superior Court has the authority to enjoin public employees from striking to the extent necessary to protect the public health and safety. Because work stoppages that would potentially harm the public health and safety are

neither prohibited nor protected by the MMBA, then it is the Superior Court, rather than PERB, that has jurisdiction over claims seeking to enjoin such conduct.

But there are reasons that go beyond Section 3509 and how it should be interpreted that compel the reversal of the appellate court's decision. In its opinion, the Sixth District downplays the significance of what is fundamentally at stake in these proceedings: the health and safety of the community. By treating potentially hazardous work stoppages as basically "any other labor dispute," the lower court imprudently minimizes the importance of the "local concern" doctrine or other exhaustion exceptions, and how these legal exceptions apply to divest PERB of jurisdiction in this case. So even if the Court of Appeal's analysis of Section 3509's scope is correct, which the City strongly disputes, the Court erred in failing to recognize an exception to PERB's jurisdiction in matters such as this where the underlying goal is the preservation of the public health and safety.

II. STATEMENT OF THE CASE

A. THE INITIAL THREAT OF A WORK STOPPAGE

This case stems from labor negotiations between the City and one of its unions, Operating Engineers Local Union No. 3 ("OE3"). OE3 is the exclusive representative of a bargaining unit consisting of approximately 808 City employees. (See Appellants Appendix of Exhibits to Petition for Writ of Supersedeas or Other Appropriate Relief ["App."] Exh. 1 at 1:21-28; Exh. 2 at 18:9-13; Exh. 3 at 34:13-14.)[1] A good portion of these

[1] On June 9, 2006, the City filed with the Sixth District its Appellant's Appendix of Exhibits for its Petition for Writ of Supersedeas. Because this Writ Appendix includes all documents that would also be included in an Appellant's Appendix, the City did not file a separate Appellant's

employees perform some form of safety-sensitive functions, ranging from the maintenance of sophisticated wastewater treatment systems to the repair and maintenance of City fleet vehicles, including police cruisers. (App. Exh. 2 at 18:9-13; Exh. 3 at 34:13-14.)

On May 30, 2006, during the course of labor negotiations between the parties, OE3 provided the City with 72 hours notice of job actions (which could include a strike or similar work stoppage), meaning a potential work stoppage could have occurred any time after Friday, June 2, 2006. (App. Exh. 3 at 2:25-27.)

B. THE CITY'S ATTEMPT TO SEEK AN INJUNCTION IN SUPERIOR COURT

On June 1, 2006,[2] the City filed a Complaint with the Santa Clara County Superior Court seeking to enjoin fifty-nine specific safety-critical members of OE3 from participating in OE3's threatened work stoppage.[3] (App. Exh. 1; Exh. 3 at 36:1-3.) Of these fifty-nine employees, thirty-nine worked at the City's Water Pollution Control Plant, and twenty worked at the Department of Transportation to ensure proper operation and

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Appendix. Rather, all reference to the Appendix will be to such June 9, 2006 Writ Appendix.

[2] The file endorsed clerk stamp indicates a filing date of "May 1, 2006." (App. Exh. 1 at 1.) This is simply a typo. The Complaint was signed on May 31, 2006 (App. at 9), and was filed on June 1, 2006. (App. Exh. 3 at 36:1-3.)

[3] The City also included a prayer regarding anticipated picketing activities by the OE3. (App. Exh. 1 at 9:3-9) That matter was not the subject of the City's subsequent Temporary Restraining Order request, and is not relevant to this Appeal.

maintenance of the City's extensive sewer system.[4] (App. Exh. 4 at 138-144 and Exh. 5 at 145:26-146:9 and 146:25-152:25.)

In response to the City's efforts to seek relief from the Court, on May 31, 2006, OE3 filed an "Unfair Practice Charge" with PERB against the City. (App. Exh. 8 at 172-176.) OE3 based its unfair practice claim, not on any action leading up to the strike, but rather on the City's filing of its action with the Superior Court to enjoin the 59 employees from participating in the work stoppage. Specifically, OE3 alleged that the City "interfered with workers' rights to participate in strikes by threatening to file an application for an order to prevent city employees that are members of the Union from engaging in a strike." (App. Exh. 8 at 174.)

On June 2, 2006, the City filed a request for Temporary Restraining Order and an Order to Show Cause re: Preliminary Injunction with the Superior Court. (App. Exh. 2.) The parties appeared at a hearing regarding such request before Judge Kevin Murphy. (Reporter's Transcript ["RT"] Vol. 1.)

Also appearing at the hearing was Robert Thompson, General Counsel for the PERB. (RT Vol. 1 at 2.) PERB is an administrative agency with the State of California charged with oversight of California's public sector collective bargaining laws, including the MMBA, which establishes the collective bargaining rights of employees of California's cities, counties, and districts. (App. Exh. 10 at 182:2-6.) At the hearing, both OE3 and PERB asserted that the Court had no jurisdiction over the City's

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[4] OE3 has never challenged the City's position that the selected employees were safety-critical. For the purposes of this appeal, the merits of the City's position regarding the criticality of such employees are not at issue.

Complaint and request for an injunction in that PERB had exclusive initial jurisdiction over the matter. (App. Exhs. 6 and 10.)

The Court requested an arrangement whereby the Court could further review the parties' legal papers and research the jurisdictional issue. (RT Vol. 1 at 4:8-18.) In order to allow the Court more time to review the matter, OE3 stated on the record that it would not take any job action, or encourage its members to engage in any job action, any sooner than Thursday, June 08, 2006. (RT Vol. 1at 4:24-5:4.) As such, the Court set a new hearing date of June 7, 2006 regarding the City's request for a Temporary Restraining Order. (RT Vol. 1 at 4:15-18.)

