

Case No. **S162647** SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE,
Plaintiff/Petitioner,
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)

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SUPREME COURT
FILED

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DEPUTY

PETITION FOR REVIEW

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

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To the Honorable Chief Justice Ronald M. George and the Honorable Associate Justices of the California Supreme Court:

The City of San Jose ("City") petitions for review of the opinion of the Court of Appeal, Sixth District, filed on March 4, 2008, a copy of which is attached hereto as Exhibit A.

I. STATEMENT OF ISSUE

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?

II. SUMMARY OF REASONS REVIEW SHOULD BE GRANTED

While this matter was pending before the Sixth District Court of Appeal, the very issue presented in this case was being considered in at least four other appellate cases in District Courts throughout the State.¹ In each of those concurrent cases, the appellate court was considering trial court orders finding that the Superior Courts, and not the California Public Employment Relations Board ("PERB"), had initial jurisdiction to decide

¹ See *County of Contra Costa v. Public Employees Union Local One* (1st Dist.), Case No. A115095; *County of Contra Costa v. California Nurses Assoc.* (1st Dist.), Case No. A115118; *County of Sacramento v. AFSCME Local 146* (3rd Dist.), Case No. C054233; *County of Santa Clara v. Service Employees International Union Local 535* (6th Dist.), Case No. H030937.

whether public employees, whose job duties were alleged to be critical to the public health and safety, could be enjoined from participating in a work stoppage. It was only in the present case where the trial court found PERB – and not the Superior Court – to have initial jurisdiction over such potentially critical matters.

Because it was the first appellate court to reach a decision on this vital legal issue, and because its decision was seemingly inconsistent with this Court's decision in *County Sanitation, supra*, the Sixth District Court's published opinion affirming the trial court's decision in this case has reverberated throughout the state. Two other Districts that are considering the issue (the First and the Third Districts) have either invited or accepted additional briefing in light of the Appellate Court's decision in this case.

This issue is ripe for final resolution by the Supreme Court in that only this highest court can settle the important question of law presented in this case: when faced with a work stoppage that poses an imminent threat to the public health and safety, does the common law doctrine under *County Sanitation* allow a public entity to seek immediate injunctive relief from a Superior Court, or is a public entity required to exhaust administrative remedies through PERB in an attempt to convince PERB to seek injunctive relief on its behalf from the Superior Court?

Further demonstrating the importance of deciding this issue, both the legislature and the Governor's office have recently made unsuccessful efforts to bring closure to the question raised in this case, with these two branches of government coming to different conclusions on the proper resolution. On August 30, 2007, the legislature enrolled to the Governor Assembly Bill 553, which would have provided that, "under the Meyers-Milias-Brown Act, the Public Employment Relations Board is exclusively

authorized to make a determination whether to seek from a court of competent jurisdiction injunctive relief involving or growing out of a strike, work stoppage, or lockout involving an employee organization and a public agency.” On September 26, 2007, the Governor vetoed this Bill, stating in his veto message that it is “imperative that local governments have access to immediate injunctive relief from Superior Courts during strike situations.”² In light of the Governor’s veto, the question presented in this petition remains unresolved.

The issue of whether public entities may seek injunctive relief immediately from the Superior Court, or else be first required to seek an administrative determination from PERB, is of critical importance to every city and county in the state that is charged with protecting the public welfare. Until the Court of Appeal’s decision in this case, public entities generally understood, and most trial courts apparently agreed, that threatened work stoppages by specific safety-critical public employees could be expeditiously enjoined by the Superior Courts. Now, if the lower court’s decision were allowed to stand, and despite the Governor’s veto, a more cumbersome route to an injunction would appear to be required — one that would require time consuming administrative exhaustion through PERB. In order for this important issue to be resolved, the City respectfully requests that the Supreme Court grant review.

III. LEGAL BACKGROUND

Labor relations between public entity employers and their employees are governed by the *Meyers-Millas-Brown Act* (*Cal. Gov’t Code §3500, et seq.*) (“MMBA”). Although setting forth public employees’ collective

² On October 18, 2007, the Court of Appeal judicially noticed both enrolled AB 553 as well as the Governor’s veto message.

bargaining rights, the MMBA is silent as to whether public employees have a right to strike.

Because the legal right of public employees to engage in a work stoppage has been intentionally overlooked by the legislature,³ the development and limitations of such a right have been the product of judicial analysis over the last several decades. In 1985, this Court decided *County Sanitation District Number 2 v. Los Angeles County Employees Ass'n* (1985) 38 Cal. 3d 564. In the *County Sanitation* case, this Court concluded that public employees generally have the right to engage in a work stoppage, unless such action would cause a disruption that would "seriously threaten the public health or safety." *Id.* at 580. In such cases, the Superior Court should exercise its "equitable authority to enjoin a strike based on a showing that the strike represents a substantial and imminent danger to the public health or safety." *Id.* at 587.

At the time *County Sanitation* was decided, PERB had no jurisdiction whatsoever over any MMBA claims. However, in 2001, the legislature vested PERB with initial exclusive jurisdiction over alleged violations of the MMBA. See Cal. Gov't. Code §3509(b). Before it passed Government Code Section 3509, the legislature specifically considered codifying the rule of *County Sanitation* into the MMBA. (See SB 739, as amended August 16, 1999 §8.) Had it done so, there would have been very little question that a *County Sanitation* charge would implicate the MMBA and invoke PERB jurisdiction. By the legislature's failure to adopt *County Sanitation's* holding into the MMBA, however, *County Sanitation* remained merely a common law rule over which PERB ostensibly had no jurisdiction.

³ As noted by this Court, the Legislature has seemed content to leave this "thorny issue" to the judiciary. *County Sanitation District No. 2 v. Los Angeles County Employees Ass'n* (1985) 38 Cal. 3d 564, 571 n. 12.

See Central Delta Water Agency v. State Water Resources Control Bd. (1993) 17 Cal.App.4th 621, 633-634 (finding Legislature's deletion of language that appeared in statute's earlier version is strong evidence that final statute as enacted should not be construed to include omitted provision.) The Governor's recent veto of AB 553 is further evidence that the Superior Court retained jurisdiction over *County Sanitation* claims.

IV. FACTUAL AND PROCEDURAL HISTORY

A. SUMMARY OF FACTS

1. The Initial Threat Of A Work Stoppage

This case demonstrates a typical factual situation in which a public entity requires a swift injunction in order to prevent certain specific safety-sensitive employees from participating in an otherwise legal work stoppage. In the summer of 2006, the City and one of its unions, Operating Engineers, Local Union No. 3 ("OE#3" or "Union") reached an impasse during the course of labor negotiations. OE#3 is the exclusive representative of a bargaining unit consisting of 808 City employees. A portion of these 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. (See Appellants Appendix of Exhibits to Petition for Writ of Supersedeas or Other Appropriate Relief ["App."] Exh. 2 at 18:9-13; Exh. 3 at 34:13-14.)⁴

On May 30, 2006, and pursuant to the parties' agreed upon impasse procedures, OE#3 provided the City with **72 hours notice** of job actions (which could include a strike or similar work stoppage). (App. Exh. 1.)

⁴ The Writ Appendix served as the "Appellate Appendix" for the City's appeal.

Thus, a potential work stoppage could have occurred any time after Friday, June 2, 2006.

2. The City's Attempt to Seek an Injunction in Superior Court

On May 31, 2006, the City filed a Complaint with the Santa Clara County Superior Court seeking to enjoin fifty-nine specific safety-critical members of OE#3 from participating in OE#3's threatened work stoppage. (App. Exh. 1.) 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 the continuous and proper operation of the City's extensive sewer system. (App. Exh. 4 at ¶4 and Exh. 5 at ¶5)

On June 2, 2006, the City filed a request for Temporary Restraining Order and an Order to Show Cause re: Preliminary Injunction (App. Exh. 2), and the parties appeared at a hearing regarding such request before Superior Court Judge Kevin Murphy. Also appearing at the hearing was Robert Thompson, General Counsel for PERB. (App. Exh. 10.) 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 most employees of California's cities, counties, and special districts. At the hearing, both OE#3 and PERB asserted that the Superior Court had no jurisdiction over the City's Complaint and request for injunctive relief in that PERB had exclusive initial jurisdiction over the matter. (App. Exhs. 6 and 10.)

