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Case No.

SUPREME COURT
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IN THE

SUPREME COURT OF CALIFORNIA

UNITED TEACHERS LOS ANGELES,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division 5
Case No. 2nd Civil No. B214119

PETITION FOR REVIEW

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[Exempt from filing fees pursuant to Gov. Code, § 6103]

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UNITED TEACHERS LOS ANGELES,

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v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

PETITION FOR REVIEW

ISSUES PRESENTED

1) Does Education Code section 47611.5(e) which provides that "The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board" preempt and invalidate collective bargaining agreement

provisions governing the process for establishment of a charter school?

2) Is a petition to compel binding arbitration properly denied where the collective bargaining provisions upon which the grievance is based are preempted by statute?

WHY REVIEW SHOULD BE GRANTED

This Petition brings before the Court a case involving the intersection of education reform and collective bargaining. California's charter school legislation was enacted to provide education reform to improve the quality of education for California's children. (Ed. Code, § 47601.) However, by holding that the arbitrator, rather than the court, must evaluate whether the Education Code preempts collective bargaining provisions, the Court of Appeal decision defies the Legislature's intent that establishment of a charter school not be subject to collective bargaining, creates a barrier to California school districts' delivery of educational reform, and unnecessarily taxes school district resources by requiring participation in binding arbitration even where the collective bargaining provision is preempted and invalid. The implications of the Court of Appeal Opinion reach beyond the application of Education Code section

47611.5, subdivision (e),[1] impacting the preemption doctrine under the Educational Employment Relations Act ("EERA"), generally. The decision puts school districts in an impossible position: comply with illegal provisions of a collective bargaining agreement or face binding arbitration. School districts are bound to face legal challenge either from the charter school or the union, undermining the Court of Appeal suggestion that allowing matters to proceed through binding arbitration will preserve the court's resources. This Court's review is essential to protect a primary and express public policy to expedite the process of improving public education by establishing charter schools without hindrance of collective bargaining and to clarify the impact of preemption upon a collective bargaining agreement.

Los Angeles Unified School District ("District") acknowledges chronic academic underperformance of a significant number of its schools and is committed to education reform, including establishment of charter schools. The District's recently adopted Public School Choice policy calls for reform of 250 schools, including operation as charter schools. In order to foster implementation of the Charter Schools Act, the Legislature expressly provided in section 47611.5(e) that the establishment of charter

[1] Hereafter referred to as "section 47611.5(e)."

schools shall not to be hindered by collective bargaining and is not to be subject to the impediments of the arbitration process:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 *shall not be controlled by collective bargaining agreements* nor subject to review or regulation by the Public Employment Relations Board.

(Emphasis added.)

While the District and union negotiated provisions regarding the charter petition process, the parties were without the power to do so and the provisions have no force or effect. (*Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4th 269.) Here, the collective bargaining provisions are not only barred by section 47611.5(e) but are further preempted by the nonsupercession clause of the EERA (Gov. Code, § 3540)[2] because the provisions are in conflict with the statutory process for establishment of a charter school set forth in Education Code section 47605.

Under these circumstances, longstanding case law interpreting the EERA holds, contrary to the Court of Appeal decision, that collective bargaining provisions in conflict with the Education Code are preempted and that a petition to compel arbitration under the collective bargaining agreement is properly denied. (Gov. Code, § 3540; *Round Valley Unified*

[2] Hereafter referred to as "section 3540."

School District v. Round Valley Teachers Association, supra, 13 Cal.4th 269, 286 [preempted provisions of collective bargaining agreement are invalid]; *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823 ["the school district is barred from applying the binding arbitration step of its grievance procedure" where collective bargaining provisions are inconsistent with Education Code]; *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, [disapproved in part on other grounds but cited with approval by *Round Valley* with regard to the holding that preempted provisions of collective bargaining agreement are not subject to arbitration]; see also, *Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal.App.4th 168, 180 [preemption precludes the decision from being challenged as a breach of the collective bargaining agreement and is outside the scope of the agreement as a matter of law].) Notably, the Court of Appeal did not interpret section 47611.5(e) or section 3540, nor did it address the case authorities holding a petition to compel arbitration is properly denied where the collective bargaining provisions are preempted.

That the charter school concept is central to education reform is reflected in President Obama's education strategy for America, "One of the

places where much of that innovation occurs is in our most effective charter schools. These are public schools founded by parents, teachers, and civic or community organizations with broad leeway to innovate . . . . I call on states to reform their charter rules, and lift caps on the number of allowable charter schools, wherever such caps are in place." (Barack Obama, President of the United States, address to United States Hispanic Chamber of Commerce (Mar. 10, 2009) Taking on Education.) California's Legislature is also clear in its mandate: "In reviewing petitions for the establishment of charters . . . the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged." (Ed. Code, § 47605(b).)

Governor Wilson, in signing the Charter Schools Act of 1992 and in rejecting a competing bill which included union participation in the charter petition process, stated that any union involvement in the review and approval process was specifically rejected as in contravention of the "charter school concept." (Joint Appendix ("JA") 104.) This policy statement is reinforced in section 47611.5(e).

The Court of Appeal decision gives effect to invalid provisions and conflicts with the Legislature's intent in enacting the Charter Schools Act

generally, and section 47611.5(e) specifically, that unions shall not be involved in the process for establishment of a charter school and that related issues are not subject to the jurisdiction of the Public Employment Relations Board. Therefore, arbitration is not an available remedy, is barred as a matter of law, and requiring arbitration is an "idle act." (Civ. Code, § 3532 ["the law neither does nor requires idle acts"]; *Fontana Teachers Association v. Fontana Unified School District, supra,* 201 Cal.App.3d at 1526.) The Court of Appeal, by giving effect to provisions that violate the law, further opens the door to unions asserting a right to negotiate over the charter petition process, despite the express language of section 47611.5(e) which specifically prohibits the charter petition process from being controlled by collective bargaining agreements.

