Case No. S162647

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

ANSWER TO PETITION FOR REVIEW

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

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I. OPERATING ENGINEERS LOCAL UNION NUMBER THREE JOINS IN SEEKING REVIEW, BECAUSE A SIGNIFICANT SPLIT HAS JUST EMERGED WITHIN THE COURT OF APPEAL

Respondent Operating Engineers Local Union Number Three ("Local Three") agrees with Appellant City of San Jose ("the City") that this Court should grant review, because on May 22, 2008, the First Appellate District of the Court of Appeal issued a published decision directly in conflict with the decision of the Sixth Appellate District in the instant case. *See County of Contra Costa v. Public Employees Union Local One, et al.* (First Appellate District, Division One, Case Nos. A115095 & A115118, May 22, 2008), attached as Exhibit A to the City of San Jose's Request for Judicial Notice to this Court dated May 23, 2008.

In the decision of the First District, the Court of Appeal noted the conflict:

> **We recognize that our colleagues in the Sixth District arrived at the opposite conclusion in the recent *City of San Jose* case.**

Id., at page 11.

At the conclusion of its decision in the *County of Contra Costa* case, the First District specifically noted the importance of the issues at stake and urged this Court to grant review:

> **We have narrowly interpreted the scope of PERB's jurisdiction in this area. This case concerns an issue of importance to every local agency in the state and labor organizations representing the agencies' employees. We note that a petition for review in the *City of San Jose* case has already been filed. We urge our Supreme Court to**

resolve this important issue.

Id., at 21.

Local Three joins with the City and the First Appellate District in urging that review be granted, because the crucial jurisdictional issues at stake arise each and every time there is a labor dispute involving a city or county that escalates toward a potential strike. For several years, even before there was a split of opinion within the Court of Appeal, Superior Courts throughout the state have been issuing conflicting decisions and following conflicting procedures in strike cases. In the wake of the recent split within the Court of Appeal, this upheaval in the courts will likely now be exacerbated, until this Court resolves the split.

II. THE COURT SHOULD GRANT REVIEW IN BOTH THE INSTANT CASE AND THE *COUNTY OF CONTRA COSTA* CASE AND CONSOLIDATE THE TWO CASES FOR BRIEFING, ARGUMENT AND DECISION

The Petition for Review in *County of Contra Costa* will be filed in late June 2008.[1] As will be more fully explained therein, there are three important reasons why this Court should grant review not only in the instant case but also in the *County of Contra Costa* case.

First, *County of Contra Costa* presents a different set of facts that will begin to demonstrate the range of contexts in which strike injunction cases arise. For instance, in *County of Contra Costa*, the Superior Court enjoined from striking (among others) an entire bargaining unit of

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[1]Counsel for Local Three also represents Appellant Public Employees Union Local One in the *County of Contra Costa* case.

approximately 500 nurses, deeming each and every nurse to be "essential," thereby entirely eviscerating all of the nurses' right to strike.

Second, *County of Contra Costa* also presents an additional issue on appeal – an issue that is intimately related to the jurisdictional issue raised by the City in the instant case, but which was not part of the decision in the instant case. Specifically, *County of Contra Costa* presents the following additional issue: Do the provisions of California Labor Code §§1138-1138.5 apply to actions seeking to enjoin public employee strikes? Because the two issues are so closely related to one another, are commonly raised in all of the same cases, and are both hotly disputed in the courts at the moment, resolution of the two issues together is appropriate.

Finally, the Public Employment Relations Board ("PERB") is a party to the appeal in *County of Contra Costa*, but is not a party in the instant case, as PERB's motions to intervene were denied. Because the first issue at stake is the extent of PERB's jurisdiction, it is appropriate for PERB to be a party.[2]

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[2] As the City notes on page 1, footnote 1, of its Petition for Review, there is also a third set of cases, involving the same set of issues, that is presently pending in the Third Appellate District of the Court of Appeal, entitled *County of Sacramento v. AFSCME Local 146, et al*, Case Number C054233. Oral argument is scheduled for June 16, 2008 in that case.

III. THE THRESHOLD ISSUE THAT IS COMMON TO BOTH THE INSTANT CASE AND *COUNTY OF CONTRA COSTA* REQUIRES THIS COURT TO DECIDE WHETHER THERE IS ANY BASIS TO DIFFERENTIATE PERB'S JURISDICTION OVER CITIES AND COUNTIES FROM PERB'S JURISDICTION OVER OTHER PUBLIC ENTITIES

The Court of Appeal in the instant case affirmed the Superior Court's application of a long-standing Supreme Court precedent that has been the bedrock of public sector labor relations law in California for three decades, *San Diego Teachers Association* v. *Superior Court* (1979) 24 Cal.3d 1. In *San Diego Teachers*, a public sector employer had asserted a common-law theory in an effort to enjoin strike activity -- just as the City did in the instant case. Yet this Court in *San Diego Teachers* held that the Public Employment Relations Board ("PERB") has exclusive initial jurisdiction over such a strike injunction action brought by a public employer covered under PERB's jurisdiction, because striking in violation of the common law may constitute an unfair labor practice. *Id.*, at 8.

