Case No. S162647

Supreme Court Copy

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)

ANSWER BRIEF ON THE MERITS

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

Arthur Krantz (SBN 182629)
Margot Rosenberg (SBN 144955)
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Tel: (510) 272-0169; Fax: (510) 272-0174
Email address: akrantz@leonardcarder.com

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

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)

ANSWER BRIEF ON THE MERITS

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

Arthur Krantz (SBN 182629)
Margot Rosenberg (SBN 144955)
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Tel: (510) 272-0169; Fax: (510) 272-0174
Email address: akrantz@leonardcarder.com

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

STATE REGULATIONS

I. INTRODUCTION

Appellant City of San Jose ("the City") sued Operating Engineers Local Union Number Three ("Local Three"), asking the Superior Court to partially enjoin a threatened strike on the ground that the absence of certain employees from work would allegedly endanger the public's health and safety. The City relied upon *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Association* (1985) 38 Cal.3d 564, 585, in which this Court found that California public employees have the right to strike, except for a narrow subset of employees whose absence would pose a substantial and imminent threat to the health or safety of the public.

The Court of Appeal's decision in this case correctly recognizes that, while *County Sanitation* continues to set the standard concerning which public employees may lose their right to strike, in 2000 the Legislature amended the labor relations statute governing cities and counties to bring it in line with the labor relations statutes governing other public employers in California, thereby requiring cities and counties seeking strike injunctions to follow the same procedures followed by other public employers throughout the state. Specifically, the Legislature enacted Senate Bill 739 ("SB 739"), Stats. 2000, ch. 901, effective July 1, 2001, which expanded the jurisdiction of the Public Employment Relations Board ("PERB") to cover the labor relations statute governing cities and counties, the Meyers-Milias-Brown Act, California Gov. Code §3500 *et seq.* ("MMBA"). This statutory amendment required the City to follow PERB's mandatory

injunctive relief procedures, but in this case the City failed to do so.

Both the Superior Court and the Court of Appeal, Sixth District, recognized this Court's well-established holding in *San Diego Teachers Association* v. *Superior Court* (1979) 24 Cal.3d 1, 8: where a public employer covered under PERB's jurisdiction seeks a strike injunction based upon an alleged violation of the common law, that allegation could also be framed as an unfair practice charge – bad faith bargaining by the union's use of an illegal pressure tactic – and the employer therefore must follow PERB's injunctive relief procedures.

Several months after the Sixth District's decision in the instant case, the Third District Court of Appeal issued a decision on the same issue and similarly determined that a city or county seeking to enjoin "essential" employees from striking must file an unfair labor practice charge with PERB, as such a claim implicates the unfair labor practice charge of bad faith bargaining. *County of Sacramento v. AFSCME Local 146, et al* (2008) 165 Cal.App.4th 401, 416. However, in contrast with the decisions of the Sixth District in the instant case and the Third District in *County of Sacramento*, the First District in *County of Contra Costa v. Public Employees Union Local One, et al.* (2008) 163 Cal.App.4th 139 failed to recognize that PERB's traditional jurisdiction over common law strike injunction actions (as explained by this Court in *San Diego Teachers*) now applies to cities and counties in the wake of the Legislature vesting PERB

with jurisdiction over the MMBA.[1]

Following *San Diego Teachers*, there were three additional appellate decisions in cases in which school district employers covered under PERB's jurisdiction attempted to litigate common law strike injunction or strike damage claims in court. In each of these cases, the appellate courts found that PERB has exclusive jurisdiction, and that the employer therefore may not bypass PERB and litigate its claims directly in court. *El Rancho Unified School District* v. *National Education Association* (1983) 33 Cal.3d 946 ("*El Rancho*"); *Fresno Unified School District v. National Education Association* (1981) 125 Cal.App.3d 259 ("*Fresno*"); *PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 ("*Modesto*").

After PERB's creation in 1975, no appellate court ever countenanced any effort by any public sector employer covered under PERB jurisdiction

---

[1] While PERB's view of its jurisdiction is not dispositive, PERB's "considered determination [regarding the scope of its jurisdiction] is of interest," and principles of judicial economy generally require a party to exhaust PERB's procedures so that the agency can first consider its jurisdiction, prior to judicial review. *PERB v. Superior Court* (1993) 13 Cal.App.4th 1816, 1831-32. PERB sought to intervene to assert its jurisdiction in this litigation, as well as in the *County of Contra Costa* and *County of Sacramento* cases. PERB was granted intervenor status in the latter two cases and PERB thereafter appealed the superior court's erroneous rulings finding that PERB did not have jurisdiction in those cases. *See* Declaration of Arthur Krantz in Support of Local Three's Request for Judicial Notice [hereinafter, "Jud. Not. Decl."], Exhibits 1-4 (appellate briefs filed by PERB). In the instant case, PERB is not a party, as PERB's motion to intervene was denied. *See* Order of the Court of Appeal dated June 20, 2006. However, PERB did actively assert its jurisdiction in one brief to the trial court and two *amicus curiae* briefs in the Court of Appeal. *See* City of San Jose's Appendix of Exhibits to Petition for Writ of Supersedeas or Other Appropriate Relief [hereinafter, "App."], Exhibit 10; and *see* PERB's *amicus* briefs to the Court of Appeal dated June 14 and June 20, 2006.

to seek a strike injunction directly in court (rather than by following PERB procedures), until the First District did so earlier this year in *County of Contra Costa*. Indeed, from 1975 to 2001, cities and counties were the ***only*** California public entities permitted to go directly to court to seek strike injunctions – because cities and counties were not covered under PERB jurisdiction until 2001. The system in place since the 1970s has worked well for all PERB-covered employers – these public entities cannot point to a single instance in three decades, anywhere in the entire state, in which PERB has acted too slowly to protect the public. This is true even though numerous PERB-covered employers have employees that are arguably "essential," including State-employed prison guards, CalTrans emergency workers, and many other employees.

Also in the years since 1975, the number of labor relations statutes that the Legislature has entrusted to PERB's jurisdiction has grown from one to seven.[2] Under each of these statutes, PERB stands ready to process expeditiously any employer requests for injunctive relief against strike activity, based upon health and safety grounds or other grounds. Indeed,

---

[2] The seven labor relations statutes falling within PERB's jurisdiction are the Educational Employment Relations Act ("EERA"), Government Code §3540 *et seq.*, the Ralph C. Dills Act, Government Code §3512 *et seq.*, the Higher Education Employer-Employee Relations Act, Government Code §3560 *et seq.*, the Meyers-Milias-Brown Act ("MMBA"), Government Code §3500 *et seq.*, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Act, Government Code §99560 *et seq.*, the Trial Court Employment Protection and Governance Act, Government Code §71600 *et seq.*, and the Trial Court Interpreter Employment and Labor Relations Act, Government Code §71800 *et seq.*

PERB has made that position clear since the beginning of this case.[3]

There is no basis for distinguishing PERB's jurisdiction under the the MMBA from PERB's jurisdiction under other labor relations statutes such as the Educational Employment Relations Act ("EERA"), Gov. Code §3540 *et seq.*, which governs local school districts. In fact, when the Legislature enacted SB 739 and thereby vested PERB with its powers and duties under the MMBA, the Legislature defined those new powers and duties (in Section 3509(a) of the Government Code) by referring to PERB's previously existing powers and duties under the EERA (in Section 3541.3 of the Government Code).[4] This Court was therefore well-founded in its 2005 holding that the Legislature amended the MMBA to make it consistent with the analogous legal framework governing other public employers. *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1089-1090 (finding it "reasonable to infer" that the Legislature's extension of PERB jurisdiction to cover cities and counties was intended to create "a coherent and harmonious system of public employment relations laws"). Because PERB plays the same administrative

---

[3] PERB appeared at all of the proceedings in this case, as well as in the *County of Contra Costa* and *County of Sacramento* cases, and in each case PERB has made clear at all times that it is prepared to process any request for injunctive relief. *See, e.g.,* Reporter's Transcript, Vol. II, at 14A-16A; Jud. Not. Decl., Exhibit 4, at 14-17; *Id.*, Exhibit 2, at 11-14.

[4] Moreover, under the MMBA, as under the EERA, "[t]he initial determination of whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purpose of this chapter, shall be a matter within the exclusive jurisdiction of the board." Gov. Code §3509(b). *Compare* EERA, Gov. Code §3541.5.

role with respect to the MMBA that it does with respect to the EERA, the *San Diego Teachers* line of cases is controlling.[5]

II. SUMMARY OF FACTS AND PROCEEDINGS

After a collective bargaining agreement between Local Three and the City expired, Local Three gave the City 72 hours' notice that strike activity could occur any time after June 2, 2006. *City of San Jose v. Operating Engineers Local Union No. Three* (2008) 160 Cal.App.3d 951, 958. The City, rather than immediately invoking PERB jurisdiction and using PERB's expedited procedures to ask PERB to seek emergency injunctive relief, instead made an apparently tactical decision to follow a different course: the City bypassed PERB completely and went directly to court to seek an injunction preventing certain employees from striking.[6]

At the TRO hearing, PERB's General Counsel appeared in order to assert PERB's exclusive jurisdiction over the matter, and PERB filed a brief

---

[5] Were this Court to adopt the holding of *County of Contra Costa* and reverse the Sixth District's decision in this case, the Court would upend long-standing precedent and throw the law into doubt under six other labor relations statutes by intimating that PERB jurisdiction over strike injunction actions may exist only with respect to *some* of the seven labor relations statutes, despite the absence of material differences in statutory wording. As a result, what has occurred in the past few years with respect to the MMBA – conflicting rulings from superior courts and appellate courts regarding what procedures are to be followed in strike cases – could easily become the norm for employers and unions under the other six labor relations statutes which have, to date, seen no such upheaval.