Supreme Court review is necessary to settle an important issue of law related to the efficient implementation of the Charter Schools Act to improve public education through the application of section 47611.5(e), to set forth the application and effect of the preemption doctrine under the EERA, to secure uniformity of decisions including the Supreme Court's authority, to protect education resources, and to address the important policy issues impacting education reform in California. (Cal. Rules of Court, rule 8.500(b)(1).)

PETITION FOR REHEARING

On October 1, 2009, the District filed its Petition for Rehearing on the grounds that the Court of Appeal's Opinion ("Opinion") fails to account for and conflicts with relevant authority, misstates or omits material facts, fails to address arguments made by the District within the meaning of California Rules of Court, rule 8.500(c)(2) and fails to consider the important public policy giving priority to the establishment of charter schools to improve the State of California's education system. Although the Opinion was modified by Order dated October 16, 2009, the Petition for Rehearing was denied.

BACKGROUND

On September 11, 2007, the District's Board of Education granted the Alain Leroy Locke Conversion Charter Petition ("Locke Charter Petition") pursuant to Education Code section 47605, subdivision (b), creating the Locke Charter Schools (JA 113-130.) Locke High School, located in the Watts neighborhood of Los Angeles, was a troubled school experiencing severe drop out and performance problems. The Locke Charter Schools are now operational and began instructional operations in Fall 2008. (JA 165, lines 10-12.)

United Teachers Los Angeles ("UTLA"), the union that serves as the exclusive representative of the certificated staff employed by the District, has never challenged the District Board's decision to grant the Locke Charter Petition as in violation of Education Code section 47605. Instead, on September 4, 2007, UTLA, on its own behalf, submitted a grievance alleging that the District had violated Article XII-B, Sections 2.0 and 3.0, of the collective bargaining agreement ("CBA") and requesting that the Board's approval of the Locke Charter Petition be rescinded based upon the alleged failure to comply with the collective bargaining agreement. (JA 68.)

The CBA between UTLA and the District addresses conversion charter schools at Article XII-B. (JA 19-26.) A conversion charter school refers to a traditional district school that has "converted" to charter status by petition pursuant to Education Code section 47605(a)(2). The other form of charter school is commonly referred to as "start up" and represents a charter school established by a petition pursuant to section 47605(a)(1) that has no connection to an existing school district program. By statute, to establish a conversion charter school, the petition must be signed by not less than 50 percent of the permanent status teachers concurrently employed at the public school to be converted. (Ed. Code, § 47605(a)(2).)

However, a signature does not commit the teacher to employment at the charter school. (Ed. Code, § 47605(a), (e).)

Article XII-B, Section 2.0 of the CBA sets forth a series of procedures pertaining to processing and approval of charter petitions for conversion charters. (JA 60-61.) Article XII-B, Section 3.0 sets forth a series of procedures pertaining to disclosures to be made by charter petitioners to employees at a school that is the subject of a conversion charter petition. (JA 61-63.) ("Article XII-B of the collective bargaining agreement sets forth procedures for converting a school to a charter school"; Opinion p. 3.) The procedures set forth in Article XII-B, Sections 2.0 and 3.0 are not required by Education Code section 47605, subdivision (b), and are inconsistent with the statutory procedures for establishment of a charter school set forth therein.

In response to the grievance, the District informed UTLA on December 4, 2007, that the grievance did not present an arbitrable dispute and is not properly the subject of collective bargaining. (JA 69.) UTLA filed its Petition to Compel Arbitration seeking an order compelling the District to submit to binding arbitration. On November 12, 2008, the Honorable Superior Court Judge Mary Ann Murphy denied the Petition on

the grounds that the grievance is not arbitrable "under the Charter Schools Act and Round Valley." (Reporter's Transcript ("RT") p. 16.)

UTLA filed its appeal. The Court of Appeal issued its Opinion on September 17, 2009, reversing the trial court's order denying the Petition to Compel Arbitration and holding that the question of whether the collective bargaining agreement was preempted or invalidated by section 47611.5(e) was a "defense" that must be determined by the arbitrator. (Opinion p. 9.) The Court of Appeal relied upon *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, which was decided under the Dills Act. (*Id.* at 202.) The Court of Appeal failed to address the cases interpreting the EERA which hold that where the collective bargaining provisions are preempted, the petition to compel arbitration is properly denied and submission to arbitration would be a "pointless act." (*Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1526; *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 827.)

The Opinion and the Order Modifying Opinion are attached hereto in conformity with California Rules of Court, rule 8.504(b)(4).)

LEGAL DISCUSSION

EDUCATION CODE SECTION 47611.5(e) PREEMPTS AND INVALIDATES COLLECTIVE BARGAINING AGREEMENT PROVISIONS GOVERNING THE PROCESS FOR ESTABLISHMENT OF A CHARTER SCHOOL

Section 47611.5 (e) states: "The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 *shall not be controlled by collective bargaining agreements* nor subject to review or regulation by the Public Employment Relations Board." (Emphasis added.) This statute is a jurisdictional bar to arbitration and renders the CBA provisions inarbitrable as a matter of law. In addition, the preemption doctrine found in section 3540 of the EERA, demonstrates that the CBA agreement to arbitrate is invalid and "that the school district is barred from applying the binding arbitration step of its grievance procedure." (*United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 832 [petition to compel arbitration properly denied where collective bargaining provision conflicts with Education Code]; *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517 [preempted provisions of collective bargaining agreement are not subject to arbitration]; *Round Valley Unified School District v.*

Round Valley Teachers Association, supra, 13 Cal.4th 269, 286 [the intent of the EERA is to preclude contractual agreements that would alter the meaning of statutory provisions and preempted provisions are invalid].)

