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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

State Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

I

INTRODUCTION

The Answer Brief of the City of Los Angeles (the "City") is premised almost entirely on its own mischaracterization of what will be decided in the arbitration sought by the members of Petitioner Engineers and Architects Association ("EAA"). Specifically, the City presumes, without any basis, that if EAA is successful at arbitration, the arbitrator will enter an unlawful order "overturning" the City's furloughs decision. But its overwrought concern with *remedy* has nothing to do with whether the arbitration EAA seeks would result in an unlawful delegation. It would not for the reasons EAA outlined in its Opening Brief, many of which the City ignored or failed to respond to. Indeed, the City inappropriately and belatedly attempts to shift the focus of this case away from the delegation question. (See Part IV, *infra*.)

The City fails to meaningfully distinguish or provide any reason why *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 and *Taylor v. Crane* (1979) 24 Cal.3d 442 should be overruled. Those cases together establish that MOUs, including wage-and-hour provisions, are binding and enforceable, as are arbitration clauses therein. As such, they are the keystones on which grievance arbitration and stable labor relations at the city and county level in California have been built. (See OB at pp. 17-18, 25-28, 42-43.) And this Court's subsequent cases

have confirmed that municipalities cannot use their charter powers to abrogate the collective bargaining or MOU rights of their employees. In fact, a Los Angeles City Attorney opinion letter proffered by the City essentially admits that *Taylor* disposes of the issues in this case. (See Part II.A, *infra*.)

The City still does not adequately explain what municipal powers would be unlawfully delegated to the arbitrator, especially given that it *already* exercised its discretion and made the fundamental policy choices to: (1) negotiate and ratify MOUs setting wages and work hours, and containing a broad grievance arbitration provision; and (2) enact a subsequent ordinance for the purpose of furloughing city employees. Instead, it relies on a stale theory of municipal authority that this Court's precedents have long rejected: that a city's local laws trump collective bargaining agreements entered into and ratified under *state* law. (See Part III, *infra*.) What is more, the unfettered municipal powers arguments the City advances run afoul of the state and federal contracts clauses.

The City improperly attempts to recast the issue before this Court, and also invites it to wade into the merits of the parties' dispute in arbitration by interpreting and applying the terms of the parties' MOUs (i.e., management rights and arbitrability). But this Court granted review to answer the following question: "Whether a charter city may arbitrate disputes over collectively-bargained wage and hour provisions without

unlawfully delegating its discretionary budgeting and salary-setting authority to the arbitrator?" (Petition at p. 1.) None of the City's merits-related arguments address that question. In sum, this Court's inquiry is whether the arbitration EAA seeks can take place, not what the result of that arbitration should be.

This Court should reverse the court of appeal's judgment and affirm that the received wisdom of *Glendale* and *Taylor*—i.e., that collective bargaining agreements with grievance arbitration and wage and hour provisions are binding and enforceable against public employers—still holds true today.

II

THE CITY DOES NOT EXPLAIN WHAT IS BEING "UNLAWFULLY DELEGATED" TO THE ARBITRATOR AND ASSUMES THE ARBITRATOR WILL ISSUE AN UNLAWFUL REMEDIAL ORDER

The City concedes it has already (1) exercised its discretion to negotiate and ratify the MOUs with arbitration and wage-and-hour provisions, and (2) exercised its discretion to enact a city-wide furloughs ordinance. Yet it insists that arbitration of whether the second act conflicts with the first impermissibly delegates to the arbitrator the City's discretionary powers. It does not, for the reasons EAA outlined in its Opening Brief (at pp. 30-46), many of which parallel the reasoning of the City Attorney's own Opinion Letter 85-28. (City's 4RJN, Ex. 1 [LA City

Attorney Opinion No. 85-28 (July 26, 1988)] [hereinafter, "City's Opinion Letter" or "Opinion Letter"].)