[6] Even at the very outset of this litigation, the City fully knew that it was choosing to try and avoid PERB jurisdiction, as shown by the City's very first brief in support of its petition for a temporary restraining order, which argues at length why PERB does not have exclusive jurisdiction. *See* App., Exhibit 2, at 29-33.

explaining the basis for this jurisdiction. *See* App., Exhibit 10. The Superior Court, after taking the matter under submission for five days and securing Local Three's agreement not to strike during that time, sustained PERB's assertion of jurisdiction and therefore dismissed the City's lawsuit based upon the City's failure to utilize PERB's procedures. *Id.*, Exhibit 11.

III. THIRTY YEARS OF PRECEDENT REGARDING PUBLIC SECTOR LABOR LAW SUPPORTS THE SIXTH DISTRICT'S DECISION IN THIS CASE, NOT THE FIRST DISTRICT'S DECISION IN *COUNTY OF CONTRA COSTA*

A. The Supreme Court and Courts of Appeal Have Consistently Held that PERB Has Jurisdiction When PERB-Covered Employers Bring Strike Injunction or Strike Damage Actions That Assert Common Law Theories, Because the Conduct at Issue Is Arguably Prohibited and/or Arguably Protected by the Labor Relations Statutes Entrusted to PERB's Jurisdiction

In *San Diego Teachers*, 24 Cal.3d 1, the San Diego Unified School District had obtained a common law injunction prohibiting a teachers union from striking, and both the union and its president had later been found in contempt of that injunction. This Court vacated the contempt finding, holding that the underlying injunction was improper because PERB has exclusive initial jurisdiction over the matter and the school district had improperly failed to utilize PERB's injunctive relief processes. *Id.*, at 14.

The employer in *San Diego Teachers* was a school district covered under the EERA. The EERA, just like the MMBA, does not expressly mention strikes, but rather generally protects the right of employees to

participate in union activities.[7]

Significantly, in *San Diego Teachers*, the trial court had enjoined the union from striking based upon a series of prior cases finding public employee strikes to be illegal under the common law. *San Diego Teachers*, 24 Cal.3d at 6. On review, this Court noted that as of 1979 it was uncertain whether and to what extent public employees had a legal right to strike, *id.*, at 6-7, but the Court ultimately found that "it is unnecessary here to resolve the question of the legality of public employee strikes, if the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the EERA." *Id.*, at 7.

The Court found that in order to answer the exhaustion question, it had to determine whether "PERB properly could determine that the strike was an unfair practice under the EERA," whether it could "furnish equivalent relief to that which would be provided by a trial court," and whether the Legislature intended "that PERB would have exclusive initial jurisdiction over remedies against strikes that it properly could find were unfair practices." *Id.* The Court answered all three questions affirmatively.

On the central question of whether the strike could have been found to be an unfair practice, the Court determined that there were at least two different violations of the EERA which could have been alleged. *Id.*, at 8. Most significantly, the Court found that if the union's strike was illegal under the common law, then such striking could violate the EERA's

---

[7] EERA provides this protection at Government Code §3543. The MMBA provides this protection at Government Code §3502.

requirement that a union must bargain in good faith, as set forth in Government Code §3543.6(c). *Id.*

At the time that *San Diego Teachers* was decided, PERB had only recently been created and assumed jurisdiction over local school districts (in 1975), but a long line of appellate decisions before then had ruled that public employee strikes were illegal under the common law. *See, e.g., Los Angeles Unified School District v. United Teachers* (1972) 24 Cal.App.3d 142, 145 (citing other cases). Thus, prior to 1975, school districts, unions and superior courts were all accustomed to resolving common law strike injunction cases in court. In *San Diego Teachers*, this Court recognized that the Legislature changed the procedure that school districts must follow when the Legislature enacted EERA and vested PERB with jurisdiction, much as the Legislature has more recently vested PERB with jurisdiction over the MMBA.

Notably, the school district in *San Diego Teachers* specifically argued to this Court "that even if PERB could have applied for judicial relief against the strike, the ground on which this might have been done would not necessarily encompass all grounds on which a judicial order could be granted....PERB's determination to seek an injunction, as well as its application to the court, would reflect only a narrow concern for the negotiating process mandated by EERA and would ignore strike-caused harm to the public." 24 Cal.3d at 11. This Court rejected the argument, finding that it:

> **erroneously presupposes a disparity between public and PERB interests. The public interest is to minimize interruptions of**

> **educational services. Yet did not an identical concern underlie enactment of the EERA? .... PERB's responsibility for administering the EERA 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.**

Id. (citations omitted).

The Court of Appeal's decision in the instant case is therefore well grounded in the *San Diego Teachers* Court's holding that PERB's mission includes protecting the public. The City fails to acknowledge this and also ignores that protection of the public constitutes the rationale for the historical common law rule prohibiting public employee strikes. This historical prohibition against public employee strikes formed the basis for the injunction issued by the lower court in *San Diego Teachers*, which this Court found to have been improperly issued in derogation of PERB's newly-created jurisdiction. Six years later, in *County Sanitation*, this Court found that the flat common law prohibition on public employee strikes had eroded (by passage of the MMBA, among other factors), and the Court therefore replaced the traditional common law rule with a much more narrow remnant of that rule, upon which the City relies here: a strike by "essential" public employees is only illegal to the extent that it would imminently and substantially threaten the public's health or safety. *County Sanitation*, 38 Cal.3d at 585. Thus, the instant case is governed by *San Diego Teachers*, because the City's *County Sanitation* claim is a direct descendent of the traditional common law illegal strike claim that *San Diego Teachers* found to be preempted by PERB's initial jurisdiction.

The school district in *San Diego Teachers* also "contended that to

require the district to apply to PERB before suing for injunctive relief would be to require an idle act," because PERB might have "refused to apply to a court for relief." *Id.*, at 13. This Court rejected that contention, too, finding that "the EERA gives PERB discretion to withhold, as well as to pursue, the various remedies at its disposal. Its mission to foster constructive employment relations (§3540) surely includes a long range minimization of work stoppages. PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of the strike (as perhaps neither did here) and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer." *Id.*

Indeed, the Supreme Court explicitly premised its holding on the Legislature's trust in PERB's expertise – expertise that this Court found lacking in the superior courts:

> **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.**

Id. In reaching its conclusion, this Court also found that PERB's processes for seeking an injunction provide an adequate alternative to the district's claimed right to file a lawsuit. *Id.*, at 10-11.

Four years after this Court's decision in *San Diego Teachers*, the Court reaffirmed and further clarified PERB's exclusive jurisdiction in *El Rancho,* 33 Cal.3d 946. In *El Rancho*, the trial court had, following *San Diego Teachers*, sustained the defendant unions' demurrers to a lawsuit alleging, among other causes of action, that the unions were engaging in a strike that was illegal under the common law. The Court of Appeal, in

contrast, found that PERB had no jurisdiction because the lawsuit was premised on legal theories that did not arise under the EERA, and the court saw no arguable basis on which the strike could be found to constitute an unfair practice under EERA. *See* 33 Cal.3d at 952.

However, this Court reversed, giving in-depth treatment to the exclusive jurisdiction doctrine. First, the Court adopted the rule developed by the federal Supreme Court in determining whether the National Labor Relations Board has exclusive jurisdiction over a private sector labor dispute – exclusive jurisdiction exists where the ***conduct*** at issue is "***arguably protected or prohibited***" by the statute. *Id.*, at 953. This Court found that the strike activity qualified under either prong, as it was both arguably protected and arguably prohibited. *Id.*, at 957 & 960.

With respect to the "arguably prohibited" prong, the Court noted that the employer's amended complaint included causes of action for "conspiring to cause and causing a violation of the California Compulsory Education Law by making it impossible for students to attend school by means of the allegedly illegal strike," as well as for encouraging, advising and inducing the teachers to strike illegally. *Id.*, at 951-952. Thus, as in *San Diego Teachers*, the school district alleged that the strike was illegal at common law. In addressing the threshold question of PERB's exclusive jurisdiction over such claims, the Court noted that "strikes are an unfair practice under EERA only if they involve a violation of the act's provisions. [citing *San Diego Teachers*]. As a result, the District argues that the issues which it could present in court are broader than the issues that it could

present to PERB. In the District's view, PERB would be concerned only with the existence of unfair labor practices – asserted to be a minor aspect of this case – and not with the harm to the District and to the public flowing from the allegedly illegal strike itself." *Id.*, at 957.