After *San Diego Teachers* was decided in 1979, there were three additional appellate decisions in cases where public sector employers covered under PERB's jurisdiction attempted to litigate common-law strike injunction or strike damage claims in court. In each of these cases, the appellate courts found that PERB has exclusive jurisdiction, and that the public sector employer therefore may not bypass PERB and litigate its claims directly in court. *El Rancho Unified School District* v. *National Education Assn.* (1983) 33 Cal.3d 946; *Fresno Unified School District v. National Education Association* (1981) 125 Cal. App. 3d 259; *PERB v. Modesto City Schools Dist.* (1982) 136 Cal. App. 3d 881.

Since PERB's creation in 1976, no appellate court has ever countenanced any effort by a public sector employer covered under PERB jurisdiction to seek a strike injunction directly in court, rather than following PERB procedures – until the First Appellate District did so in the *County of Contra Costa* case on May 22, 2008. In fact, for over two decades, cities and counties – because they were not covered under PERB jurisdiction until 2001 – have been the only California public entities that have attempted to go directly to court to seek strike injunctions. Contrary to the policy arguments that the City advances in its Petition for Review, the system in place from the 1970s through early 2008 worked well, such that the public sector employers cannot point to a single instance in three decades, anywhere in the entire state, in which PERB has acted too slowly to protect the public.

Also in the years since 1976, the number of labor relations statutes that the Legislature has entrusted to PERB's jurisdiction has grown from one to seven.[3] Under each of the seven labor relations statutes, PERB stands ready to process expeditiously any employer requests for injunctive relief against strike activity, based upon health and safety grounds or other

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

grounds. Indeed, PERB has made that position clear since the beginning of this case.[4]

Effective July 1, 2001, the Legislature and Governor Gray Davis enacted SB 739, Stats. 2000, ch. 901, which extended PERB's jurisdiction to cover the labor relations statute governing cities and counties, the Meyers-Milias-Brown Act, California Gov. Code §3500 et. seq. ("MMBA").[5] Thus, prior to July 1, 2001, there was no dispute that courts had jurisdiction to resolve allegations brought by cities and counties or the labor organizations representing their employees.

The Court of Appeal in *County of Contra Costa* sought to distinguish the MMBA from other labor relations statutes – particularly from the Educational Employment Relations Act ("EERA"), Gov. Code §3540 et. seq., which governs local school districts. (City of San Jose's Request for Judicial Notice, Exhibit A, page 12). However, when the Legislature specifically vested PERB with jurisdiction over cities and counties and the unions representing their employees, the Legislature made that jurisdiction coextensive with PERB's jurisdiction over local school districts. *See* Gov.

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[4]PERB appeared at all of the proceedings in this case and made clear that it was prepared to process any request for injunctive relief by the City. *See* Reporter's Transcript, pp. 3-6 (June 2, 2006) and 14A-16A (June 7, 2006). PERB took the same position as amicus in front of the Court of Appeal in the instant case, as well as at all stages in *County of Contra Costa* and in the case currently pending in the Third Appellate District.

[5]Contrary to the City's unfounded suggestion in its Petition for Review, the Legislative history of SB 739 supports the Court of Appeal's decision in the instant case. Should this Court grant review, Local Three will fully brief the legislative history of SB 739.

Code §3509(a) (providing that the powers and duties of PERB with respect to the MMBA are the same as those set forth in Government Code §3541.3, pertaining to PERB's jurisdiction over local school districts). Indeed, this Court has specifically explained that the Legislature amended the labor relations framework governing cities and counties to make it consistent with the analogous legal framework governing other public employers. *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal. 4th 1072, 1089-1090 (finding it "reasonable to infer" that the Legislature's extension of PERB jurisdiction to cover cities and counties was intended to create "a coherent and harmonious system of public employment relations laws").

IV. CONTRARY TO THE CITY'S PETITION FOR REVIEW, THIRTY YEARS OF PRECEDENT REGARDING PUBLIC SECTOR LABOR LAW SUPPORTS THE SIXTH DISTRICT'S DECISION IN THE INSTANT CASE, NOT THE FIRST DISTRICT'S DECISION IN *COUNTY OF CONTRA COSTA*

A. The Supreme Court and Courts of Appeal Have Consistently Held that PERB Has Exclusive Jurisdiction Over Injunction Actions and Other Disputes about Strikes, Because Strike Conduct Is Both Arguably Protected and Arguably Prohibited by the Labor Relations Laws Entrusted to PERB's Jurisdiction

In *San Diego Teachers*, 24 Cal.3d 1, the San Diego Unified School District had obtained a common-law injunction prohibiting a teachers union from striking, and both the union and its president had later been found in contempt of that injunction. The Supreme Court vacated the contempt finding, holding that the underlying injunction was improper because PERB has exclusive initial jurisdiction to resolve questions about strike

injunctions and the school district had improperly failed to exhaust PERB processes. *Id.*, at 14.