Here, the CBA provisions are preempted and invalid pursuant to section 47611.5(e) and under section 3540 because they are inconsistent with Education Code section 47605 which governs the process for establishing a charter school. To give the provisions effect flies in the face of the legislative intent and undermines a school district's exercise of discretion in the delivery of education and its ability to implement reform.

The Public Employment Relations Board ("PERB") is charged with interpreting the EERA. As PERB recognized, the omission of any role for a union in the chartering process was not inadvertent. (*United Educators of San Francisco v. San Francisco Unified School District* (2001) Docket No. SF-CE-2015 (adopted by PERB in PERB Dec. No. 1438 [25 PERC ¶ 32027], JA 102-108.) When the Charter Schools Act became law, there were two rival bills enacted by the Legislature. Assembly Bill 2585 provided for collective bargaining as a part of the ongoing charter school process, whereas Senate Bill 1448, signed by the Governor, did not provide for collective bargaining. In vetoing AB 2585, Governor Wilson stated:

> This bill [AB 2585] requires teacher union approval of all charter schools, state review and approval of the charter

> application, continuation of elaborate collective bargaining processes, and limitations on who can attend a charter school. On all accounts this bill fails to embrace the basic ingredients of the charter school concept.

(JA 104.)

As the Governor's message makes clear, any union involvement in the review and approval process was specifically rejected as in contravention of the "charter school concept." (JA 104.) In 1999, the Charter Schools Act was amended to subject charter schools to the EERA to the degree charter employees wish to organize; however, the amendment specifically continued the ban on union and PERB involvement in the charter petition process. (Ed. Code, § 47611.5(e).)

In *Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th 269, the California Supreme Court considered whether a school district could, through collective bargaining, agree to give greater procedural protections to probationary employees than those set forth in Education Code section 44929.21. The collective bargaining agreement at issue gave greater notice and disclosure rights to a probationary teacher prior to nonreelection than provided by statute. This Court concluded that: 1) the school district had the statutory right to not retain a probationary teacher without cause or a right to a hearing; and, 2) the entire reelection issue cannot, pursuant to the EERA, be made the

subject of collective bargaining. (*Id.* at 276.) Citing *San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, the *Round Valley* Court further concluded that such provisions are not to be validated and that "the intent of the Government Code [section 3540] is to *preclude* contractual agreements that would alter the meaning of other statutory provisions." (*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at 286, citing Gov. Code, § 3540; emphasis added.) "Preclude: to make impossible by necessary consequence: rule out in advance." (Webster's Collegiate Dict. (10th ed. 1993) p. 917.) (See also, *Local 8599, United Steelworkers of America, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 833 [statutory authority given to school district cannot be usurped by provisions of collective bargaining agreement].)

The Court of Appeal decision turns this Court's ruling in *Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269, on its head; ignoring the high court's application of the preemption doctrine by ruling that the question of preemption must be submitted to arbitration and may only be considered by the court *post* binding arbitration pursuant to Code of Civil Procedure section 1286.4. The decision further undermines this Court's holding in *Round Valley* that

the effect of preemption is to preclude such collective bargaining agreements. Where, as here, such agreements are preempted as in conflict with the Education Code, they are precluded and there is no valid agreement to arbitrate.

A PETITION TO COMPEL ARBITRATION IS PROPERLY DENIED WHERE THE COLLECTIVE BARGAINING PROVISIONS ARE PREEMPTED AND/OR INVALIDATED BY STATUTE

The Court of Appeal ruled that the section 47611.5(e) is a defense to be presented to the arbitrator and, "if the arbitrator concludes that the district violated the collective bargaining agreement, it may then challenge the award in the trial court based upon its defense that section 49711.5 [sic], subdivision (e) preempts the union's grievance rights." (Opinion p. 13.) However, this ruling places school districts in an untenable position, especially when faced with an arbitrator's decision to invalidate a charter school established in compliance with section 47605. In such a case, a school district must either comply with the award, facing a lawsuit from the charter school, or the district must continue to spend resources fighting the arbitrator's award.

Moreover, the Opinion conflicts with the long-standing authority interpreting Government Code section 3540 of the EERA, holding that where the collective bargaining provision is inconsistent with the Education

Code it is preempted and the school district is barred from proceeding to arbitration under preempted provisions. Notably, the Court of Appeal did not address the cases decided under the EERA which hold that petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2 is properly denied where the collective bargaining provisions are preempted.

In *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, the court affirmed the trial court's denial of a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2 where the collective bargaining provision was in conflict with Education Code section 45113: "[W]e hold that the school district is barred from applying the binding arbitration step of its grievance procedure to disciplinary decisions of the governing board...." The court further stated: "Pursuant to these statutes [Ed. Code, § 45113 and Gov. Code, § 3540] . . . the potential double remedy of subjecting a conclusive governing board decision to the subsequent final and binding arbitration of the general collective bargained for agreement simply was neither authorized nor intended by the California Legislature." (*Id.* at 840.)

In *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1521, the court considered whether to compel

arbitration where the collective bargaining provisions were, as here, preempted by the Education Code. The court confirmed that absent an agreement to submit the question of arbitrability to the arbitrator, it is the *duty of the court*, not the arbitrator, to determine whether or not the parties' agreement to arbitrate covers the particular dispute. The court further held that since the collective bargaining agreement was preempted, the petition to compel arbitration was properly denied. (*Id.* at 1521.) In the instant case, it is undisputed that the parties have not granted the arbitrator authority to determine arbitrability (JA 53, 57) and the Court of Appeal provides no reference to the collective bargaining agreement to support its conclusion that the question of arbitrability is to be considered by the arbitrator.