The parties, as well as PERB, appeared at the hearing on June 7, 2006 for oral argument. (RT Vol. 2.) During the hearing, Judge Murphy ruled from the bench that PERB had exclusive initial jurisdiction over the City's action and thereby ruled that the City had not exhausted its administrative remedies. (RT Vol. 2 at 19A:5-15.) Judge Murphy based his decision on two grounds: (1) that OE3 had filed its unfair practice charge with PERB on May 31, 2006, and (2) that the allegations in the City's pleadings suggest conduct which is arguably prohibited or arguably protected by the MMBA. (RT Vol. 2 at 19A:8-15.) As such, the Court dismissed the City's case without ruling on the merits. The Court's written Dismissal Order, executed and filed on June 9, 2006, reads: "The Court hereby dismisses this action without prejudice on the grounds that Plaintiff City has failed to exhaust its administrative remedies, in that Plaintiff has not first sought relief from [PERB], which the Court finds to have exclusive initial jurisdiction." (App. Exh. 11.)

C. THE CITY'S WRIT PETITION AND APPEAL

The City filed a Notice of Appeal with the Sixth District on June 9, 2006 and immediately sought a Writ of Supersedeas seeking to prevent the identified safety-critical employees from engaging in a work stoppage pending resolution of the City's request for injunctive relief on its merits. (App. Exh. 12; Petition for Writ of Supersedeas or Other Appropriate Relief, filed June 9, 2006.) The Sixth District issued a stay order on June 14, 2006, prohibiting OE3 from inducing such a work stoppage while the City "seeks injunctive relief through [PERB]." (See Stay Order, filed June 14, 2006.) Upon issuing the stay, the appellate court also sought additional briefing on the following issues: (1) whether the administrative remedies for seeking injunctive relief through PERB are adequate in situations involving a substantial and imminent threat to the health or safety of the public; (2) whether exhaustion of such administrative remedy should be excused in limited situations where there is a substantial probability that the threatened harm to the health or safety of the public will occur; and (3) if exhaustion is excused under such limited circumstances, what is the appropriate remedy. (Id. at 2.)

After briefing by the parties on these and other issues, the parties presented their oral arguments to the three judge appellate panel on October 18, 2007. After the matter was submitted, the Court requested further briefing on the issue of mootness, and the parties subsequently complied, both agreeing that regardless of whether this matter is moot, the Court should exercise its inherent power to decide matters of continuing public interest. (See OE3's Letter Brief, filed Nov. 29, 2007 and City's Letter Brief filed Nov. 30, 2007.)

The Court agreed and on March 4, 2008, issued its opinion on the merits. (See Petition for Review, Exh. A.) The Court affirmed the trial

court's decision and held that PERB had exclusive initial jurisdiction in this matter. (Id.) On June 18, 2008, this Court granted review of the Sixth District's decision.

III. ARGUMENT

A. STANDARD OF REVIEW

In this case, the trial court dismissed the City's case based on a ruling that it lacked subject matter jurisdiction. The issue of whether a court has subject matter jurisdiction is a question of law which the appellate courts review *de novo*. *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1773-1774.

B. HISTORIC BACKGROUND AND STATUTORY FRAMEWORK

Because much of the arguments of this case deal with the timing of the enactment of the MMBA, the creation of PERB and its eventual application to MMBA charges, and this Court's decision in *County Sanitation*, a brief history of these matters is warranted.

1. History of PERB's Jurisdiction Over Its Governing Statutes

The predecessor to PERB was created in 1975 as part of the Legislature's adoption of the Educational Employment Relations Act ("EERA"), which governs employer-employee relations for public schools and community colleges. Cal. Gov't Code §§3540, *et seq.*; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1084. In enacting EERA, the Legislature created the Educational Employment Relations Board ("EERB"), which was deemed to be "'an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board

["NLRB"] to enforce the act.'" *Coachella* 35 Cal.4th at 1084-1085, *citing Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177. EERB was authorized to adjudicate unfair labor practice charges under EERA. *Coachella* 35 Cal.4th at 1085.

In 1977, the Legislature enacted the State Employer-Employee Relations Act (Cal. Gov't Code §§3512, *et seq.*) to govern relations between the state government and certain of its employees. *Coachella* 35 Cal.4th at 1085. It was later renamed, and its official name is now the Ralph C. Dills Act ("Dills Act"). *Id.* In enacting the Dills Act, the Legislature expanded the jurisdiction of EERB to include adjudication of unfair practice charges under the Dills Act, and as a result the EERB was renamed the PERB. *Id.*

Since the Dills Act was passed, the Legislature has enacted new employment relations laws covering additional categories of public agencies and their employees. Commensurate with these new enactments, the Legislature has granted PERB unfair labor practice jurisdiction over these new statutes as well. For example, in 1978, the Legislature enacted the Higher Education Employer-Employee Relations Act (Cal. Gov't Code §§3560, *et seq.*) to govern labor relations within the University of California, the California State University, and Hastings College of the Law, and PERB was also granted jurisdiction over unfair labor charges made under this statute. *Id.* at 1085-1086.

As discussed below, the Legislature's enactment of the MMBA preceded the creation of PERB by several years. However, PERB was not given jurisdiction over charges made under the MMBA until 2001, at which time the Legislature's 2000 enactment of Government Code Section 3509 became effective. Section 3509(b) reads, in pertinent part, as follows:

> A complaint alleging any violation of this chapter . . . shall be processed as an unfair practice charge by the board [*i.e.*, PERB]. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> Cal. Gov't Code §3 509(b).

2. The History of the MMBA and Its Relationship to PERB

The MMBA was enacted in 1968, some seven years prior to the creation of PERB. *Coachella* 35 Cal.4th at 1083. The MMBA governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and districts. Cal. Gov't Code §3501(c). There is no dispute that both the City and OE3 are subject to the provisions of the MMBA.

In general, the MMBA imposes on local public entities and public employees a duty to meet and confer in good faith, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. Cal. Gov't Code §3500; *Coachella* 35 Cal.4th at 1083.

