No. S192828
(2nd Civil No. B228732)
(L.A.S.C. Case No. BS126192)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest.

After a Decision by the Court of Appeal, Second Appellate District, Division Three, Case No. B228732

PETITIONER'S SUPPLEMENTAL BRIEF ON ISSUE OF INARBITRABILITY UNDER THE MANAGEMENT RIGHTS CLAUSE OF THE MEMORANDUMS OF UNDERSTANDING

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. THE MOU GRIEVANCE PROCEDURE AND MANAGEMENT RIGHTS CLAUSE 2

III. THE CITY'S DETERMINATION THAT EMPLOYEE FURLOUGHS WERE NECESSARY TO MEET A FINANCIAL EMERGENCY IS NOT A PROPER SUBJECT FOR ARBITRATION UNDER THE MOUS 5

A. The MMBA and the Ordinance Specifically Authorize the City to Exempt Certain Subject Matter from Collective Bargaining and the Grievance Process 5

B. The MOU Management Rights Clause Excludes City Management's Decision to Furlough Employees Due to a Financial Emergency from Arbitration 9

C. City Council Actions are Beyond the Scope of the Department-Oriented MOU Grievance Procedure 14

D. Arbitration of the Emergency Furlough Decision Would Annul, Set Aside or Conflict with the City Council's Exclusive Authority Under the City Charter to Manage the City's Finances 16

TABLE OF CONTENTS (cont.)

PAGE

E. The MOUs Do Not Contain a Clear and Unmistakable Waiver of the City's Right to a Judicial Forum for Resolution of Claims Challenging the City Council's Statutory Authority to Act Swiftly to Address a Fiscal Crisis.....20

IV. CONCLUSION.....27

TABLE OF AUTHORITIES

CASES **PAGE**

Agricultural Labor Relations Bd. v. Superior Court
(1976) 16 Cal.3d 392 6

Ajamian v. Cantorco2e, LP
(2012) 203 Cal.App.4th 771 ..... 22, 25

Balandran v. Labor Ready
(2004) 124 Cal.App.4th 1522 14

California Assoc. of Professional Scientists v. Schwarzenegger
(2006) 137 Cal.App.4th 371 20

City and County of San Francisco v. International Union of Operating Engineers, Local 39
(2007) 151 Cal.App.4th 938 6

County of Alameda v. Board of Retirement of the Alameda County Employees' Retirement Assoc.
(1988) 46 Cal.3d 902 23

County of Sonoma Organization of Public Employees v. Sonoma County
(1991) 1 Cal.App.4th 267 23

Eastern Associated Coal Corp. v. Massey
(4th Cir. 2004) 373 F.3d 350 23

Elijahjuan v. Superior Court
(2012) 210 Cal.App.4th 15 ..... 23, 26

Engineers & Architects Assn. v. Community Development Department
(1994) 30 Cal.App.4th 644 ..... 11-12, 15

TABLE OF AUTHORITIES (cont.)

CASES **PAGE**

Flores v. Axxis Network &Telecommunications, Inc. et al.
(2009) 173 Cal.App.4th 802 ..... 20, 22-23

Granite Rock Co. v. Teamsters
(2010) 561 U.S.____, 130 S.Ct. 2847, 177 L.Ed.2d 2847 .....14, 26

International Association of Firefighters, Local 188 v. Public Employee Relations Board
(2011) 51 Cal.4th 259 13

Jonites v. Exelon Corp.
(7th Cir. 2008) 522 F.3d 721 23

Los Angeles Police Protective League v. City of Los Angeles
(1988) 206 Cal.App.3d 511 .....7, 15

Marcario v. County of Orange
(2007) 155 Cal.App.4th 397 ..... 20, 23-24

O'Brien v. Town of Agawam
(1st Cir 2003) 350 F.3d 279 23

Professional Engineers in California Government v. Schwarzenegger
(2010) 50 Cal.4th 989 17-18

Santa Clara County Counsel Attys. Assn. v. Woodside
(1994) 7 Cal.4th 525 5

Service Employees International Union v. City of Los Angeles
(1994) 24 Cal.App.4th 136 ..... 7, 15-16

TABLE OF AUTHORITIES (cont.)