A. The City's Opinion Letter Confirms Grievance Arbitration Does Not Result In Any Unlawful Delegation

The City's Opinion Letter recognizes that *Taylor v. Crane* (1979) 24 Cal.3d 442 "definitively answered" that grievance arbitration is not an unlawful delegation when (1) the City retains initial discretion to act and (2) there are adequate judicial safeguards, including vacatur. (See Opinion Letter at p. 10.) It further acknowledges that *Taylor*'s arbitration clause was "similar in its breadth to that contained in the ERO's definition of 'grievance in § 4.801'" (*ibid.*), which substantially parallels that of the MOUs. (See, e.g., AA 1:103.) Accordingly, the Opinion Letter explains that the City Attorneys' office "revised its [earlier] position . . . on the delegation issue" and determined that, even to the extent there was any delegation at all, "Binding Grievance Arbitration is a Permissible Delegation of Governmental Authority." (Opinion Letter at p. 10.) The Opinion Letter confirms there is no unlawful delegation here. (See *id.* at pp. 9-11). The City nowhere explains the apparent contradiction between the City Attorney's position in the Opinion Letter that grievance arbitration is not an unlawful delegation and its litigation position in this case.

The City's invocation of "interest arbitration" and "decision[al] and effects bargaining" principles in the Answer Brief does not change the

result. According to the City, interest arbitration principles apply because the court of appeal was concerned with "the inevitable impact on City government of allowing arbitration of these grievances to proceed," i.e., it would "impact policy matters." (Answer at p. 52, internal quotations and citations omitted.) But unlike interest arbitration, the arbitration here would not create new contractual obligations for the City, but would instead merely *enforce* the ones it already agreed to in the MOUs, terms the City was capable of making "more or less precise." (See OB at pp. 33-39; *Taylor, supra,* 24 Cal.3d at p. 453.)

Similarly, the City's new reliance on the distinction between "decisional and effects bargaining" actually undercuts its argument. According to the City, EAA's grievances "challenge the emergency furlough decision itself," rather than its "implementation and effects" on EAA members, purportedly in violation of the City's reserved "management rights." (Answer at pp. 30-31.) That mischaracterizes the relief EAA members seek in arbitration. It also incorrectly presumes that the "furlough decision itself" falls within management prerogative—a question the court of appeal deemed it need not answer to reach the unlawful delegation issue at the center of this case. (See Slip Op. at pp. 18-19.) Moreover, this Court previously rejected the notion that furloughs are a management prerogative exempt from the scope of bargaining in

construing the Dills Act, a parallel collective bargaining scheme applicable to state employees:

> [T]he issue whether an employee's wages may be reduced by the implementation of a mandatory furlough (and, if so, by what amount and with what input from the recognized employee organization) lies at the heart of the matter of "wages, hours, and other terms and conditions of employment" that are the subject of an MOU. Accordingly, we conclude that under the Dills Act[1] a state employer's unilateral authority to impose such a furlough on represented employees (in the absence of an impasse) is governed by the terms of the applicable MOU, rather than by any general statutory provision that applies in the absence of an MOU.

(*Professional Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040-1041 [footnote added]; accord *International Assn. of Fire Fighters v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 277.) Thus, if provisions of the MOUs preclude furloughs (the very issue to be decided by the arbitrator in this matter), they are by definition ***not*** a "management right."[2]

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[1] The scope of bargaining is identical in relevant respects under Meyers-Milias-Brown Act, Government Code § 3500 *et seq.* ("MMBA") and the Ralph C. Dills Act, Government Code section 3512 *et seq.* (See Gov. Code §§ 3504 and 3516.)

[2] The City cites *Fire Fighters Union, Local 1186 v. City of Vallejo ("Vallejo")* (1974) 12 Cal.3d 608, 621-622, as supporting its position that imposing furloughs is a "management right." (Answer at p. 31.) But that case held that imposition of layoffs, not furloughs, were management prerogative. *Professional Engineers, supra,* makes plain that the reasoning of *Vallejo* does not extend to furloughs.

EAA's challenge here is not to the City Council's decision to enact its furloughs ordinance; rather, it is to the City's attempt to apply that ordinance to a group of employees who have conflicting wage and hour provisions established in their previously-ratified MOUs. Accordingly, the City's attempt to distinguish *Taylor* and *SEIU v. City of Los Angeles* (1996) 42 Cal.App.4th 1546 falls flat. The City insists those decisions involve "arbitral review of operational decisions; i.e., lower level decisions that merely implement a basic policy already formulated." (Answer at p. 50, internal citations and quotations omitted.) But that is exactly what the arbitrator in this case will be performing. He or she will not exercise any "general policymaking power"—that was accomplished with the City's ratification of relevant wage and hour provisions in its MOU. Instead, the arbitrator will merely "determine facts and then apply them to the [City's] previously established polic[ies]." (*Id.* at p. 51.) "The only task left to the arbitrator is 'to interpret and apply terms which the city council itself has created or agreed to and which it is capable of making more or less precise.'" (*SEIU, supra,* 42 Cal.App.4th at p. 1554 [quoting *Taylor, supra,* 24 Cal.3d at p. 453, internal brackets omitted].)