Before 2001, public employers and public employee unions claiming a violation of the MMBA could bring an action in superior court. As discussed above, however, effective July 1, 2001, the Legislature vested PERB with exclusive jurisdiction over alleged violations of the MMBA.[5]

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[5] According to the PERB's regulations, employee organizations commit an unfair practice under the MMBA if they do any of the following: (1) cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA, (2) interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of the right to join or abstain from joining labor organizations, (3) refuse or fail to meet and confer in good faith, (4) fail to exercise good faith while participating in any impasse procedure, or (5) in any other way violate the MMBA. Cal.

Coachella 35 Cal.4th at 1077. Subsequent cases have interpreted this language to mean that PERB has initial exclusive jurisdiction over claims alleging conduct that is either "arguably protected" or "arguably prohibited" by the governing statute. *See, e.g., El Rancho Unified School District v. Nat'l Education Ass'n* (1983) 33 Cal.3d 946, 953. However, as recognized by the courts, "**PERB has no authority to remedy conduct not expressly or impliedly proscribed by its governing statutes.**" *California Teachers Ass'n v. Livingston Union School District* (1990) 219 Cal.App.3d 1503, 1525 (emphasis added).

3. The Common Law Rule of the *County Sanitation* Case

Prior to 1985, the Courts of Appeal had virtually uniformly held that the common law of the State prohibited strikes by public employees. *See* cases cited in *County Sanitation* 38 Cal. 3d at 579, n. 9. Likewise, the legislature had "steadfastly refrained" from providing clear-cut guidance on the issue. *Id.* at 571.

In its 1985 *County Sanitation* decision, this Court held for the first time that public employees generally do indeed have the common law right to strike. As stated by this Court:

> [W]e conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortuous **under California common law.**
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> *Id.* at 585 (emphasis added).

While recognizing this common law right to strike, the Supreme Court granted public entities the common law right to request an injunction based on a showing that the strike would have a detrimental impact on the public health and safety. The Court concluded as follows:

Code Regs., tit. 8, §32604.

> After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are **not unlawful at common law** unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also **requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.**
>
> *Id.* at 586 (emphasis added).

The rule of law set forth in *County Sanitation* has never been codified in the MMBA or in any other statutory provisions. Therefore, there can be no doubt that both the right of public employees to strike and the right of public entities to seek to enjoin certain safety-critical employees from engaging in a strike are based on the common law.

C. AN INJUNCTION PURSUANT TO *COUNTY SANITATION* IS NEITHER ARGUABLY PROHIBITED NOR ARGUABLY PROTECTED BY THE MMBA

The Court below concluded that the participation of safety-critical employees in a work stoppage, which is made illegal by *County Sanitation* decision, is both arguably protected and arguably prohibited by the MMBA, thus invoking PERB's jurisdiction over an injunction claim. (Petition for Review at Exh. A, pp. 17-19.) The reasoning the Court used to reach this conclusion is flawed, and flies in the face of prior cases that have analyzed the scope and limits of PERB's jurisdiction.[6]

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[6] It should be noted that the appellate court's framing of the issue before it made its holding regarding PERB's jurisdiction a forgone conclusion. In the very first line of the decision, the Court stated:

> When a strike involving **statutory** unfair labor practice claims is threatened by public employees whose services are essential to municipal health and safety, who has jurisdiction over the dispute. . .?

(cont...)

There is no provision of the MMBA that either arguably protects or arguably prohibits threatened work stoppages of allegedly safety-sensitive employees, which is the touchstone for determining whether PERB has initial exclusive jurisdiction. *See California Teachers, supra,* 219 Cal.App.3d at 1511 (in determining whether PERB has jurisdiction over any matter, the initial question should be whether the party seeking relief is alleging conduct which constitutes an unfair practice or violation of the MMBA).

Courts have consistently denied PERB jurisdiction over labor-related disputes where no potential violation of the governing statute occurred. *See, e.g., Pittsburg Unified School District v. California School Employees Ass'n* (1985) 166 Cal. App. 3d 875 (court not persuaded that picketing and leafleting activities are either arguably protected or prohibited by EERA); *California Teachers Ass'n, supra,* 219 Cal. App. 3d at 1519 (finding nothing supportive of the contention that claims which assert only violations of the Education Code be directed to PERB simply because the defendant *contends* the EERA may be implicated in the resolution of the claim); *Wygant v. Victor Valley Joint H.S. District* (1985) 168 Cal. App. 3d 319, 324-325. (**every** employee lawsuit complaining of acts of a public employer arguably raises a question of whether the employer was meeting and negotiating in good faith, "yet PERB's exclusive jurisdiction is not all-inclusive"); *California School Employees Assn. v. Azusa Unified School Dist.* (1984) 152 Cal. App. 3d 580, 593 (while an interpretation of any

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(Petition for Review at Exh. A, p.1.)

By couching the underlying claim as one "involving statutory unfair practice claims," the court's decision was practically pre-determined. In reality, and as discussed below, the underlying claim is not "statutory," but rather one based on the common law as declared in *County Sanitation.*

statute adverse to the employee by the employer may be unfair in the lay-sense, such a result does not necessitate a conclusion that it is also an "unfair practice" within the meaning of EERA).

Furthermore, no pre-emption can be found unless the controversy presented to the state court is "identical" to that which could have been presented to the Board. *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal. App. 4th 1807, 1814. In the federal context ,[7] the U.S. Supreme Court has rejected the theory that all labor disputes should necessarily be pre-empted by the jurisdiction of the applicable administrative board. As stated by the Court:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to the state court is identical to . . . or different from . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch . . . was designed to avoid.
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> *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180, 197.

