No. S192828

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES and Does 1 through 50, inclusive

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY

Respondents,

ENGINEERS AND ARCHITECTS ASSOCIATION,

Real Party in Interest.

Court of Appeal of the State of California
Second Appellate District, Division 3
Case No. B228732

Appeal from Superior Court of Los Angeles
Honorable Gregory Alarcon
Civil Case No. BS126192

PETITIONER'S ANSWER TO RESPONDENT'S SUPPLEMENTAL BRIEF

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I

INTRODUCTION

The Supplemental Brief of the City of Los Angeles ("City") fails to persuasively demonstrate that furloughs are not arbitrable under the parties' memoranda of understanding ("MOUs") and instead rehashes prior arguments, to which EAA has already responded. Indeed, the City rarely frames its arguments in terms of *the scope of arbitrability* under the parties' contract and instead overreaches by trying to prevail on the substantive merits of the parties' underlying dispute by insisting that furloughs are an indisputable management right that overrides the MOUs' wage and hour provisions—the issue squarely to be decided at arbitration.[1]

Underlying the City's argument is its unexamined and unargued position that its MMBA, Charter, and ordinance powers "are distinct from its contractual rights and obligations under the MOUs." (City Suppl. Br. at 26.) The City cites no authority for that proposition, and that argument is unpersuasive because, as this Court has recognized in countless cases, local governmental powers are harmonized with state law on collective bargaining that makes MOUs binding and enforceable. The City agreed to

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[1] For example, the City conflates its Charter, Employee Relations Ordinance ("ERO"), and MOU arguments and does not directly answer the question posed by this Court. (See, e.g., City Suppl. Br. at 16 ["Under the Ordinance, City management is relieved from [arbitration] . . . . The Ordinance, thus, does not mandate arbitration of this dispute"].)

bind itself to particular wage and hour terms for a particular amount of time and to arbitrate any MOU-based disputes, thus limiting the management prerogatives it held before. Those provisions—including Article 3.1—must be enforceable, notwithstanding contrary City action, for MOUs to have any meaning. (OB at 17-30; RB at 11-18.) Accepting the City's overbroad arguments would have devastating consequences for MOU enforcement through grievance arbitration in this case and others.

To be clear, as it has contended all along, EAA does not "seek[] to arbitrate the validity of [the] City Council's determination that furloughs were necessary" (City Suppl. Br. at 12, 26), but rather only seeks arbitration to determine whether the City's decision to impose furloughs violated the MOUs' wage and hour provisions—i.e., to enforce its MOUs in arbitration. (OB at 3; RB at 7; EAA Suppl. Br. at 1.) And that arbitration is authorized by Article 3.1.

II

FURLOUGHS ARE NOT A MANAGEMENT RIGHT UNDER THE MOUS OR THIS COURT'S PRECEDENTS

The City's entire Supplemental Brief is premised on its unsupported assertion that furloughs are an "unfettered" management right not subject to arbitration. The City relies on its reading of Article 1.9's "relieve employees from duty," "lack of funds," and "take all necessary actions . . . in emergencies" text, but that language does not expressly

authorize furloughs nor does it prohibit furloughs arbitration. The City offers no argument that the parties' *mutually* intended the MOUs to authorize furloughs under the "lack of funds" or "emergenc[y]" language; nor does it have any response to the appellate court's finding these phrases are ambiguous and require remand.

There simply is no support for the City's position. (See Part III, *infra*; EAA's Suppl. Brief at 7-9 [under collective bargaining law furloughs are mandatory subjects of bargaining rather than management rights because they directly impact wages and hours], 9-11 [Article 3.1 makes furloughs arbitrable], and 16-18 [MOUs do not expressly allow furloughs under "lack of funds" or "emergenc[y]" language and cannot reasonably be construed to authorize them either].)

Rather than presenting rigorous argument, the City instead conflates layoffs (a management right) with furloughs (not a management right), ignoring the key distinction between the two that this Court has previously recognized. This Court has affirmed that layoffs are a management right because they involve "the employer's retained freedom to manage its affairs *unrelated* to employment," and thus are beyond employers' obligation to bargain. (See *International Assoc. of Fire Fighters v. Public Employment Relations Board* ("*Richmond*") (2011) 51 Cal.4th 259, 273 [italics added; internal citations and quotations omitted];

International Assoc. of Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608, 621 ("*Vallejo*").)