B. The City Is Unduly Concerned With The Arbitrator's Remedy, Which It Presumes Will Be Unlawful or One It Cannot Satisfy

At its core, the City's argument is essentially that the arbitrator will enter an unlawful remedial order "overturn[ing]" the furlough

ordinance. In its view, such an order would "second-guess the manner in which [the] City Council has exercised its discretionary powers to manage the City's finances during a fiscal emergency" (Answer at pp. 53-54) or, worse, "validate or overturn the City Council's discretionary policy decisions to reduce salary appropriations and to implement a new work rule . . . to preserve essential public services . . . ." (*id.* at p. 55). Specifically, the City argues "the arbitrator would be substituting his or her judgment for that of the City's elected officials, effectively rewriting the City's budget . . . . As such, the impact of arbitrating this dispute will be . . . a decision and remedy that will affect the allocation of public resources, the level of public services, and potentially an increase in taxes." (*Ibid.*) The City's parade of horribles is dramatic, but wildly inaccurate.

First, notwithstanding the City's rhetorical excesses, if EAA prevails, there is no reason to assume an arbitrator will enter an unlawful order when he or she can craft a lawful one. (See OB at p. 39.) As explained in the Opening Brief (at pp. 45-46), if EAA is successful at arbitration, the arbitrator *could* enter a remedial order enforcing the MOUs, but such an order would not overturn citywide policy. (See *id.* at pp. 36-40, 45-46.) The City has *already* made the relevant policy decisions to furlough employees citywide, and any arbitration order would only impact those covered by the wage and hour provisions of the MOUs. Other City employees would not be affected.

Second, even if the arbitrator attempted to make citywide policy, the resulting order would—and *should*—be vacated as exceeding his or her authority. (*Taylor, supra,* 24 Cal.3d at p. 452; Code Civ. Proc. § 1286.2.)[3]

Third, the City's entire argument is premised on the unsupported assumption that a monetary remedy would be improper and that the City's willingness to takes steps to enable it to pay such a remedy has bearing on the delegation issue in this case. Yet, if the arbitrator does order a cash remedy, this would be no different than other contexts where a government entity is directed to pay monetary damages for, e.g., breach of contract or a tort. No case has held that a trial court's power to order such a payment in any way unlawfully infringes upon a government entity's discretionary authority.

By contrast, early in California's history this Court recognized that "a subordinate municipal body, which, although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its

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[3] The City insists safeguards are insufficient to cure unlawful delegations involving "discretionary" as opposed to "legislative" power, especially when a city has no statutory authority to delegate discretionary power. (Answer at pp. 47-52.) But, the City of Los Angles *is* authorized by the City Charter and the ERO to arbitrate disputes over "the interpretation or application" of MOUs. (See OB at pp. 8-9; ERO section 4.865 [mandating grievance arbitration in all MOUs with the City].) And *Taylor* held that vacatur was an adequate safeguard that prevented any unlawful delegation of discretionary authority. (*Taylor, supra,* 24 Cal.3d at p. 452; accord Opinion Letter at p. 9.)

powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction as any other body or person, natural or artificial." (*Spring Val. Waterworks v. City and County of San Francisco* (1890) 82 Cal. 286, 310-311; see also Government Code section 815.2 [municipality may be subject to liability] and sections 970-971.2 [outlining procedures for enforcement of judgments against municipalities].) Indeed, even if the arbitrator ordered such a remedy, the City would retain its full discretion to decide how to satisfy the judgment in accordance with its policy choices.

In sum, the City *itself*—rather than the arbitrator— will determine and have the last word on "the allocation of public resources, the level of public services, and potentially an increase in taxes." (Answer at p. 55.) That ensures that the City Council retains its ultimate control and accountability to the Citizens of Los Angeles, and that arbitration would not "interfere with the relationship between the local electorate and their elected representatives" or "remove [ultimate] policy matters from [the City's] discretion." (Answer at pp. 45, 46.)