The *Fontana* court further held that where the arbitrator would have no power to provide the requested remedy, arbitration is an idle act barred by Civil Code section 3532. (*Id.* at 1526.) Here, the law is clear that the arbitrator would have no authority to order compliance with the collective bargaining agreement or grant the requested relief, which is rescission of the Board's approval of the charter petition, as to do so would violate both Education Code sections 47611.5(e) and 47605.

This Court in *Round Valley* cited both *United Steelworkers and Fontana* with approval. (*Round Valley Unified School District v. Round*

Valley Teachers Association, supra, 13 Cal.4th at 286.) The Court of Appeal Opinion also conflicts with the Court of Appeal, Sixth District's recent decision in *Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal.App.4th 168, which recognized the preclusive effect of preemption: "In sum, as *Round Valley* specifically held, a school district's decision not to reelect a probationary teacher cannot be the subject of collective bargaining. *It follows that the decision cannot be challenged as a breach of the collective bargaining agreement. The decision is outside the scope of the agreement, as a matter of law.*" (*Id.* at 180; emphasis added.) Here, section 47611.5(e) prohibits the establishment of charter schools from being the subject of collective bargaining. Moreover, the CBA provisions are preempted as inconsistent with the procedures set forth in Education Code section 47605. Therefore the decision to approve the Locke Charter Petition cannot be challenged as a breach of the collective bargaining agreement. (*Id.* at 180.)

While the Court of Appeal views the *Round Valley* decision as only applying to undo an improper arbitration decision post binding arbitration pursuant to Code of Civil Procedure section 1286.4, this does not take into account the following Supreme Court statement:

> Moreover, in contrast to assertions made by Association and the Court of Appeal below, *San Mateo, supra,* 33 Cal.3d 850,

> observed that *the intent of the Government Code is to preclude contractual agreements that would alter the meaning of other statutory provisions. As District observes, if we were to validate the requirements of article 19, section B(1) of the agreement with Association, we would severely undermine section 44929.21(b).* Indeed, under *San Mateo, supra,* enforcement of article 19, section B(1), would result in replacing or setting aside a nonnegotiable and mandatory provision of the Education Code, a result the Fontana court explained Government Code section 3540 et seq. sought to avoid.

(*Round Valley, supra,* 13 Cal.4th at 286; emphasis added.)

This statement demonstrates that although this Court received the issue post arbitration in *Round Valley*, and did hold the matter subject to review under Code of Civil Procedure section 1286.4, it also held that the contract provisions were invalid, precluded, and without force and effect. (*Ibid.*)

The Court of Appeal assumes, *ab initio*, that the parties to a collective bargaining agreement must pursue arbitration because Code of Civil Procedure section 1281 provides that an agreement to arbitrate a dispute is enforceable. However, this analysis did not consider the overriding authority, the *preemptory effect*, of the particular statutes set forth in the Charter School Act and the EERA that are paramount and abrogate the general statutes, including Code of Civil Procedure sections 1281 et seq. (See, Code Civ. Proc., § 1859 [in construing statute "a

particular intent will control a general one that is inconsistent with it."].)

The "particular intent" of the Legislature in enacting section 47611.5 (e) and section 3540 is to abrogate and override inconsistent general statutes found in Code of Civil Procedure sections 1281.1 et seq.

The Court of Appeal incorrectly relied upon *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, which was decided under the Dills Act rather than the EERA. (*Id.* at 202.) Importantly, there was no similar jurisdictional statute to 47611.5 (e) at issue in *Peace Officers,* nor does the Dills Act include a nonsupercession clause as does the EERA (Gov. Code, § 3540). In *Peace Officers*, the Department opposed the Union's petition to compel arbitration based upon Government Code section 3529 of the Dills Act, which states that supervisory employees "shall not participate in meet and confer sessions on behalf of" rank-and-file employees, and vice versa. (*Id.* at 201.) In other words, *the Department defended the conduct alleged in the grievance by relying upon a statute in an otherwise arbitrable case.* "While no California case has expressly ruled on the exclusive right of judges to consider *otherwise arbitrable cases raising issues of statutory interpretation*, the Department's position runs counter to the assumptions that underlie many California decisions, which anticipate that arbitrators

will engage in statutory interpretation." (*Id.* at 208; emphasis added.) The court held that the arbitrator may interpret statutes asserted as a defense to the grievance. (*Id.* at 210.)

Unlike in *Peace Officers*, this is not an "otherwise arbitrable case" upon which a statute is relied upon in defense of conduct alleged in the grievance. Neither section 47611.5 (e) or section 3540 is relied upon to defend any act or omission alleged in the grievance. Rather, these statutes render the arbitration agreement preempted, thereby precluding the parties from giving any force and effect to the preempted provisions, barring arbitration.

CONCLUSION

By requiring the parties to engage in arbitration, the Court of Appeal gives effect to provisions that the Legislature has expressly stated are contrary to law leading to the exact result the Legislature sought to avoid – union involvement in the chartering process impairing the implementation of the Charter Schools Act. If the Court of Appeal decision stands, the District and school districts across the state would be repeatedly required to either comply with illegal provisions or be put through the grievance process, including binding arbitration. Not only is submitting to arbitration under illegal provisions an "idle act," this approach would unnecessarily

drain already strained resources and is contrary to both section 47611.5(e) and section 3540 which is to "preclude" contracts that conflict with the Education Code.

This Court's review is necessary to give effect to the Education Code and legislative policy supporting education reform, to clarify the effect of preemption under the EERA upon the grievance process as set forth in the collective bargaining agreement, and to bring uniformity to the case law addressing this issue.