Indeed, the precondition for pre-emption, that the conduct be arguably protected or prohibited by the governing statutes, "is not without substance" and a party cannot satisfy this precondition "by a conclusory assertion of preemption." *Service by Medallion* 44 Cal. App. 4th at 1814, *citing Int'l Longshoremen Ass'n v. Davis* (1986) 476 U.S. 380, 394-395.[8]

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[7] As stated by the California Supreme Court, the principles defining the preemptive reach of the NLRA [National Labor Relations Act] are generally applicable in determining the scope of PERB's preemptive jurisdiction. . ." *San Diego Teachers Ass'n v. Superior Court* (1979) 24 Cal.3d 1, 12.

[8] In light of this authority, the definition of "arguable" must mean more than simply "theoretical," or "possible." Rather, the meaning of

1. The Conduct Underlying a *County Sanitation* Claim is Not Arguably Prohibited by the MMBA

The Sixth District first took the position that claims for injunctive relief under *County Sanitation* are arguably prohibited by the MMBA. (Petition for Review at Exh. A, pp. 17-18.) Citing to *San Diego Teachers Ass'n v. Superior Court* (1979) 24 Cal.3d 1, the Court asserted that an "illegal strike is arguably prohibited as an unfair labor practice under the MMBA." The Court took the following language from *San Diego Teachers* to support its position: "By engaging in a strike, the [union] may have committed at least two of the unfair practices forbidden an employee organization that is recognized as exclusive representative: (1) failure to negotiate in good faith (§ 3543.6, subd. (c)), and (2) refusal to participate in the impasse procedure (§ 3543.6, subd. (d))." (Petition for Review at Exh. A, p. 17.) The Court even went so far as to point to two statutory provisions that seem to have no relation whatsoever to the conduct at issue in this matter: one making it unlawful for a union to basically intimidate employees because of their exercise of the right to refuse to participate in union activity, and another making it unlawful for a union to cause a public employer to contribute financial or other support to a union. (Id.)

PERB's jurisdictional scope cannot be widened by such farfetched theories regarding which provisions of the MMBA may be implicated. First of all, the court erred in deeming the underlying conduct to be simply a potentially illegal strike, without taking into consideration the source of the possible illegality at issue. As an example, firefighters are public employees covered by the MMBA. *County Sanitation, supra,* 38 Cal.3d at

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"arguable" in this context must be akin to the common meaning of the term: that is, "that can be plausibly or convincingly argued." *Merriam-Webster's Collegiate Dictionary* (10th Ed. 1999.)

572. There are no provisions of the MMBA that prohibit firefighters from engaging in a work stoppage. *Id.* However, there is a Labor Code provision, specifically Section 1962, which contains such a prohibition.[9] There can be little question that, were a union of firefighters subject to Section 1962 threatening to go on strike, a public entity would **not** first need to go through PERB to seek an injunction, as the prohibition of such strikes stems from the Labor Code, not from the MMBA. *See El Rancho, supra,* 33 Cal.3d at 957 ("strikes are an unfair practice under EERA only if they involve a violation of the act's provisions").

Similarly, the conduct alleged in this case is not just any other strike. Rather, it is one involving employees whose participation in a work stoppage may be potentially harmful to the public health and safety. The source of the illegality of any such conduct is not the MMBA, but rather the common law rule of *County Sanitation.* Similar to the situation where a public entity would seek to enjoin a firefighter strike made illegal by Labor Code Section 1962, PERB does not have jurisdiction over a work stoppage made illegal by common law.

Secondly, under the Sixth District's "unfair labor practice" analysis, basically all claims in which a strike is involved may hypothetically implicate some provision of the MMBA sufficiently enough to invoke

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[9] Labor Code Section 1962, reads as follows (emphasis added):

> [Firefighters] shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, **but shall not have the right to strike**, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.

PERB's jurisdiction. This cannot be the case. Indeed, even in those cases where PERB jurisdiction was found, the Court in each instance rested its determination on the facts of the case and the provisions of the governing statute – not simply the idea that all dispute having anything to do with labor or with strikes might hypothetically touch upon some prohibition set forth in the MMBA. *See Wygant, supra,* 168 Cal. App. 3d at 324-325.

For example, in *San Diego Teachers Ass'n, supra,* 24 Cal. 3d 1, a school district obtained an injunction against a teachers association that precluded the teachers from engaging in a strike.[10] Among other arguments, the school district argued that the strike would violate EERA in that the association failed to negotiate in good faith and had not declared an impasse. Specifically, the school district alleged that the association's bad faith was evidenced "by its sponsoring work slowdowns and threatening a strike if no contract were negotiated by June 6." *Id.* at 4.

Unlike the position taken by the lower court in this case, the Court did not simply deem all disputes involving strike activity to be covered by PERB. Rather, the Court had to analyze whether PERB could "properly determine the strike was an unfair practice under the EERA." *Id.* at 7. In doing so, the Court relied on the facts of that case and the specific provisions of EERA which prohibited (1) failures to negotiate in good faith (Cal. Gov't Code §3543.6(c)), and (2) refusals to participate in the impasse procedures (Cal. Gov't Code §3543.6(d)). These provisions were implicated under the **facts** of the *San Diego Teachers* case, thus justifying PERB's initial jurisdiction.

There is no similarity in the present case. The issue of good faith negotiations and impasse procedures are completely irrelevant to the issue

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[10] As a case decided before *County Sanitation*, the issue of whether the common law prohibited public employee strikes was still unsettled.

of whether a certain limited number of employees are critical to the public health and safety. Even if PERB somehow could conclude that the events leading to the threat of a strike were some sort of PERB violation (allegations that have never been raised), the issue of whether public safety requires these employees to continue working would not be affected.