This Court has further recognized that, for the same reason, furloughs are *not* a management right because they directly impact wages and hours—i.e., mandatory subjects of collective bargaining directly implicating an employer's bargaining duty. (See *Professional Engineers v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040-1041 ["the issue whether an employee's wages may be reduced by the implementation of a mandatory furlough . . . lies at the heart of the matter of 'wages, hours, and other terms and conditions of employment' that are the subject of an MOU"].)

The City does not explain why the furloughs it imposed here warrant different treatment. And even though the City cites *Professional Engineers*, *Vallejo*, and *Richmond*, it makes no attempt to explain what in those cases makes furloughs a management right, let alone distinguish the reasoning establishing that they are not.

III

THE CITY'S MANAGEMENT RIGHTS ARGUMENT RENDERS THE MOU UNENFORCEABLE

The City insists throughout its brief that the MOUs are "subordinate to established law" such as the MMBA, the City Charter and ERO, such that Article 1.9's arbitration clause is subject to external constraints. (E.g., City Suppl. Br. at 17, 5-9.) But this case does not

implicate any external limits on MOUs' grievance provision. And our courts have consistently sought to harmonize local governmental powers with collective bargaining agreements reached under the MMBA. (See OB at 23-30; RB at 12-14.)

According to the City, certain ERO provisions "place[] . . . certain subjects, including the City Council's rights, powers and authority in all matters, beyond the scope of an arbitration agreement." (City Suppl. Br. at 8-9.) But the ERO was enacted pursuant to MMBA section 3507, and this Court has harmonized local procedures enacted under this section with the MMBA, but it has not hesitated to hold they are unenforceable when they conflict with MMBA policies. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202 ["The power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are 'consistent with, and effectuate the declared purposes of, the statute as a whole'"]; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 781 ["It is indisputable that the procedures set forth in the MMBA are

a matter of statewide concern, and are preemptive of contradictory local labor-management procedures"].)[2]

In any event, this case does *not* implicate any external limits on the MOUs' arbitration clause because furloughs arbitration is fully consistent with the Charter and ERO. Specifically, there is no dispute that Article 3.1 is itself consistent with and authorized by the Charter and ERO, as is Article 1.9. (See OB at 8-9, 12 fn.7, 28-29; RB at 15.) The arbitrability question posed by this Court thus turns on how these two provisions interact. However, on the current record, that interaction is not unambiguous, such that, following this Court's determination of the principal unlawful delegation question, remand is necessary. (EAA Suppl. Br. Parts II.) Alternatively, to the extent the Court approaches that interaction as a matter of law, Article 3.1 mandates arbitration.

A. The City Fails to Heed *Vallejo* and *Richmond* And Its Argument Would Swallow the Rest of the MOU

Distilled to its essence, the City argues Article 1.9 gives it "unfettered" and "exclusive responsibility" to manage the city and its

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[2] For example, the City argues that ERO 4.875, which makes the ERO applicable to "all departments, offices and bureaus of the City[,]" means that "the arbitration process was not intended to apply to . . . the City Council." (City Suppl. Br. at 8). But that would effectively make the MOUs unenforceable in arbitration if the City attempts to legislate its way out of an MOU, as it has done here—contrary to *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 and *Taylor v. Crane* (1979) 24 Cal.3d 442.

workforce, such that it can "take all actions deemed necessary in an emergency," leaving employees only the right to grieve the "practical consequences." (See City Suppl. Br. at 1, 9-11.) But that argument completely ignores Article 3.1's broad arbitration clause making "*any* dispute which concerns the interpretation or application of this written MOU" subject to arbitration. (AA 1:103, italics added; EAA Suppl. Br. at 9-11.) The City nowhere explains why Article 3.1 should not be given its plain meaning or why Article 1.9 would necessarily trump the parties' arbitration clause.[3] Nothing in the parties' MOUs compels or even suggests that result.