After obtaining assurances from the Union that it would delay job action pending the court's decision, Judge Murphy rescheduled the TRO hearing for June 7. 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. (Reporter's Transcript ["RT"] at 19A:5-15.) Judge Murphy based his decision, in relevant part, on his finding that the allegations in the City's pleadings suggest conduct which is arguably prohibited or arguably protected by the MMBA⁵ (RT at 19A:8-15.) As such, Judge Murphy dismissed the City's case without ruling on the merits. The Superior Court's written Dismissal Order was executed and filed on June 9, 2006. (App. Exh. 11.)

3. The City's Writ Petition and Appeal

The City filed a Notice of Appeal with the Court of Appeal for the Sixth Appellate District on June 9, 2006 and immediately sought a Writ of Supersedeas seeking to prevent the identified safety-critical employees from participating in a work stoppage pending resolution of the City's request for injunctive relief on its merits. The Appellate Court issued a stay order on June 14, 2006, prohibiting OE#3 from inducing such a work stoppage until the City sought "injunctive relief through [PERB]." Shortly thereafter, PERB and/or various unions filed appeals from Superior Court decisions which came to the opposite conclusion of Judge Murphy, in cases originating in Contra Costa County, the County of Santa Clara, and the County of Sacramento. (See footnote 1, above.) The Sacramento and

⁵ Judge Murphy also based his decision on the alternative ground that PERB had jurisdiction since the Union had filed a charge with PERB on May 31, 2006, alleging that the City's complaint seeking an injunction amounted to an unfair labor practice. However, 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. See *Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 890. The Appellate Court in this case apparently recognized this rule, and did not base its decision on the Union's PERB filing.

Contra Costa County cases are still pending in the First and Third Districts, respectively, while the Sixth District dismissed the Santa Clara County case as moot on the same date that it rendered its decision in this case.

B. COURT OF APPEAL'S OPINION

The Court of Appeal for the Sixth Appellate District issued its decision in this case on March 4, 2008. (See Exhibit A, attached hereto.)⁶ The Appellate Court affirmed the trial court's determination that PERB has exclusive initial jurisdiction, even with regard to a request for injunctive relief under *County Sanitation*. The Appellate Court found that the underlying work stoppage by the safety-critical employees was both arguably prohibited and arguably protected by the MMBA and therefore PERB has exclusive initial jurisdiction. (Id. at 17-19.)

With respect to *County Sanitation*, the Appellate Court determined that the Legislature removed from the courts their initial jurisdiction over public employee work stoppage when it vested PERB with MMBA jurisdiction in 2001. (Id. at 20.) The Appellate Court further determined that the local concern doctrine was not applicable (Id. at 24-25.) and there was no exception to the general rule requiring administrative exhaustion before resorting to the courts. (Id. at 26.)

V. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING A CITY'S ABILITY TO SEEK IMMEDIATE INJUNCTIVE RELIEF FROM THE SUPERIOR COURT TO PROTECT THE PUBLIC HEALTH AND SAFETY

Rule 8.500(b)(1) of the California Rules of Court provides that review by the Supreme Court will be granted where it appears "necessary to

⁶ In addition to the file copy of the Appellate Court's decision, attached hereto as Exhibit A, the published opinion can be found at 160 Cal.App.4th 951.

secure uniformity of decision or the settlement of important questions of law.” Cal. Rules of Court, Rule 8.500(b)(1). The settlement of the important question raised in this case is sought by public entities across the State, courts that are currently considering the question, as well as the legislature and governor’s office

A. IT IS ESSENTIAL THAT THIS COURT RESOLVE WHETHER THE COMMON LAW DOCTRINE AGAINST STRIKES BY SAFETY-CRITICAL EMPLOYEES IMPLICATES THE MMBA AND THEREFORE PROVIDES PERB WITH EXCLUSIVE INITIAL JURISDICTION

In the underlying action, the City sought to enjoin from striking specific employees whose absence during a work stoppage would create an imminent threat to the health and safety of the public. The City did not seek a finding, and could not have alleged, that the Union or its members were threatening to commit an unfair labor practice in violation of the MMBA or any PERB regulation. Instead, the City sought to enforce the **common law** rule allowing public entities to enjoin a work stoppage that “creates a substantial and imminent threat to the health or safety of the public.” *County Sanitation* 38 Cal.3d at 586. The power of the judiciary to enjoin work stoppages that would endanger the public health and safety was clearly established by the Supreme Court in *County Sanitation*.

1. Whether the 2001 Adoption of Government Code Section 3509(b) Expands PERB’s Jurisdiction Over *County Sanitation* Claims Requires Resolution

In 2001, the legislature vested PERB with jurisdiction over alleged MMBA violations. Specifically, the operative language is contained in Government Code Section 3509(b), which reads as follows:

A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency . . . shall be processed as an unfair practice charge by [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 [PERB]. [PERB] shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

Cal. Gov't Code §3509. With the passage of this law in 2001, PERB has been deemed to have exclusive and initial jurisdiction over conduct which is arguably prohibited or arguably protected by the MMBA. *Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1084; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1. As part of that exclusive jurisdiction, PERB has authority to determine whether conduct constitutes an "unfair practice" under the MMBA. Cal. Gov't Code §3509(b).

Since Government Code Section 3509 was adopted, this Court has not had cause to determine the scope of PERB's jurisdiction, if any, over work stoppages by specific safety critical public employees. In light of the legislature's recent failure to clearly establish PERB's jurisdiction over *County Sanitation* strikes (see vetoed AB 553), it is in the hands of the judiciary to determine the extent PERB's jurisdictional reach.

2. This Court Has Yet to Determine Whether the MMBA Is Implicated by Claims that Certain Employees are Too Safety-Sensitive to Participate in a Work Stoppage

As the Appellate Court acknowledged in its decision, the MMBA "neither denies nor grants local employees the right to strike." (Exh. A at 16.) Yet, despite this acknowledgement, the Court found that the underlying conduct of *County Sanitation* claim would be both arguably prohibited and protected by the MMBA.

As to the "arguably prohibited" prong of the test, the Court conceded that "the activity at issue must be tethered to the MMBA." (Id. at 18.)

However, without any direct Supreme Court precedence on the scope of the MMBA, the Court based its decision on theoretical MMBA violations that could arise in any given strike situation. In particular, the Court felt comfortable relying on cases involving entirely different factual scenarios – none involving the type of health and safety threats present in cases like this one – to conclude that public employee strikes must necessarily involve conduct that is arguably prohibited by the MMBA. (Id. at 17-18.)

The City disagrees that this can be the standard in assessing whether the “arguably prohibited” prong is satisfied. Rather, allegations regarding the safety-sensitive nature of specific employees is wholly separate from whether a Union has engaged in other conduct (such as the threat of a general strike) that may somehow be deemed an unfair labor practice under the MMBA. See, e.g., *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”). Because the basis for prohibiting these certain employees from striking is the common law (specifically, *County Sanitation*) and not the MMBA, PERB does not have jurisdiction.

This same reasoning is what motivated Superior Courts across the State to find that PERB did not have jurisdiction in such situations. However, without Supreme Court guidance, the Court of Appeal in this case reasoned otherwise, failing to distinguish between a *County Sanitation* claim which focuses solely on the functions of specific employees and their importance to the public health and safety, and general unfair labor practice claims, which would indeed implicate the MMBA.

The same holds true with regard to the Appellate Court's analysis of the "arguably protected" prong. Once again, the Court of Appeal found nothing in the provisions of the MMBA that protected the right of public employees to strike. Indeed, the Appellate Court cited nothing but case law to support such a right. (Id. at 19.) Because the source of the legal protection must be the MMBA and not common law, the Court's reasoning is not sound. See *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1814 (the precondition for pre-emption, that the conduct be arguably protected or prohibited, "is not without substance" and a party cannot satisfy this precondition "by a conclusory assertion of preemption"). However, unless reviewed by this Court, the published decision will guide the analysis of similar claims. Once again, Supreme Court intervention is necessary to prevent this misreading of the law.