CASES **PAGE**

United Teachers of Los Angeles v. Los Angeles Unified School Dist.
(2012) 54 Cal.4th 504 ..... 2, 6, 16-20

Vasquez v. Superior Court
(2000) 80 Cal.App.4th 430 ..... 22-23, 25

Wright v. Universal Maritime Service Corp.
(1998) 525 U.S. 70 20-25

STATUTES

29 United States Code
Section 201, et seq. (Fair Labor Standards Act) 23

42 United States Code
Section 12101, et seq. (Disabilities Act of 1990) 21

California Civil Code
Section 1641 14

California Code of Civil Procedure
Section 1859 6
Section 1281.2 14
Section 1286.2 24

California Government Code
Section 3500, et seq. (Meyers-Milias-Brown Act) 4
Section 3500 (a) 5, 18
Section 3507 5-6
Section 3507, subdivision (a) (5) 6
Section 3509 6
Section 3509 (a) 6

TABLE OF AUTHORITIES (cont.)

STATUTES **PAGE**

California Government Code
- Section 3512-3524 (Dills Act) 17
- Section 3540 18

Los Angeles Administrative Code
- Section 4.800, *et seq.* (Employee Relations Ord.) 6
- Section 4.801 7
- Section 4.859 ..... 4, 7, 9-11, 15-16
- Section 4.865 ..... 6, 8
- Section 4.875 8
- Section 4.880 ..... 8, 11
- Section 4.880(b) 8

Los Angeles City Charter
- Section 219 11
- Section 262 ..... 4, 11
- Sections 310-315 11
- Sections 312-315 4
- Section 320 ..... 4, 11

I. INTRODUCTION

This case is about the Los Angeles City Council's right to make financial policy and to manage the City's budgetary affairs in an emergency. The case was fully briefed on February 2, 2012. Respondent City of Los Angeles submits this supplemental brief in response to the question posed in this Court's October 31, 2012 Order.

QUESTION PRESENTED: "Do the memorandums of understanding at issue here, including but not limited to their management rights clauses (article 1.9), render the decision whether to impose employee furloughs inarbitrable?"

SHORT ANSWER: Yes. The Los Angeles City Council's decision to impose employee furloughs in a financial emergency to preserve essential public services is beyond the scope of arbitration under the memorandums of understanding (MOUs) at issue. The Management Rights clauses (article 1.9) reserve to the City the unfettered right to "relieve employees from duty" because of "a lack of funds, as well as the discretion to "take all necessary actions to maintain uninterrupted service to the community and to carry out its mission in emergencies," thus exempting such decisions from

collective bargaining and the department-oriented grievance process established under the MOUs (article 3). Succinctly stated, there is no agreement to arbitrate a decision by the City Council to relieve employees from duty, via furloughs, that is based on a fiscal emergency.

The issues raised by this question were, in large part, recently decided by this Court in *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (June 28, 2012) 54 Cal.4th 504, 515-516, 520, 528 (*United Teachers*). As this Court explained in *United Teachers,* when mandatory statutory provisions or public policy prohibit the result sought by the Union in the arbitration process, a petition to compel arbitration cannot be granted. Here, the Court is again faced with the same situation.

II. THE MOU GRIEVANCE PROCEDURE AND MANAGEMENT RIGHTS CLAUSE

The MOUs establish a grievance process, at article 3.1, which applies to:

> "any dispute which concerns the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working

conditions applicable to employees covered by this MOU."

The final step of the MOU grievance procedure is binding arbitration, and requires service of the request for arbitration on "the head of the department, office or bureau." (Article 3.1.)

A "Management Rights" clause contained in article 1.9 of the MOUs provides:

> "As the responsibility for the management of the City and direction of its work force is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, the right to determine the mission of its constituent departments, offices and boards, set standards of services to be offered to the public, exercise control and discretion over the City's organization and operations, take disciplinary action for proper cause, relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons,

> determine the methods, means and personnel by which the City's operations are to be conducted, take all necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; provided, however, that the exercise of these rights does not preclude employees and their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment."