The employer in *San Diego Teachers* was a school district covered under the Educational Employment Relations Act ("EERA"). EERA, just like the MMBA, does not expressly mention strikes, but rather generally protects the right of employees to participate in union activities.[6]

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

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

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

On the central question of whether the strike could have been found to be an unfair practice, the Court found that there were at least two different violations of the EERA which could have been found. *Id.*, at 8. Most significantly, the Court found that, if the union's strike was illegal under the common law, then such striking could violate the EERA's requirement that a union must bargain in good faith, as set forth in Government Code §3543.6(c). *Id.*

This dispositive holding from *San Diego Teachers* lies at the crux of the Court of Appeal's decision in the instant case (Exhibit A to Petition for Review, at page 17) and is controlling, because the City claims that Local Three threatened to violate the common law. Specifically, the City alleged that Local Three's strike would have violated the common law by including "essential" employees in violation of this Court's landmark decision regarding the scope of public employees' right to strike in California, *County Sanitation Dist. No. 2 v. Los Angeles County Employees Association* (1985) 38 Cal. 3d 564.

Significantly, the *County Sanitation* decision was based in large part upon this Court's interpretation of how the MMBA altered the common law rule regarding public employee strikes (*see infra* at page 20), meaning that the City's invocation of *County Sanitation* intimately involves the MMBA even on its face. However, even to the extent that the *County Sanitation* holding arguably constitutes a purely "common law" rule regarding which employees have the right to strike, violation of such a common law rule could constitute an unfair practice – specifically, bad faith bargaining. *San*

Diego Teachers, 24 Cal.3d at 8 (holding that if the union's strike "were held legal it would not constitute a failure to negotiate in good faith. As an illegal pressure tactic, however, its happening could support a finding that good faith was lacking"). Bad faith bargaining by a union constitutes an unfair practice under the MMBA, just as it does under the EERA. *Compare* 8 Cal. Code Reg. 32604 (outlining the categories of unfair practices by labor unions under the MMBA) *with* Government Code §3543.6 (comparable outline of unfair practices by labor unions under the EERA).

Thus, according to *San Diego Teachers*, illegality of particular strike conduct under the common law would make the same strike conduct at least "arguably prohibited" under the statutory labor relations laws. For this reason, PERB, the agency charged with interpreting and enforcing the MMBA, the EERA and five other public sector labor relations statutes, is well supported by Supreme Court precedent in taking the position (as it has throughout this case) that strike conduct that is illegal under *County Sanitation* could arguably violate the MMBA. For the same reason, the City is simply wrong in stating that it "could not have alleged that the Union or its members were threatening to commit an unfair labor practice in violation of the MMBA" (Petition for Review, at page 9) – to the contrary, if the City had a good-faith belief that the threatened strike would violate the common law, the City easily could have sought redress (including injunctive relief) through PERB's procedures.

Notably, in light of EERA's silence on the issue of strikes, the school district in *San Diego Teachers* "contended that to require the district to

apply to PERB before suing for injunctive relief would be to require an idle act," because PERB might have "refused to apply to a court for relief." *Id.*, at 13. The Supreme Court completely rejected this contention, finding that "the EERA gives PERB discretion to withhold, as well as to pursue, the various remedies at its disposal." *Id.*

In reaching its conclusion, the Court also found that PERB's processes for seeking an injunction provide an adequate alternative to the district's claimed right to file a lawsuit. *Id.*, at 10-11. The district "contended, however, that even if PERB could have applied for judicial relief against the strike, the ground on which this might have been done would not necessarily encompass all grounds on which a judicial order could be granted....PERB's determination to seek an injunction, as well as its application to the court, would reflect only a narrow concern for the negotiating process mandated by EERA and would ignore strike-caused harm to the public." *Id.*, at 11. The Court rejected this argument, too, finding that it:

> **erroneously presupposes a disparity between public and PERB interests. The public interest is to minimize interruptions of educational services. Yet did not an identical concern underlie enactment of the EERA? .... PERB's responsibility for administering the EERA requires that it use its power to seek judicial relief in ways that will further the public interest in maintaining the continuity and quality of educational services.**

Id. (citations omitted).[7]