In short, prior to the Appellate Court's decision, no case has taken the position that all public employee disputes involving "strike-related activity" is 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 statute governed by PERB, is implicated. Supreme Court review confirming the more measured approach in determining the scope of PERB's jurisdiction is required.

B. THERE IS BROAD STATEWIDE INTEREST IN THE ISSUE PRESENTED, MERITING SUPREME COURT RESOLUTION

The City recognizes that the Supreme Court is not inclined to grant review unless the case presents a matter of statewide importance. There can be little question that the issue presented in this case meets such a standard.

First of all, the fact that the very issue raised in this case is currently before multiple Courts of Appeal in different appellate districts speaks volumes about the pervasiveness of the issue presented. Secondly, by the legislature's enrolling of AB 153 and the Governor's subsequent veto thereof, it is evident that the other branches of government also have an interest in whether PERB has initial exclusive jurisdiction over attempts to enjoin safety-critical employees from participating in work stoppages.

The reason for this clear statewide interest is self-evident. The issue of this case touches upon one of the core duties of California's local governments: the ability to adequately ensure the continued public health and safety of the communities they serve. This duty could be severely curtailed if the Appellate Court's decision were to be the last word on whether public entities must first exhaust PERB's processes before seeking injunctive relief.

There can be no dispute that, even under the best case scenario, PERB is incapable of providing the kind of immediate relief that public entities may require. The process through which PERB determines the appropriateness of judicial 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. See Pub. Empl. Rel. Bd. Regs. 32450-32460. Indeed, Under PERB's own regulations, the process to obtain a determination by PERB could take well over a week. *Id.*

Further, even if PERB 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).

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.

Finally, this case raises issues that are “so deeply rooted in local feeling and responsibility” that pre-emption should not be inferred in the absence of clear evidence of legislative intent. *Service by Medallion* 44 Cal. App. 4th at 1813-1814. While rejected by the Appellate Court, this concept – referred to as the “local concern” doctrine – has been applied to determine that PERB should not have jurisdiction over “local concerns,” even where the dispute unquestionably involves labor issues that would otherwise be covered. *See, e.g., Pittsburg Unified School District v. California School Employees Ass'n* (1985) 166 Cal.App.3d 875, 886 (union’s leafleting and picketing activities raised local concerns that can be enjoined by the Superior Court in the first instance).

Local preservation of the public health and safety is such a “local concern” that should not be hindered by PERB’s administrative processes. *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). Therefore, this case raises an issue of fundamental and broad statewide interest. Supreme Court review of this matter is warranted and anticipated by public entities as well as Unions across the state.

VI. CONCLUSION

For the reasons set forth herein, the City respectfully requests Supreme Court review of the important issues raised in this case.

Respectfully submitted,

Dated: April 14, 2008

RICHARD DOYLE, City Attorney

By: *Robert Fabela*
ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Petitioners

VII. 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 PETITION FOR REVIEW, exclusive of tables, cover sheet, and proof of service, according to my computer program is 5,163 words.

Respectfully submitted,

Dated: April 14, 2008

RICHARD DOYLE, City Attorney

By: 
ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Plaintiff/Petitioner
CITY OF SAN JOSE

EXHIBIT A

Filed 3/4/08

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE,

Plaintiff and Appellant,

v.

OPERATING ENGINEERS LOCAL
UNION NO. 3, et al.,

Defendants and Respondents.

H030272

(Santa Clara County
Super. Ct. No. CV064707)

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: the superior court or the Public Employment Relations Board? As the trial court correctly determined, the agency has exclusive initial jurisdiction. We therefore affirm the order challenged here.

INTRODUCTION

The statute at the heart of this case is the Meyers-Milias-Brown Act (MMBA), codified at Government Code sections 3500-3511.¹ The MMBA “governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and special districts.” (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072,

¹ Further unspecified statutory references are to the Government Code.

1077 (*Coachella Valley*)). The Public Employment Relations Board (PERB) has exclusive initial jurisdiction over claimed violations of the MMBA. (*Ibid.*)

The labor dispute at issue here is between the City of San Jose (the City) and Operating Engineers Local No. 3 (the Union). The Union represents approximately 800 of the City's employees, including a number of individuals that the City identified as critical to the continued operation of its sanitation system and other facilities.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, the City and the Union were engaged in negotiations for a new memorandum of agreement. In April 2006, a tentative agreement was reached, but it was rejected by Union members. The old contract expired, and the Union refused to extend it. On May 30, 2006, the Union gave the City 72 hours' notice that job actions could occur any time after June 2.

Request for Injunction

The City filed a complaint for permanent injunction, preliminary injunction, and temporary restraining order, seeking to enjoin specified Union employees from engaging in a work stoppage. Those employees were identified on Exhibit A to the complaint. The City deemed their services essential to the public health and safety of its citizens.

On June 2, 2006, the City applied to the superior court for a temporary restraining order against a work stoppage by 67 of the employees identified as essential. The City asserted that the superior court was the proper forum for the requested relief. It argued that the Public Employment Relations Board does not have exclusive initial jurisdiction over the common law prohibition against health and safety strikes, that PERB lacks expertise in determining whether a strike constitutes an imminent threat to public health and safety, and that the agency's processes are not suited to protecting against such threats.

Opposition

The Union opposed the City's application for temporary restraining order. The Union argued that the court's jurisdiction was preempted in favor of PERB, because the underlying conduct was arguably prohibited or arguably protected by the MMBA. Furthermore, the Union asserted, PERB has developed procedures to effectively compel remedial action, including the ability to seek injunctions when appropriate. The Union advised the court that it had filed an unfair practice charge against the City on May 31, 2006, alleging violations of the MMBA.

The Public Employment Relations Board also opposed the City's request for injunctive relief. PERB argued that the dispute came within its exclusive initial jurisdiction and that the City was required to exhaust its administrative remedies prior to seeking relief in the superior court.

Hearings

The matter first came on for hearing on June 2, 2006. With the parties' agreement, and the Union's representation that it would not strike in the interim, the court continued the matter to the following week. One reason for the continuance was to give the court the opportunity to review the briefs and the case law.

The hearing resumed on June 7, 2006. The court began by thanking the parties for agreeing to the continuance, observing that it was "in a better position to be informed on the law" than before. After entertaining oral arguments, the court announced its conclusion that the parties' dispute "falls within the exclusive initial jurisdiction of the Public Employment Relations Board." It stated: "Therefore, for the reason of lack of jurisdiction the court will take no action at this time."

Order

On June 9, 2006, the superior court entered a formal dismissal order, which 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 the Public Employees Relations Board, which the Court finds to have exclusive initial jurisdiction over this matter."

Appeal

The City immediately filed a notice of appeal. It also petitioned this court for a writ of supersedeas, and we granted a stay pending final determination of this appeal.

Two amicus curiae briefs have been filed in support of the City's appeal, one submitted jointly by the California State Association of Counties and the League of California Cities and the other submitted by the County of Santa Clara.

The Union opposes the appeal. Like the City, it is supported by two amici, the Public Employment Relations Board (PERB) and the California State Council of Service Employees.

Concerning PERB, we denied its application for leave to intervene. But we granted the agency leave to appear as an amicus. Concerning the California State Council of Service Employees, we accepted its amicus brief and we also granted its request for judicial notice.

ISSUES ON APPEAL

The City contends that this dispute should be heard in superior court, both because the court has jurisdiction under the common law to enjoin public employee strikes that threaten public health and safety, and also because the City "did not allege any violations of the MMBA, which is the only basis by which PERB would have exclusive initial

jurisdiction.” The City further argues that the agency’s remedies are inadequate in cases such as this and that exhaustion should be excused.