This provision is consistent with Section 4.859 of the City's Employee Relations Ordinance (Ordinance), enacted pursuant to Government Code section 3500, *et seq.,* known as the Meyers-Milias-Brown Act (MMBA). It is also consistent with the Los Angeles City Charter, which vests discretionary authority to manage the City's finances and set fiscal policy in the City Council. (3RJN[1], Ex. 1, Charter §§ 312-315, 4RJN, Ex. 2, Charter §§ 262, 320.)

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[1] Our references to "Slip Op." are to the typed Court of Appeal opinion. "ABOM" for the City's Answer Brief on the Merits;: "1RJN" for the City's Request for Judicial Notice filed on November 10, 2010; "2RJN" for the City's Second Request for Judicial Notice filed on January 12, 2011; "3RJN" for Association's Motion for Judicial Notice filed on September 26, 2011; "4RJN" for the City's Motion for Judicial Notice filed on December 12, 2011; and, to be consistent with Association's references, we use "AA" to refer to the exhibits submitted to the Court of Appeal with the City's mandate petition.

III. THE CITY'S DETERMINATION THAT EMPLOYEE FURLOUGHS WERE NECESSARY TO MEET A FINANCIAL EMERGENCY IS NOT A PROPER SUBJECT FOR ARBITRATION UNDER THE MOUS

A. The MMBA and the Ordinance Specifically Authorize the City to Exempt Certain Subject Matter from Collective Bargaining and the Grievance Process

The stated purpose of the MMBA "is to provide a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment" between local public employers and public employee organizations. (Gov. Code § 3500 (a); *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 536.)

Section 3507 of the MMBA, gives local public agencies the right, after good faith consultation with representatives of recognized employee organizations, to "adopt reasonable rules and regulations ... for the administration of employer-employee relations under this chapter." Among the rules and regulations a public agency may adopt are "Additional procedures for the resolution of disputes involving

wages, hours, and other terms and conditions of employment." (Gov. Code § 3507, subdivision (a) (5).)[2]

The specific provisions of the MMBA that grant the City the power to enact its own rules pertaining to the resolution of labor disputes, "control over the more general state arbitration statutes." (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 950 (*Local 39*), citing *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420. See also *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 516 (*United Teachers*); Code Civ. Proc § 1859 ["when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."])

The City, in accordance with the legislative policy of the MMBA, enacted the Ordinance (Los Angeles Administrative Code § 4800 *et seq*). (3RJN, Ex.2). Under Ordinance section 4.865, the City

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[2] Section 3509 of the MMBA authorizes the City of Los Angeles to establish its own employee relations commission to administer the rules enacted pursuant to Section 3507. (Gov. Code § 3509 (a).)

is required to "meet and confer" with its employee unions to develop a grievance procedure for employees in represented bargaining units, to be incorporated into any MOU reached by the parties. The Ordinance does not, however, mandate that all labor disputes be subject to resolution through a grievance process. (See *Service Employees International Union v. City of Los Angeles* (1994) 24 Cal.App.4th 136, 140 (*Service Employees International Union*) (holding that this MOU grievance procedure does not authorize cross departmental grievances); *Los Angeles Police Protective League v. City of Los Angeles* (1988) 206 Cal.App.3d 511 (same) (*LAPPL*).) Indeed, Ordinance section 4.801 confines the scope of any negotiated grievance procedure to disputes "concerning the interpretation or application of a written [MOU] or of department rules and regulations governing personnel practices or working conditions."

Additionally, the Ordinance specifically excludes some types of disputes from the grievance process. Ordinance section 4.801 states that "an impasse in meeting and conferring upon the terms of a proposed memorandum of understanding" is not a "grievance." Similarly, Ordinance section 4.859 precludes employees and their

unions from using the grievance procedure to challenge decisions involving the exercise of statutorily reserved "Management Rights," while permitting grievances about the "practical consequences" such decisions may have on terms and conditions of employment.