Dated: October 26, 2009

MILLER BROWN & DANNIS

SUE ANN SALMON EVANS

By Sue Ann Salmon Evans
SUE ANN SALMON EVANS
Attorneys for Respondent
LOS ANGELES UNIFIED SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, Respondent's Petition for Review was produced using 13-point Roman type including footnotes and does not exceed 8,400 words and contains approximately 5,450 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: October 26, 2009

MILLER BROWN & DANNIS

SUE ANN SALMON EVANS

By Sue Ann Salmon Evans
SUE ANN SALMON EVANS
Attorneys for Respondent
LOS ANGELES UNIFIED SCHOOL DISTRICT

ATTACHMENT
(OPINION OF THE COURT OF APPEAL
DATED SEPTEMBER 17, 2009)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNITED TEACHERS LOS ANGELES, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B214119 (Los Angeles County Super. Ct. No. BS116739)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed.

Holguin, Garfield & Martinez, Jesús Quiñonez and John J. Kim for Plaintiff and Appellant.

Miller Brown & Dannis and Sue Ann Salmon Evans for Defendant and Respondent.

I. INTRODUCTION

The United Teachers Los Angeles ("the union") appeals from an order denying its petition to compel arbitration of a dispute with Los Angeles Unified School District ("the district") over alleged collective bargaining agreement violations. The alleged violations of the collective bargaining agreement concern the district's approval of a charter school petition, which was made pursuant to The Charter Schools Act of 1992. (Ed. Code,[1] § 47600 et seq.) The district refused to submit the dispute to arbitration on the ground the charter school provision of the collective bargaining agreement either violated or was preempted by section 47611.5, subdivision (e). Citing *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 277-288, the trial court agreed with the district and denied the union's petition to compel arbitration. We reverse the order denying the petition to compel arbitration.

II. BACKGROUND

On May 11, 2007, Green Dot Public Schools filed a charter petition with the district. The petition sought to convert Alain Leroy Locke Senior High School ("Locke high school") to a charter school. The district's education board granted the charter school petition on September 11, 2007.

On May 9, 2008, the union filed a petition to compel arbitration pursuant to a written collective bargaining agreement. The petition alleges that Article V of the collective bargaining agreement outlines the three-step grievance procedure. The three-step grievance procedure must be pursued when the union claims the district violates the collective bargaining agreement. Article V, section 11.0 provides that if the grievance is not settled in step two, the union may submit the matter to arbitration. Article V, section 1.0 of the collective bargaining agreement defines a grievance as "a claim that the district

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[1] All further statutory references are to the Education Code unless otherwise indicated.

has violated an express term" of the collective bargaining agreement. Article XII-B of the collective bargaining agreement sets forth procedures for converting a school to a charter school. Article XII-B states in part, "The primary purpose of this Article is to mitigate the potentially disruptive effect upon employees assigned to schools which are converting (or considering converting to independent charter schools." Article XII-B, section 2.0 sets forth the duties of the union and its members in processing a conversion charter petition. Article XII-B, section 3.0 establishes disclosure requirements by a charter school operator to employees of a proposed charter school.

The petition also alleges that, on August 30, 2007, the union filed a grievance against the district. The grievance alleged that the district had violated Article XII-B, sections 2.0 and 3.0 of the collective bargaining agreement in connection with the Locke high school conversion. The grievance asserted the district had violated the collective bargaining agreement by: not presenting the complete charter to employees; not giving ample time to permit affected employees and the community a reasonable opportunity to review and discuss the plan; not giving the union a copy of the proposed charter for review; and not clearly and fully disclosing the conditions of employment with the charter school. The district denied the union's grievance on December 4, 2007. To comply with step 2 of the grievance procedures, the union sent a letter dated January 9, 2008, to the district. The union subsequently requested arbitration of the dispute by letter dated January 29, 2008. The district refused to submit to arbitrate the controversy. The union's points and authorities argued: Government Code section 3548.7, which is part of the Educational Employment Relations Act, permits an aggrieved party to an arbitration clause to file a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2; there was no dispute about the validity of the collective bargaining agreement; the trial court's jurisdiction was limited to determining whether there was an arbitration agreement, a refusal to do so or an exception to the duty to arbitrate; and the arbitrator must decide the substantive merits of the dispute.

The district opposed the union's petition to compel arbitration. First, in a footnote, the district argued the union had no standing to challenge the alleged violations of the

collective bargaining agreement on behalf of its members. Second, relying upon *Board of Education v. Round Valley Teachers Assn, supra*, 13 Cal.4th at pages 277-288, the district asserted the union's claims concerning the alleged violations of the collective bargaining agreement could not be arbitrated. The district asserted that Code of Civil Procedure section 1281.2 requires the existence of a valid agreement to arbitrate. According to the district, there was no valid agreement to arbitrate the alleged violation of the collective bargaining agreement. The district reasoned that Article XII-B of the collective bargaining agreement was either preempted or invalidated by section 47611.5, subdivision (e) which provides that the approval of a charter school petition shall not be controlled by a collective bargaining agreement nor subject to review or regulation by the Public Employment Relations Board. Further, the district argued that Article XII-B of the collective bargaining agreement is invalid because it imposes procedural steps on the district beyond what is required under section 47605.

Citing *Board of Education v. Round Valley Teachers Assn., supra*, 13 Cal.4th at pages 277-288, the trial court denied the petition to compel arbitration. Notice of entry of the trial court's ruling denying the petition was given on December 17, 2008. The union filed a notice of appeal on February 13, 2009.

III. DISCUSSION

A. Standing

The district asserts the union lacks standing to pursue the grievance because neither the charter school operator nor Locke high school's staff are parties to the collective bargaining agreement. The determination of standing to compel arbitration of a controversy is a legal question. (*Bouton v. USAA, Cas. Ins. Co.* (2008) 167 Cal.App.4th 412, 425; *Smith v. Microskills San Diego L.P.* (2007) 153 Cal.App.4th 892, 900.) We conclude the union had standing to file the petition to compel arbitration.