The Union characterizes the City’s contentions as contrary to law. In its view, the City’s argument concerning PERB remedies ignores both precedent and the facts of this case. Furthermore, the Union asserts, the City failed to establish an exception to the agency’s exclusive initial jurisdiction over this dispute excusing exhaustion.

Following oral argument in this case, we asked the parties to submit additional briefing on the question of mootness. In its response, the City acknowledged that the parties had “reached an agreement for a new contract during the course of this appeal.” The Union likewise advised that it had reached agreement with the City “on a successor labor agreement, and the threatened work stoppage never occurred.” Nevertheless, both parties ask us to decide the issues presented in the appeal, even if they are technically moot. According to the City, “the issues currently on appeal are of continuing public interest....” The Union agrees, adding that “this issue has the potential to arise in every California city, county, and other districts subject to the MMBA, and the issue of public sector strikes is clearly of broad public interest.”

DISCUSSION

We begin our analysis with the threshold question of mootness. We then consider jurisdiction and exhaustion.

Mootness

A case is moot when the reviewing court cannot provide the parties with practical, effectual relief. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) In such cases, the appeal generally should be dismissed. (*Ibid.*)

As both parties recognize, even if a case is technically moot, the court has inherent power to decide it where the issues presented are important and of continuing interest.

(*Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4.) That is particularly true when the issue is likely to recur yet evade review. (See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190, fn. 6.)

We agree that the central issues presented here – the extent of PERB’s exclusive initial jurisdiction and the need for exhaustion of administrative remedies – present important legal questions of continuing public importance. We therefore exercise our discretion to decide those issues on the merits, despite the fact that the underlying dispute is technically moot.

Jurisdiction

To establish the proper framework for our analysis of the jurisdictional issues, we begin by describing the development of the relevant body of law.

I. Overview: Labor Relations in Public Employment

Starting in the 1960s, the California Legislature “enacted a series of legislative measures granting public employees, at both the state and local level, a variety of organizational and negotiating rights somewhat analogous to the rights long afforded most employees in the private sector by the federal labor relation laws of the 1930’s.” (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 173-174.) These measures “established a framework for the resolution of employer-employee disputes and the avoidance of work stoppages.” (*Id.* at p. 202.) Each “is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1089.)

A. Legislative Acts

1. The MMBA and its predecessor

“In 1961, the Legislature enacted the George Brown Act [citation], which for the first time recognized the rights of state and local public employees to organize and to

have their representatives meet and confer with their public agency employers over wages and working conditions.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1083.)

“In 1968, the Legislature went a step further by enacting the MMBA [citation], which ‘authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency.’ [Citations.] Although the MMBA covered most employees of local public entities, it did not include school districts’ employees.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1083.) Notwithstanding some “‘sketchy’ provisions, the act contains strong protection for the rights of public employees to join and participate in the activities of employee organizations, and for the rights of those organizations to represent employees’ interests with public agencies.” (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 198.) The stated purposes of the MMBA are “to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes” and “to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California....” (§ 3500, subd. (a).)

“When the Legislature enacted the MMBA in 1968, it had not yet created the PERB, and it did not include in the MMBA any provisions expressly authorizing either administrative or judicial proceedings to enforce its provisions.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1084; see *International Brotherhood of Electrical Workers v. City of Gridley, supra*, 34 Cal.3d at p. 197.) Many years later, the Legislature “brought the MMBA within the PERB’s jurisdiction” through legislation that was adopted in 2000 and effective in July 2001. (*Coachella Valley, supra*, at p. 1085.)

2. Other statutes governing public employees

Moving beyond the MMBA, the Legislature enacted other labor measures in the 1970s, “covering additional categories of public agencies and their employees.”

(*Coachella Valley, supra*, 35 Cal.4th at p. 1085.) In 1975, it “adopted the Educational Employment Relations Act (Gov. Code, §§ 3540-3549.3; hereafter the EERA), which governs employer-employee relations for public schools (kindergarten through high school) and community colleges.” (*Id.* at p. 1084.) “Two years later, in 1977, the Legislature enacted the State Employer-Employee Relations Act (Gov. Code, §§ 3512-3524) to govern relations between the state government and certain of its employees.” (*Id.* at p. 1085.) Originally known by its acronym SEERA, that legislation “was later renamed, and its official name is now the Ralph C. Dills Act (hereafter the Dills Act).” (*Ibid.*) “In 1978, the Legislature enacted the Higher Education Employer-Employee Relations Act ... to govern labor relations within the University of California, the California State University, and Hastings College of the Law.” (*Ibid.*)

The trend of bringing additional categories of public employees under the statutory umbrella has continued in the 21st century. “In 2000, the Legislature ... enacted the Trial Court Employment Protection and Governance Act ... to govern labor relations and other employment matters within the state’s trial courts. [Citation.] In 2002, the Legislature enacted the Trial Court Interpreter Employment and Labor Relations Act ... to govern labor relations and employment matters for trial court interpreters. [Citation.] In 2003, the Legislature enacted the Los Angeles County Metropolitan Transit Authority Transit Employer-Employee Relations Act ... to govern labor relations for a public transit district.” (*Coachella Valley, supra*, 35 Cal.4th at pp. 1085-1086.)

B. The Public Employment Relations Board: creation and development

“The history of the PERB begins in 1975, when the Legislature adopted the Educational Employment Relations Act.... As part of this new statutory scheme, the Legislature created the Educational Employment Relations Board (EERB), ‘an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board,

to enforce the act.’ ” (*Coachella Valley, supra*, 35 Cal.4th at pp. 1084-1085, quoting *Pacific Legal Foundation v. Brown, supra*, 29 Cal.3d at p. 177.) “The Legislature vested the EERB with authority to adjudicate unfair labor practice charges under the EERA.” (*Coachella Valley*, at p. 1085.)

Two years later, in 1977, the Dills Act was enacted. (See *Coachella Valley, supra*, 35 Cal.4th at p. 1085.) Although “the Legislature did not incorporate the Dills Act into the EERA,” it did “expand the jurisdiction of the EERB to include adjudication of unfair practice charges under the Dills Act, and as a result the EERB was renamed the PERB.” (*Ibid.*)

“Since 1977, the PERB’s jurisdiction has continued to expand as the Legislature has enacted new employment relations laws covering additional categories of public agencies and their employees.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1085.) As each new public employment statute was added, “the Legislature followed the pattern set by the Dills Act. It did not incorporate the new laws’ substantive provisions into the EERA.... But the Legislature expanded the PERB’s jurisdiction to cover unfair labor practices alleged under each of these labor relations laws.” (*Id.* at p. 1086.)

“PERB is an expert, quasi-judicial administrative agency.” (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 943 (*San Francisco*)). It is “independent of any state agency....” (§ 3541, subd. (a)). Its five members are “appointed by the Governor by and with the advice and consent of the Senate.” (*Ibid.*)

The Public Employment Relations Board “is authorized to resolve disputes and enforce the statutory duties and rights of public employees” subject to the various public employment statutes, including the MMBA. (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency & Employment, § 568, p. 679.) “One of PERB’s primary functions is to investigate and adjudicate charges of unfair labor practices.” (*San Francisco, supra*, 151 Cal.App.4th at p. 943.) “The initial determination as to whether the charge of unfair

practice is justified and, if so, the appropriate remedy” is “a matter within the exclusive jurisdiction of the board.” (§ 3509, subd. (b).)

As the California Supreme Court has long recognized, “PERB has a specialized and focused task—to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by” the statutes that it administers. (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804, quoting *Pacific Legal Foundation v. Brown, supra*, 29 Cal.3d at p. 198.) “As such, PERB is ‘one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.’” (*Banning Teachers Assn.*, at p. 804, quoting *Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 488.)

Where PERB has exclusive initial jurisdiction, “the courts have only appellate, as opposed to original, jurisdiction to review PERB’s decisions.” (*International Federation of Prof. & Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, 677 (*International Federation*); see § 3509.5.)

C. Case Law

While these statutory and administrative developments were unfolding, case law was evolving as well. Three California Supreme Court cases are particularly relevant here, because they involve public employee strikes: (1) *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 (*San Diego*); (2) *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 (*El Rancho*); and (3) *County Sanitation Dist. No. 2 v. Los Angeles County Employees’ Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*).