In short, no case has once taken the position that OE3 is advocating and that the Sixth District essentially endorsed: basically that all public employee disputes involving "strike-related activity" are subject to PERB jurisdiction. Were that the rule, then the cases finding PERB jurisdiction where strike activity is alleged would surely have said so. However, rather than simply sending "strike related cases" to PERB, the Courts in each instance analyze the facts to determine whether the statutes over which PERB had jurisdiction were implicated. For example, in *El Rancho*, this Court specifically stated that "strikes are an unfair practice under EERA **only if they involve a violation of the act's provisions.**" *El Rancho, supra,* 33 Cal.3d at 946. Because of none of the MMBA's provisions are involved in a claim seeking a determination on whether certain employees are safety-critical, PERB's has no jurisdiction over such claims.

2. The Conduct Underlying a County Sanitation Claim is Not Arguably Protected by the MMBA

The lower court also deemed the underlying conduct of this case to be arguably protected by the MMBA. Specifically, the Court stated that "the Union's conduct is arguably protected because public employees covered by the MMBA enjoy a general right to strike." (Petition for Review at Exh. A, p. 18.) However, the Court completely glossed over the fact that the source of such right is not the MMBA, but rather the common law as set forth in the *County Sanitation* case.

It is true that public employees generally have been held to have a right to strike. However, the source of this right is not the MMBA. In fact, both the MMBA and EERA are silent on the issue of strikes, although they have been interpreted by the Courts not to prohibit strikes. As stated by the California Supreme Court, "**the MMBA neither denies nor grants local employees the right to strike.**" *County Sanitation* 38 Cal. 3d at 572 (emphasis added).

To the extent public employees have a "right" to strike, the right stems from the common law and judicial interpretations. As noted by our Supreme Court in *County Sanitation*, the Legislature has seemed content to leave **to the judiciary** the "thorny issue" on whether employees covered by the MMBA have a right to strike. *County Sanitation* 38 Cal. 3d at 571 n. 12. Indeed, one need look no further than Chief Justice Bird's several page long concurrence in the *County Sanitation* case to determine that the "right to strike" concept has a long and amorphous history in American jurisprudence. *County Sanitation* 38 Cal. 3d at 593-609 (Bird concur).[11] The Courts, not PERB, are best left to comprehend right to strike issues and address them should they arise in the context of injunction actions.

In supporting its conclusion that it was in fact the MMBA that protects the right to strike, the Sixth District relied on two flawed legal

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[11] In her concurrence, the Chief Justice also confirmed the source of the plurality's right to strike finding: the common law. As stated by Chief Justice Bird, "Today's decision brings the law of public employee strikes into the 20th century and **makes the common law contemporary**." *County Sanitation, supra,* 38 Cal.3d at 593 (Bird concurring) (emphasis added.) Nowhere in her concurrence does she even reference the MMBA. *See also, California Public Sector Labor Relations* (Matthew Bender, 2007) Right to Strike, §25.03[1], p. 25-8 ("[T]he right of employees covered by the MMBA to strike as well as limitations on that right, are governed by the common law as set out in *County Sanitation*").

bases. First, the lower court noted that, in the *El Rancho* case, the Court stated that "EERA might protect a strike called in response to an employer's unfair labor practice," and implicitly analogized that to a situation, like the present one, where certain employees, are alleged to be critical to the public health and safety. (Petition for Review at Exh. A, pp. 18-19.) Second, the Sixth District took language from the *County Sanitation* case to support its conclusion that the MMBA arguably protected public employees' right to strike.

There are several problems with the lower court's reliance on the *El Rancho* case. First, in *El Rancho*, the discussion regarding "unfair labor practice" strikes has no bearing on whether injunction actions under *County Sanitation* implicate the MMBA. For one thing, the *El Rancho* case preceded *County Sanitation* by two years, and therefore does not address the *County Sanitation* common law prohibition against strikes that pose an imminent threat to public health and safety.

The *El Rancho* court did find some credence to the teacher unions' position that its strike may be deemed protected by EERA if there were facts demonstrating that it was "undertaken in response to unfair practices on the part of the public school employer." *El Rancho, supra,* 33 Cal.3d at 958. However, even if it is true that the MMBA protects such strikes, [12]

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[12] The *El Rancho* court based its reasoning on federal cases that found unfair labor practice strikes protected by the National Labor Relations Act. *El Rancho, supra,* 33 Cal.3d at 957-958. Since *El Rancho* was decided in 1983, there have apparently been no other California cases that have cited *El Rancho* for the proposition that unfair labor practice strikes are similarly protected by EERA or the MMBA. *See, e.g., California Public Sector Labor Relations* (Matthew Bender, 2007) Right to Strike, §25.01, p. 25-3 ("It is not yet settled whether these distinctions [between "economic" and "unfair labor practice" strikes] are fully applicable under California's public sector labor laws or, if applicable, whether they have the same effect on employee and employer rights as they have had in the private sector").

there is absolutely nothing in the record in this case even suggesting that is the type of strike at issue in the present case.

Furthermore, any protections for such strikes would not override the common law illegality of safety-critical employees' engaging in a work stoppage. Indeed, *County Sanitation* makes no mention of such an exception to its rule prohibiting safety-critical employees from participating in a work stoppage. In short, any protections for unfair labor practice strikes would not extend to those public employees who have no right to strike under *County Sanitation*, just as they would certainly not extend to firefighters or police officers who are similarly prohibited from striking.

The other basis for the Sixth District's determination that the conduct at issue in this case was arguably protected by the MMBA was the language of *County Sanitation* itself. However, the language that the District Court extracted from *County Sanitation* is taken completely out of context and does not support its conclusion. The *County Sanitation* case at no point concluded that the MMBA protects anybody's right to strike. In fact, this Court explicitly stated the exact opposite: that the MMBA fails to grant local employees the right to strike. *County Sanitation*, *supra,* 38 Cal.3d at 572. The language cited by the Sixth District stems from the *County Sanitation* Court's conclusion that the MMBA cannot be read to **prohibit** strikes, not that the MMBA **protects** such a right.