At a more fundamental level, even in arbitration the City retains ultimate discretion because it negotiated and ratified the applicable terms and conditions, as well as the scope, of the arbitration at issue in this case. It and EAA together negotiated the terms of the arbitration, including what

is arbitrable. The City Council then independently ratified those terms. As the Opinion Letter explains:

> The City Council provided for arbitration of unresolved employee grievances in the City's [ERO]. *We have concluded that delegation of authority to arbitrators in grievance matters is lawful.* Moreover, memoranda of understanding which include provisions for binding arbitration of grievances have been entered into by the various City departments and have been approved by the City Council. *In our opinion, those provisions are valid.*

(Opinion Letter at pp. 9, 11 ["*Delegation of authority*, therefore, *does not present a problem* in establishing binding arbitration of unresolved employee grievances"] (emphases added, internal citations omitted).)

That ultimate control over the arbitration process means there is no unlawful delegation of the City of Los Angeles' discretionary authority. (See, e.g., *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 24 ["[i]t is difficult to imagine how the city herein could have more completely retained ultimate control over those matters involving the exercise of judgment and discretion"].)

III

THE CITY IGNORES THIS COURT'S PRECEDENTS CONFIRMING THAT A CITY'S LOCAL LAWS CANNOT ABROGATE COLLECTIVE BARGAINING RIGHTS OR RATIFIED MOUS PROTECTED BY STATE LAW

The City insists that it "may not agree to an MOU which purports to impair the obligations of the City's elected officials under the Charter" in a fiscal emergency. (Answer at p. 19.) That argument is a red

herring. At issue here is whether the City can exercise its discretion to create contractual obligations and then, in a second act of discretion, endeavor to breach those obligations and escape arbitral review. As EAA explained in the Opening Brief (at pp. 25-27, 40), the MOUs' arbitration clause and wage-and-hour clauses are both enforceable under *state* law.

A. The City's Powers Under the City Charter and the ERO Do Not Supersede *State Law* Which Makes the MOUs Binding and Enforceable

Under the circumstances of this case, the MOUs—voluntarily negotiated and ratified by the City pursuant to *state law* (i.e., the MMBA)—take precedence over the claimed limitations in the LA City Charter and ERO. (See OB at pp. 23-27, 51-55.) This Court has long harmonized a charter city's powers with the requirements of the MMBA. (See, e.g., *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 65-66.) But, this Court has further recognized that, because collective bargaining is a matter of statewide concern, when a charter city enters into a collective bargaining agreement under the MMBA, that city cannot rely on its charter powers to legislate around that agreement. (E.g., *Glendale, supra,* 15 Cal.3d at p. 336; *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach ("City of Seal Beach")* (1984) 36 Cal.3d 591, 600, fn. 11; see also *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 782 [even voter initiatives cannot legislate around MOUs].)

Thus, while it is true that the City has discretion to enact whatever ordinances it sees fit in accordance with its priorities, that does not mean such ordinances *ipso facto* may be applied to EAA members who are protected by an MOU. Otherwise, MOUs would be meaningless if they were not enforceable against subsequent attempts to legislate around them. (See *Glendale, supra,* 15 Cal.3d at p. 336 ["What integrity would be left in government if government itself could attack the integrity of its own agreement?"].)

1. The City advances a theory of municipal power rejected in *Taylor v. Crane.*

The City advances two new arguments: (1) the MOUs' grievance procedures are limited to departmental disputes because its Employee Relations Ordinance ("ERO") is a substantive limitation on them, and (2) the City may not contract away its "police powers." (Answer at p. 32-35, 23-25.) The first has no merit; the second does not apply here.

The City unwittingly adopts the position of the dissent in *Taylor.* Justice Richardson's dissent argued that charter provisions or ordinances reserving ultimate city authority over specific municipal affairs necessarily preempt collective bargaining agreements entered into pursuant to state law. (See 24 Cal.3d at pp. 454-457 [Richardson, J. concurring and dissenting] ["I would conclude that the arbitration procedure provided in the [MOU] contravenes the charter and ordinances of the City of Berkeley,

and is therefore void"].) That position was not adopted by the majority, and even Justice Richardson determined that because, *inter alia*, the City of Berkeley had ratified the MOU it was estopped from challenging its validity. (*Id.* at p. 457).

The development of the case law since *Taylor* has further eroded that argument. (See OB at pp. 24-27 [collecting cases affirming that collective bargaining as statewide concern pre-empts inconsistent local laws infringing collective bargaining rights].) And in *this* case, there is no conflict between the City Charter and City ordinances, because the grievance procedures in the MOUs fully accord with and were authorized by both. (See OB at pp. 8-9.)