1. *San Diego*

In the *San Diego* case, a teachers' union and its president sought annulment of contempt orders issued against them for conducting a strike in violation of a court injunction. (*San Diego, supra*, 24 Cal.3d at p. 4.) At issue was whether "the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the EERA." (*Id.* at p. 7.)

Addressing the exhaustion question, the *San Diego* court identified three main issues: "(1) Could PERB properly determine that the strike was an unfair practice under the EERA? (2) If it made that determination could it furnish relief equivalent to that which would be provided by a trial court? (3) Did the Legislature intend that PERB would have exclusive initial jurisdiction over remedies against strikes that it properly could find were unfair practices?" (*San Diego, supra*, 24 Cal.3d at p. 7.)

The high court answered each question in the affirmative. First, it held, a strike could be an unfair practice under the EERA. (*San Diego, supra*, 24 Cal.3d at pp. 8-9.) Next, the court concluded, the school district was required to exhaust its administrative remedy under the EERA, since "PERB could furnish relief equivalent to that which could be provided judicially." (*Id.* at p. 9.) Based on those determinations, the court also answered the third question affirmatively, finding that PERB had exclusive initial jurisdiction over the teachers' strike. (*Id.* at p. 12.)

Because the school district had failed to exhaust its remedies with PERB, the high court annulled the contempt orders arising out of the strike injunction. (*San Diego, supra*, 24 Cal.3d at p. 14.)

2. *El Rancho*

Four years after its decision in *San Diego*, the California Supreme Court took up the *El Rancho* case. (*El Rancho, supra*, 33 Cal.3d. 946.) The court summarized its earlier decision as holding "that PERB has exclusive jurisdiction over actions to enjoin strikes by public school employee organizations recognized or certified as exclusive

representatives under EERA.” (*Id.* at pp. 952-953, citing *San Diego, supra*, 24 Cal.3d at p. 14.) In *El Rancho*, the court was presented not with an injunction but with an action for tort damages arising out of a past school strike. (*El Rancho*, at p. 952.) Despite the differences in posture between the two cases, the court used its earlier decision as “a starting point for analysis.” (*Id.* at p. 953.)

The court described the federal preemption doctrine and its relevance, noting: “*San Diego Teachers* embraced the preemption doctrine developed by the federal courts under the National Labor Relations Act...” (*El Rancho, supra*, 33 Cal.3d at p. 953, citing *San Diego, supra*, 24 Cal.3d at p. 12.) Following that lead, the *El Rancho* court also looked to “those principles” in deciding the issue before it. (*El Rancho*, at p. 953.) “Stated broadly,” the court said, “under the federal preemption doctrine, the National Labor Relations Board (NLRB) is held to have exclusive jurisdiction over activities arguably protected or prohibited by the NLRA.” (*Ibid.*) The *El Rancho* court discussed United States Supreme Court precedent, which explains that “the aim of this rule is to avoid conflict ‘in its broadest sense’ in the regulation of labor-management relations, ‘conflict with [the] complex and interrelated federal scheme of law, remedy and administration.’” (*Ibid.*) California has a similar system; as with federal law, “EERA establishes a comprehensive scheme of law, remedy and administration through PERB.” (*Id.* at p. 960.)

Applying the federal preemption doctrine, the *El Rancho* court considered both branches of the doctrine: arguably prohibited and arguably protected. The court first addressed the question of whether the past strike was “arguably prohibited” as “an unfair practice under EERA.” (*El Rancho, supra*, 33 Cal.3d at p. 954.) Concerning this first prong, the court observed, “strikes are an unfair practice under EERA only if they involve a violation of the act’s provisions.” (*Id.* at p. 957.) Even constrained by that limitation, the court rejected the school district’s contention “that the issues which it could present in court are broader than the issues it could present to PERB.” (*Ibid.*) The court thus

concluded that “the arguably prohibited branch of the preemption doctrine” applied. (*Ibid.*) Turning to the second prong, the court agreed with the unions that the strike activity was “arguably protected” under the EERA. (*Id.* at p. 959.) Based on this analysis, the high court held that the superior court lacked jurisdiction either to enjoin the strike or to award damages arising out of it. (*Id.* at p. 960.) In the court’s words: “Having concluded that the Unions’ strike was arguably protected or prohibited under EERA and that application of the preemption doctrine is fully justified under either prong, it follows that the superior court would not have had jurisdiction to enjoin the strike.” (*Ibid.*)

3. *County Sanitation*

The *County Sanitation* case, decided in 1985, involved a strike by sanitation workers, who were governed by the MMBA. (*County Sanitation, supra*, 38 Cal.3d at p. 568.) There, a plurality of the California Supreme Court squarely addressed the unresolved issue of the legality of public employee strikes. (*Id.* at pp. 570-571.) Prior to this decision, a long line of cases had deemed such strikes unlawful. (*Id.* at p. 570, fn. 10; see *id.* at p. 610 [dis. opn. of Lucas].) Rejecting that line of authority, the court concluded that “the common law prohibition against all public employee strikes is no longer supportable.” (*Id.* at p. 567; see *id.* at p. 585.)

The court identified and refuted four categories of arguments offered as justifications for the common law rule against public employee strikes. (*County Sanitation, supra*, 38 Cal.3d at pp. 574-581.) Most relevant here is the fourth argument, which posits that “interruption of government services is unacceptable because they are essential.” (*Id.* at p. 579.) The court questioned that notion, observing that the law tolerates strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education, and utilities. “Indeed,” the court said, “strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.” (*Id.* at p. 580.) The court did

find “partial merit” in the argument, though. (Grodin, *Author’s Comments to Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1999) 50 Hastings L.J. 761, 768.)

The court acknowledged “that there are certain ‘essential’ public services, the disruption of which would seriously threaten the public health or safety.” (*County Sanitation, supra*, 38 Cal.3d at p. 580.) “The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited.” (*Id.* at p. 585, fn. omitted.) “While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis.” (*Ibid.*)

As a standard to guide these determinations, the court stated that “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.” (*County Sanitation, supra*, 38 Cal.3d at p. 586.) “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.” (*Ibid.*)

Guided by the foregoing principles and authority, we now address the specific contentions raised here. As the City correctly observes, this appeal raises questions of law, which we review *de novo*. (See, e.g., *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1773-1774 [dismissal for lack of subject matter jurisdiction].)

II. Analysis

To warrant PERB jurisdiction, the conduct at issue must implicate the MMBA. (See *El Rancho, supra*, 33 Cal.3d at p. 957.) A necessary first step is identifying that conduct.

A. What conduct is at issue here?

In determining whether the challenged activity implicates the statute, we disregard the parties' labels. A party "may not, through artful pleading, evade PERB's exclusive jurisdiction." (*San Francisco, supra*, 151 Cal.App.4th at p. 945 [rejecting the city's argument that "PERB does not have jurisdiction because its complaint only alleges a violation of the city charter, not ... any unfair practice under the MMBA"].) "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." (*Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 292; accord, *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259, 269 (*Fresno*)). In other words, "what matters is whether the underlying conduct on which the suit is based ----- however described in the complaint ----- may fall within PERB's exclusive jurisdiction." (*El Rancho, supra*, 33 Cal.3d at p. 954, fn. 13.)

For the same reasons, a party's forum selection is not determinative. (See *San Francisco, supra*, 151 Cal.App.4th at p. 944 [rejecting the city's contention that PERB "has no jurisdiction over complaints that are filed in the superior court"]; *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 890 (*Modesto*) [fact that district filed "unfair practice claims did not confer jurisdiction upon PERB"].) Thus, neither the City's selection of the superior court as the forum for its complaint nor the Union's choice to file a charge with PERB influences the analysis.

Moreover, "we must construe the activity broadly in order to provide 'exclusive jurisdiction over activities arguably protected or prohibited....'" (*California Teachers Association v. Livingston Union School District* (1990) 219 Cal.App.3d 1503, 1511, quoting *El Rancho, supra*, 33 Cal.3d at p. 953.)