The City fails to account for this Court's precedents outlining the function of management rights clauses and their limitations. The purpose of management rights clauses is to preserve management prerogatives and not to trump MOU provisions, particularly those establishing wages and hours. (EAA Suppl. Br. at 3-8, citing *Vallejo* and *Richmond.*) For that reason, Article 1.9 simply cannot, as the City urges, be read to give the City *carte blanche* to violate the MOUs wage and hour provisions because that would "swallow the whole [agreement] and relegate determination of all labor issues to the city's discretion." (*Vallejo, supra,*

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[3] Indeed, the only express carve out from the grievance process relates to parking disputes. (See, e.g., AA 1:142 [Article 7.9 Parking: "appeals of

12 Cal.3d at p. 615; EAA Suppl. Br. at 11-19.) (See also *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 105 ("Clearly, employers would always prefer unencumbered decisionmaking in management of operations, but such an exception [management rights] cannot swallow the [collective bargaining] rule by allowing the employer to designate with impunity what is an operational management decision") (Ardaiz, J., dissent).)

EAA does not dispute the City has general management powers and that Article 1.9, as a management rights clause, preserves them, but that does *not* mean that the City can unilaterally impose furloughs or that its imposition of furloughs is outside the scope of arbitration. Indeed this Court has held that furloughs are not an inherent management right, and *this* management rights clause does not expressly make furloughs a management right.[4] (*Professional Engineers, supra,* 50 Cal.4th at 1040-1041; *United Teachers of Los Angeles v. Los Angeles Unif. Schl. Dist.* (2012) 54 Cal.4th 504, 519 ("*UTLA*") [only "express provision" making an employment decision a management right can exclude a grievance from arbitration]; see Part II, *supra.*) In short, because furloughs are not a

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employee parking issues . . . . shall not be grievable"].)

management right and are in fact at the heart of the bargaining obligation (wages and hours), they fall squarely within the scope of the arbitration clause.[5]

B. Article 1.9 Does Not Trump Article 3.1

The City adopts but does not defend the court of appeals' flawed interpretation of Article 1.9 as a limitation on Article 3.1. (See City Suppl. Br. at 10-11.) That reading is unsupported and confuses Article 1.9 "effects" arbitration for Article 3.1 MOU-based arbitration. (See EAA Suppl Br. at 19-21.) Nothing in the parties' MOUs makes Article 1.9 a limitation on Article 3.1 arbitration, and such a reading would be contrary to the labor policies in management rights cases recognizing that management rights do not trump MOU rights. Indeed, the appellate court, like the City, incorrectly presumed furloughs were an Article 1.9

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[4] By contrast, Los Angeles County apparently has negotiated a management rights clause that *expressly* allowed it to impose furloughs. (See *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2007) 154 Cal.App.4th 1536, 1540-1541.)

[5] *EAA v. Community Development Dept. of City of Los Angeles* (1994) 30 Cal.App.4th 644 did not "h[o]ld that because the layoff was due to lack of funds . . . it was a management decision . . . not subject to arbitration." (City Suppl. Br. at 12.) There EAA agreed that layoffs were a management right and the only question was whether there was substantial evidence that the layoffs were due to lack of work and/or lack of funds. (*Id.* at pp. 648, 650.) By contrast, here EAA disputes that *furloughs* are a management right because they directly impact employees' wages and hours, i.e., it disputes the parties intended Article 1.9's lack of work/funds language authorizes furloughs.

management right, even though extrinsic evidence was necessary to decide if that reading accorded with the parties' intent. (See Slip Op. at 15-18; EAA Suppl. Br. at 2-4.)[6]

The same is true for the City's argument that Article 1.9 allows it "to use all of its pre-existing authority . . . unless *specifically* restricted by the terms of the MOU." (City Suppl. Br. at 11, italics added.) That reading too is based on the court of appeals' unsupported analysis and suffers from the same flaws because it fails to account for *Glendale*'s and *Taylor*'s holdings that MOUs are enforceable once ratified, and *Vallejo* and *Richmond* which held that management rights do not trump MOU rights.[7] More fundamentally, it fails to recognize this Court's holding that

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[6] Indeed, the court of appeals' inability to resolve that matter led it to its unlawful delegation holding, where it is evident that it believed furloughs were a unilateral and unreviewable management right. (See Slip Op. at 18-26.)