The scope of arbitration between the City and a City employee union is further limited by Ordinance section 4.880's statement that "The *rights, powers and authority of the City Council in all matters*, including the right to maintain any legal action, shall not be modified or restricted by this chapter." (Ordinance § 4.880 (b), emphasis added.) That the arbitration process was not intended to apply to legislative acts of the City Council is further reinforced by Ordinance section 4.875, which states "This chapter shall apply to all departments, offices and bureaus of the City"; all of which are subordinate to the City Council. (3RJN, Ex.2.) Thus, Ordinance section 4.865's general mandate that the City establish a grievance procedure for represented City employees is qualified by the Ordinance's placement of certain subjects, including the City Council's rights, powers and authority in all matters, beyond the scope

of an arbitration agreement between the City and a City employee union.

The interrelationship between the MMBA, the Ordinance, and the negotiated grievance procedure is the subject of a formal, written City Attorney opinion directed to the Los Angeles City Council. (Opinion 85-28, filed July 26, 1988, 4RJN, Ex.1.) There, the City Attorney opined that the structure of the Ordinance and the statutory definition of a grievance evidenced a legislative intent by the City Council to limit the type of disputes subject to the grievance procedure to issues resolvable by individual departments. The City Attorney concluded "the [Ordinance] does not contemplate a grievance process to contest the largely economic decisions over which the Council has authority." (4RJN, Ex. 1 at p. 15, LA City Attorney Opinion No. 85-28 (July 26, 1988).)

B. The MOU Management Rights Clause Excludes City Management's Decision to Furlough Employees Due to a Financial Emergency from Arbitration

The MOU Management Rights clause, article 1.9, (1AA 93, 153, 218, and 2AA 284) is nearly identical to Ordinance section 4.859. (3RJN Ex.2.) Like the statutory provision, the MOU

Management Rights clause reserves to the City, the "exclusive" responsibility "for the management of the City and direction of its workforce."

Both Management Rights provisions limit "the employees' rights to raise grievances regarding the exercise of the City's reserved [management] rights to those grievances which pertain only to the practical consequences of the City's decisions." (Slip Op. at pp. 13-15; 3RJN, Ex. 2, Ordinance § 4.859; 1AA 93, 153, 218; 2AA 284.)

City management retains the right to take all actions deemed necessary in an emergency, while the employees retain the right to grieve the "practical consequences" of such emergency decisions — not the decisions themselves. As the Court of Appeal explained, "[N]o other construction of section 1.9 makes sense. If employees had retained the right to grieve the management decisions themselves, section 1.9 would have so provided, rather than indicating only that they retained the right to grieve the practical consequences." (Slip Op. at p. 15.)

The Court of Appeal's analysis is equally applicable to the City's reserved management right under article 1.9 to "take all

necessary action to maintain uninterrupted service to the community and to carry out its mission in emergencies." This provision, when read in conjunction with the article 1.9's "practical consequences" limitation on grievances, means that the MOU does not authorize arbitration of a determination by the City Council that it was "necessary" to impose cost-saving furloughs to "maintain uninterrupted service to the community and carry out the [City's] mission in a emergency."

Article 1.9 unambiguously reserves to the City the power and authority to *unilaterally* take all action necessary to meet an emergency situation, and to use all of its pre-existing authority to do so, unless specifically restricted by the terms of the MOU. It is undisputed that the pre-existing authorities include the reserved management rights under the Ordinance (3RJN, Ex.2, Ordinance §§ 4.859, 4.880), as well as the City Council's discretionary salary-setting and budget-making authority under the Charter. (3RJN, Ex. 1, Charter §§ 219, 310-315; 4RJN, Ex. 2, Charter §§ 320, 262.)

In *Engineers & Architects Assn. v. Community Development Department* (1994) 30 Cal.App.4th 644, 652-653 (*Engineers*), the

Court of Appeal interpreted this Management Rights clause to exclude from arbitration a decision to relieve an employee from duty because of lack of funds. (*Id.* at p. 655.) There, Association sought to arbitrate a grievance on behalf of an employee who, due to lack of funds, was relieved from duty in the form of a layoff. The Court of Appeal held that because the layoff was due to lack of funds, in light of the language in the Management Rights clause it was a management decision within the City's prerogative and not subject to arbitration. (*Id.* at pp. 650, 654-55.) The reasoning in *Engineers* applies fully to the case now before this Court.