Code of Civil Procedure section 1281.2 provides that the court should compel arbitration "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate" subject to specified exceptions. Code of Civil Procedure section 1280, subdivision (e) states in part: "'Party to the arbitration' means a party to the arbitration agreement: [¶] (1) Who seeks to arbitrate a controversy pursuant to the agreement." The general rule is that a party or signatory to an arbitration agreement may seek to enforce it. (*Bouton v. USAA Cas. Ins. Co.*, *supra*, 167 Cal.App.4th at pp. 423-424; *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1369.) It is undisputed that the district and the union are both parties to the collective bargaining agreement. The union is seeking to enforce provisions of the collective bargaining agreement. The union and the district are in a dispute about a provision of the collective bargaining agreement. Thus, one party to an agreement to arbitrate is seeking to enforce the arbitration clause against another signatory. (Code Civ. Proc., §§ 1280, subd. (e), 1281.2; *Melander v. Hughes Aircraft Co.* (1987) 194 Cal.App.3d 542, 546; see also *Bouton v. USAA Cas. Ins. Co.*, *supra*, 167 Cal.App.4th at pp. 423-424.)

The district nevertheless argues that the union has no standing to compel arbitration. The district argues neither the charter school nor the union members are a party to the collective bargaining agreement. Government Code section 3543.8, which is part of the Educational Employment Relations Act, provides in part, "Any employee organization shall have standing to sue in any action or proceeding heretofore or hereafter instituted by it as representative and on behalf of one or more of its members." Government Code section 3543.8 confers standing on a labor union to represent its members. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.3d 276, 283-284, disapproved on a different point in *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 63, fn.6 [labor union has standing to represent members]; *California School Employees Assn. v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 523-524 [union had standing to seek relief on behalf of employees other than the specific aggrieved employee]; *Anaheim Elementary Education Assn. v. Board of Education* (1986) 179 Cal.App.3d 1153, 1157 [standing to sue extends to former members even if

the union is no longer the exclusive bargaining representative]; *International Union of Auto etc. Workers v. Dept. of Human Resources Dev.* (1976) 58 Cal.App.3d 924, 933-935 [union had standing "to represent its members in an action which is inseparably founded upon its members' employment"]; *California School Emp. Assn. v. Sequoia Union High School Dist.* (1969) 272 Cal.App.2d 98, 104 [union had standing to sue on behalf of cafeteria employees who were dismissed after cafeteria operation discontinued]; *California School Employees. Assn. v. Willits Unified School Dist.* (1966) 243 Cal.App.2d 776, 779-780 [Gov. Code, § 3500 et seq. gave union standing to sue to enforce employment rights of its members including formerly employed janitors].) Thus, the union has standing to pursue the claims raised by the petition to compel arbitration.

Our Supreme Court's recent decision in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1000-1001 is not pertinent to the outcome of this appeal. In that case, our Supreme Court held that a union, which has not suffered any damage, has no standing to file an unfair competition law or Labor Code Private Attorney Generals Act of 2004 representative action on behalf of the rank-and-file membership. (*Id.* at pp. 998, 1001.) Our Supreme Court reasoned that under the unfair competition law or Labor Code Private Attorney Generals Act of 2004, the plaintiff must have suffered injury. (*Id.* at pp. 1000-1001.) Our case does not involve the unfair competition law or Labor Code Private Attorney Generals Act of 2004. Rather, our case is controlled by the specifically applicable provisions of Government Code section 3543.8 which generally grants standing to a union to represent its members.

B. Merits

The present dispute arises in the context of an arbitration provision in a collective bargaining agreement. As such, the controlling statute is Government Code section 3548.7 which states, "Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section

3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6." (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 855; *South Bay Union School Dist. v. Public Employee Relations Bd.* (1991) 228 Cal.App.3d 502, 507. fn. 5.) Government Code section 3548.7 is part of the Educational Employment Relations Act which was originally adopted in 1975. (Stats. 1975, ch. 961, § 2, p. 2247; Gov. Code, § 3540 et seq.; see *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177.) Code of Civil Procedure section 1281 states, "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." The trial court has authority to compel arbitration pursuant to Code of Civil Procedure section 1281.2 which provides in part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement . . . " Code of Civil Procedure section 1281.2 further provides in part, "If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit." The statutory provisions set forth in this paragraph control the outcome of this case.

Doubts as to whether an arbitration clause applies to a particular dispute should be resolved in favor of sending the parties to arbitration. (*Cronus Investment, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 386; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189.) However, the right to compel arbitration depends upon the existence of a valid contract between the parties. (*County of Contra Costa v.*

Kaiser Foundation Health Plan, Inc. (1996) 47 Cal.App.4th 237, 245; *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 253.) The question of whether a valid agreement to arbitrate exists is determined by reference to state law applicable to contracts generally. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-972.) California has a strong public policy in favor of arbitration. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) But there is no public policy favoring arbitration of disputes which parties have not agreed to arbitrate. (*Freeman v. State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 481; *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 634.) The moving party has the burden of proving the existence of a valid arbitration clause and the dispute is covered by the agreement. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972; *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413-414.) If the moving party meets the foregoing burden, the opposing litigant has the responsibility to prove by a preponderance of the evidence any defense to the petition. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972; *Rosenthal v. Great Western Financial Securities Corp., supra,* 14 Cal.4th at p. 413.) In the absence of any disputed historical facts, we review the order denying the petition to compel arbitration de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 613.)

The district contends the trial court properly concluded that the Article XII-B of the collective bargaining agreement was preempted or invalidated by section 47611.5, subdivision (e). The district asserts that the collective bargaining agreement provision governing the charter school petition process cannot be reviewed by an arbitrator. Therefore, the district argues the arbitration agreement cannot be enforced. In this vein, the district argues an arbitrator cannot enforce Article XII-B of the collective bargaining agreement, which delineates the procedures to be followed in the case of a charter school conversion, because of section 47611.5, subdivision (e). We respectfully disagree.