[7] The City, however, apparently rejects the court of appeals' reading of Article 1.9 as requiring that the restrictions on management rights be in the management rights clause itself. (See Slip Op. at 14 fn.12; EAA Suppl. Br. at 12-13, esp. fn.9.) Indeed, it espouses EAA's reading of Article 1.9 that, "except as specifically set forth [in this MOU,] no provisions in this MOU shall be deemed to limit or curtail the City['s management rights]."

As EAA previously argued, this language is at minimum redundant (EAA Suppl. Br. at 13 fn.9), but that redundant reading is more reasonable than the alternative argument the City makes here–that a provision in an MOU is not a limitation on management rights unless each and every section specifically says it is. What controls is the parties' intent. (See *In re David S.* (2005) 133 Cal.App.4th 1160, 1167-1168 [accepting "redundant" interpretation as "not unreasonable" because "such an interpretation upholds the legislative intent"].)

furloughs are not within management's pre-existing authority. (*Professional Engineers, supra,* 50 Cal.4th at 1040-1041.)

Thus, the specificity the City demands in light of these principles is unnecessary because an MOU provision is, by its very nature, a limitation on management rights. (EAA Suppl. Br. at 4-9.) That is, the existence of various MOU provisions on wages and hours are themselves sufficient to restrict the City's management prerogatives (to the extent they existed in regard to these mandatory subjects of bargaining) because, by negotiating and ratifying the MOU, the City agreed to limit its authority as to those subjects over which it would otherwise have plenary discretion. Requiring further specificity in each and every MOU section stating that a particular section is an exception to management rights would be superfluous and burdensome. Indeed, such language is unnecessary because the City of Los Angeles ratified the MOUs and they are thus enforceable under *Glendale* and *Taylor*.

C. Article 1.9 Cannot Be Constitutionally Read to Absolve the City of Its Obligations Under the Contracts Clause

This Court has previously rejected a government employer's assertions that a fiscal emergency alone allowed imposition of furloughs on public employees. (*Professional Engineers, supra,* 50 Cal.4th 989.) More generally, it has rejected arguments that fiscal constraints are sufficient to allow a governmental entity to breach its contractual obligations to public

employees. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 ("*SCOPE*").) It should do so again here.

The City insists that Article 1.9 means it can "*unilaterally* take all action necessary to meet an emergency situation" (City Suppl. Br. at 11), including ignoring the MOUs, breaching its contractual obligations, and then escaping its contractual duty to arbitrate resulting disputes. That argument has no support in law. (See OB at 47-55; RB at 20-23.) This Court has specifically recognized that public entities cannot unilaterally ignore their contractual obligations unless exceptions to the contracts clause apply. (*SCOPE, supra,* 23 Cal.3d at 307-308 [contract impairment must be constitutionally "reasonable" and "necessary"].) None apply in this case.

Further, the City presents no argument why the "lack of funds" language authorizes furloughs (not a management right), as opposed to layoffs (a recognized management right.) It does not. (See EAA Suppl. Br. at 16-18.) Moreover, the Third District recently held that a city employer's lack of funds or inability to pay for MOU obligations is not relevant to determine whether that obligation exists or is enforceable. (See *International Brotherhood v. City of Redding* (Nov. 2, 2012) 210 Cal.App.4th 1114, 148 Cal.Rptr. 857, 862 [examining MOU in light of contracts clause obligations].)

D. Grievances Are Not Limited to Departmental Disputes

The City insists the grievance process solely "is aimed at resolving disputes that can be addressed by" department heads. (City Suppl. Br. at 14-15.) That is incorrect.

First, Article 3.1 broadly defines a grievance to include MOU-based grievances.[8] (AA 1:103.) Although the City maintains that "[n]othing . . . suggests that the City Council . . . . may be challenged via a 'grievance'" (City Suppl. Br. at 15), EAA does not seek to challenge the City Council, but rather it merely seeks arbitration to determine whether the City Council's imposition of furloughs violated its MOUs—i.e., it seeks to *enforce* its MOUs in arbitration. That squarely falls within the "interpretation or application" language of Article 3.1.