The Court rejected this argument for two reasons. First, the Court found that ***"the issue before PERB would have been whether the strike itself was unlawful,"*** the same question that the Superior Court would have to determine, meaning that "the controversy presented in both forums may fairly be termed the same." *Id.* (emphasis supplied). Second, "the District's argument hinges on an assumption rejected by this court in *San Diego Teachers*. It 'presupposes a disparity between public and PERB interest.'... Thus, there is little chance that PERB will ignore the 'larger harm' involved in a teachers' strike. Moreover, it is equally clear that PERB has the authority to take steps to alleviate that harm in order to effectuate its duties and the purposes of the act." *Id.*, at 957 (*quoting San Diego Teachers*).

While the "arguably prohibited" branch of the exclusive jurisdiction doctrine was alone sufficient to find that PERB had exclusive jurisdiction, the *El Rancho* Court also went beyond the *San Diego Teachers* analysis to address the "arguably protected" prong of the doctrine. The Court held that even though EERA "does not provide express protection for economic strikes," the conduct was "arguably protected." *Id.*, at 958.

In between this Court's decisions in *San Diego Teachers* and *El Rancho*, the Courts of Appeal also contributed to the developing doctrine of PERB's exclusive jurisdiction in strike cases, issuing significant decisions

in *Fresno,* 125 Cal.App.3d 259, and *Modesto,* 136 Cal.App.3d 881.

In *Fresno,* the employer sued a union for damages resulting from a strike, asserting that the strike (i) was illegal at common law, (ii) amounted to the tort of interference with contract, and (iii) was a contract breach. *Fresno*, 125 Cal.App.3d at 267-268. According to the court, both of the first two causes of action made allegations that "would be, arguably, an unfair labor practice." *Id.*, at 268. This is especially significant because the appellate court clearly explained that the crucial aspect of a preemption analysis is the ***conduct*** being challenged, not the plaintiff's formal description of the legal challenge to that conduct. *Id.*, at 269 ("Preemption exists to shield the system (of regulation of labor relations) from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.") (citation and internal quotation marks omitted).

The Court of Appeal applied the same reasoning recently in *City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, where the plaintiff city had alleged a violation of the city's charter, but not any violation of the MMBA. Nevertheless, the court found that PERB has exclusive jurisdiction:

> **While it is true that the City's complaint does not mention the MMBA, at this stage in the proceedings, where the only question is PERB's jurisdiction, 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...It is irrelevant that the superior court may have jurisdiction to interpret Charter provisions or grant declaratory relief in other types of disputes, or that the City declines to plead a claim for relief from an unfair labor practice.**

Id., at 945 (internal quotation marks and citations omitted).

Thus, as the Court of Appeal found in the instant case, 160 Cal.App.4th at 967-968, even where a plaintiff has a legitimate legal claim that can be framed as not involving an unfair labor practice, the courts must defer to PERB's exclusive jurisdiction if the same conduct could also be framed as an unfair labor practice, irrespective of whether the party actually chooses to file an unfair labor practice charge.[8] *Accord County of Sacramento*, 165 Cal.App.4th at 416 ("[T]he question here is not whether the complaining party expressly alleged an unfair labor practice but whether the underlying conduct challenged is arguably protected or arguably prohibited....As for the County's assertion that it could not have alleged an unfair labor practice charge, this is based on a faulty assumption that no unfair labor practice is implicated where the County seeks to stop essential employees from striking.").

For that reason, the First District erred in *County of Contra Costa* to the extent that it relied upon the fact that in *San Diego Teachers* the employer had chosen both to go to court and to file unfair practice charges. As explained in *Fresno* and in *City and County of San Francisco*, the employer's choice of forum and the employer's framing of its allegations are irrelevant where the employer could file an unfair practice charge if it

---

[8] Moreover, as the Sixth District pointed out, in conducting a preemption analysis it is appropriate to "construe the activity broadly 'in order to provide exclusive jurisdiction over activities arguably protected or prohibited....'" *City of San Jose*, 160 Cal.App.4th at 968 (*citing El Rancho* and *California Teachers' Association v. Livingston Union School District* (1990) 219 Cal.App.3d 1503, 1511).

wishes to do so. *See also County of Sacramento*, 165 Cal.App.4th at 416.[9]

Moreover, the First District also erred in distinguishing *Fresno* as follows: "we do not find *Fresno* to be dispositive since the case before us does not involve an unfair labor practice." *County of Contra Costa*, 163 Cal.App.4th at 152. *County of Contra Costa* in fact involved conduct which would have allowed the employer to file unfair labor practice charge, exactly as in *Fresno* and all of the *San Diego Teachers* line of cases. Indeed, the employer in *Fresno* went directly to court and declined to file any unfair labor practice charge until after the Superior Court correctly sustained a demurrer based upon PERB's exclusive jurisdiction. *Fresno*, 125 Cal.App.3d at 263.[10]

In *Modesto*, the school district sought an injunction against a strike that it believed was illegal at common law, first via PERB's injunctive relief procedures and then shortly thereafter by directly filing for a TRO in

---

[9] The same conclusion is also reinforced in *Modesto*, in which the Court of Appeal held that, for purposes of determining PERB's jurisdiction, it does not matter whether a PERB charge has or has not been filed, as "filing unfair practice claims [does] not confer jurisdiction upon PERB....jurisdiction over the subject matter cannot be conferred by consent, waiver or estoppel." 136 Cal.App.3d at 890 (citing other cases).

[10] The *Fresno* court distinguished federal preemption cases such as *Farmer v. Carpenters* (1977) 430 U.S. 290, where the claim at issue was related to a labor dispute but "was not essentially about a labor dispute." *Fresno*, 125 Cal.App.3d at 268. The *Fresno* court explained that while the claim at issue in *Farmer* was "a 'peripheral concern' of labor law," in contrast, a tort claim challenging strike activity ***"goes to the essence of labor law – the right to strike."*** *Id.* (emphasis supplied). The same is true in the instant case: the question at issue goes to the essence of labor law – determining which City employees lose their otherwise protected right to strike because their absence would pose a substantial and imminent threat to the public's health or safety. *See infra* at 28-29.

court, outside of PERB's injunctive relief procedures. 136 Cal.App.3d at 885-886. PERB processed the Modesto School District's unfair practice charge and request for injunctive relief, determined to seek an injunction in court, and then successfully obtained an injunction against various conduct by both the school district and the union (including an injunction against the strike). *Id.*, at 886-889.

Meanwhile, in the separate proceedings that were brought directly by Modesto School District in court, outside of PERB's injunctive relief procedures, the superior court followed *San Diego Teachers* and found that the court "lacked jurisdiction to issue an injunction against the [union] sought by the District." *Modesto*, 136 Cal.App.3d at 889. The school district challenged this jurisdictional determination on appeal, arguing that "PERB should have no jurisdiction in postimpasse strikes because the 'public interest lies in minimizing interruptions of educational services, and in maintaining their quality and continuity.'" *Id.*, at 890. The Court of Appeal flatly rejected this contention:

> **While recognizing that both the EERA and the California Supreme Court have established that PERB has initial exclusive jurisdiction to determine whether certain conduct is an unfair practice under the EERA, District, nonetheless, contends that PERB does not have exclusive original jurisdiction over strikes occurring after statutory impasse procedures have been completed, as in the instant case. District desires to restrict the *San Diego* holding to strikes occurring prior to the time statutory impasse procedures have been completed. We are not persuaded.**

Id., at 892. One of the reasons that the appellate court cited in finding that PERB's jurisdiction continues even after an impasse in bargaining occurs

was that the duty to bargain in good faith – which the *San Diego Teachers* court found to be the central basis for PERB to have jurisdiction over strike conduct that violates the common law – continues even after impasse. *Id.*, at 892-893.

The *Modesto* court also noted that even a "competent, thorough, and informed" trial judge knows far less about this area than the parties to the case, which "amply exemplifies the need to defer to the expertise of PERB" so that it can "promote the improvement of personnel management and employer-employee relations." *Id.*, at 893-94. Thus, the court continued, "we do not believe it would 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." *Id.*, at 895. And the court noted that PERB's expertise was well illustrated in the facts of the *Modesto* case, as PERB's requested injunction against various conduct by both parties (including the strike), which the superior court granted, was particularly well-suited to maintaining the balance of power and stabilizing labor relations. *Id.*, at 895.

///

///

///

B. The Sixth District Was Correct in Finding That the Conduct at Issue Is Both Arguably Prohibited and Arguably Protected by the MMBA

The City acknowledges that PERB has jurisdiction over an action if there are claims based upon ***conduct*** that is either "arguably protected" or "arguably prohibited" by the governing labor relations statute, and the City further acknowledges that courts have interpreted PERB jurisdiction "more broadly than a literal reading of language would suggest." (Appellant's Opening Brief ["AOB"], at 2). However, as Local Three proceeds to show, the City, like the Court of Appeal in *County of Contra Costa*, stops its analysis short at that point, as it must in order to preserve its argument. Among other errors, the City never acknowledges part of the fundamental holding of *San Diego Teachers*: that a union violates its statutory duty to bargain in good faith to the extent that it calls a strike in violation of the common law, meaning that PERB has jurisdiction over such claims. 24 Cal.3d at 8.