The district is arguing the union's position concerning its members' rights under the collective bargaining agreement has no merit because of the dispositive effect of section 47611.5, subdivision (e). But the merits of a dispute, such as the effect of section 47611.5, subdivision (e), must be resolved in the first instance by the arbitrator. Whether there is a meritorious defense to the enforcement of the Article XII-B was not properly raised as a defense to the petition to compel arbitration. (Code Civ. Proc., § 1281.2; *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 205; see *Service Employees International Union, Local 1000 v. Department of Personnel Administration* (2006) 142 Cal.App.4th 866, 874-875.) And the arbitrator is authorized to decide the merits of the district's section 47611.5, subdivision (e) defense.

Rather, at this stage, our determination and that of a trial court is limited to whether there was a valid agreement to arbitrate. (Code Civ. Proc., §§ 1281, 1281.2; *California Correctional Peace Officers Assn. v. State of California, supra*, 142 Cal.App.4th at pp. 210-211; see also *Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972; *Rosenthal v. Great Western Financial Securities Corp., supra,* 14 Cal.4th at pp. 413-414.) Arbitrators are authorized to resolve statutory claims. This includes interpreting statutes and considering statutory defenses. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1075; *Moncharsh v. Heily & Blasé, supra*, 3 Cal.4th at p. 33; *California Correctional Peace Officers Assn. v. State of California, supra*, 142 Cal.App.4th at pp. 208-209.) This includes the district's section 47611.5, subdivision (e) defense.

The present case is similar to the scenario in *California Correctional Peace Officers Assn. v. State of California, supra*, 142 Cal.App.4th at pages 204-211. In *California Correctional Peace Officers Assn.*, the union asserted that rank-and-file-members could participate in meet and confer sessions involving supervisors and vice-versa. When management refused to permit negotiations to occur in the presence of others, the union filed a petition to compel arbitration. (*Id.* at pp. 202-203.) Management

resisted the petition arguing that Government Code section 3529, subdivision (c)[2] excluded supervisors from participating in meet and confer meetings with rank-and-file employees and vice-versa. (*Id.* at p. 204.) The trial court denied the petition to compel arbitration because the dispute was governed in its view by Government Code section 3529, subdivision (c). (*Ibid.*)

Our colleague, Associate Justice Sandra Lynn Margulies, held the petition to compel arbitration should have been granted. Associate Justice Margulies explained: "[P]arties to a dispute have agreed to arbitrate the dispute, section 1281.2 requires arbitration unless the agreement is revocable or arbitration has been waived. Further, there is a strong public policy favoring arbitration. [Citation.] There is no statutory exception for arbitrations presenting issues of statutory construction. [¶] Fundamentally, the Department is attempting to leverage its contention that Government Code section 3529 supersedes the substantive terms of the MOU into an argument that section 3529 supersedes the obligation to arbitrate entirely. Even assuming the Department is correct that section 3529 supersedes any inconsistent provisions of the MOU, section 3529 in no way prevents the presentation of this argument to an arbitrator. Reduced to its essence, the Department's claim is that it should be permitted to avoid arbitration because the Union's position is barred by section 3529-in other words, that the Union's claim, as a matter of law, has no merit. As discussed above, Code of Civil Procedure section 1281.2 expressly *forbids* courts from denying arbitration on the ground that the petitioner's claim is meritless." (*California Correctional Peace Officers Ass'n. v. State of California*, *supra*, 142 Cal.App.4th at p. 211, original italics.) In our case, the district is contending that section 47611.5, subdivision (e) prevents the arbitrator from granting the union any relief. Associate Justice Margulies's analysis in *California Correctional Peace Officers*

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[2] Government Code section 3529, subdivision (c) provides, "Excluded employees shall not participate in meet and confer sessions on behalf of nonexcluded employees. Nonexcluded employees shall not participate in meet and confer sessions on behalf of supervisory employees."

Ass'n. is directly relevant here—the issue the district contends is dispositive must first be presented to the arbitrator.

Further, there is no merit to the district's argument that *Board of Education v. Round Valley Teachers Assn.*, *supra*, 13 Cal.4th at pages 277-288 mandates that the statutory section 47611.5, subdivision (e) defense is a matter which only the trial court can resolve in connection with the petition to compel arbitration. In *Board of Education*, our Supreme Court held an arbitrator exceeded his powers thereby permitting the award to be set aside pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(4).[3] In *Board of Education*, the Round Valley education board refused to rehire a probationary teacher. Pursuant to a collective bargaining agreement, the legality of the refusal to rehire was contested by the probationary employee's union. The arbitrator, acting pursuant to a collective bargaining agreement, returned an award in favor of the probationary teacher. The award required that the teacher be given a hearing at which he could contest the correctness of the refusal to rehire. Further, the collective bargaining agreement required good cause be present to terminate a probationary teacher. (*Id.* at pp. 273-274.) Our Supreme Court, in passing on a petition to vacate the award held that section 44929.21, subdivision (b)[4] preempted the procedural protections contained in the

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[3] Code of Civil Procedure section 1286.2, subdivision (a)(4) states: "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: [¶] . . . (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

[4] Section 44929.21, subdivision (b) states in part: "Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district. [¶] The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or

collective bargaining agreement. (*Id.* at pp. 272, 277-288.) Before deciding the preemption issue, our Supreme Court held that post-award judicial review of the award was warranted as an exceptional circumstance to the arbitration finality rule. (*Id.* at pp. 273-276.) Our Supreme Court held: "We conclude section 44929.21(b) preempts collective bargaining agreements as to causes and procedures governing the reelection of probationary teachers. The statutory scheme governing the proper subjects for collective bargaining (Government Code section 3540, et seq.) and the reelection of probationary teachers (section 44929.21(b)) makes it clear that a school district's decision not to reelect a probationary teacher after the second year of employment is vested exclusively in the district and may not be the subject of collective bargaining. Moreover, because the arbitrator's decision below is inconsistent with District's statutory rights under the Education Code, the issue is subject to judicial review. [Citation.]" (*Id.* at pp. 287-288.) *Board of Education* only holds that an award is subject to judicial review on preemption grounds because, in that case, the arbitrator exceeded his powers. *Board of Education* does not address the issue of nor hold that the statutory defense was not subject, in the first instance, to arbitration.