Second, while it is true that the grievance process culminating in arbitration originates in city departments, that is mandated by the City's own ERO. (See EAA's MJN Ex. 2 [ERO 4.865(a)(1) ["Provision *shall* be made for discussion of the grievance first with the employee's immediate supervisor on an informal basis"], italics added].) That department-specific

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[8] That broad definition is, of course, subject to the limitation that the matter sought to be arbitrated actually arise from or seek to enforce MOU rights, and our courts have been able to discern the difference between grievances that do and do not. (See, e.g., *L.A. Police Protective League v. City of Los Angeles* (1988) 206 Cal.App.3d 511), 513 ("*LAPPL*") [denying arbitration because grievance filed purportedly under the MOU did not actually concern interpretation or application MOU or departmental rules].)

approach accords with labor public policy because it attempts to resolve employee disputes at the lowest level possible. (OB at 22-23; RB at 17-18.) More fundamentally, however, the MOUs expressly allow grievances to be filed at a level higher than step one, allowing the parties to proceed *directly* to arbitration without going through the departments. (See AA 1:104 [Article 3.1, Section II.C [in multi-employee grievances "the Association may request that the first level of review be at a level higher than Step 1 and shall provide justification for such request"].) The MOUs thus make clear that the parties recognized that certain grievances, particularly those involving multiple employees, are *not* limited to department-specific matters.[9]

Third, *SEIU v. City of Los Angeles* (1994) 24 Cal.App.4th 136 does not support the City's argument that "combined grievances are limited to employees in a single department" such that "[t]he procedure is inapplicable to City wide disputes." (City Suppl. Br. at 15.) *SEIU* merely decided an employee in one department was not entitled to arbitration of an "interdepartmental grievance[]" he filed against another city department he did not work for. (24 Cal.App.4th at p. 145; *id.* at p. 139 ["the MOU does not compel arbitration of employees' disputes with departments other than

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[9] The record does not indicate whether EAA sought such arbitration and was denied, because only the grievance denials drafted by management are

those employing them"].) But the City identifies no grievance that was filed by an EAA member in a department other one in which he or she works.[10]

Finally, the City also inexplicably cites the same City Attorney Opinion ("Opinion") that undermined its unlawful delegation argument to argue the Opinion discerned "a legislative intent by the City Council [in the ERO] to limit the type of disputes subject to the grievance procedure to issues resolvable by individual departments." (City Supp. Br. at 9 [relying on Opinion 85-28, filed July 26, 1988 [City's 4RJN, Ex. 1].) That is a gross mischaracterization because the Opinion makes no mention of legislative intent, makes no legislative history analysis, and its conclusion on this issue is unsupported with any legal authority. (See City's 4RJN, Ex. 1 at p. 15.) More importantly, it does not answer whether the *parties* here intended Article 3.1 to be so limited. Indeed, the Opinion does not deal with MOU-based grievances at all and ignores labor arbitration policies favoring resolution of employment disputes at the lowest levels.[11] In any

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in the record.

[10] *LAPPL* does not support the City either because the employee there did not even try to enforce any MOU-based right through the grievance arbitration process. (206 Cal.App.3d at p. 513)

[11] The Opinion analyzes the allocation of power between the City Council and city departments. (See *id.* at 2- 3.) It did not substantively deal with grievances seeking to enforce MOU rights.

event, the Opinion is entitled to no weight as it is essentially the City's own unsubstantiated opinion.

IV

THE CITY'S OTHER ARGUMENTS DO NOT HELP IT OR ANSWER THIS COURT'S QUESTION

The Court specifically asked the parties to brief arbitrability under the parties' MOUs. The City makes several non-MOU based arguments it asserts are relevant to this question. None have merit.

A. *UTLA* Does Not Preclude Arbitration Here Because There Is No State Statute or Local Law Expressly Prohibiting Collective Bargaining or Arbitration Regarding Furloughs

Relying on *United Teachers of Los Angeles v. Los Angeles Unif. Schl. Dist.* (2012) 54 Cal.4th 504 ("*UTLA*"), the City argues enforcing the arbitration clause here would "replace, set aside or annul" its management rights and charter based powers. In fact, *UTLA* actually reinforces EAA's arbitration arguments. (*Id.* at p. 519 [only "express provision" making an employment decision a management right can exclude a grievance from arbitration]; see also *id.* at pp. 518-520 [reaffirming *Steelworkers Trilogy*, requiring doubts be resolved in favor of arbitration, and lack of merits not an arbitration defense].)