1. Local Three's Threatened Strike Activity Was Arguably Prohibited by the MMBA

As discussed *supra* at pages 8-10, the City could have brought an unfair practice charge alleging that Local Three engaged in bad faith bargaining by threatening a strike that would (in the City's view) violate the common law. Indeed, the City's argument – that PERB lacks jurisdiction because the City raised issues in court that are not mentioned in the MMBA – was rejected in *San Diego Teachers* and *El Rancho*. *See, e.g., El Rancho*, 33 Cal.3d at 957. Notably, the *El Rancho* Court found that PERB had exclusive jurisdiction even though the employer framed its claims as non-

EERA causes of action. *Id*; *accord Fresno*, 125 Cal.App.3d at 269.

These dispositive principles lie at the crux of the Sixth District's decision in the instant case, as well as the Third District's decision in *County of Sacramento*. The City (like the counties in *County of Sacramento* and *County of Contra Costa*) alleged that a threatened strike would have violated the common law by including "essential" employees. As the Sixth District found based upon the holding of *San Diego Teachers*, such an allegation could also be framed as bad faith bargaining by use of an illegal pressure tactic. *City of San Jose*, 160 Cal.App.3d at 969-970. Indeed, bad faith bargaining by a union constitutes an unfair practice under the MMBA, just as it does under the EERA. *Compare* 8 Cal. Code Reg. 32604 (listing categories of unfair practices by labor unions under the MMBA) *with* Government Code §3543.6 (listing categories of unfair practices by labor unions under the EERA).[11]

Since strike conduct that violates the common law is also at least "arguably prohibited" under the statutory labor relations laws, PERB is well supported in its position that strike conduct that is illegal under *County*

---

[11] The City's common law theory is based upon this Court's decision regarding the scope of public employees' right to strike in California, *County Sanitation,* 38 Cal.3d 564. Significantly, as discussed further *infra* at page 26, the *County Sanitation* decision was based in large part upon this Court's interpretation of how the MMBA altered the common law rule regarding public employee strikes (*see* 38 Cal.3d at 576), meaning that the City's invocation of *County Sanitation* intimately involves the MMBA. However, even to the extent that the *County Sanitation* holding arguably constitutes a purely "common law" rule regarding which employees have the right to strike, violation of such a common law rule constitutes an unfair practice under the MMBA – specifically, bad faith bargaining. *San Diego Teachers*, 24 Cal.3d at 8.

Sanitation could arguably violate the MMBA. For the same reason, the Sixth District was correct to summarize this case as as "involving statutory unfair labor practice claims" (160 Cal.App.3d at 957) – specifically, an employer's claim that a union may not call a strike of allegedly "essential" employees.

In contrast, the First District erred as a matter of law in *County of Contra Costa* when it found "no evidence of allegations ***or conduct*** on the record before us suggesting that any party to this case had committed, or had threatened to commit, an unlawful labor practice." 163 Cal.App.4th at 154 (emphasis supplied). Indeed, the First District mistakenly distinguished *San Diego Teachers* on the ground that the union in that case "may have committed at least two unfair practices by undertaking the strike" – the First District did not recognize that the arguable unfair practices in *San Diego Teachers* were premised on a theory that the strike was illegal ***at common law***. 163 Cal.App.4th at 149.

The *County of Contra Costa* court also failed to recognize that, for several decades, PERB has followed the instruction of *San Diego Teachers* and sought injunctions where necessary to protect the public from strike activity. For instance, in *San Ramon Valley Unified School District v. San Ramon Valley Education Association* (1984) PERB Decision Number IR-46 (http://www.perb.ca.gov/decisionbank/pdfs/I046E.pdf), school district employees went on strike without any notice whatsoever. While the governing labor relations statute, the EERA, does not contain any rule regarding surprise or unannounced strikes – indeed the statute does not

mention strikes at all – PERB found such strikes to violate the duty to bargain in good faith, because of the public interest and public safety problem inherent in surprise strikes: "[W]hen parents have no advance notification of a strike, they cannot reasonably determine whether their minor children can safely be sent to school and cannot make alternative arrangements for their care during school hours." *Id.*, at 14. Accordingly, PERB granted the school district's request to seek injunctive relief. *Id.*, at 15.

In deciding that a surprise strike violated the duty to bargain in good faith, PERB relied heavily upon *San Diego Teachers*, noting that the Supreme Court had explicitly found it to be PERB's "responsibility" to administer labor relations in a manner that protects the public. *San Ramon Valley*, at 14 (citing *San Diego Teachers*). As this example shows, PERB has for many years followed *San Diego Teachers*, in which this Court found that the duty to bargain in good faith includes the duty not to imminently and substantially endanger the public, and the Court further found that PERB has the authority to flesh out this general principle by crafting decisional rules and by seeking injunctions where necessary. Indeed, in PERB's appellate briefs asserting its jurisdiction in those cases in which it was granted intervenor status, PERB explicitly cited to *San Ramon Valley*, among other cases, to illustrate PERB's history of protecting the public from substantial and imminent harm in the course of crafting decisional law surrounding injunctive relief requests and the duty to bargain in good faith. *See, e.g.,*, Jud. Not. Decl., Exhibit 4, at 15 & 33.

Thirty years of experience under *San Diego Teachers* have not led to even a single reported instance in which PERB has acted too slowly to protect the public. This is the case even though PERB's jurisdiction includes such disparate employee groups as prison guards and hospital employees at the University of California medical centers. The City can offer only speculation that, at some point in the future, PERB will act too slowly to protect the public.

The *County of Contra Costa* court was mistaken to treat the issue of PERB jurisdiction as an open one, thereby failing to recognize the import of *San Diego Teachers*. Indeed, the decision in *County of Contra Costa* at certain points tracks the dissent in *San Diego Teachers*, arguing that protecting the public from strike activity is a matter for the superior court, not PERB. *Compare County of Contra Costa*, 163 Cal.App.4th at 153 & 155 ("We do not see a need to defer to the PERB's expertise in cases such as this. Trial courts are quite capable of resolving these issues... In the absence of any indication that the employees the County was seeking to prevent from striking were committing an unfair practice, or that the County was committing an unfair practice by seeking the injunction, the MMBA was not implicated and the PERB had no jurisdiction over the complaint.") *with San Diego Teachers* 24 Cal.3d at 20 (Richardson, J., dissenting) ("[N]othing in the EERA would support the view that the Legislature intended to divest courts of their traditional equitable jurisdiction over public strikes or any other unlawful activities which threaten irreparable injury...EERA nowhere mentions a strike by public school employees as

one of the practices which is subject to PERB's jurisdiction.").

Most fundamentally, the *County of Contra Costa* court acknowledged at the close of its decision that "[w]e have narrowly interpreted the scope of the PERB's jurisdiction," and the First District therefore specifically urged this Court to grant review and resolve the issue. 163 Cal.App.4th at 159. The First District's acknowledgment is telling, because PERB's jurisdiction is not to be interpreted narrowly – as even the City acknowledges, on page 2 of its opening brief. Rather, this Court has cited with approval federal precedent explaining that preemption principles are intended "to avoid conflict in its broadest sense" and therefore the "arguably protected" or "arguably prohibited" prongs of the exclusive jurisdiction standard are satisfied if there exists a "potential overlap between the controversy presented to the superior court [] and the controversy that might have been presented to PERB." *El Rancho*, 33 Cal.3d at 953 & 959 (internal quotation marks and citations omitted). Put another way, the *County of Contra Costa* court improperly failed to base its decision on the ***conduct*** complained of, which, as the *El Rancho* court explained, "is, of course, the Unions' strike." *El Rancho*, 33 Cal.3d at 954.

Finally, while this Court's *San Diego Teachers* decision demonstrates that it is not a stretch for employers such as the City to fit common law strike injunction allegations into statutory prohibitions against bad faith bargaining, the Sixth District also correctly noted that it is "erroneous" to presume that PERB is limited to investigating only charges which are specifically defined as unfair labor practices. *City of San Jose*,

160 Cal.App.4th at 970 (*citing Leek v. Washington Unified School District* (1981) 124 Cal.App.3d 43, 48). As the Court of Appeal explained in *Leek*, the EERA vests PERB with authority to deal with "unfair practice charges ***or*** alleged violations of this chapter, and take any action and make any determinations in respect to these charges ***or*** alleged violations as the Board deems necessary to effectuate the policies of this chapter." Gov. Code § 3541.3(i) (emphasis supplied). Significantly, when the Legislature amended the MMBA to vest PERB with jurisdiction, the Legislature specifically vested PERB with the same powers and duties that it has under §3541.3 of the EERA. *See* Gov. Code §3509(a). Moreover, the Legislature specified that "[a] complaint alleging any violation of this chapter," or of any rules and regulations adopted by the PERB, shall be processed as an unfair practice charge by the PERB. *See* Gov. Code §3509(b).