In fact, the Sixth District almost seems to blatantly overlook that distinction in the manner in which it quotes from *County Sanitation.* For example, the appellate court in its opinion cites *County Sanitation* for its proposition that "regardless of whether the MMBA is the source of the general right to strike, the statute's 'implications' concerning that right 'are significant.'" (Petition for Review at Exh. A, p. 19.) The actual quote from

County Sanitation spoke nothing of the MMBA's implications regarding the **right** to strike. Rather, *County Sanitation* was addressing the MMBA's implications "regarding the traditional common law **prohibition**" against strikes. *County Sanitation*, 38 Cal. 3d at 576.

In short, neither the *El Rancho* case nor the language of *County Sanitation* support the lower court's position that this case raises conduct arguably protected by the MMBA. It has long been established that the MMBA neither grants nor prohibits the right to strike. Such a right stems from the common law only, which is outside of PERB's jurisdiction.

D. REGARDLESS OF WHETHER THE MMBA IS IMPLICATED, THE PUBLIC HEALTH AND SAFETY IS A FUNDAMENTAL "LOCAL CONCERN" NOT WITHIN PERB'S PURVIEW

As stated by the California Supreme Court, "the principles defining the preemptive reach of the NLRA [National Labor Relations Act] are generally applicable in determining the scope of PERB's preemptive jurisdiction. . ." *San Diego Teachers, supra,* 24 Cal. 3d at 12. "Under this federal model, state courts have been allowed to enforce certain laws of general applicability even though aspects of the challenged conduct were arguably protected or prohibited by the NLRA." *Pittsburg Unified, supra,* 166 Cal. App. 3d at 885.

> "Thus, for example, the Court has upheld state-court jurisdiction over conduct that touches '**interests so deeply rooted in local feeling and responsibility** that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' [Citations]." . . . This "local concern exception" rests in part upon principles of federalism but also upon a recognition that, **in certain areas, decisions of local courts do not present substantial danger of interference with administrative adjudication.**
>
> *Id.* (emphasis added, citations omitted.)

California courts have applied this exact same reasoning in determining that PERB should not have jurisdiction over "local concerns," even where the dispute unquestionably involves labor issues that would otherwise be covered. As noted in some courts, there are some issues that are "so deeply rooted in local feeling and responsibility" that pre-emption could not be inferred in the absence of clear evidence of legislative intent. *Service by Medallion, supra,* 44 Cal. App. 4th at 1813-1814.

For example, in the *Pittsburg Unified* case, the Court held that the Superior Court had the jurisdiction to issue an injunction against a school employee's association for certain leafleting and picketing activities. Although stating that the activity complained of was neither arguably protected nor prohibited by EERA (*Id.* at 886), the Court actually based its opinion on the "local concern" exception as utilized by the federal courts.

As stated by the *Pittsburg Unified* court, "[t]wo factors are considered relevant to application of the local concern exception to the arguably prohibited branch of the preemption doctrine." *Id.* at 885. First, the courts should consider whether there is a "significant state interest" in protecting the citizens from the challenged conduct. *Id.* Second, the courts should consider whether the exercise of Superior Court jurisdiction entails "little risk of interference with the regulatory jurisdiction of the administrative agency." *Id.*

The Court in *Pittsburg Unified* considered these factors and ruled that the local concern exception applied. The Court noted that the dispute before the Superior Court involved issues of corrupt practices or conflicts of interests involving members of the governing school board. As such, these issues were not "proper subjects of collective bargaining, and these

issues are neither of jurisdictional interest to PERB nor within its areas of expertise." *Id.* at 888.

Nor in this case are the public health consequences resulting from the City's inability to provide certain services a "proper subject of collective bargaining." The only issue that would be relevant to a Superior Court reviewing the City's injunction claim is whether the public health and safety would be threatened if certain employees did not perform their job functions. There may not be a more clear example of a "local concern" that should be exempt from PERB's jurisdiction. *See People v. Union Pacific Railroad* (2006) 141 Cal. App. 4th 1228, 1247 (the exercise of the police power to protect the health and welfare of the public and the environment is primarily and historically a matter of local concern).

E. EXHAUSTION, TO THE EXTENT IT WOULD OTHERWISE BE REQUIRED, SHOULD BE EXCUSED WHEN A *COUNTY SANITATION* INJUNCTION IS SOUGHT

In *Coachella, supra,* 35 Cal.4th 1072, 1081-1082, the California Supreme Court stated that exhaustion of administrative remedies may be excused "when the party claims that 'the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.'" Where such is the case, courts consider three factors: (1) the injury or burden that exhaustion will impose, (2) the strength of the legal argument that the agency lacks jurisdiction, and (3) the extent to which administrative expertise may aid in resolving the jurisdictional issue. *Id.* at 1082. In this situation, all of these factors work in favor of excusing any exhaustion requirement where a public entity seeks to enjoin safety-critical employees from participating in a work stoppage.

1. Requiring Exhaustion Will Impose Substantial Public Injury

First of all, in situations where "there is a substantial probability that the threatened harm to the health or safety of the public will occur," requiring administrative exhaustion would obviously impose significant harm.

PERB is incapable of providing the kind of immediate relief available through the courts in situation of this nature. PERB has noted that it has "the authority to seek judicial intervention when appropriate." (PERB's Supplemental Opposition, filed June 21, 2006) However, the process through which PERB determines the appropriateness of such intervention (which takes place through its Sacramento office) can be convoluted, insufficiently time consuming and patently insufficient to address imminent health and safety strikes. Only after such process is completed does it even consider whether it will seek an injunction on a complainant's behalf in Superior Court.