Here, the City's complaint asserted two types of conduct that it sought to enjoin. First, it alleged, Union members "intend to picket outside of certain City facilities, the operation of which are critical to the public health and safety," with the result that the

delivery of “critically necessary parts [and] supplies” may be disrupted. Second, the City asserted, essential employees “will engage in work stoppage” that “will hinder, delay and interfere with the City’s efforts to provide essential services, the disruption of which seriously threatens the public health or safety.”

For its part, the Union’s unfair labor practice charge with PERB asserted 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.” Based on that conduct, the Union charged the City with violating both the MMBA (§§ 3502, 3506) and PERB regulations (Cal. Code of Regs., tit. 8, § 32603).

In essence, then, the City complains about threatened strike activity, while the Union complains about interference with that activity. (Cf. *El Rancho*, *supra*, 33 Cal.3d at p. 954 [“conduct complained of ... is, of course, the Unions’ strike”].)

B. Does the challenged conduct implicate the MMBA?

The MMBA “does not directly address the question of strikes.” (*County Sanitation*, *supra*, 38 Cal.3d at p. 571.) The MMBA thus “neither denies nor grants local employees the right to strike.” (*Id.* at p. 572.) “The Legislature ... intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity.” (*Id.* at p. 573.) In the opinion of a renowned labor law commentator: “The MMBA ... was silent on the right to strike, most likely because the Legislature found that issue politically too hot to handle.” (Grodin, *Author’s Comments to Public Employee Bargaining in California: The Meyers-Millias-Brown Act in the Courts*, *supra*, 50 Hastings L.J. at pp. 767-768.) Despite its silence, “the Legislature effectively removed many of the underpinnings of the common law per se ban against public employee strikes. While the MMBA does not directly address the issue of such strikes, its

implications regarding the traditional common law prohibition are significant.” (*County Sanitation*, at p. 576.)

Absent explicit statutory guidance concerning strikes, the question is whether the MMBA arguably prohibits or arguably protects that conduct. (See *El Rancho*, *supra*, 33 Cal.3d at pp. 957, 959 [under EERA, strike arguably was both prohibited and protected].) If the act does either or both, PERB nominally has exclusive initial jurisdiction. (*Id.* at p. 960.)

1. *Arguably prohibited activity*

Here, the City contends that the threatened strike is illegal because it is prohibited at common law.

An illegal strike is arguably prohibited as an unfair labor practice under the MMBA, just as it is under the EERA. (See *San Diego*, *supra*, 24 Cal.3d at p. 8.) As explained in *San Diego*: “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)).” (*Ibid.*)

Similarly, in *El Rancho*, “the strike arguably could have involved a violation of section 3543.6, subdivision (b). This section makes it unlawful for a union ‘to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed them by [EERA],’ including their rights to refuse to participate in union activity and to represent themselves individually (§ 3543).” (*El Rancho*, *supra*, 33 Cal.3d at p. 954.)

Additionally, “the strike arguably could have violated section 3543.6, subdivision (a). That section makes it unlawful for an employee organization to ‘[c]ause or attempt to cause a public school employer to violate Section 3543.5.’ Subdivision (d) of the latter section, in turn, forbids a public school employer from ‘contribut[ing] financial or other support’ to a union.” (*Id.* at p. 955.)

As the City points out, specific statutory provisions were at issue in those two cases. But that observation rests on the “erroneous premise that PERB is limited to investigating only charges which are defined as ‘unlawful’ under [the statute].” (*Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 48 [discussing EERA].) “The Legislature has further vested PERB with authority to investigate other alleged violations of the [statute] and to make determinations with respect to such alleged violations.” (*Ibid.*) “The statute is not as narrow as the City suggests.” (*San Francisco, supra*, 151 Cal.App.4th at p. 944.)

We acknowledge that the activity at issue must be tethered to the MMBA. But this is not a case, like some cited by the City, where the underlying conduct implicates an entirely different statute, such as the Education Code. (See, e.g., *California Teachers Association v. Livingston Union School District, supra*, 219 Cal.App.3d 1503; *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319.) “Mandatory provisions of the Education Code are outside the purview of the board.” (*California Teachers Association v. Livingston Union School District*, at p. 1510.) “Conversely, where there is any claim which ‘arguably’ constitutes an unfair labor practice, the courts have deferred to the administrative tribunal.” (*Ibid.*) The issue is “whether the genesis of the disagreement here was an arguable unfair labor practice or was rooted in an arguable violation of the [statute].” (*Ibid.*) Here, we conclude, it was. Despite its label as a common law claim, the underlying activity — an allegedly illegal strike — may run afoul of the MMBA. The “arguably prohibited” branch of the preemption doctrine thus is satisfied.

2. Arguably protected activity

The “arguably protected” prong presents the opposite side of the coin.

As explained above, the landmark 1985 plurality decision in *County Sanitation* recognized public employees’ general right to strike. (*County Sanitation, supra*, 38 Cal.3d at p. 567.) But even before that decision, when the legality of public employee

strikes was still an open question, the *El Rancho* court concluded that the EERA might protect a strike called in response to an employer's unfair labor practices. (*El Rancho, supra*, 33 Cal.3d at p. 958.) Under such circumstances, the court held, "the strike may constitute 'arguably protected' activity." (*Id.* at p. 959.)

Here, the Union's conduct is arguably protected because public employees covered by the MMBA enjoy a general right to strike. (*County Sanitation, supra*, 38 Cal.3d at p. 567.) "The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute: in this case, it is specifically mandated by the provisions of the MMBA itself." (*Id.* at pp. 587-588, fn. omitted.) But "the right to unionize means little unless it is accorded some degree of protection regarding its principal aim — effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so." (*Id.* at p. 588.) And regardless of whether the MMBA is the source of the general right to strike, the statute's "implications" concerning that right "are significant." (*Id.* at p. 576.) The threatened strike activity thus is arguably protected under the MMBA.

C. Is there an exception to PERB jurisdiction where "essential" public employees are involved?

Resisting PERB jurisdiction, the City argues that its complaint does not implicate the MMBA but is instead premised on the common law prohibition against strikes by safety-sensitive employees.

We disagree. First, as just discussed, the City's complaint *does* implicate the MMBA, since it involves conduct that the statute arguably prohibits or protects. Moreover, as we now explain, absent an explicit statutory prohibition against strikes by

particular employees, the question of the legality of such strikes is entrusted to PERB in the first instance.

1. Limitations on essential employees' right to strike

As discussed above, the *County Sanitation* case recognizes “that there are certain ‘essential’ public services, the disruption of which would seriously threaten the public health or safety.” (*County Sanitation, supra*, 38 Cal.3d at p. 580.) In the absence of legislative guidance, decisions about the permissibility of strikes by public employees who perform such essential services must be made “on a case-by-case basis.” (*Id.* at p. 585.)

2. Forum

In 1985, when *County Sanitation* was decided, the courts were charged with those individualized decisions. (See *County Sanitation, supra*, 38 Cal.3d at p. 580.) But with the statutory changes that became effective in 2001, “what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1089.) As explained in *Coachella Valley*, the Legislature thereby changed “the forum — vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA charges....” (*Ibid.*) The *Coachella Valley* case involved a statute of limitations issue, but we understand that legislative transformation to have broader implications. The *Coachella Valley* court itself described it as a “fundamental change.” (*Id.* at p. 1077.)

By vesting the agency with exclusive initial jurisdiction over the MMBA, we conclude, the Legislature entrusted PERB with determining the permissibility of strikes by essential public employees that implicate the MMBA. None of the City’s arguments persuades us to the contrary.