2. Local Three's Threatened Strike Activity Was Arguably Protected by the MMBA

The Court of Appeal in the instant case was also correct in its alternate holding that PERB has exclusive initial jurisdiction because the conduct at issue is "arguably protected." *City of San Jose*, 160 Cal.App.3d at 970-71. This holding was grounded, first, in the *El Rancho* Court's determination that even though EERA "does not provide express protection for economic strikes," strike conduct is "arguably protected." *Id.*, 33 Cal.3d at 958. *See also County of Sacramento*, 165 Cal.App.4th at 415 (finding that strike activity may be protected activity).

This principle applies equally under the MMBA, which, like EERA, generally protects union activity, without mentioning strikes. *See supra* at 8

fn 7. The "arguable protection" of strike conduct is very strong for employees under the MMBA, as this Court relied heavily upon the MMBA in finding that all MMBA-covered employees have a protected right to strike, other than those whose absence imminently and substantially threatens the public. *County Sanitation,* 38 Cal.3d at 585. Specifically, this Court held that the MMBA "removed many of the underpinnings of the common law *per se* ban against public employee strikes" and therefore the MMBA's "implications regarding the traditional common law prohibition [against strikes] are significant." 38 Cal.3d at 576. The Court then went on to note that the MMBA specifically extended the right to engage in union activities to city and county employees, and "the right to unionize means little unless it is accorded some degree of protection . . . A creditable right to strike is one means of doing so." *Id.*, at 587 & 588.

In light of this holding, it is untenable for the City to allege that the issues involved in this action relate only to the "common law" and have nothing to do with the MMBA. Indeed, in *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, this Court discussed the import and reasoning of its decision in *County Sanitation*, as follows: "We found the traditional common law rule [barring public employees from striking] with no basis in modern labor law, ***particularly in light of the MMBA***...." 7 Cal.4th at 542 (emphasis supplied). Moreover, the *County Sanitation* Court's reasoning that the "right to unionize" should include a "creditable right to strike" is very significant for the instant analysis, for the right to unionize referenced by the Court appears in

Government Code §3502, and any interference with the rights set forth in section 3502 constitutes an unfair practice under PERB regulations. *See* 8 Cal. Code Reg. 32603(a).

Therefore, even looking only at the "arguably protected" prong of preemption analysis, PERB must have jurisdiction to determine which employees are so "essential" that they may not strike, for that is the only means by which PERB can determine the converse – which employees have the protected right to strike. PERB must regularly make such determinations, for instance, when employees file charges with PERB claiming that their employers have retaliated against them for allegedly protected strike activity. If superior courts were to retain jurisdiction to determine whether employees should be enjoined from striking, even though PERB now has jurisdiction over the MMBA, the risk of conflict with PERB's determination of employee rights is quite high – a much higher risk than is necessary to support a finding of exclusive jurisdiction. As noted in *El Rancho*, a finding of preemption is required if there exists a risk that a court could prohibit conduct which PERB might find to be protected. 33 Cal.3d at 960 n. 19 (citing federal precedent).

Certainly, at the time that *County Sanitation* was decided, PERB did not have jurisdiction over cities and counties, and therefore determination of these issues was left to the courts. As noted above, the Legislature changed all that effective July 1, 2001. *See Coachella*, 35 Cal.4th at 1077 (noting that Government Code §3509, added by Stats 2000, ch. 901, §8, constitutes a "fundamental change" which supersedes this Court's holding

in *Santa Clara County Counsel Attorneys Ass'n* that courts have jurisdiction over the MMBA). Indeed, the act vesting PERB with jurisdiction over the MMBA twice directs PERB to follow standards previously adopted and followed by the courts. Government Code §§3509(b) & 3510(a).

In *County of Contra Costa*, the First District largely sidestepped the "arguably protected" prong of the exclusive jurisdiction test and instead held that "whether or not an employee is deemed 'essential' is not a labor law issue; rather, it is a public safety issue." 163 Cal.App.4th at 153; *see also id.*, 163 Cal.App.4th at 159 n.13 (asserting that an injunction action over allegedly "essential" employees has only a "tangential relationship" to the underlying labor dispute). In reaching this conclusion, the First District failed to appreciate the fact that employees deemed "essential" lose their right to strike, and that the effectiveness and credibility of a labor union, as well as its ability to obtain benefits for its members, is typically dependant upon its ability to call a strike that halts most operations of the employer.[12] Thus, in many cases, the determination of which employees are so "essential" that they may not strike directly impacts the outcome of the labor dispute.[13]

---

[12] The *County Sanitation* Court specifically recognized the importance of the right to strike: "In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith." 38 Cal.3d at 583; *see also id.*, at 589 (noting that "a union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness" and that "the right to strike is fundamental to the existence of a labor union").

[13] As the Third District Court of Appeal found in *County of Sacramento*, 165 Cal.App.4th at 423-424: "[T]he County's assertions go to the

This is particularly true in those inevitable cases in which a public employer overreaches and attempts to obtain an injunction against an overly large group of employees in order to minimize the generalized impacts of the strike and not just those that might pose an imminent and substantial threat to the public's health or safety. Indeed, the facts in *County of Contra Costa* make this point clear. At the request of the County, the superior court enjoined from striking, among others, an entire bargaining unit of 500 nurses, concluding that the public would be imminently and substantially threatened if even a single nurse were to strike, despite the fact that nurses work in very diverse settings, nurses commonly take vacation and sick days, and nurses in the private sector strike frequently. 163 Cal.App.4th at 143 & n.2 ("The County also sought to enjoin all the members of the nurses' union....The nurses' union is the California Nurses Association which represented approximately 500 nurses...The court also issued a TRO forbidding the nurses from engaging in a sympathy strike, finding that they were also essential public employees."). Thus, in approving the County's requested injunction against every single employee represented by the nurses union, the court completely eviscerated the ability of the nurses' union to ever strike, belying the First District's claim that "the court did not enjoin the strike; it enjoined a relatively small number of employees who provide essential public services." 163 Cal.App.4th at 150 (internal citation

---

right of public employees to strike in order to exert pressure on the employer to accede to their contract demands. The fact that essential employees are involved merely goes to the amount of pressure exerted. Resolution of this matter goes to the very heart of labor law and PERB's jurisdiction."

mark and citations omitted).[14] The point is not whether the superior court in *County of Contra Costa* was right about who is "essential" – rather, the point is that the "essential employee exception" can swallow the rule, further underscoring why essential employee questions are at the heart of labor law.[15]

In contrast to the *County of Contra Costa* decision, in the instant case the Sixth District correctly followed precedent and found that a dispute over which employees have the right to strike is far from "tangential" to the labor dispute and rather "goes to the essence of labor law and thus to the very heart of the agency's jurisdiction." *City of San Jose*, 160 Cal.App.4th at 976 (internal quotation marks and citations omitted). Indeed, as the Sixth District noted,

> **[t]he Legislature has established a comprehensive scheme "for the regulation of public employment relations under the initial jurisdiction of the PERB." [*Citing Coachella*]. The expansive common law exception posited [by the City] would disrupt that scheme. The activity that the City would exempt from agency**

---

[14] In assessing the County's assertions regarding employees represented by unions other than the nurses' union, on the other hand, the superior court was of the view that the County had overreached in seeking to enjoin 270 employees from striking, and the court issued an injunction with respect to 160 of the 270 employees. *Id.*, 163 Cal.App.4th at 143.

[15] The appellate courts, in developing the exclusive jurisdiction doctrine, were cognizant of the fact that only an expert agency such as PERB can act in an equitable manner that does not unduly disturb either side's power in a labor struggle. *See, e.g.*, *Modesto*, 136 Cal.App.3d at 893 ("[A] primary factor in [the preemption doctrine's] development was the perceived incapacity of common law courts and state legislatures, acting alone, to prove 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.") (internal quotation marks and citations omitted).

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." [*Citing Fresno*].

Id., at 972-973.

IV. EFFECTIVE JULY 1, 2001, THE LEGISLATURE EXTENDED PERB'S EXCLUSIVE INITIAL JURISDICTION TO COVER CITIES AND COUNTIES, AND IN DOING SO REQUIRED CITIES AND COUNTIES TO USE THE SAME PROCEDURES THAT HAVE LONG BEEN APPLICABLE TO OTHER PUBLIC SECTOR EMPLOYERS IN CALIFORNIA

A. This Court, in *Coachella*, Correctly Discerned the Legislature's Intent in Placing the MMBA Under PERB's Jurisdiction

In *Coachella*, 35 Cal.4th 1072, this Court described the Legislature's act vesting PERB with jurisdiction over the MMBA:

> **The [MMBA] governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties and special districts. Before July 1, 2001, an employee association claiming a violation of the MMBA could bring an action in Superior Court.... Effective July 1, 2001, however, the Legislature vested the [PERB] with exclusive jurisdiction over alleged violations of the MMBA.**

Id., at 1077.

As noted above, when the Legislature vested PERB with jurisdiction over the MMBA, the Legislature explicitly defined PERB's powers and duties to be equivalent to its powers and duties under EERA. *See* Gov. Code §3509(a) (incorporating by reference EERA, Gov. Code §3541.3). In vesting PERB with the same powers and duties under the MMBA as it already had under EERA, the Legislature is presumed to have known the existing state of judicial interpretations regarding the nature of those powers

and duties, including the *San Diego Teachers* line of cases. *See, e.g.*, *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977. *Accord County of Sacramento* 165 Cal.App.4th at 419 & 420 ("[W]hen the Legislature transferred jurisdiction over MMBA matters to PERB in 2001, it did so with the backdrop of *San Diego Teachers* and *El Rancho*....It is not to be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.") (Citations and internal quotation marks omitted).