Understood in this light, the City's two new arguments are fundamentally flawed.

a. Grievances are not limited to departmental disputes by the ERO or MOUs.

At the outset, EAA objects that the City's argument regarding the scope of the arbitrability provision under the ERO improperly treads on the merits of the parties' disputes, because it is a backdoor to argue about the scope of the MOUs' grievance provisions. Moreover, like the court of appeal, this Court need not decide the issue of arbitrability under the particular ERO/MOUs at issue in this case in order to decide whether, as a matter of law, the arbitration EAA seeks is barred as an unlawful

delegation. (See Part IV, *infra*; see also Slip Op. at pp. 18-19 [noting ambiguity on issue of arbitrability that would ordinarily be remanded but for unlawful delegation ruling].)

Regardless, the ERO is not a substantive limitation on the MOUs. First, even if the ERO's arbitration provision were narrower than that in the MOUs (and it is not—see *infra*), the parties' arbitration clause sets the scope of the arbitration. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372-373; *City of Seal Beach, supra,* 36 Cal.3d at p. 600 [MOUs entered into under MMBA "prevail[] over local enactments of a chartered city"]; see also cases at OB at pp. 25-27 [same].) Moreover, under both the ERO and the MOUs, a "grievance" is broadly defined as *"[a]ny dispute* concerning the interpretation or application of a written [MOU] *or* of departmental rules and regulations . . . ." (ERO § 4.801 and AA 1:103, emphasis added.) The City inexplicably ignores half of the definition of a "grievance" when it insists that grievances by design are only meant to address departmental disputes. And that position is at odds with its own Opinion Letter, which recognizes at least two types of grievances: "(a) those that claim violation of certain departmental rules and regulations and (b) those that claim violation of MOU provisions." (See Opinion Letter at p. 15.)

Nor is the "structure" of the grievance process a substantive limitation on the arbitration EAA seeks. (Answer. at p. 32.) The City

asserts that there is "no provision for arbitration of City Council decisions," and "[g]rievances are initiated by an informal discussion between employees and their supervisors, not with [the] City Council." (*Id.* at p. 33.) But a City Council decision *can* result in impairment of the "application of a written [MOU]" and trigger the grievance language of the ERO and MOUs. For example, if a duly-ratified MOU provided that covered employees would be paid at $25.00 per hour, and the City Council subsequently passed an ordinance capping hourly rates of pay at $20.00 per hour, there can be no question that City Council action, as applied to covered members, would be subject to arbitral review. (See *Glendale, supra,* 15 Cal.3d at p. 332 [holding MOU with wage and hour provisions is binding on the parties and enforceable notwithstanding subsequent city ordinance purporting to reduce contracted-for salaries]; *Taylor, supra,* 24 Cal.3d at pp. 449, 451-452 [grievance arbitration clauses enforceable].) It does not follow, however, that arbitration over such an event would result in an unlawful delegation of the City's powers.

The only authority the City cites for its argument is its own Opinion Letter, which is meagerly supported on this point. (See Answer at p. 35.) According to the Opinion Letter, the broad "definition of grievance must be read in conjunction with the 'standards' the ERO mandates for grievance procedures[:] 1. Informal discussion with the employee's immediate supervisor . . . and 2. Binding arbitration for grievances

involving most departments and advisory arbitration for grievances involving the proprietary departments." (Opinion Letter at p. 15, internal citations and quotations omitted.) From this, the Opinion Letter concludes that "[i]f grievances were intended to challenge actions of the Council, departmental consideration . . . would not have been utilized." (*Id.*) But, again, EAA does not seek to "challenge" the City Council's action in passing the ordinance or seek to have the ordinance amended or repealed. Rather, in arbitration EAA challenges the *application* of the ordinance (i.e., imposition of furloughs) on its members during the life of its MOUs. By enforcing the MOUs the arbitrator will ***not*** rewrite the City's furloughs ordinance; but, rather, he or she will, consistent with the parties' agreement, adjudicate whether the MOUs prohibit application of that ordinance as to EAA members.