UTLA dealt with a union's request for arbitration that directly conflicted with two specific statutes that apply only to collective bargaining in school districts: (1) Government Code section 3540 of the Educational

Employment Relations Act ("EERA") and (2) Education Code section 47611.5, subd. (e), which applies to charter school approvals. (*Id.* at pp. 511-513.) This Court explained that Government Code section 3540 is a "non-supersession clause," meaning that it prohibits collective bargaining over matters that directly infringe on the Education Code. (*Id.* at 513-516 ["the scope of [collective bargaining] does not include matters that would annul, set aside, or replace portions of the Education Code"].) The rationale for that rule is that "labor relations in [public schools] significantly intersect with educational goals . . . [and] the Legislature has limited the scope of [collective bargaining] by withdrawing . . . certain matters in the Education Code. The Legislature has decided that those matters should be exclusively management prerogatives." (*Id.* at p. 520.)

Similarly, Education Code section 47611.5, subd. (e) expressly provides that "[t]he approval or denial of a charter [school] petition . . . shall not be controlled by collective bargaining agreements nor subject to review . . . by the Public Employment Relations Board." Taking these two statutes together, this Court held that the grievance arbitration the union sought regarding whether the charter school approval procedures set forth in the parties' MOU were followed was "statutorily preempted." (*Id.* at

520, 524-526.)[12] Given this preemption, it denied arbitration where the arbitrator's remedy would necessarily conflict with these statutory proscriptions. (*Id.* at pp. 526, 528.)

The City here cites no similar statutes or local laws containing an express prohibition on furloughs or wage and hour arbitration. There are none. The MMBA does not have a "non-supersession clause." The language in Government Code section 3500(a) the City cites—"[n]othing contained herein shall be deemed to supersede . . . the charters, ordinances, and rules of local public agencies"—is not a "non-supersession" clause allowing local laws to trump the MMBA and MOUs. On the contrary, this Court has interpreted it as merely "reserving to local agencies the right to pass ordinances and promulgate regulations consistent with the purposes of the MMBA." (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 62-63 ["To extend a broader insulation from MMBA's requirements would allow local rules to undercut the minimum rights that the MMBA guarantees"]; Gov. C. § 3500, subd. (a).)

The City asserts that Article 1.9, the Charter, and the ERO preempt the arbitration EAA seeks here, but unlike *UTLA*, it points to no

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[12] The Court noted that its conclusions did not mean all of the union's grievances were inarbitrable, and it remanded to the trial court to assess what specific MOU provisions were at issue and whether they ran afoul of the Education Code. (*Id.* at pp. 527-528.)

specific language in any of those authorities that expressly does so. That glaring omission is fatal to the City's argument, because it is clear that when a legislative body wants to carve out certain matters from collective bargaining—as the Legislature did in Government Code section 3540 and Education Code section 47611.5, subd. (e)—it knows how to do so.

As to the issue of arbitration remedy, unlike *UTLA* the arbitrator here can fashion a remedy within the constraints of the law. (See RB at 7-11). That was impossible in *UTLA* because EERA and the Government Code expressly prohibited any use of MOUs to impinge on charter school approval. There is no analogous limitation here.

B. The City Has No Statutory Right To A Judicial Forum, and It Directly Negotiated and Ratified the Grievance Arbitration Clause Mandated by the ERO

The City argues at great length that it did not "waive[] its [statutory] right to a judicial forum for resolution of challenges to its exercise of its reserved management rights." (City Suppl. Br. at 20.) That argument is meritless. The City never identifies the source of its purported *statutory* right to a judicial forum.[13] There is none.

Instead, the City draws on cases where courts have refused to compel individual discrimination plaintiffs from being pushing into

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[13] ERO 4.880(b), which gives the City "the right to maintain any legal action" does not grant the City a *right* to a judicial forum, but at most authorizes it to bring and/or defend against a lawsuit.

arbitration based on dubious readings of employment agreements. (See City Suppl. Br. at 21-24.) Application of those cases here would turn them on their head because, unlike an individual plaintiff, the City of Los Angeles is a sophisticated entity that directly negotiated and ratified an arbitration clause and grievance process that accords with its own ERO. That does not mean it "waived" a judicial forum, but rather that it agreed employees could bring MOU-based disputes through a grievance process that would quickly and efficiently resolve them.[14] It was entitled to do so under *Taylor*.