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[7]At the time that *San Diego Teachers* was decided, PERB had only recently been created and assumed jurisdiction over local school districts (in 1976), but a long line of appellate courts before then had ruled that public

Four years after the Supreme Court's decision in *San Diego Teachers*, the Court reaffirmed and further clarified PERB's exclusive jurisdiction in *El Rancho Unified School District* v. *National Education Assn.* (1983) 33 Cal.3d 946. In *El Rancho*, the trial court had, following *San Diego Teachers*, sustained the defendant unions' demurrers to a lawsuit alleging a tort cause of action against the unions' strike. The Court of Appeal, in contrast, found that PERB had no jurisdiction because the lawsuit was premised upon a tort cause of action and the court saw no arguable basis on which the strike could be found to constitute an unfair practice under EERA. *See* 33 Cal. 3d at 952. However, the Supreme Court reversed, giving in-depth treatment to the exclusive jurisdiction doctrine.

First, the Court adopted the rule developed by the federal Supreme Court in determining whether the National Labor Relations Board has exclusive jurisdiction over a private sector labor dispute – exclusive jurisdiction exists where the ***conduct*** at issue is "***arguably protected or prohibited***" by the statute. *Id.*, at 953. This Court found that the issues raised by strike activity qualified under both prongs – the conduct was both arguably protected and arguably prohibited. *Id.*, at 957 & 960.

Indeed, the Court found that the "arguably prohibited" prong was satisfied even though employer's amended complaint included tort causes

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employee strikes were illegal under the common law. *See, e.g., Los Angeles Unified School District v. United Teachers* (1972) 24 Cal. App. 3d 142, 145 (citing other cases). The *San Diego Teachers* Court recognized that when the Legislature enacted EERA and vested PERB with jurisdiction, exclusive jurisdiction over such issues was effectively transferred from the courts to PERB, exactly as the Legislature has since done with respect to the MMBA.

of action for "conspiring to cause and causing a violation of the California Compulsory Education Law by making it impossible for students to attend school by means of the allegedly illegal strike," as well as for encouraging, advising and inducing the teachers to strike illegally. *Id.*, 33 Cal.3d at 951-952. In addressing the threshold question of PERB's exclusive jurisdiction over such claims, the Court noted that "strikes are an unfair practice under EERA only if they involve a violation of the act's provisions. [citing *San Diego Teachers*]. As a result, the District argues the issues which it could present in court are broader than the issues that it could present to PERB. In the District's view, PERB would be concerned only with the existence of unfair labor practices – asserted to be a minor aspect of this case – and not with the harm to the District and to the public flowing from the allegedly illegal strike itself." *Id.*, at 957.

The Court rejected this argument for two reasons. First, the Court found that "the issue before PERB would have been whether the strike itself was unlawful," the same question that the Superior Court would have to determine, meaning that "the controversy presented in both forums may fairly be termed the same." *Id.* Second, "the District's argument hinges on an assumption rejected by this court in *San Diego Teachers*. It 'presupposes a disparity between public and PERB interest.'... Thus, there is little chance that PERB will ignore the 'larger harm' involved in a teachers' strike. Moreover, it is equally clear that PERB has the authority to take steps to alleviate that harm in order to effectuate its duties and the purposes of the act." *Id.*, 33 Cal. 3d at 957.

While that branch of the exclusive jurisdiction doctrine was alone sufficient to find that PERB had exclusive jurisdiction, in *El Rancho* the Court also went beyond the *San Diego Teachers* analysis to look at the "arguably protected" prong of the doctrine. The Court held that even though EERA "does not provide express protection for economic strikes," the conduct was "arguably protected." *Id.*, at 958. Moreover, as discussed in detail *infra* at pages 20, the arguable protection of strike conduct under the MMBA is quite strong.

In between the Court's decisions in *San Diego Teachers* and *El Rancho*, the Courts of Appeal also contributed to the developing doctrine of PERB's exclusive jurisdiction in strike cases, issuing significant decisions in *Fresno Unified School District v. National Education Association* (1981) 125 Cal. App. 3d 259 and *PERB v. Modesto City Schools Dist.* (1982) 136 Cal. App. 3d 881, 890-895.

In *Fresno*, the Court of Appeals expanded upon the *San Diego Teachers* holding that a union, by engaging in a strike that may have violated the common law rule regarding public employee strike conduct, could be found to have committed an unfair practice. Specifically, the *Fresno* court found that even a strike that is arguably illegal for an entirely different reason – because it violates a contract – also could be found to be an unfair practice, meaning that PERB again has exclusive jurisdiction over such a case. *Id.*, at 268.

In fact, the *Fresno* court noted that the employer's suit included two causes of action – the "first theory asserts that the strike was illegal," while

the "second theory is grounded in the tort of interference with contract." *Fresno*, 125 Cal. App. 3d at 267-268. According to the court, either theory "sets forth what would be, arguably an unfair labor practice." *Id.*, at 268.