Moreover, requiring initiation of grievances at the department-level does not limit the permissible *scope* of grievance arbitration. And there are numerous reasons why initiating grievances at the department level makes practical sense. First, in accordance with general grievance arbitration principles, it may simply be more expeditious and efficient to bring grievances to one's supervisor. (OB at pp. 22-23.) Second, because grievances do not challenge City Council actions, but rather the *effects* of those actions on a grievant, it also makes sense that grievances should be initially directed at those individuals who determine how to implement City

Council policy decisions on the grievant. Third, even where a grievance might directly challenge City Council action, the City Council could have lawfully delegated to department heads initial authority over such matters before proceeding to arbitration.[4]

Regardless, limiting grievances to departmental disputes would fail to give full effect to the purposefully-broad and negotiated definition of a "grievance" under the MOUs. That means there would be no outlet for prompt resolution of grievances pertaining to "the interpretation or application" of MOUs, contrary to public policy favoring expeditious resolution of labor disputes. (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 184 fn. 4 [grievance arbitration is a "safety valve for troublesome complaints" and complainants, and a pivotal mechanism to maintain peaceful labor-management relations]; see also OB at pp. 19-23.)

b. The City's police powers are irrelevant.

The City asserts its "police powers" cannot be limited by any MOU (Answer at pp. 23-25), but nowhere defines the scope of these powers or even explains how they apply to this collective bargaining case. Instead, the City broadly argues that whatever those police powers may be, they cannot be "contractually restricted." (*Id.* at p. 23.) But arbitration in

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[4] The departments are additional signatories to the MOUs, but what makes the agreements effective is the City Council's ratification. (*Glendale, supra*, 15 Cal.3d at pp. 335-336; Gov. Code sections 3500, 3505.1.)

this case in no way prevents the City from enacting ordinances or otherwise legislating in response to fiscal emergencies, whether pursuant to police powers or other authority. EAA does not "assert[] that the City has lost the right to take all necessary actions in an emergency by virtue of the governing MOUs" (*id.* at 24), but rather EAA's position is that, *once the City has acted*, an arbitrator can properly assess whether its actions contravene the terms of pre-existing contractual obligations the City negotiated and ratified, and, if so, what the appropriate remedy is.

2. The City has no authority to de-fund MOUs.

The City argues that it "retain[s] ultimate control over the appropriation for salaries required by the governing MOUs." (Answer at p. 21.) But not only does that argument go to the merits of the parties' dispute in arbitration, it has nothing to do with the delegation question at issue here. Regardless, the City is wrong on this point as well (see OB at pp. 50-51), and its appropriations and budgeting arguments are all premised on its speculative assumption the arbitrator will issue a cash-remedy the City cannot pay (see Part II.B, *supra*). The City cites no direct authority allowing it to de-fund MOUs in the same way as Government Code section 3517.7 allows the state Legislature to do so.

B. The City's Overbroad Argument That It Has Authority to Disregard MOUs Does Not Survive The Contracts Clause

The City maintains it has authority under the MMBA, City Charter, and ERO to breach the MOUs in a fiscal emergency and to refuse arbitration. But none of the City's arguments are persuasive for the reasons outlined above and in the Opening Brief (at pp. 23-30, 47-51), and it provides no authority for an otherwise-unconstitutional impairment of contract under the circumstances of this case.[5]

According to the City, EAA is estopped from challenging the existence of a fiscal crisis. EAA has never challenged that Los Angeles faced significant budgetary difficulties, but that does not automatically mean those difficulties rise to the level of a fiscal emergency under the contracts clause. Regardless, the issue here is not the existence of a fiscal emergency, but rather the City's unyielding position that the existence of an

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[5] The City argues this issue was not raised in the Petition for Review. But EAA raised the contracts clause argument in its Reply Brief in Support of its Petition for Review (at pp. 16-17) directly in response to the City's arguments regarding its purportedly-broad authority over already-ratified MOUs. Further, the City can claim no prejudice because EAA also briefed the matter in its Opening Brief, to which the City responded with almost thirteen pages of argument.

emergency allows it to disregard the arbitration provision in the MOUs.[6] The contracts clause says otherwise. (See OB at pp. 51-55.)