V

EVEN IF FURLOUGHS WERE A MANAGEMENT RIGHT, EAA MEMBERS HAVE A RIGHT TO GRIEVANCE ARBITRATION REGARDING THE "PRACTICAL EFFECTS"

There is no need to revisit this Court's holding in *Professional Engineers* that furloughs are not a management right, but if it determines that furloughs somehow were a management right under the circumstances of this case, EAA submits the arbitration it seeks is still proper because

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[14] The City further argues that an arbitrator is unconstrained by a presumption supposedly favoring the City's exercise of emergency powers. (See City Suppl. Br. at 24 [arguing presumption applies "unless and until Association proves that the City abused its discretion"].) First, the City's authority to declare an emergency is not at issue here. Second, there is no such presumption when a local government's action substantially impairs its employment contract with public employees. (See *SCOPE, supra,* 23 Cal.3d at 308-309 [legislative deference unnecessary because "the government's self-interest is at stake"].)

members are allowed to file grievances regarding the "practical consequences" of any management rights decision. Specifically, Article 1.9 allows grievances about the practical effect furloughs have on "wages, hours, and other terms and conditions of employment." (See AA 1:93.)

The court of appeal acknowledged that some of the grievances before it squarely fit within the "practical consequences" category, but faulted the union for not distinguishing those grievances from others, even though the City never made that argument and the grievance denials in the record were drafted by the City and not the employees. (See Slip. Op. at 16-17 fn.13; AA 2:2400-7:1648.) If this Court finds furloughs are authorized by Article 1.9, it should direct the trial court to compel arbitration of those grievances directed at the "practical consequences" of the City's imposition of furloughs because that issue squarely falls within Article 1.9.

VI

CONCLUSION

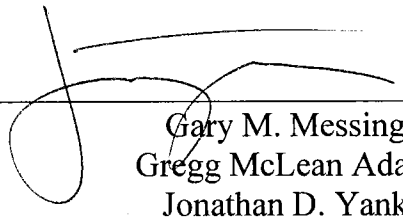
If this Court decides to reach the issue of arbitrability it should remand to the trial court to resolve the ambiguity as to whether the MOUs authorize furloughs under the circumstances of this case or, alternatively, find that the MOUs do not make furloughs inarbitrable. To the extent the Court finds furloughs are authorized by Article 1.9, it should remand to the trial court to allow grievance arbitration regarding the "practical

consequences" on EAA members. Resolution of the issue of arbitrability, however, is not necessary to reverse the court of appeal's unlawful delegation holding on which this Court granted review and, accordingly, this Court should reverse the decision of the court of appeals to allow the arbitrations to proceed.

Dated: December 14, 2012

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By 

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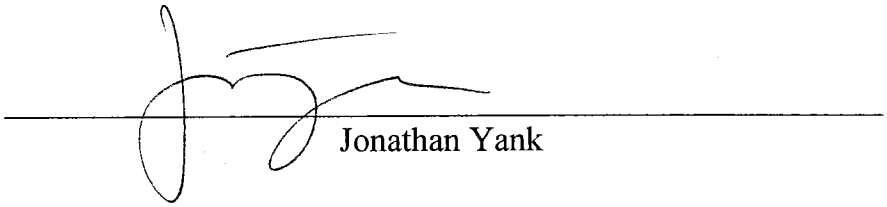
WORD COUNT CERTIFICATION

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the attached brief contains 5212 words, as determined by the computer program used to prepare the brief.

Dated: December 14, 2012



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PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On December 14, 2012, I served the enclosed:

PETITIONER'S ANSWER TO RESPONDENT'S SUPPLEMENTAL BRIEF

on the parties in said cause (listed below) by enclosing a true copy thereof in a sealed envelope and, following ordinary business practices, said envelope was placed for mailing and collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for mail collected for deposit with the United States Postal Service. I am readily familiar with the Firm's practice for collection and processing of correspondence/documents for mailing with the United States Postal Service and that said correspondence/documents are deposited with the United States Postal Service in the ordinary course of business on the same day.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 14, 2012, at San Francisco, California.

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