3. Policy considerations

Important policy considerations underpin the grant of exclusive initial jurisdiction to PERB. “The decision to give exclusive initial jurisdiction to PERB enables it to

'perform its mandated duty to effectuate and implement the purposes and policies of the [statute]....' " (*International Federation, supra*, 40 Cal.App.4th at p. 676 [discussing EERA]). Acknowledging the agency's jurisdiction helps "promote the Legislature's purpose in creating an expert administrative body whose responsibility it is to develop and apply a comprehensive, consistent scheme regulating public employer-employee relations." (*Link v. Antioch Unified School Dist.* (1983) 142 Cal.App.3d 765, 769; accord, *International Federation*, at p. 677.) Deference to the agency's exclusive initial jurisdiction serves "to help bring expertise and uniformity to the delicate task of stabilizing labor relations." (*San Diego, supra*, 24 Cal.3d at p. 12.)

In light of these strong policy implications, a controversy "raising primarily legal claims does not remove the necessity for following the prescribed administrative remedy." (*International Federation, supra*, 40 Cal.App.4th at p. 676.) Even "allegations of constitutional violations do not warrant judicial intervention prior to a final determination by PERB." (*Id.* at p. 677.)

The same principle applies to the City's invocation of the common law. The Legislature has established a comprehensive scheme "for the regulation of public employment relations under the initial jurisdiction of the PERB." (*Coachella Valley, supra*, 35 Cal.4th at p. 1089.) The expansive common law exception posited here would disrupt that scheme. The activity that the City would exempt from agency jurisdiction "goes to the essence of labor law—the right to strike: the very fabric of the [statute] could be destroyed if such suits could be maintained." (*Fresno, supra*, 125 Cal.App.3d at p. 268 [discussing the NLRA].)

4. Expertise

Our conclusion is further bolstered when PERB's expertise is considered. The agency brings "an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so

as to further the common good.” (*Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at p. 286, fn. omitted [NLRB]; accord, *Modesto*, *supra*, 136 Cal.App.3d at p. 893.)

By contrast, the courts are not well suited to the task. “A court enjoining a strike on the basis of (1) a rule that public employee strikes are illegal, and (2) harm resulting from the withholding of teachers’ services cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.” (*San Diego*, *supra*, 24 Cal.3d at p. 13.) That is true even where the court is “competent, thorough, and informed.” (*Modesto*, *supra*, 136 Cal.App.3d at p. 893.) When it comes to strike-related disputes, “the courts are poor forums for the resolution of such issues.” (*County Sanitation*, *supra*, 38 Cal.3d at p. 613 [dis. opn. of Lucas, J.])

Nor are we persuaded to a different view by the claim that PERB lacks expertise concerning essential municipal functions. According to the City, “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.”

We question the premise underlying the City’s contention. The City focuses narrowly on job function, which is only one factor in assessing the risk of public harm. Certainly, as *County Sanitation* acknowledges, “if particular jobs performed by striking sanitation or other public employees require unique skills and training, it is conceivable that a public agency might be unable to find adequate replacements.” (*County Sanitation* at p. 586, fn. 35.) But as that case also recognizes, with “sanitation strikes, it is often the length of the strike which will ultimately require issuance of an injunction.” (*Ibid.*) And even with respect to job functions, similarities likely exist in the provision of essential municipal services, particularly in areas subject to state law, such as child protective services. (See, e.g., Welf. & Inst. Code, § 300 et seq.) At least as to those areas, PERB’s statewide perspective offers an obvious advantage.

More fundamentally, to reiterate a point made above, it does not “serve public policy to have numerous superior courts throughout the state interpreting and

implementing statewide labor policy inevitably with conflicting results. One of the basic purposes for the doctrine of preemption is to bring expertise and uniformity to the task of stabilizing labor relations.” (*Modesto, supra*, 136 Cal.App.3d at p. 895.)

5. Remedies

The City also challenges the adequacy of the available administrative remedies, saying: “PERB is incapable of providing the kind of immediate relief that the City requires in this case.”

We reject that challenge. As explained in the *San Diego* case, the issue is whether PERB can furnish relief equivalent to that available in court. (*San Diego, supra*, 24 Cal.3d at p. 9.) Here, we conclude, it can.

First, as a practical matter, “PERB possesses ‘broad’ remedial powers enabling it ‘to take action and make determinations as are necessary to effectuate the policies of’ the statutes it administers.” (*International Federation, supra*, 40 Cal.App.4th at p. 679.) As has been said of a teachers’ strike, it “does not present insurmountable relief problems, PERB having broad powers, including the right to seek injunctive relief on the request of a party to a complaint.” (*Fresno, supra*, 125 Cal.App.3d at p. 271.) The same can be said of threatened work stoppages by other essential public employees. With respect to the City’s concern for celerity, the facts of this case demonstrate the agency’s ability to act promptly. Here, the City was given 72 hours’ notice of the possibility of a strike. Instead of seeking administrative relief, the City went directly to court — three days later. By then, PERB had already filed papers with the court. Moving beyond the facts before us, and reviewing the agency’s processes, we find nothing that dictates a different conclusion. (See Cal. Code of Regs., tit. 8, §§ 32450-32465.)

Moreover, PERB has the same interest in public safety as the City. In *San Diego*, our state’s high court explicitly rejected the notion that there is “a disparity between public and PERB interests.” (*San Diego, supra*, 24 Cal.3d at p. 11.) At issue there was threatened disruption of educational services. As the court observed: “The public

interest is to minimize interruptions of educational services.” (*Ibid.*) “PERB’s responsibility for administering the [statute] requires that it use its power to seek judicial relief in ways that will further the public interest in maintaining the continuity and quality of educational services.” (*Ibid.*) The agency has the same responsibility to the public with respect to municipal services. But in each case, the determination of how best to avoid public harm is left to the agency. “PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike . . . and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer.” (*Id.* at p. 13.) Decisions about which remedies to pursue have been entrusted to the agency’s discretion, which is to be exercised in the public interest.

Ultimately, resolution of the remedies question brings us full-circle to policy considerations again. “In delimiting the areas of conduct which are within PERB’s exclusive jurisdiction, the courts must necessarily be concerned with avoiding conflict not only in the substantive rules of law to be applied, but also in remedies and administration, if state policy is to be unhampered.” (*El Rancho, supra*, 33 Cal.3d at p. 960.) A court “cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.” (*San Diego, supra*, 24 Cal.3d at p. 13.) The rule requiring deference to the agency “must stand even against the argument that to require PERB procedures to be commenced and PERB to seek injunctive relief might cause irreparable injury should PERB decide against seeking court injunctive relief.” (*Fresno, supra*, 125 Cal.App.3d at p. 271.)

6. *Local concern doctrine*

Finally, contrary to the City’s contention in its reply brief, this is not a proper case for application of the local concern doctrine.

“Two factors are considered relevant to application of the local concern exception to the arguably prohibited branch of the preemption doctrine. First, does there exist a ‘significant state interest in protecting the citizen from the challenged conduct.’ Second,

despite the occurrence of the challenged conduct in the course of a labor dispute and the possibility of filing an unfair labor charge, does the exercise of state jurisdiction over the tort claim entail little risk of interference with the regulatory jurisdiction of the administrative agency.” (*Pittsburg Unified School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875, 885 (*Pittsburg*), quoting *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 196.)

Neither of those factors applies here. First, this is not a case in which the interests of a particular private citizen are threatened. (Cf. *Kaplan’s Fruit & Produce Co., Inc. v. Superior Court* (1979) 26 Cal.3d 60, 71 [“preemption of ‘arguably protected’ activity ... does not preclude superior court injunctions limited to restraints upon obstructions to access” to private property].) Second, excising strike activity from PERB’s jurisdiction would risk substantial “interference with the regulatory jurisdiction of the administrative agency.” (*Pittsburg, supra*, 166 Cal.App.3d at p. 885.) As explained above, the City’s complaint in this case “goes to the essence of labor law” and thus to the very heart of the agency’s jurisdiction. (*Fresno, supra*, 125 Cal.App.3d at p. 268.)

Exhaustion

I. Legal Principles

“In general, a party must exhaust administrative remedies before resorting to the courts.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1080.) But that general rule “is subject to exceptions.” (*Ibid.*) Futility is one exception. (*Id.* at pp. 1080-1081.) Another exception, which the City invokes here, applies “when a party claims that ‘the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.’” (*Id.* at pp. 1081-1082.)