The City also insists that "there has been no determination that the governing MOUs have actually been impaired" (Answer at p. 65)—but that is exactly the relief that EAA seeks in this action: the right to proceed to arbitration to have that determination made by an arbitrator in accordance with the parties' agreement. Moreover, courts that have assessed the impact of furloughs on existing collective bargaining agreements have found such impairment. (See OB at pp. 53-54.) *San Diego Police Officers' Association v. San Diego City Employees Retirement System* (9th Cir. 2009) 568 F.3d 725 is not contrary. In that case, the Ninth Circuit found no contracts clause issue exactly because there was no contract in place (i.e., no binding MOU). (*Id.* at p. 732 ["Bargaining sessions between City and Association were unsuccessful"].) Whatever rights a city employer might have when no MOU is in place says nothing about constitutional constraints on its powers when there is a binding and enforceable one in place.

The City further argues its furloughs ordinance is "reasonable and necessary" under the contracts clause because its Employee Relations

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[6] The Employee Relations Board's decision cannot collaterally estop EAA from challenging the existence of a fiscal emergency. (See Part III.C, *infra*.)

Board ("ERB") supposedly so found. (Answer at pp. 63, 66.) But as outlined below, the ERB's order does not help the City and does not apply here, because the ERB did not examine impairment of the MOUs, let alone the reasonableness and necessity of such impairment, vis-à-vis other available policy choices.

That is, when "government is attempting to modify governmental financial obligations" the City's actions are subjected to heightened scrutiny in light of the availability of less drastic measures. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 310.) "[I]mpairing the obligations of its own contracts" is not "on par with other policy alternatives" available to government entities. (*Id.* at p. 308.) To make that assessment, a court examines other available policy alternatives, including less "politically feasible" alternatives such as "reducing non-contractual . . . services and raising taxes and fees." *Opinion of the Justices (Furlough)* (1992) 135 N.H. 625, 635-636. The ERB decision does none of this.

Whatever fiscal straights the City may have been in, it had less drastic alternatives than breaching the contracts with its employees. What is more, that is no reason to preclude the contractual arbitration EAA seeks.

C. The ERB Decision Does Not Help the City or Answer the Questions Here

The City touts the decision of the Employee Relations Board, but that decision does not help the City. (Attached as EAA's MJN Ex. 3.) First, the ERB's authority is limited to "investigat[ing] and resolv[ing] charges of unfair employee relations practices" under the City's Employee Relations Code. (Answer at p. 70; ERO § 4.810, subd. (f)(4).) The ERB has no authority to interpret MOUs.

Second, the ERB did *not* decide the unlawful delegation issue in this case. Instead, in accordance with its jurisdictional limitations, it: (1) expressly found the City violated *the ERO* by refusing to bargain over its decision to impose furloughs; (2) rejected the City's argument that the "management rights" language in the ERO allowed it to impose furloughs; and (3) as a remedy, directed the City "shall post" a notice that the City shall "cease and desist from refusing to meet and confer with [EAA] over the decision to impose furloughs." (See MJN Ex. 3.)

Third, the ERB found that *even a fiscal emergency did not excuse the City from complying with the ERO*:

> An emergency did exist, which excused the City from the normal duty to complete the meet and confer process . . . . However, because the City announced it would not bargain over the decision and refused to bargain with EAA over the decision itself, Respondent's refusal to bargain over the decision to

impose furloughs violated the Employee Relations Ordinance.[7]

(*Id.* at p. 2.)

Fourth, in substance (as outlined above) and in form (as outlined below) the ERB's order undermines the City's argument. The adjudicative function the ERB performed is just like that the arbitrator will perform in the arbitration EAA seeks. That is, the arbitrator will examine the City's enactment of the furloughs ordinance through the lens of some external body of law (for the ERB, the ERO; for the arbitrator, the parties' MOU) and decide whether the City violated it.

That adjudicative review is not an unlawful delegation of City discretion, because the City already exercised its discretion to enact the furloughs ordinance, and because the City negotiated and agreed to the arbitration. The City's overreaching argument here would preclude even its own ERB from exercising its powers to review the City's action for violations of the ERO. The City's position thus threatens not only contractual grievance arbitration, but also a municipality's ability to enforce its own employee relations ordinance.

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[7] The ERB's finding of a fiscal emergency was expressly tied to Government Code § 3504.5's notice provision and was not a finding of fiscal emergency under the contracts clause. (See, e.g., MJN Ex. 3 at p. 2.)