Fresno is especially significant because the court clearly explained that the crucial aspect of a preemption analysis is the ***conduct*** being challenged, not the formal description of the legal challenge to that conduct. *Id.*, at 269. Thus, because the conduct at issue in *Fresno* was strike activity, the appellate court found that a stay pending exhaustion of PERB's exclusive jurisdiction was necessary, even though the particular causes of action alleged by the employer were tort and contract theories rather than violations of the labor relations statutes. *Id.*, at 274.

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

> **While it is true that the City's complaint does not mention the MMBA, at this stage in the proceedings, where the only question is PERB's jurisdiction, what matters is whether the underlying conduct on which the suit is based – however described in the complaint – may fall within PERB's exclusive jurisdiction...It is irrelevant that the superior court may have jurisdiction to interpret Charter provisions or grant declaratory relief in other types of disputes, or that the City declines to plead a claim for relief from an unfair labor practice.**

Id., at 945 (internal quotation marks and citations omitted). Thus, as the Court of Appeal found in the instant case (Exhibit A to Petition for Review,

that even a "competent, thorough, and informed" trial judge knows far less about labor relations than the parties to the case, which "amply exemplifies the need to defer to the expertise of PERB" so that it can "promote the improvement of personnel management and employer-employee relations." 136 Cal. App. 3d at 893-94. Thus, the court continued, "we do not believe it would serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results. One of the basic purposes for the doctrine of preemption is to bring expertise and uniformity to the task of stabilizing labor relations." *Id.*, at 895.

B. Effective July 1, 2001, The Legislature Extended PERB's Exclusive Initial Jurisdiction to Cover Cities and Counties

In *Coachella*, 35 Cal. 4th 1072, this Court described the Legislature's recent grant to PERB of jurisdiction over all employers and unions operating under the MMBA:

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

Id., at 1077.

Thus, prior to July 1, 2001, Superior Court was the proper forum for local agencies such as the City, as well as for unions such as Local Three, to resolve legal disputes regarding strikes. In contrast, employers and unions subject to PERB jurisdiction have always resolved legal disputes

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

Id., at 1077.

Thus, prior to July 1, 2001, Superior Court was the proper forum for local agencies such as the City, as well as for unions such as Local Three, to resolve legal disputes regarding strikes. In contrast, employers and unions subject to PERB jurisdiction have always resolved legal disputes concerning strikes by exhausting PERB's jurisdiction, with PERB seeking injunctive relief in court where appropriate.

When the Legislature vested PERB with jurisdiction over the MMBA, the Legislature explicitly defined PERB's powers and duties to be equivalent to its powers and duties under EERA. *See* Gov. Code §3509(a) (incorporating by reference EERA, Gov. Code §3541.3). In vesting PERB with the same powers and duties under the MMBA as it already had under EERA, the Legislature is presumed to have known the existing state of judicial interpretations regarding the nature of those powers and duties. *See, e.g., Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977.

This conclusion draws considerable support from *Coachella*, *supra*, 35 Cal. 4th 1072. In *Coachella*, this Court was asked to determine whether the Legislature's act vesting PERB with jurisdiction over the MMBA had altered in any way the statute of limitations for filing an unfair labor

practice charge under the MMBA. The Court answered in the affirmative, finding that the Legislature, in vesting PERB with exclusive initial jurisdiction over the MMBA, implicitly intended to have PERB apply its traditional six-month limitations period, just as it does with all other statutes under its jurisdiction, even though the MMBA does not reference a limitations period within its text. *Id.*, at 1089. As the Court found:

> **Here, what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges.... By changing the forum – vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA charges – the Legislature abrogated the three-year statute of limitations.**

Coachella, 35 Cal. 4th at 1089.

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

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

Coachella, 35 Cal. 4th at 1089-1090 (emphasis supplied).

These principles apply equally here. The Legislature, in granting

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

C. PERB Has Jurisdiction Even Though the City Did Not Allege a Violation of the MMBA

The City, in arguing that PERB lacks jurisdiction because the City did not allege any unfair labor practice or other violation of the MMBA, ignores the Supreme Court and Court of Appeal cases discussed above. *San Diego Teachers* and subsequent cases arose under EERA, which, like the MMBA, does not contain any language explicitly mentioning any prohibitions or protections regarding strikes. Yet, the appellate courts have nevertheless uniformly held that strike activity is both "arguably prohibited" and "arguably protected" by EERA, meaning that school districts' legal claims challenging strike activity – including injunction actions to prevent irreparable harm to the public – must be brought to PERB irrespective of whether the employers allege violations of EERA.