As the California Supreme Court recently explained in the *Coachella Valley* case: “In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or

burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue.” (*Coachella Valley*, *supra*. 35 Cal.4th at p. 1082.)

II. Analysis

Applying the three *Coachella Valley* factors to this case, we find no basis for excusing exhaustion here.

A. Injury

The City argues that requiring exhaustion would impose substantial public injury. In support of that argument, the City cites *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155. The City’s reliance on that case is misplaced.

When *Department of Personnel Administration* was decided, “California faced an unprecedented budgetary crisis at the outset of fiscal year 1991-1992, with expenditures projected to exceed revenues by more than \$14 billion.” (*Department of Personnel Administration v. Superior Court*, *supra*, 5 Cal.App.4th at p. 163.) Against that backdrop, “negotiations continued for new collective bargaining agreements between petitioner Department of Personnel Administration (DPA) and various unions representing state employees.” (*Ibid.*) When an impasse was reached, two unions (later joined by others) petitioned for a writ of mandate prohibiting DPA from unilaterally reducing members’ wages or modifying their health care benefits. (*Id.* at p. 164.) Siding with the unions, the trial court issued a writ of mandate. (*Id.* at p. 165.) DPA sought extraordinary relief from the Court of Appeal. (*Ibid.*) As that court explained, two “interrelated” exceptions applied: futility and irreparable harm. (*Id.* at p. 171.) The court thus excused exhaustion “because of the potential for irreparable injury and because filing with PERB would have been futile under the circumstances.” (*Id.* at p. 166.) As to the first point, the court observed: “The irreparable injury exception has been rarely applied.” (*Id.* at p. 170.) But the court nevertheless felt compelled to apply the exception

there: “Because of the unprecedented nature of the fiscal crisis faced by the state, the urgent need for resolution of these issues prior to the end of the year, and the great potential for irreparable harm in the nature of increased layoffs of state employees, we believe the failure of the unions to exhaust their administrative remedy by filing an unfair practice charge with PERB should be excused.” (*Id.* at p. 171.) The court continued: “Exhaustion should be excused for another, interrelated reason” – futility. (*Ibid.*) PERB had explicitly disavowed jurisdiction over the dispute. (*Id.* at p. 168.) Resort to the agency thus would have been futile. (*Ibid.*) And “the process of seeking a writ to compel PERB to assume jurisdiction would have greatly increased the time required to resolve this dispute, thus aggravating the potential irreparable injury.” (*Id.* at p. 172, fn. 8.)

This case is distinguishable from *Department of Personnel Administration* on both grounds cited in that case, futility and irreparable harm. First, PERB has not disavowed jurisdiction: to the contrary, it has vigorously claimed it. (Cf. *Department of Personnel Administration v. Superior Court*, *supra*, 5 Cal.App.4th at p. 168.) Second, this case does not present an “unprecedented” crisis or other unique circumstances. (Cf. *id.* at p. 171.) A strike by public employees is threatened, albeit one that carries the risk of public harm.

Moreover, as discussed above, the available administrative remedies are equal to the task at hand, given PERB’s “broad powers, including the right to seek injunctive relief on the request of a party to a complaint.” (*Fresno*, *supra*, 125 Cal.App.3d at p. 271; see *Department of Personnel Administration v. Superior Court*, *supra*, 5 Cal.App.4th at p. 171 [recognizing “the possibility that PERB could have ordered the same relief as that provided by respondent superior court”].)

B. Strength of Jurisdiction Argument

The second factor in the analysis is “the strength of the legal argument that the agency lacks jurisdiction...” (*Coachella Valley, supra*, 35 Cal.4th at p. 1082.) That factor also weighs against excusing exhaustion.

For all the reasons discussed above, the City’s jurisdictional argument is weak.² As the *San Diego* court remarked, PERB’s “exclusive initial jurisdiction” is “amply implied by the comprehensiveness of the [statutory] scheme” — there, the EERA. (*San Diego, supra*, 24 Cal.3d at p. 12.) Furthermore, the Legislature included an express statutory declaration to that effect in the EERA. (See *ibid.*, citing § 3541.5.) Effective in July 2001, it did the same thing in the MMBA. That provision reads: “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.” (§ 3509, subd. (b).) Taken together, this statute and the California Supreme Court’s interpretation of a cognate provision compel the conclusion that PERB has exclusive initial jurisdiction over this dispute.

C. Expertise

In deciding whether exhaustion should be excused, the third and final factor is “the extent to which administrative expertise may aid in resolving the jurisdictional issue.” (*Coachella Valley, supra*, 35 Cal.4th at p. 1082.) As explained above, PERB is “equipped or informed by experience to deal with a specialized field of knowledge,” public employment labor relations. (*Universal Camera Corp. v. Labor Bd., supra*, 340 U.S. at p. 488; accord, *Banning Teachers Assn. v. Public Employment Relations Bd., supra*, 44 Cal.3d at p. 804.) “One of PERB’s primary functions is to investigate and

² We use the word “weak” not because we find the City’s argument meritless but as a term of art, because “strength of the legal argument that the agency lacks jurisdiction” is the legal criterion. (*Coachella Valley, supra*, 35 Cal.4th at p. 1082.)

adjudicate charges of unfair labor practices.” (*San Francisco, supra*, 151 Cal.App.4th at p. 943.) Since the jurisdictional issue here turns in part on whether the underlying conduct constitutes an unfair labor practice (and thus is arguably prohibited by the MMBA), the agency’s expertise in this area may go a long way in helping to resolve the disputed question of jurisdiction.

In sum, we conclude, this case presents no basis for excusing exhaustion. Our conclusion does not mean that parties subject to PERB’s exclusive initial jurisdiction are foreclosed from seeking a judicial determination excusing administrative exhaustion where the particular circumstances warrant it. Whether such circumstances exist may present a case-specific factual question. (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 692 [futility exception to exhaustion requirement “may be an issue of fact in some cases”].) Here, we decide only that the record before us does not warrant such relief.

SUMMARY OF CONCLUSIONS

I. Mootness: Although this controversy is technically moot, we nevertheless exercise our inherent power to address the issues presented, which are important and of continuing interest.

II. Jurisdiction: The Public Employment Relations Board has exclusive initial jurisdiction to determine whether particular public employees covered by the MMBA have the right to strike in cases that implicate the MMBA. Two critical elements combine to compel that conclusion: the amendment of the MMBA, effective in 2001, and prior California Supreme Court precedent. With the statutory amendment, the MMBA was brought under the same jurisdictional umbrella as other public employment statutes, such as the EERA. In prior cases, the California Supreme Court has already ruled – twice – that the EERA transfers exclusive initial jurisdiction from the courts to PERB when the public employer was seeking relief from a union’s strike activity. (*San*

Diego, supra, 24 Cal.3d 1; *El Rancho, supra*, 33 Cal.3d 946.) That precedent now applies with equal force to the MMBA. The superior court's jurisdiction thus is preempted in favor of PERB.

III. Exhaustion: Applying the three relevant factors to the case presented here, we find no basis for excusing exhaustion. First, the City will not suffer irreparable harm, as the administrative remedies are adequate. Next, its arguments concerning jurisdiction are weak. And finally, the agency's expertise is relevant in resolving the disputed question of jurisdiction.

DISPOSITION

The judgment of dismissal is affirmed.

McAdams, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Duffy, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CV064707
Trial Judge:	Honorable Kevin Murphy
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Attorney for Amicus curiae, County of Santa Clara:	Office of the County Counsel Ann Miller Ravel, County Counsel Nancy J. Clark, Assistant County Counsel Lori E. Pegg, Lead Deputy County Counsel

PROOF OF SERVICE

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)

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 **April 14, 2008**, I caused to be served the within:

PETITION FOR REVIEW

- 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.

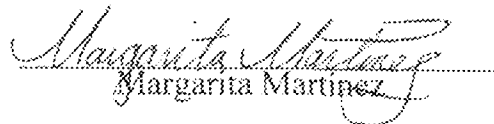
I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver 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 **April 14, 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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