This conclusion draws considerable support from *Coachella*, *supra*, 35 Cal.4th 1072. In *Coachella*, this Court was asked to determine whether the Legislature's act vesting PERB with jurisdiction over the MMBA had altered in any way the three-year statute of limitations that the superior courts had long applied to cases arising under the MMBA. The Court answered in the affirmative, finding that the Legislature, in vesting PERB with exclusive initial jurisdiction over the MMBA, implicitly intended to have PERB apply its traditional six-month limitations period, just as it does with all other statutes under its jurisdiction, even though the MMBA does not reference a limitations period within its text (unlike the other labor relations statutes that PERB administers, which specify a six-month statute of limitations). *Id.*, at 1089.

As the *Coachella* Court found:

> **Here, what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges....**

> **By changing the forum – vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA charges – the Legislature abrogated the three-year statute of limitations.**

Id., 35 Cal.4th at 1089.

Significantly, the *Coachella* Court also found it important to harmonize the labor relations law governing cities and counties with the laws governing other public sector entities, explaining as follows:

> **Finally, and perhaps *most importantly*, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided.... The MMBA, which we construe here, is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB. The PERB suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations statutes within the PERB's jurisdiction... *We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws.***

Coachella, 35 Cal.4th at 1089-1090 (emphasis supplied). Indeed, the Legislature's goal of harmonizing the different labor relations statutes is so important that it controlled the outcome in *Coachella* even in the face of different statutory wording (as noted above, the MMBA differs from the other labor relations statutes in that it does not specify a six-month statute of limitations).

These principles apply equally here; in fact, the principles apply even more so in the instant case, where there is no material difference in statutory wording. The Legislature, in granting PERB exclusive initial jurisdiction

over the MMBA, made the scope of that exclusive jurisdiction comparable to the scope of PERB's exclusive jurisdiction over EERA. And PERB's exclusive jurisdiction, as definitively explained in *San Diego Teachers* and subsequent cases, extends to claims that a strike will cause irreparable harm to the public, even if the employer is asserting a common law allegation, because an allegation that a union is striking in violation of the common law could also be framed as an unfair practice.[16]

B. The Legislative History of SB 739 Shows That the Legislature Considered Giving *County Sanitation* Special Status, But Instead Determined That *County Sanitation*, Like All Other Pre-Existing Judicial Interpretations, Would Now Be Interpreted and Applied by the PERB Board

The Government Code provisions vesting PERB with jurisdiction over the MMBA were enacted via Senate Bill 739. Stats. 2000, ch. 901. Prior to enactment, SB 739 went through multiple drafts. In the version showing all amendments adopted through August 16, 1999, the bill added to Government Code Section 3510(b) language affording special status to this Court's *County Sanitation* decision, as follows:

The holding of *County Sanitation Dist. No. 2 v. Los Angeles*

---

[16] In *County of Contra Costa,* the First District points out that *San Diego Teachers* is specifically limited to a different labor relations statute, the EERA. 163 Cal.App.4th at 149. The *County of Contra Costa* decision thus fails to recognize the import of *Coachella* and the fact that there is no statutory wording difference between the EERA and the MMBA that would even remotely support an argument that the use of PERB's injunctive relief procedures is required under the EERA yet not required under the MMBA. *See, e.g., supra,* page 5 & fn 4. Indeed, the relevance of EERA cases to the instant analysis is further underscored by the fact that the City also relies upon cases involving the EERA. *See infra*, at 48 fn 24.

***County Employees' Assn* (1985) 38 Cal.3d 564 is hereby adopted and shall be applied for the purposes of this chapter.**

Jud. Not. Decl., Exhibit 6, at 11.

Ultimately, however, the Legislature determined to excise that language. Gov. Code §3510(b); Jud. Not. Decl., Exhibit 7, at 12 (showing deletion via amendment in later version of bill) & Exhibit 8, at 6 (final chaptered version of bill). Instead, the Legislature decided to treat *County Sanitation* just like every other pre-existing judicial decision – SB 739 explicitly directs that "[t]he provisions of this chapter shall be interpreted and applied ***by the board*** in a manner consistent with and in accordance with judicial interpretations of this chapter." Gov. Code §3510(a)(emphasis supplied); *accord* Gov. Code §3509(b) ("***The board***" shall follow "existing judicial interpretations") (emphasis supplied).

The Legislature thus specifically decided not to include special language enshrining *County Sanitation*, thereby choosing not to insert into the MMBA language different from the EERA. This decision further confirms that the Legislature intended no significant difference between PERB's jurisdiction under the MMBA and under the EERA. Accordingly, this Court's landmark holding in *San Diego Teachers* – that the enactment of EERA in 1975 transferred jurisdiction over common law teacher strike injunction cases to PERB, despite the fact that courts had for many years prior to EERA taken jurisdiction over allegations that teacher strikes violated the common law – applies equally here.

C. The City is Misplaced in Its Reliance Upon The Governor's Veto of Assembly Bill 553

The City asserts that the content of a one-page veto message for Assembly Bill 553 ("AB 553") supports its position. (AOB, at 26, fn 13). That is not the case, for the reasons explained below.

AB 553 is an unenacted piece of legislation that was originally introduced in February 2007. Jud. Not. Decl., Exhibit 9. The bill was introduced because superior courts, faced with time-sensitive TRO requests from MMBA-covered employers seeking strike injunctions, had issued opposite decisions regarding whether to continue entertaining such injunction requests in the wake of the Legislature extending PERB's jurisdiction to cover the MMBA. *See* Jud. Not. Decl., Exhibit 10, fourth page ("Supporters also state: 'There is currently confusion and uncertainty by some over the jurisdictional issue. There have been some courts which have issued injunctions against strike activity at the request of local agency employers despite the laws passed by the Legislature . . . AB 553 does not change the law but simply clarifies what the Legislature already did and intended in enacting SB 739 in 2000.'").

Thus, AB 553 explicitly stated, in both its original and amended version, that it was "clarifying of existing law" and did ***not*** "expand the Public Employment Relations Board's jurisdiction or authority beyond that previously authorized by the Legislature." Jud. Not. Decl., Exhibit 9, second page, Sections 1(a) & 1(b)). Indeed, precedent is clear that such clarifying legislation is not intended to change the law:

Our consideration of the surrounding circumstances can indicate

> **that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning.**
> ...
> **One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute."**

Western Security Bank v. Superior Court (1997) 15 Cal.4th 232, 243 (citations omitted).

Accordingly, the City's reliance on Governor Schwarzenegger's veto message, which occurred after AB 553 was passed by the Assembly and the Senate, is misplaced. Unenacted legislation is of no value in determining legislative intent of the previously enacted legislation. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 fn 4 ("The parties draw conflicting inferences from the fact that in 1991 the Legislature passed a bill, which was vetoed by the Governor, to abrogate [a court decision]. On reflection, we are unable to draw any relevant inference from this event; it provides no guidance on whether the political branches approved or disapproved of [the court decision] as an interpretation of the existing statutes.") (citation omitted); *People v. Escobar* (1992) 3 Cal.4th 740, 751 ("In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. Legislative inaction is a weak reed upon which to lean.") (citations and internal quotation marks omitted).

Indeed, California's cities and counties, in opposing enactment of

AB 553, acknowledged at the time that AB 553 was an attempt to "preempt" ongoing appellate litigation. *See* Jud. Not. Decl., Exhibit 10, fourth page ("Opponents also state: 'AB 553 seeks legislative preemption in litigation currently before three California District Courts of Appeals....'"). Therefore, Governor Schwarzenegger's veto simply meant that the issue of PERB's exclusive jurisdiction was not moot and the Court of Appeal, Sixth District, properly resolved the issue on appeal.[17] *See County of Sacramento*, 165 Cal.App.4th at 422 ("Notwithstanding the proposed 2007 legislation and the Governor's veto message, we are not persuaded the Legislature of 2001 did not intend that strikes involving public health and safety issues fall within the exclusive jurisdiction of PERB....the proposed legislation specifically states it is 'intended to be technical and clarifying of existing law.' (Assem. Bill 553, § 1.) Hence, the legislation actually reflects the Legislature's understanding that PERB already has exclusive jurisdiction over strikes, work stoppages or lockouts involving public employees, notwithstanding the Governor's contrary assumption.").

///

///

///

///

///

---

[17] Governor Schwarzenegger was not in office in 2000 when the Legislature vested PERB with jurisdiction over the MMBA by enacting SB 739, which was signed by then-Governor Gray Davis.