IV

THE CITY'S "MANAGEMENT RIGHTS" AND ARBITRABILITY ARGUMENTS ARE BEYOND THE SCOPE OF REVIEW AND IMPROPERLY GO TO THE MERITS OF THE PARTIES' DISPUTE

The sole issue on which this Court granted review is that in EAA's Petition for Review, which is quoted in EAA's Opening Brief on the Merits. (Rules of Court 8.516, subd. (a)(1) and 8.520, subd. (b)(2)-(3).) That issue, in relevant part, is: "Whether a charter city may arbitrate disputes over collectively-bargained wage and hour provisions without unlawfully delegating its discretionary budgeting and salary-setting authority to the arbitrator?" (Petition and OB at p. 1, respectively.)

The three new questions posed by the City in its Answer Brief on the Merits (at pp. 1-2) are ***not*** fairly encompassed in the unlawful delegation question and are, thus, beyond the scope of review.[8] This Court need not resolve these issues in order to answer the unlawful delegation question. The court of appeal itself left the "management rights" and arbitrability questions unanswered because it was unnecessary to resolve them before making its unlawful delegation ruling. (See Slip Op. at pp. 18-

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[8] One of those questions was drawn from a summary intended for the general public which on its face explains: "The statement of the issue or issues in each case set out below does not necessarily reflect the views of the court, or define the specific issues that will be addressed by the court." (See *Issues Pending Before The California Supreme Court In Civil Cases*, available at http://www.courts.ca.gov/13648.htm.)

19.) Moreover, the City's new questions would require construction of the MOUs, which is not necessary to answer the issue now before this Court. (OB at pp. 3, 55-56.)

As to election of remedies, the ERB correctly decided that issue against the City, and even the court of appeal expressed great skepticism about the City's argument on this point. Both correctly saw that the issues before the ERB were distinct from those before the superior court. (Slip Op. at p. 5 fn. 5; EAA's MJN Ex. 3 at p. 2.) And, as noted above, the ERB's jurisdiction is limited to interpreting the ERO, rather than the MOUs at issue here. (See Part III.C, *supra.*)

The City belatedly argues for the first time that EAA waived its right to arbitration. But under this Court's precedents, arbitration "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." *Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (cited in Answer at p. 56). Specifically, a party arguing waiver must show the following:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps

> [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

(*Id.* at p. 1196, internal citations and quotations omitted.) The City makes an inadequate showing on all these fronts and, in particular, does not even argue, let alone satisfactorily show, it was prejudiced. (See Answer at pp. 56-57.) At this stage of litigation, it is EAA's members who would be prejudiced by any finding of waiver based on the City's meager showing.

V

CONCLUSION

Accepting the City's argument will eliminate meaningful grievance arbitration regarding the interpretation and application of duly-ratified MOUs, and potentially flood our superior courts with lawsuits that would have otherwise been adjudicated in arbitration (assuming the courts themselves were immune from the City's unlawful delegation charge). This Court should reaffirm the principles of *Glendale* and *Taylor* that negotiated and ratified MOUs are enforceable against public employers.

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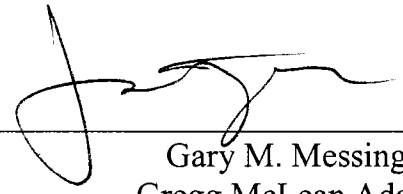
Accordingly, this Court should reverse the judgment of the court of appeal and direct it to enter an order denying the City's writ of mandate and to remand the case to the trial court for enforcement of that court's order compelling arbitration of EAA members' grievances.

Dated: February 2, 2012

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By 

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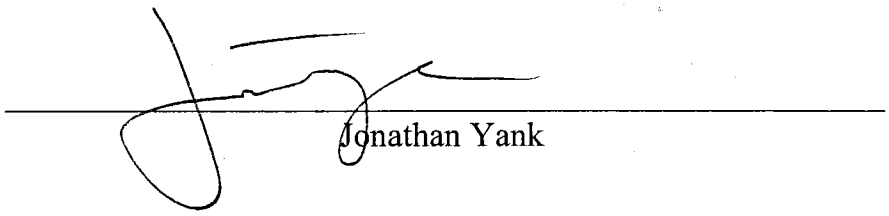
WORD COUNT CERTIFICATION

Pursuant to Rule 8.520 (c) of the California Rules of Court, I certify that the attached brief contains 6,317 words, as determined by the computer program used to prepare the brief.

Dated: February 2, 2012



Jonathan Yank

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 February 2, 2012, I served the enclosed:

REPLY BRIEF ON THE MERITS

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 February 2, 2012, at San Francisco, California.

Janine Oliker

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