As discussed *supra* at pages 8-10, the City could have brought an unfair labor practice charge alleging that Local Three was engaging in bad faith bargaining, in violation of the MMBA, by threatening a strike by "essential" public employees. Indeed, the City's argument – that PERB

lacks jurisdiction because the City raised issues in court that are not mentioned in the MMBA – was rejected in *San Diego Teachers* and *El Rancho*. *See, e.g.*, El Rancho, 33 Cal.3d at 957. Notably, the *El Rancho* Court found that PERB had exclusive jurisdiction even though the employer framed its claim as a tort cause of action. *Id*; *accord Fresno*, 125 Cal. App. 3d at 269 (exclusive jurisdiction analysis turns on the type of conduct at issue, not the legal theories asserted regarding that conduct).

Furthermore, the Court of Appeal in the instant case was equally correct in its alternate holding that PERB also has exclusive jurisdiction because the conduct at issue is "arguably protected." (Exhibit A to Petition for Review, at page 19). Indeed, the *El Rancho* Court held that even though EERA "does not provide express protection for economic strikes," strike conduct is "arguably protected." *Id.*, 33 Cal. 3d at 958.

This holding applies equally under the MMBA, as that statute, like EERA, generally protects union activity, without mentioning strikes. *See supra* at 8 fn 5. The "arguable protection" of strike conduct is, in fact, very strong for employees under the MMBA, as this Court specifically held that all MMBA-covered employees have a protected right to strike, other than those whose absence imminently and substantially threatens the public's safety. *County Sanitation,* 38 Cal. 3d at 585 (holding that "the right of public employees to strike is by no means unlimited," and proceeding to limit that right only for "essential" employees).

As this Court held in *County Sanitation*, the MMBA "removed many of the underpinnings of the common law *per se* ban against public

employee strikes" and therefore the MMBA's "implications regarding the traditional common-law prohibition [against strikes] are significant." 38 Cal. 3d at 576. The Court then went on to note that the MMBA specifically extended the right to engage in union activities to city and county employees, and "the right to unionize means little unless it is accorded some degree of protection . . . A creditable right to strike is one means of doing so." *Id.*, at 587 & 588.

In light of this Court's finding that the MMBA provides the foundation for the right of most city and county employees to strike, it is untenable for the City to allege that the issues involved in this action relate only to the "common law" and have nothing to do with the MMBA. Indeed, in *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal. 4th 525, this Court discussed the import and reasoning of its decision in *County Sanitation*, as follows: "We found the traditional common law rule [barring public employees from striking] with no basis in modern labor law, ***particularly in light of the MMBA***...." 7 Cal. 4th at 542 (emphasis supplied). Moreover, the *County Sanitation* Court's reasoning that the "right to unionize" should include a "creditable right to strike" is very significant for the instant analysis – the right to unionize referenced by the Court appears in Government Code §3502, and any interference with the rights set forth in section 3502 constitutes an unfair practice under PERB regulations. *See* 8 Cal. Code Reg. 32603(a).

While the *County Sanitation* decision announced the general rule that MMBA-covered employees have the right to strike unless their absence

on a given day would imminently and substantially endanger the public's safety, *San Diego Teachers* and *El Rancho* leave no doubt that it is PERB that has the expertise to make specific strike-related determinations, on a case-by-case basis, regarding particular strikes carried out at employers under PERB's jurisdiction. *See, e.g.*, *San Diego Teachers*, 24 Cal. 3d at 13 (finding that a court "cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.").

Therefore, even looking only at the "arguably protected" prong of preemption analysis, PERB must have jurisdiction to determine which employees are so "essential" that they may not strike, for that is the only means by which PERB can determine the converse – which employees have the protected right to strike. PERB must regularly make such determinations, for instance, when employees file charges with PERB claiming that their employers have retaliated against them for strike activity which they claimed to have been protected. *See* 8 Cal. Code Reg. 32603(a) (PERB Regulation promulgated to enforce the MMBA, declaring any interference with employees' rights to be a violation of the MMBA). For this reason, if superior courts were to retain jurisdiction to determine whether employees should be enjoined from striking, even though PERB now has jurisdiction over the MMBA, the risk of conflict with PERB's determination of employee rights is quite high – a much higher risk than is necessary to support a finding of exclusive jurisdiction. As noted in *El Rancho*, the purpose of the exclusive jurisdiction doctrine is "to avoid conflict 'in its broadest sense' in the regulation of labor relations." 33 Cal.

3d at 953 (citing federal precedent).

Certainly, at the time that *County Sanitation* was decided, PERB did not have jurisdiction over cities and counties, and therefore determination of these issues was left to the courts. As noted above, the Legislature changed all that effective July 1, 2001. *See Coachella*, 35 Cal. 4th at 1077 (noting that Government Code §3509, added by Stats 2000, ch. 901, §8, constitutes a "fundamental change" which supersedes this Court's holding in *Santa Clara County Counsel Attorneys Ass'n* that courts have jurisdiction over the MMBA). Indeed, the act vesting PERB with jurisdiction over the MMBA twice directs PERB to follow standards previously adopted and followed by the courts. Government Code §§3509(b) & 3510(a).