V. NO EXCEPTIONS TO PERB'S JURISDICTION APPLY

The City claims that a "local concern" exception to PERB's jurisdiction should apply here. (AOB, at 22-24). The City also asserts that requiring exhaustion will impose substantial public injury, because, the City claims, PERB's injunctive relief procedures are inadequate. (AOB, at 25-27).[18] As Local Three proceeds to show, neither argument is well taken

A. No "Irreparable Harm" Exception to PERB's Jurisdiction Applies Here – PERB's Injunctive Relief Procedures Could Have Provided the City with Adequate Relief

PERB is authorized by its governing statutes and regulations to seek injunctive relief in court. *See, e.g.*, Gov. Code §3509(a) (incorporating by reference Government Code § 3541.3(j)); 8 Cal. Code Reg. 32450. When any party asks PERB to seek injunctive relief, within five days PERB's general counsel recommends to PERB's Board whether to seek injunctive relief – and PERB acts much more quickly when necessary. *See* 8 Cal. Code Regs. 32460 & 32147. Practitioners familiar with PERB know that when a party covered by PERB jurisdiction requests that PERB seek injunctive relief, PERB acts as quickly as necessary to process the case in a

---

[18] The City makes this argument in the course of discussing three factors set forth in *Coachella*, but those three factors, rather than constituting a substantive exception to PERB's jurisdiction, actually pertain to a court's decision "whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course." *Coachella*, 35 Cal.4th at 1082. Reading the City's brief as a whole, the City essentially argues three points: (i) PERB does not have jurisdiction because the City asserted a claim under the common law, (ii) a local concern exception should apply, because the matter is outside of PERB's expertise, and (iii) PERB's injunctive relief remedies are inadequate, which amounts to an argument that the Court could find an "irreparable harm" exception to apply.

timely enough manner that injunctive relief will still be effective if and when it is ultimately obtained. *See, e.g.*, PERB's Supplemental Opposition to City of San Jose's Petition for Writ of Supersedeas, p. 15 & Ex. C (detailing PERB's receipt of a request for injunctive relief on Friday, June 16, 2006, and subsequent work through the weekend to prepare for a Monday injunctive relief action); *see also* Reporter's Transcript, page 16A (description of PERB's capacity, where necessary, to go to court and seek an injunction within a day and a half of first being notified of a request for injunctive relief against a strike).[19]

While the City argues that there is too much delay built into the PERB process (AOB, at 25-26), the City ignores the facts of this case and settled precedent. Factually, the City asserts that on May 30, 2006, it was given 72 hours notice of potential strike activity – more than enough time for PERB to seek injunctive relief. *See* Petition for Writ of Supersedeas, ¶

---

[19] As PERB's General Counsel explained to the Superior Court in the *County of Contra Costa* case:

> **[W]e will do whatever it takes to get a request investigated and a board decision made in order for the board to seek injunctive relief prior to any type of problem occurring. In other words, we are not going to sit around and watch Rome burn while we are making up our minds.**
>
> . . .
>
> **I've been supervising this process since 1992, or perhaps before then. And I do not know of a case where parties have sought injunctive relief from our board and gone away wanting. Now, they may have disagreed with what the board's decision was. But we did not grant a request and then find ourselves going to court too late. It never happened. . . . [W]e will react to a filing for injunctive relief as rapidly as the situation requires.**

Jud. Not. Decl., Exhibit 5, page 28, line 28, through page 29, line 25.

5.[20] Instead of immediately requesting injunctive relief from PERB, the City decided to bypass PERB and to attempt to go directly to court, yet the City took a full three days, until June 2, 2006, to prepare papers, provide notice, and appear in Court, by which time strike activity could have already commenced (but had not). *Id.*, ¶¶ 6-7. There is no showing that PERB would have reacted more slowly – even without any notice from the City, PERB appeared at the June 2, 2006 injunction hearing and filed papers one day in advance thereof. *Id.*, ¶¶ 8-9 & App., Exhibit 10. Indeed, there is no evidence that PERB has ever been dilatory in any case, anywhere in the State, at any point in PERB's 33 years of existence.[21]

Moreover, this Court has previously determined that PERB's procedures to enjoin strikes are adequate. In *San Diego Teachers*, this Court stated that in order "to provide an adequate alternative to a party's own lawsuit for an injunction, PERB's power to apply for injunctive relief should be exercisable in response to any aggrieved party's request, not simply on its own motion." 24 Cal.3d at 10. The Court found that this

---

[20] In *County of Sacramento*, the County received six weeks' notice of the strike, while in *County of Contra Costa* the County received a week's notice of the strike. *See County of Sacramento*, 165 Cal.App.4th at 407; Jud. Not. Decl., Exhibit 1, at 3-4. Nevertheless, each of these public employers decided not to file a charge with PERB and instead waited until the last or second-to-last business day prior to the strike before going directly to court to seek an injunction.

[21] The City is off-base in its reliance upon the timelines mentioned in PERB's regulations. (AOB, at 25-26). As the Third District noted in *County of Sacramento*, these timelines provide a ***maximum*** amount of time for PERB to take action, but in no way establish any minimum amount of delay, and PERB may expedite matters whenever necessary, as explicitly set forth in PERB regulations at 8 Cal. Code Regs. § 32147. *County of Sacramento*, 165 Cal.App.4th at 418.

standard was satisfied. *Id.* In fact, even though PERB at that time was a new agency and had not developed any procedures for processing parties' requests for injunctive relief, the Court nevertheless found that the purely ad hoc approach that PERB was using to resolve injunctive relief requests at the time was adequate. *Id.*, at 11.

Three decades later, PERB now has specific regulations in place and a well-developed history of working as quickly as necessary to process injunctive relief requests so that injunctive relief, if warranted and if sought and obtained, will be obtained in a timely enough manner to be effective. Thus, there could hardly be cause to relitigate the "adequacy of relief" issue already decided by this Court in 1979. *See County of Sacramento*, 165 Cal.App.4th at 417 ("In the present matter, where the County sought an injunction prohibiting the unions from ordering or encouraging certain employees from participating in the strike, there is no reason to believe PERB is not well suited to fashion an appropriate remedy that would minimize disruption of public services while protecting the parties' collective bargaining rights.").

Lastly, even assuming for the sake of argument that the holding of *San Diego Teachers* (that PERB's remedies are adequate) could somehow be subject to attack now, the exclusive jurisdiction doctrine is so important that it must govern even against speculation that it could some day lead to irreparable harm: "A preemption rule is of overriding significance. The rule 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,* 125 Cal.App.3d at 271. Indeed, while there is no evidence that irreparable harm occurs merely because PERB's injunctive relief procedures must be utilized (which has for decades been the law under multiple labor relations statutes), any such evidence should be brought to the Legislature, which can amend the statute again.

In these circumstances, it is not surprising that an "irreparable harm" exception to PERB's jurisdiction has only been applied in very different circumstances. In *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, the appellate court found two applicable exceptions to PERB's exclusive jurisdiction – futility and irreparable injury – which the court found to be "interrelated" exceptions. *Id.*, at 171. First, the court noted that PERB had completely disavowed all jurisdiction over the dispute. *Id.*, at 168. For that reason, it would have been futile to invoke PERB's jurisdiction, and there was no "separation of powers" issue between the executive and judicial branches. *Id.*, at 168 & 171. Thus, the circumstances in *Department of Personnel Administration* could not have been more different than here, where PERB has actively asserted its jurisdiction from the very outset of the case.

In *Department of Personnel Administration*, since PERB refused to assert jurisdiction, there was no chance that PERB would determine what remedies were appropriate, including whether it was necessary to go to court to seek an injunction against irreparable injury. Indeed, the appellate court noted that it was faced with an "unusual" circumstance, *id.*, at 168,

and that application of the irreparable injury exception was warranted even though that exception is "rarely applied." *Id.*, at 170. This is also why the court found the two exceptions to be "interrelated" – the futility of going to PERB given its disavowal of jurisdiction assured that there would be no potential check on any threatened irreparable harm.

Lastly, the court in *Department of Personnel Administration* also noted that it was faced with "unique" circumstances in that there was an "unprecedented" fiscal crisis leading to "questions of first impression." *Id.*, at 169, 170 & 171. In the instant case, in contrast, application of an "irreparable harm" exception would divest PERB of jurisdiction every single time any city or county in California is faced with the threat of a strike and believes that the public's health or safety may be threatened by the strike.[22] Thus, the extremely unusual facts that gave rise to the decision in *Department of Personnel Administration* do not even remotely support a ruling that would allow cities and counties to bypass PERB each and every time they are threatened with a strike.

///
///
///

---

[22] Because irreparable harm is an element that must be shown in order to obtain temporary injunctive relief, application of an irreparable harm exception to PERB's exclusive jurisdiction over strike injunction actions would divest PERB over jurisdiction in every instance except where the employer cannot show a likelihood of irreparable harm, in which case the application for injunctive relief would be untenable in the first place.

B. The "Local Concern" Exception to PERB's Exclusive Jurisdiction Does Not Apply – Precedent Leaves No Doubt That Strike Cases are at the Heart of PERB's Expertise and Jurisdiction

In *San Diego Teachers* and *El Rancho*, this Court strongly endorsed PERB's expertise over strike matters and held that PERB's mission includes protecting the public. *San Diego Teachers*, 24 Cal.3d at 11 & 13; *El Rancho*, 33 Cal.3d at 957. Nevertheless, the City wishfully argues that the law is otherwise, based upon a single Court of Appeal decision not involving any actual or threatened strike, *Pittsburg Unified School District v. California School Employees Association* (1985) 166 Cal.App.3d 875.