Here, Association seeks to arbitrate grievances on behalf of employees who, due to a financial emergency facing the City, were relieved from duty in the form of furloughs. When considering the grievances' claims and the remedy sought by Association, it is clear that Association is seeking to arbitrate the validity of City Council's determination that furloughs were necessary to reduce labor costs and preserve public services in a fiscal emergency. As discussed above, City Council's determination falls squarely within the Management

Rights provision of the MOU and is not an appropriate subject of the grievance procedure.

This result is also consistent with this Court's recent decision in *International Association of Firefighters, Local 188 v. Public Employee Relations Board* (2011) 51 Cal.4th 259 (*International Firefighters*), where the Court considered the extent to which cost-saving layoffs were a mandatory subject of bargaining under the MMBA. (*Id.* at pp. 267-271.)

In *International Firefighters*, the Court reaffirmed the distinction between decisional and effects bargaining, stating the following rule: "Under the MMBA, a local public entity that is faced with a decline in revenues may unilaterally decide to layoff some of its employees to reduce labor costs. In this situation, a public employer must, however, give its employees an opportunity to bargain over the *implementation of the decision*...." (*Id.* at p. 277.)

In this case, the decision/implementation dichotomy of *International Firefighters* applies to limit the extent to which furloughs resulting from a fiscal emergency are an appropriate subject for the negotiated grievance procedure. Under the Management

Rights clause, the City may unilaterally decide to furlough employees due to a financial emergency, but must, however, give employees and their unions an opportunity to use the negotiated grievance procedure, including arbitration, to challenge the implementation of the furloughs (i.e., the "practical consequences.")

C. City Council Actions are Beyond the Scope of the Department-Oriented MOU Grievance Procedure

The MOUs' arbitration clause must be read in harmony with the negotiated management rights provision. This analysis is pivotal to the determination of whether a particular dispute is subject to arbitration. (Code Civ. Proc. §1281.2; *Balandran v. Labor Ready* (2004) 124 Cal.App.4th 1522, 1529, citing Civ. Code §1641; *Granite Rock Co. v. Teamsters* (2010) 561 U.S.____, 130 S.Ct. 2847, 177 L.Ed.2d 2847 (*Granite Rock*).)

The MOU grievance and arbitration procedure, negotiated many years ago, has remained unchanged with regard to the Management Rights clause and the limitations built into the scope of arbitration.[3] The six-step grievance procedure is aimed at resolving

[3] While the origination date of the current language contained in the MOU grievance and arbitration procedure is not in the record, these provisions

disputes that can be addressed by "the head of the department, officer or bureau." Nothing in the grievance definition, or the department-oriented procedure, suggests that the City Council's exercise of its Charter delineated discretionary powers and policymaking authority may be challenged via a "grievance." Indeed, as previously discussed, the procedure's entire structure shows that it applies only to matters within the control of individual departments. (See *Service Employees International Union, supra,* 24 Cal.App.4th at p. 140; *LAPPL*, supra, 206 Cal.App.3d. 511 (same).)

Grievances are initiated by an informal discussion between employees and their supervisors, not with City Council. When more than one "employee in a department" is aggrieved, Association may file a grievance with that department on behalf of all the employees. (1AA 104.) Thus, even combined grievances are limited to employees in a single department. The procedure is inapplicable to City wide disputes, or those that cannot be resolved by an individual

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were at issue in *Engineers, supra,* 30 Cal.App.4th at pp. 650-651. That decision quotes extensively from Ordinance section 4.859 and article 1.9. A comparison of those quotes with the documents in this record shows that there have not been any changes to the text of the statute or article 1.9 since 1994.

department. (*Service Employees International Union, supra,* 24 Cal.App.4th at p. 140.)