D. No Exceptions to PERB's Jurisdiction Apply Here

1. The "Irreparable Harm" Exception to PERB's Exclusive Jurisdiction Does Not Apply – PERB's Injunctive Relief Procedures Could Have Provided the City with Adequate Relief

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

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

While the City argues that there is too much delay built into the PERB process (Petition for Review, at pages 3 & 13), the City ignores the facts of this case and settled precedent. Factually, the City asserts that on May 30, 2006, it was given 72 hours notice of potential strike activity – more than enough time for PERB to seek injunctive relief. *See* Petition for Writ of Supersedeas, ¶ 5. Instead of immediately requesting injunctive relief from PERB, the City decided to bypass PERB and attempted to go directly to court, yet the City took a full three days, until June 2, 2006, to prepare papers, provide notice, and appear in Court, by which time strike activity could have already commenced (but had not). *Id.*, ¶¶ 6-7. There is no showing that PERB would have reacted more slowly – even without any notice from the City, PERB appeared at the June 2, 2006 injunction hearing and filed papers one day in advance thereof. *Id.*, ¶¶ 8-9 & City of San Jose's Appendix of Exhibits to Petition for Writ of Supersedeas, Exh. 10. Indeed, there is no evidence that PERB has ever been dilatory in any case,

anywhere in the State, at any point in the past three decades.

In any event, PERB's alacrity is beside the point, because this Court determined that PERB's procedures to enjoin strikes are adequate. In *San Diego Teachers*, this Court stated that in order "to provide an adequate alternative to a party's own lawsuit for an injunction, PERB's power to apply for injunctive relief should be exercisable in response to any aggrieved party's request, not simply on its own motion." 24 Cal. 3d at 10. The Court found that this standard was satisfied. *Id.* In fact, even though PERB at that time was a new agency and had not developed any procedures for processing parties' requests for injunctive relief, the Court nevertheless found that the purely ad hoc approach that PERB was using to resolve injunctive relief requests at the time was adequate. *Id.*, at 11.

Three decades later, PERB now has specific regulations in place and a well-developed history of working as quickly as necessary to process injunctive relief requests so that injunctive relief, if warranted and if sought and obtained, will be obtained in a timely enough manner to be effective. In these circumstances, there could hardly be cause to relitigate the "adequacy of relief" issue already decided by this Court in 1979.

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

In *San Diego Teachers* and *El Rancho*, this Court strongly endorsed PERB's expertise over strike matters and held that PERB's mission includes protection of the public from potentially debilitating effects of a

strike. *San Diego Teachers*, 24 Cal.3d at 11 & 13; *El Rancho*, 33 Cal.3d at 957. Nevertheless, the City wishfully argues that the law is otherwise, based upon a single Court of Appeal decision not involving any actual or threatened strike, *Pittsburg Unified School District v. California School Employees Association* (1985) 166 Cal. App. 3d 875.

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

Before reaching the merits, the *Pittsburg* court found the matter to lie outside of PERB's exclusive jurisdiction, as "the central issue presented to the trial court and on this appeal is whether appellants' conduct represents a corrupt practice within the meaning of Education Code section 35230 or unlawfully places respondent board [of education] members in a conflict of interest of the sort prescribed by Government Code section 1090." *Pittsburg*, 166 Cal. App. 3d at 886. As the Court of Appeal determined, PERB has no jurisdiction to enforce the Education Code, nor does PERB have jurisdiction to enforce the First Amendment, meaning that the "central legal and constitutional questions presented certainly are not within PERB jurisdiction." *Id.*, at 887.

While the *Pittsburg* court had already determined that the matter was outside of PERB's jurisdiction, the court also found that the case would fall

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

Moreover, the *Pittsburg* court found that the "arguably protected" branch of the exclusive jurisdiction doctrine also could not apply given that individual school board members had no means of invoking PERB's jurisdiction (even if PERB somehow had jurisdiction over Education Code violations), because only employers, employees and labor organizations may bring actions in front of PERB. *Id.*, at 888. In this case, in contrast, as discussed above, employers such as the City are free to file charges with

PERB and ask PERB to seek an injunction to protect the public interest.

Thus, the Court of Appeal in the instant case simply followed precedent when it found that the "local concern" exception to PERB's jurisdiction did not apply. (Exhibit A to Petition for Review, pp. 24-25).

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

While the City asserts that the content of a one-page veto message for Assembly Bill 553 has some bearing on the outcome of this Petition for Review, that is not the case, for the reasons explained below.