Under PERB's own regulations, the process to obtain a determination by PERB whether it will seek an injunction from the Court could take well over a week. The process involves submitting a request for PERB to seek injunctive relief after providing adequate notice to the opposing side. Pub. Empl. Rel. Bd. Reg. 32450 and 32455. Then, the General Counsel for PERB must initiate an investigation, which could take as long as five days. Pub. Empl. Rel. Bd. Reg. 32455 and 32460. The General Counsel must first determine that the alleged conduct would constitute an unfair labor practice under the MMBA. (Id.) Thereafter, the other party may respond to the charge. (Id.) The General Counsel would then make a recommendation to the Board. Pub. Empl. Rel. Bd. Reg. 32460. The Board may then, at its discretion, determine to seek injunctive

relief. The regulations, however, do not set a definitive time limit on this process. Pub. Empl. Rel. Bd. Reg. 32450 and 32460.

Further, even if PERB's General Counsel makes a determination that an injunction is appropriate, **PERB does not have the power to issue an injunction**. Rather, it has the discretion either to seek injunction from the Court or not, and must abide by all the procedures associated with the court injunction process. Pub. Empl. Rel. Bd. Reg. 32460 and 32465; Cal. Gov't Code §3509(a).

Thus, in situations such as this, the administrative process would necessarily take at least several days, and if all goes well for the City, would result in the parties' being in the Superior Court seeking the very injunction the City should be able to seek from the Court in the first instance. Such a round-about administrative process, when it involves an imminent threat to the public health and safety, is inadequate and deficient, especially where PERB has no mechanism for a party to obtain an interim injunction while PERB engages in its process of deciding whether to pursue an injunction.

A process that requires days of administrative decision-making (as discussed above) prior to even being allowed to ask for an injunction in court creates an injury and burden to the public, which must suffer the consequences if a decision is not made quickly enough.[13] In other cases

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[13] Even the Governor has recognized the potential inadequacies of the cumbersome administrative process that could be required in lieu of going directly to court. In vetoing AB 553 – a bill that would have explicitly granted PERB jurisdiction over *County Sanitation* claims – the Governor noted how "imperative" it was for "local governments to have access to immediate injunctive relief from superior courts during strike situations." (Appellant City of San Jose's Motion and Request for Judicial Notice, filed Oct. 9, 2007 at Exh. B.) The Governor, therefore, found the courts to be better suited to address matters of public health and safety than "the slower PERB process." (Id.)

where there is an urgent need for a judicial determination, courts have excused the exhaustion requirement. *See, e.g., Department of Personnel Administration v. Superior Court* (1992) 5 Cal. App. 4th 155, 170-171 (excusing exhaustion of administrative remedies where unlikely that PERB process could have been completed in time for end-of-fiscal year budget cuts). Furthermore, the exhaustion requirement is excused when a case raises "important questions of public policy." *See Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal. App. 4th 587, 615 (costly and lengthy administrative process excused where issue raised public policy concerns related to rent control). Determinations about how the public health and safety should be protected would raise such important questions, and therefore can be excused on this ground as well.

2. The City's Jurisdictional Argument is Strong

The second factor (the strength of the legal argument that the agency lacks jurisdiction) also favors excusing exhaustion. As explained above, PERB's jurisdiction is limited, reaching only those claims where an MMBA violation is alleged. Here, the City has not made such a claim: whether specific employees are critical or not to the public health and safety raises no issue about whether the MMBA is violated.

3. PERB's Expertise in Labor Relations is of No Benefit Where the Public Health and Safety is At Risk

Finally, judicial intervention would not deny the parties the "benefit of the PERB's administrative expertise." *See Coachella Valley* 35 Cal. 4th at 1083. The *County Sanitation* Court instructed lower courts to review such matters on a "case by case" basis, determining whether certain employees were critical enough to the public health and safety that they should be enjoined from engaging in a work stoppage. *See County Sanitation, supra,* 38 Cal. 3d at 585. PERB has no expertise in this type of

safety sensitive analysis. PERB's expertise is in matters of labor relations, not public health and safety.

PERB makes much of its status as an "expert administrative agency charged with the interpretation and enforcement of the MMBA." That indeed may be the case, but PERB is no expert in what functions of a municipality are essential for the public health and safety, as such a matter requires neither the interpretation nor the enforcement of the MMBA.

PERB's expertise over labor relations gives it no upper hand in determining whether an engineer's absence is likely to create a sewage spill which would threaten the public health and safety. PERB has no place positioning itself as a buffer between the City's experts and California's courts, which must ultimately make the decision as to whether a strike by the enumerated individuals would threaten the health and safety of the public. To permit an administrative agency with no particular specialty in public safety issues to be granted the exclusive jurisdiction on such matters would be contrary to public policy and would imprudently usurp the court of its equitable powers.

Both PERB and OE3 have attempted to counter this argument by quoting from *El Rancho* and has tried to give the impression that the issue raised in the *El Rancho* case is applicable to the point raised by the City in this case: that PERB has no specialized expertise in determining matters of public safety. In fact, the quote from *El Rancho* has nothing to do with that point.

The issue before the Court in the *El Rancho* case was whether PERB had jurisdiction over alleged unfair practices by the teacher's union. The *El Rancho* Court rejected the District's argument that PERB was an

inadequate forum since PERB was not interested in the broader harm to the public should the teacher's go on strike. *Id.* at 957.

Contrary to the implication made by PERB and OE3 in their papers, the Court did **not** conclude that PERB has special expertise in determining which functions are critical to the health and safety of the public. Rather, it simply noted that PERB, in enforcing the provisions of EERA, has an interest in minimizing interruptions to educational services and, therefore, would surely "use its power ... in ways that will further the public interest in maintaining the continuity and quality of educational services." *Id.* Regardless of PERB's interests in orderly labor relations, PERB has no special expertise in determining whether, on a case by case basis, certain employees are critical to the public health and safety. The El Rancho Court certainly does not reach that conclusion.

In sum, all of the factors set forth in the *Coachella Valley* case favor excusing exhaustion, to the extent exhaustion would otherwise be required. In either case, judicial intervention is appropriate and warranted, and the lower court was wrong not to recognize such an exception in the context of this case.