In *Pittsburg*, the defendant school employees union engaged in picketing and leafleting outside of the private business offices of school board members, and the trial court enjoined such conduct on the ground that it violated the Education Code. The appellate court reversed, finding the conduct to be protected by constitutional free speech provisions. *Id.*, at 889-904.

Before reaching the merits, the *Pittsburg* court found the matter to lie outside of PERB's exclusive jurisdiction, as "the central issue presented to the trial court and on this appeal is whether appellants' conduct represents a corrupt practice within the meaning of Education Code section 35230 or unlawfully places respondent board [of education] members in a conflict of interest of the sort prescribed by Government Code section 1090." *Pittsburg*, 166 Cal.App.3d at 886. As the Court of Appeal determined, PERB has no jurisdiction to enforce the Education Code, nor does PERB

have jurisdiction to enforce the First Amendment, meaning that the "central legal and constitutional questions presented certainly are not within PERB jurisdiction." *Id.*, at 887.

While the *Pittsburg* court had already determined that the matter was outside of PERB's jurisdiction, the court also found that the case would fall under a local concern exception to PERB's jurisdiction, applicable to those cases where "decisions of local courts do not present substantial danger of interference with administrative adjudication." *Id.*, at 885 (citations omitted). Appellate courts have never even remotely extended the "local concern" exception to cover fact patterns involving strike activity. This should not be surprising, as the *Pittsburg* court specifically distinguished *San Diego Teachers* and *El Rancho*, holding that "***under the facts of those cases [San Diego Teachers and El Rancho] there was no disparity between the public and PERB interest at stake, which uniformly related to minimizing interruptions in educational services.***" *Pittsburg*, 166 Cal.App.3d at 887-88 (emphasis supplied). This crucial passage in *Pittsburg* is entirely dispositive here, where the City admittedly brought its lawsuit to minimize interruption in services during a strike – precisely the issue which this Court found to be at the core of PERB's mission, as the *Pittsburg* court itself acknowledged. For these reasons, the *Pittsburg* decision in fact strongly supports the Court of Appeal's decision in this matter, not the City's argument.[23]

---

[23] The First District, disagreeing with the Sixth District, opined that strike injunction cases do not fall within "an area of law in need of consistent rulings" and that PERB's injunctive relief procedures would not, in any event,

Moreover, the *Pittsburg* court found that the "arguably protected" branch of the exclusive jurisdiction doctrine also could not apply given that individual school board members had no means of invoking PERB's jurisdiction (even if PERB somehow had jurisdiction over Education Code violations), because only employers, employees and labor organizations may bring actions in front of PERB. *Id.*, at 888. In this case, in contrast, an employer such as the City is free to file charges with PERB and ask PERB to seek an injunction to protect the public interest; in other words, the controversy before the Superior Court is the same as it would be before PERB. *El Rancho*, 33 Cal.3d at 957 (holding that the employer's legal action based upon threatened harm to the public constitutes the same controversy that would go before PERB, and "there is little chance that PERB will ignore the 'larger harm' involved in a teachers' strike" and "PERB has the authority to take steps to alleviate that harm in order to

---

"solve" such a problem if the problem indeed exists. *Compare County of Contra Costa*, 163 Cal.App.4th at 153 *with City of San Jose*, 160 Cal.App.4th at 973-974. The First District's analysis ignores, among other factors, the extent to which use of PERB's procedures in strike injunction cases creates a body of law to guide the parties and stabilize labor relations. *See, e.g., San Ramon Valley, supra* (http://www.perb.ca.gov/decisionbank/pdfs/I046E.pdf), (PERB decision holding surprise strike to be illegal and determining to seek an injunction against such a strike). In any event, the Legislature, having experimented on the one hand with PERB jurisdiction under the EERA and other statutes, and on the other hand with superior court jurisdiction over the MMBA, ended that dual system after several decades and instead opted to put all of the labor relations statutes under PERB's jurisdiction. Accordingly, the Sixth District and First District's disagreement over public policy considerations is largely beside the point, and parties espousing the First District's view should raise their concerns with the Legislature.

effectuate its duties and the purposes of the act").[24]

Lastly, it is well settled that the local concern exception applies to only a very narrow range of court actions – those involving picketing, violence and very limited torts such as infliction of emotional distress. While no appellate court has ever followed or applied the *Pittsburg* court's holding in any other fact setting at all, prior precedent is instructive. Notably, in the same year as the *San Diego Teachers* decision, this Court also decided *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, finding that PERB's sister agency, the Agricultural Labor Relations Board ("ALRB"), did not have exclusive jurisdiction over actions seeking to enjoin mass picketing which blocks ingress to and egress from a local premises.

The dichotomy of *Kaplan's* on the one hand and *San Diego Teachers* on the other hand set the framework for cases to follow: these cases uniformly hold that strike activity lies at the heart of PERB's jurisdiction and PERB is fully empowered to act in order to protect the public's interest in strike cases, but picketing activity that interferes with ingress to and egress from a local premises lies much further outside the sphere of core

---

[24] Indeed, the other EERA cases that the City relies upon (AOB, at 13) are unpersuasive for the same reason that *Pittsburg* does not support the City's position. These cases involve violations of the Education Code, over which PERB has no jurisdiction, rather than issues surrounding employees' right to strike and the potential harm that strike may cause the public, as in *San Diego Teachers* and *El Rancho*. *See City of San Jose*, 160 Cal.App.4th at 970 (distinguishing cases relied upon by the City). However, the City's reliance on these cases means that all parties concur that EERA cases are not distinguishable merely on the basis that they involve a different statute.

labor relations issues, meaning that superior courts are not divested of jurisdiction over such picketing cases. *See, e.g.*, *Service Employees International Union, Local 102 v. Superior Court* (1980) 112 Cal.App.3d 712, 715 (following *Kaplan's* and holding that "Local courts retain powers to adjudicate such matters when they are of 'particular local concern,' meaning when they constitute violations of local law or torts, most typically, obstructions of access or violent picketing. . . . The historic exceptions to the preemption rule are few and deal with illegal or wrongful conduct such as violence, infliction of emotional distress, and mass picketing").[25]

For all of these reasons, the appellate court's decision in *Pittsburg*, which involves picketing of school board members' businesses rather than strike activity, could not possibly take precedence over this Court's decision in *San Diego Teachers* establishing PERB's exclusive jurisdiction over employers' common law injunction actions regarding strike activity. As noted above, the *Pittsburg* court itself acknowledged this principle, explicitly distinguishing strike cases because in those cases PERB's interest and the public's interest are one and the same. *See supra*, at 46. Thus, the

---

[25] As the *Modesto* court explained: "We believe that the key to *Kaplan's* was reliance on federal authority holding that local courts traditionally have jurisdiction to enjoin interference with access in a suit by a private litigant and obstruction of customer access by a primary picket line is not an unfair practice. [Citation omitted]. Thus,... the doctrine of preemption did not come into play... the [ALRB] would not be able to provide a full and effective remedy. [Citation omitted]. As noted above, a teachers' strike does not present insurmountable relief problems for PERB. [*Citing Fresno*]." 136 Cal.App.3d at 893 fn 5.

Court of Appeal in the instant case simply followed precedent when it found that the City's complaint in this case "goes to the essence of labor law" and therefore the "local concern" exception to PERB's jurisdiction did not apply. 160 Cal.App.4th at 976 (citing *Fresno*, 125 Cal.App.3d at 268).

VI. CONCLUSION

For the foregoing reasons, the decision of the Sixth District Court of Appeal should be affirmed.

Respectfully submitted,

Dated: September 11, 2008

LEONARD CARDER, LLP

By: _____
Arthur Krantz

Attorneys for Respondent
Operating Engineers Local Union
Number Three

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I, Arthur Krantz, counsel to Respondent Operating Engineers Local Union No. Three, hereby certify based on the word count report by WordPerfect 12.0, the word processing system that generated this brief, that this brief, including footnotes, contains 13,989 words.

Arthur Krantz

PROOF OF SERVICE

I am employed in Alameda County, California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1330 Broadway, Suite 1450, Oakland, CA 94612. On September 11, 2008, I served copies of the within:

ANSWER BRIEF ON THE MERITS

___X__ **BY U.S. MAIL:** I caused such envelope to be deposited in the mail at Oakland, California, addressed to the addressee(s) designated on the attachment hereto and sent via first class mail to each individual listed below:

Jonathan Weissglass
Linda Lye
Altshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Richard Doyle
George Rios
Robert Fabela, Sr.
Suzanne Hutchins
Office of the San Jose City Attorney
200 East Santa Clara Street
San Jose, CA 95113

Jennifer B. Henning
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tami Bogert, General Counsel
Wendi Ross
Deputy General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814-4174

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

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

In addition, I caused to be served by hand delivery an original and thirteen copies of the aforementioned document, addressed as follows:

California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on September 11, 2008.

Kathleen Hayes