Assembly Bill 553 ("AB 553") is an unenacted piece of legislation that was originally introduced in February 2007. The bill was introduced because superior courts, faced with time-sensitive TRO requests from public entities seeking strike injunctions, had issued opposite decisions regarding whether to continue entertaining such injunction requests in the wake of the Legislature extending PERB's jurisdiction to cover the MMBA. *See* Motion for Judicial Notice by Operating Engineers Local Union Number Three (October 5, 2007), Exhibit 2 (Assembly Bill 553 Analysis), fourth page ("Supporters go on to state, 'There is currently confusion and uncertainty by some over the jurisdictional issue. There have been some courts which have issued injunctions against strike activity at the request of local agency employers despite the laws passed by the Legislature . . . AB 553 does not change the law but simply clarifies what the Legislature already did and intended in enacting SB 739 in 2000.'").[8]

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[8] On October 18 and 22, 2007, the Court of Appeal granted the parties' cross-motions for judicial notice regarding AB 553 and certain legislative

Thus, AB 553 explicitly stated, in both its original and amended version, that it was "clarifying of existing law" and did ***not*** "expand the Public Employment Relations Board's jurisdiction or authority beyond that previously authorized by the Legislature." (Motion for Judicial Notice by City of San Jose to Court of Appeal (October 9, 2007), Exhibit A (Assembly Bill 553), second page, Sections 1(a) & 1(b)). Indeed, precedent is clear that such clarifying legislation is not intended to change the law:

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

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

Accordingly, the City's reliance on Governor Schwarzenegger's veto message, which occurred after AB 553 was passed by the Assembly and the Senate, is similarly misplaced. Unenacted legislation is of no value in determining legislative intent of the previously enacted legislation. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 1003 fn 4 ("The parties draw conflicting inferences from the fact that in 1991 the Legislature passed a bill, which was vetoed by the Governor, to abrogate [a court decision].

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history document pertaining to the bill.

On reflection, we are unable to draw any relevant inference from this event; it provides no guidance on whether the political branches approved or disapproved of [the court decision] as an interpretation of the existing statutes.") (citation omitted); *People v. Escobar* (1992) 3 Cal. 4th 740, 751 ("In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. Legislative inaction is a weak reed upon which to lean.") (citations and internal quotation marks omitted).

Indeed, California's cities and counties, in opposing enactment of AB 553, acknowledged at the time that AB 553 was an attempt to "preempt" ongoing appellate litigation. *See* Motion for Judicial Notice by Operating Engineers Local Union Number Three (October 5, 2007), Exhibit 2 (Assembly Bill 553 Analysis), fourth page ("Opponents also state 'AB 553 seeks legislative preemption in litigation currently before three California District Courts of Appeals.'"). Therefore, Governor Schwarzenegger's veto simply meant that the issue of PERB's exclusive jurisdiction was not moot and the Court of Appeal, Sixth District, was correct to go ahead and resolve the issue on appeal.[9]

V. CONCLUSION

For the above reasons, the Court should grant the City's Petition for Review, as well as the forthcoming Petition for Review in *County of Contra Costa v. Public Employees Union Local One, et al.* (First Appellate District,

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

Division One, Case Nos. A115095 & A115118, May 22, 2008), Exhibit A to the City of San Jose's Request for Judicial Notice.

Dated: June 3, 2008

Respectfully submitted,

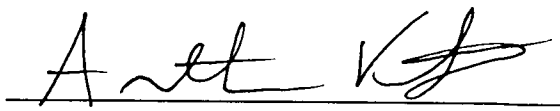
LEONARD CARDER, LLP

By: _____
Arthur Krantz

Attorneys for Respondent
Operating Engineers Local Union
Number Three

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I, Arthur Krantz, counsel to Respondent Operating Engineers Local Union No. Three, hereby certify based on the word count report by WordPerfect 12.0, the word processing system that generated this brief, that this brief, including footnotes, contains 8,145 words.



ARTHUR KRANTZ

PROOF OF SERVICE

I am employed in Alameda County, California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1330 Broadway, Suite 1450, Oakland, CA 94612. On June 4, 2008, I served copies of the within:

ANSWER TO PETITION FOR REVIEW

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

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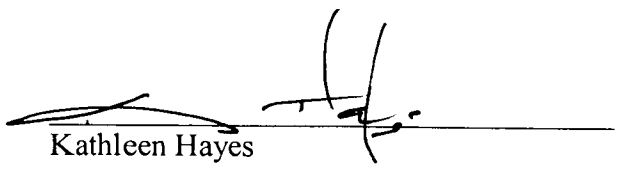
In addition, I caused to be served by UPS overnight delivery an original and thirteen copies of the aforementioned document, addressed as follows:

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on June 4, 2008.



Kathleen Hayes