F. OE3 CANNOT CREATE PERB JURISDICTION OVER THE CITY'S REQUEST FOR A HEALTH AND SAFETY INJUNCTION MERELY BY FILING ITS OWN PERB COMPLAINT

The Court of Appeal, at least implicitly, did reject the trial court's alternative basis for its ruling: that OE3's filing of its own PERB claim, after the City filed its complaint with the Superior Court seeking an injunction, invoked PERB's jurisdiction. (Petition for Review at Exh. A, p. 15.) However, the City addresses this issue since this Court may review this matter *de novo*.

A party cannot invoke PERB's subject matter jurisdiction over a Superior Court complaint merely by filing a complaint with PERB alleging that the action taken in Superior Court violates the MMBA. Such a rule would contradict case law and would, in essence, allow any party to take a matter out of the trial court's hands merely by strategically filing a reactive PERB complaint.

The basis of OE3's PERB complaint was basically its allegation that the City was wrongfully "threatening to file an application for an order to prevent city employees that are members of the Union from engaging in a strike." (App. Exh. 8 at 174.) OE3's filing of such a charge is insufficient to create PERB's subject matter jurisdiction over the City's complaint, where none existed in the first place.

First and foremost, a party's mere filing of a charge with PERB does not in and of itself mean that PERB has jurisdiction over the matter. This is the case even if the party resisting PERB's jurisdiction is the party that files the PERB charge. For example, in *Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, the School District filed a complaint with PERB, but later argued that the Superior Court, rather than PERB, had the jurisdiction to rule on the School District's request for an injunction to prevent a strike. The Court of Appeal ruled as a preliminary matter that the School District's invocation of PERB's jurisdiction by filing an unfair practice claim did not necessarily confer subject jurisdiction upon PERB. *Id.* at 890. As stated by the Court, "the jurisdiction over the subject matter cannot be conferred by consent, waiver or estoppel." *Id.*

Because it is OE3 that both filed a PERB complaint and is now claiming that PERB has jurisdiction over this matter, this presents a far less

compelling case than that presented in the *Modesto* case for invoking PERB's jurisdiction. If PERB's jurisdiction is not established when the party resisting jurisdiction files a PERB action (as in the *Modesto* case), then certainly it cannot be established merely because the party attempting to avoid the Court's jurisdiction by attempting to invoke PERB's jurisdiction files such a claim.

To rule otherwise would be to allow any party to take away jurisdiction from the Superior Court merely by subsequently filing a claim with PERB alleging that bringing the Superior Court action violates the MMBA. The analysis of proper subject matter jurisdiction is not dependent on this type of strategic gamesmanship. Thus, OE3's subsequent filing of a PERB complaint did not strip the Superior Court of its jurisdiction to rule on the City's injunction claim.

IV. CONCLUSION

Whether push by OE3 and other unions to invoke PERB's jurisdiction over public safety strikes is motivated by good intentions or strategic gamesmanship, there is no question that it is the residents of this state that have the most at stake in this legal battle. After all, it is the public health and safety that will either be enhanced or hindered by this Court's decision. Given the importance of this decision, it would seem prudent to permit a process that ensures the most direct and efficient procedure for preserving the public health and safety.

It was this Court, not the Legislature, that found public employees to have the general right to strike. It was also this Court that carved an exception to this right where the public health and safety was jeopardized. Given that this right and its exception were established by the judiciary, the argument that the judiciary should not have jurisdiction to determine the

merits of any injunction brought pursuant to these common law principles are meritless.

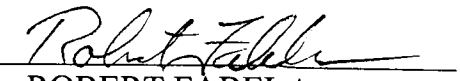
Regardless, even if PERB's jurisdiction can be justified by hyper-technical reading of the applicable cases, this Court has the power to carve an exception, either under the "local concern" doctrine or the exhaustion exception set forth in the *Coachella* case. Either of these exceptions would mandate a finding that the Superior Courts have jurisdiction to determine whether specific public employees are critical to the public health and safety.

For these reasons, the City respectfully requests that this Court reverse the Sixth District's decision granting PERB initial exclusive jurisdiction over claims brought under the common law rule of *County Sanitation.*

Respectfully submitted,

Dated: August 18, 2008

RICHARD DOYLE, City Attorney

By: 

ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Plaintiff/Appellant
CITY OF SAN JOSE

V. CERTIFICATE REGARDING WORD COUNT

I, Robert Fabela, counsel for Plaintiff/Petitioner City of San Jose, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this OPENING BRIEF ON THE MERITS, exclusive of tables, cover sheet, and proof of service, according to my computer program is 9,164 words.

Respectfully submitted,

Dated: August 18, 2008

RICHARD DOYLE, City Attorney

By: _____
ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Plaintiff/Petitioner
CITY OF SAN JOSE

PROOF OF SERVICE

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

SUPREME COURT CASE NO.: S162647
(Court of Appeals Case No.: H030272)
(Superior Court No.: 1-06-CV064707)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On **August 18, 2008**, I caused to be served the within:

OPENING BRIEF ON THE MERITS

☒ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

- ☐ causing the envelope/package to be deposited for collection
- ☒ causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

☒ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **August 18, 2008**, at San Jose, California.

Margarita Martinez

SERVICE LIST

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

COURT OF APPEALS CASE NO.: H030272
(Superior Court No.: 1-06-CV064707)

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Michael J. Yerly, Clerk of the Court
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, California 95113

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Honorable Kevin Murphy
Superior Court of California
County of Santa Clara
191 North First Street
San Jose, California 95113

One (1) Copy via U.S. Mail to:
Arthur Akiba Krantz, Esq.
Leonard Carder LLP
1330 Broadway, Suite 1450
Oakland, California 94612

Attorneys for Attorney for Defendant/Respondent Operating Engineers Local Union No. 3

Telephone No.: (510) 272-0169