The MOU grievance definition, coupled with the structure of the department-oriented procedure (1AA 103-108, 163-168; 2AA 228-233, 293-298), and the reservation of management rights under the Ordinance and MOU Management Rights provision, as well as the Charter's assignment of economic policy making to City Council's determination, leads to the inexorable conclusion that the discretionary acts and policy choices of the City's elected officials pursuant to their Charter prescribed authority are beyond the scope of the negotiated grievance procedure. Under the Ordinance, City management is relieved from arbitrating anything but the practical consequences of the exercise of its reserved management rights. (Slip Op. at pp. 18-19, fn.17, citing Ordinance § 4.859.) The Ordinance, thus, does not mandate arbitration of this dispute.

D. Arbitration of the Emergency Furlough Decision Would Annul, Set Aside or Conflict with the City Council's Exclusive Authority Under the City Charter to Manage the City's Finances

The issues presented here are similar to those recently decided by this Court in *United Teachers*. There, this Court reiterated the

well-established rule that collectively bargained arbitration rights must be understood and enforced consistently with the statutory framework, stating: "The principle that collective bargaining provisions in conflict with the Education Code may not be enforced through arbitration is also consistent with precedents of our court and the United States Supreme Court. The case law generally favors arbitration, but within limits." (*United Teachers*, *supra*, 54 Cal.4th at p. 518.) This Court held that the question of whether the statute precludes a particular collective bargaining provision, or the result sought by the Union through arbitration, "goes to the heart of the issue [of arbitrability]." (*Id.* at p. 521.)

Like the collective bargaining agreements (CBA) at issue in *United Teachers,* the negotiated MOUs here are subordinate to established law, including parameters set forth in the City's Charter. This status derives from the language in the MMBA and the Ordinance. This is in contrast with the status of MOUs between the State of California and its employee unions, which are negotiated pursuant to the language in the *Ralph M. Dills Act (Gov. Code §§ 3512-3524) (Dills Act).* (*See also Professional Engineers in*

California Government v. Schwarzenegger (2010) 50 Cal.4th 989, 1040.) (*Gov. Code § 3500(a)*[4].)

As this Court explained in *United Teachers*, the "non-supersession clause" contained in Government Code section 3540 "prohibits negotiations when 'provisions of the Education Code would be 'replaced, set aside or annulled by the language of the proposed contract clause.'...." (*United Teachers*, *supra*, 54 Cal.4th at p. 513.) The Court further held that an arbitrator had no authority to issue the remedy requested by the union, because that remedy conflicted with mandatory provisions of the Education Law. (*Id.* at p. 510.) The Court concluded by stating "We also make clear that if the arbitration process, in applying the collective bargaining agreement to the particulars of this dispute, ends up imposing obligations on the

[4] The MMBA provides in pertinent part "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (*Gov. Code § 3500(a).*)

District that run counter to the statute or otherwise violate public policy, the arbitration award must be vacated." (*Id.* at p. 528.)

Through these grievances, Association directly challenges the City's use of the emergency powers set forth in the Management Rights provisions. The specific remedy sought by Association would "replace, set aside or annul" the economic policy choices made by City Council pursuant to its Charter-derived budgetary powers, in the adopted City budget for Fiscal Year 2009-2010. Such a result would also be in direct conflict with the restrictions contained in the Management Rights clause (article 1.9), which limits grievances to the "practical consequences" of decisions involving the exercise of such reserved management rights. As this Court recognized in *United Teachers,* arbitration awards cannot order remedies which are contrary to public policy or statutory limitations. Here, Association seeks an award which is contrary to the public policy reserving emergency powers to City Council and contrary to the express statutory provision limiting the subject matter of grievances challenging such decisions. Accordingly, these grievances would

literally "annul, set aside, or replace" portions of City statutory law if enforced. (*United Teachers*, *supra*, 54 Cal.4th at p. 515.)