Our views concerning *Board of Education v. Round Valley Teachers Assn.*, *supra*, 13 Cal.4th at pages 277-288 are consistent with the Associate Justice Margulies's analysis in *California Correctional Peace Officers Assn. v. State of California*, *supra*, 142 Cal.App.4th at page 209: "In . . . *Board of Education v. Round Valley Teachers Assn.* . . ., the school district claimed that the collective bargaining agreement, as interpreted by the arbitrator, was inconsistent with provisions of the Education Code and the code superseded the provisions of the collective bargaining agreement-an argument similar in nature to the defense asserted by [the state agency in response to a Code of Civil Procedure section 1281.2 petition]. [Citation.] Despite the school district's purportedly conclusive statutory defense, the Supreme Court did not suggest that such a case should never have reached the arbitrator. Rather, it ruled that the Education Code

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before March 15, the employee shall be deemed reelected for the next succeeding school year."

provisions represented an "'explicit legislative expression of public policy'" permitting review of the arbitrator's award to ensure that it did not contravene public policy. [Citation.]"

In our case, if the arbitrator concludes that the district violated the collective bargaining agreement, it may then challenge the award in the trial court based on its defense that section 49711.5, subdivision (e) preempts the union's grievance rights. (See *Board of Education v. Round Valley Teachers Assn., supra,* 13 Cal.4th at pp. 277, 287-288; *Service Employees International Union, Local 1000 v. Department of Personnel Administration* (2006) 142 Cal.App.4th 866, 874-875; *California Correctional Peace Officers Assn. v. State of California, supra,* 142 Cal.App.4th at pp. 210-211.) By contrast, the arbitrator may decide that the district did not violate the collective bargaining agreement. In such a case, there would be no need to decide the preemption issue in the courts. (See *Service Employees International Union, Local 1000 v. Department of Personnel Administration, supra,* 142 Cal.App.4th at pp. 874-875 [statutory and constitutional claims can await arbitrator's decision on the contract where decision may dispose of constitutional and statutory issues and thereby save judicial resources]; *California Correctional Peace Officers Assn. v. State, supra,* 142 Cal.App.4th at pp. 210-211 [state agency may not skip arbitration on the basis that the union's claims are either inconsistent with statutory law or public policy because the arbitrator can decide the issue in the first instance].) In sum, the petition to compel arbitration should have been granted.

IV. DISPOSITION

The order denying the petition to compel arbitration is reversed. Plaintiff, United Teachers Los Angeles, shall recover its costs incurred on appeal from defendant, Los Angeles Unified School District.

CERTIFIED FOR PUBLICATION

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNITED TEACHERS LOS ANGELES, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B214119 (Los Angeles County Super. Ct. No. BS116739) ORDERS: MODIFYING OPINION AND DENYING REHEARING PETITION [NO CHANGE IN JUDGMENT]

The opinion filed September 17, 2009, is modified in the following particulars:

1. On page five in the second sentence of the second paragraph, delete the words "union members" and insert in their place the words "charter school employees".

2. On page nine, at the end of the first paragraph, after the word "defense" delete the period, and insert "which will be subject to judicial review as authorized by section 1286.4, subdivision (a)(4) (see *post*, fn. 3) as discussed in *Board of Education v. Round Valley Teachers Assn.*, *supra*, 13 Cal.4th at pages 273-276. It may very well be the arbitrator will conclude all of the union's claims are barred by section 47611.5, subdivision (e)".

3. On page nine, at the start of the second paragraph, delete "Rather, at" and its place, insert "At".

4. On page nine, in the last sentence of the second paragraph, after the "defense" and before the period, insert "to the merits of the grievance including the argument that the arbitrator must reject it because of the statute's preemptive effect".

5. On page 13, in the first full paragraph, insert the following as the new third sentence, "Or the arbitrator may issue an award that has nothing to do with the charter school petition but only reaches issues such as the adequacy of notice and its effect on union members who will not be involved in the charter school operation."

6. On page 13, in the new fourth sentence of the first full paragraph, which begins with "In such case," delete "would" and insert "may".

The rehearing petition filed October 1, 2009, is denied.

TURNER, P.J. ARMSTRONG, J. KRIEGLER, J.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **PETITION FOR REVIEW** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1 Copy:
Jesus Quinonez
John Kim
Holguin, Garfield & Martinez, APLC
800 West Sixth Street, Suite 950
Los Angeles, CA 90017
Telephone: (213) 623-0170
Facsimile: (213) 623-0171

1 Copy:
Clerk
California Court of Appeal
Second Appellate District
300 South Spring Street
Los Angeles, CA 90012

1 Copy:
Honorable Mary Ann Murphy
Los Angeles Superior Court, Central District
111 N. Hill Street
Los Angeles, CA 90012

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

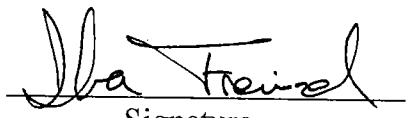
AND:

I declare that on October 26, 2009, the original and 13 copies have been hand delivered for filing on this date to:

Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Executed on October 26, 2009 at Long Beach, California.

Ila Friend
Type or Print Name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