E. The MOUs Do Not Contain a Clear and Unmistakable Waiver of the City's Right to a Judicial Forum for Resolution of Claims Challenging the City Council's Statutory Authority to Act Swiftly to Address a Fiscal Crisis

For a CBA to require arbitration of a statutory claim, it must be "clear and unmistakable" that the parties intended to waive a judicial forum for the adjudication of statutory rights. The waiver must be "explicitly stated." (*Flores v. Axxis Network &Telecommunications, Inc. et al* (2009) 173 Cal.App.4th 802, 806, citing *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 80. See also *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 405 (*Marcario*) (waiver of statutory rights in a CBA can "be effected only by the most 'explicit' language, without resort to inference.").) This principle applies to the issue of whether the City has waived its right to a judicial forum for resolution of challenges to its exercise of its reserved management rights, including the City Council's statutory authority under State and local law to manage the City's finances in a fiscal crisis. (cf. *California Assoc. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383-384 ("'sovereign

power ... will remain intact unless surrendered in unmistakable terms'").

In *Wright*, the United States Supreme Court observed that, in the context of collective bargaining agreements, the presumption of arbitrability did not extend to arbitration of statutory claims that are arguably within the scope of the arbitration clause of a CBA. (*Wright*, *supra,* 525 U.S. at pp. 77-78 (holding that a general arbitration clause in a CBA does not require an employee to arbitrate alleged violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*.) The presumption "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA. [Citations.]." (*Id.* at p. 78.) The court stated that the statutory claim is "distinct from any right conferred by the ... agreement." (*Id.* at p. 79.) The court reasoned, "the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be presumed to be included within the arbitration requirement." (*Id.*) Accordingly, "any CBA requirement to arbitrate [a statutory right] must be particularly

clear." (*Id.*) The waiver must be "'explicitly stated'" because the right to a "judicial forum is of sufficient importance to be protected against a less-than-explicit union waiver in a CBA." (*Id.*) The "clear and unmistakable test necessitates a heightened standard of proof." (*Ajamian v. Cantorco2e, L.P.* (2012) 203 Cal.App.4th 771, 783.)

In *Wright,* the arbitration clause--requiring arbitration of "matters under dispute"-- did not meet the "clear and unmistakable" standard because it did not include an "explicit incorporation of statutory antidiscrimination requirements." (*Wright, supra*, 525 U.S. at pp. 72-73, 80.) Therefore, the agreement did not waive the employee's right to a judicial forum for resolution of his statutory claims. (*Id.* at p. 82.)

In applying the *Wright* analysis to ascertain whether there has been a sufficiently "clear and unmistakable" waiver of a judicial forum, California courts have held that "[t]he test is whether a collective bargaining agreement makes compliance with the statute a contractual commitment subject to the arbitration clause. [Citations.]" (*Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 433, 434-435 (*Vasquez*); see also *Flores, supra*, 173 Cal.App.4th at p. 807.)

In *Vasquez*, the CBA contained a provision prohibiting discrimination but did not specifically incorporate by reference, or mention the statutes at issue. (*Id.* at p. 433.) The court thus found the general language in the arbitration clause ("all grievances or disputes arising between them over the interpretation or application of the terms of this Agreement") insufficient to constitute a waiver of a judicial forum for the employee's statutory claims. (*Id.* at p. 436.)

Although *Wright* and *Vasquez* both involved claims of discrimination, their holdings apply equally to other statutory rights. (See *Jonites v. Exelon Corp.* (7th Cir. 2008) 522 F.3d 721, 725 [claims under Fair Labor Standards Act (29 U.S.C. § 201 et seq) (FLSA)]; *O'Brien v. Town of Agawam* (1st Cir 2003) 350 F.3d 279, 284-286 [FLSA claims]; *Eastern Associated Coal Corp. v. Massey* (4th Cir. 2004) 373 F.3d 350 [state statutory workers compensation discrimination and disability discrimination claims]; *Flores, supra*, 173 Cal.App.4th at p. 808 [claims under state prevailing wage laws]; *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397 [state statutory whistleblower claims]; *Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 24 [claims under state wage and hour laws]. The

"clear and unmistakable" standard thus protects not only personal statutory rights, but also those of the public. (*See, e.g., County of Alameda v. Board of Retirement of the Alameda County Employees' Retirement Assoc.* (1988) 46 Cal.3d 902.)

In this case, the City Council's right to have the validity of its decision to impose furloughs in a fiscal emergency reviewed by a court, rather than an arbitrator, is substantial. Under specific rules applicable to the passage of emergency ordinances, a court is required to respect the City's exercise of its discretionary emergency powers unless and until Association proves that the City abused its discretion. (See, e.g., *County of Sonoma Organization of Public Employees v. Sonoma County* (1991) 1 Cal.App.4th 267, 274-275 (*Sonoma*).) By contrast, arbitrators are not similarly so constrained. (Code Civ. Proc. § 1286.2; *Marcario, supra*, 155 Cal.App.4th at p. 406, fn. 4.) Thus, the City's right to a judicial forum "is of sufficient importance to be protected against a less-than-explicit ... waiver in [an MOU]." (*Wright, supra*, 525 U.S. at p. 79.)

Here, the governing MOUs do not contain an express agreement by the City to arbitrate claims challenging the exercise of

the City Council's statutory rights under the Charter and state law to manage the City's finances in an emergency. Indeed, the MOUs do not explicitly mention the arbitration of City Council actions. Instead, MOU article 3.1 describes the scope of the grievance and arbitration procedure as applying to disputes "concerning the interpretation or application of a written [MOU] or of department rules and regulations governing personnel practices or working conditions." This general language is similar to that requiring arbitration of "matters under dispute" (*Wright, supra*, 525 U.S. at pp. 72-73) or of "all grievances" (*Vasquez, supra,* 80 Cal.App.4th at p. 433), or of "[a]ny disputes, differences or controversies arising under this Agreement" (*Ajamian, supra,* 203 Cal.App.4th at p. 777). It thus falls short of the "clear and unmistakable" waiver required to compel arbitration of the City Council's statutory authority to manage the City's finances in an emergency.

Association's petition to compel arbitration represents an effort to challenge the City Council's statutory rights to manage the City's finances in an emergency, not an attempt to force compliance with the MOUs. Like the statutory rights at issue in *Wright* and *Vasquez*, the

City's salary-setting and budget making authority under the City Charter and its emergency powers under the MMBA and the Ordinance, are distinct from its contractual rights and obligations under the MOUs. The ultimate issue challenged in the grievances is whether the City Council properly exercised these municipal powers. "The assessment of these factors is extra contractual and involves neither the application nor the interpretation of the [MOUs]." (*Elijahjuan, supra,* 210 Cal.App.4th at p. 22.) It involves questions of public policy, and the validity of the manner in which the City Council has exercised its legislative judgment pursuant to its statutory authority to declare a fiscal emergency and to enact a balanced budget. The MOUs do not require the City to subordinate such municipal power to arbitral review, in the absence of clear and unmistakable evidence it agreed to do so. (*Granite Rock Co, supra, 561 U.S. at p. ___ [130 S.Ct. at p. 2859]* ["a court may submit to arbitration 'only those disputes ...that the parties have agreed to submit.' [Citations.]"].)

IV. CONCLUSION

Based on the foregoing, the City of Los Angeles, respectfully requests that this Court affirm the Court of Appeal's decision in *City of Los Angeles v. Superior Court (Engineers & Architects Assn.)*.

Dated: November 29, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, **Rule 8.204 (c)(1),** Petitioner hereby certifies that this Supplemental Brief on Inarbitrability has been prepared using Times New Roman typeface, 14 point, and that the word count for all included portions is 5,244 as calculated by the Microsoft Word processing system used to prepare the brief.

DATED: November 29, 2012

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PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 800 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On **November 29, 2012**, I served the foregoing document(s) described as **PETITIONER'S SUPPLEMENTAL BRIEF ON ISSUE OF INARBITRABILITY UNDER THE MANAGEMENT RIGHTS CLAUSE OF THE MEMORANDUMS OF UNDERSTANDING** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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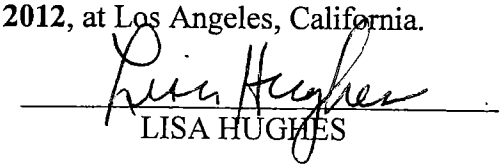

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