IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, and DOES 1- 50, inclusive, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent ENGINEER AND ARCHITECTS ASSOCIATION, Petitioner and Real Party in Interest	Supreme Court Case No. S192828 Court of Appeal, Second Appellate District, Division 3 Case No. B228732 Los Angeles Superior Court Case No. BS126192

From a Decision of the Second District Court of Appeal, Division Three, Case No. B228732

APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED AMICI CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CITY OF LOS ANGELES

DAVID TYRA,
State Bar No. 116218
MEREDITH PACKER GAREY,
State Bar No. 253701
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4416
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
Email: dtyra@kmtg.com
Attorneys for League of California Cities and California State Association of Counties

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APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER CITY OF LOS ANGELES

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), the League of California Cities (hereinafter "LOCC") and the California State Association of Counties (hereinafter "CSAC") hereby request leave from this Court to file the accompanying brief as amici curiae in support of Petitioner City of Los Angeles (hereinafter "City"). This application is timely, as it is made within thirty days after the filing of the reply brief on the merits. No persons or entities other than LOCC, CSAC, and their counsel made a monetary contribution to the preparation or submission of this amici curiae brief. The brief was authored in its entirety by LOCC, CSAC, and their counsel.

A. The Amici Curiae

LOCC is an association of 469 California cities dedicated to protecting and restoring local control of municipal affairs to provide for the public health, safety, and welfare of city residents, and to enhance the quality of life for all Californians. LOCC is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide

significance. The Legal Advocacy Committee has identified this case as being of such significance.

CSAC is a non-profit corporation whose membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by CSAC's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

B. Interest of the Amici Curiae

The issues presented in this case are issues common and relevant to all California cities and counties. The extent and scope of the authority of municipal, county, and other local governmental entities to address fiscal and budgetary crises is of great interest to both LOCC and CSAC. Both LOCC and CSAC, as organizations specifically concerned with the rights and authority of local government, take particular interest in issues that threaten the delegation of local governmental decision making to third parties. The outcome of this case has the potential to affect greatly the scope and nature of local governmental authority, especially the authority of local governments to establish policy and render critical decisions affecting their budgets, finances, and labor forces. The eventual decision in

this matter is likely to affect disputes that local government members of LOCC and CSAC will have in the future as those members continue to face difficult fiscal and budgetary decisions. Therefore, both LOCC and CSAC have a particular interest in this dispute and the outcome of this case.

As associations made up entirely of California local governmental entities, both LOCC and CSAC are in a unique position to assist this Court in determining both the scope of local governmental authority and when that authority can be delegated to third parties, such as an arbitrator. LOCC and CSAC are particularly well suited to discuss overall issues of local governmental authority, especially local governments' right and duty to manage matters affecting budgets and workforces during a fiscal emergency. Additionally, CSAC and LOCC are able to provide insight into whether the arbitration of the grievances in this matter would constitute an impermissible delegation of local government authority. LOCC and CSAC deal with issues of local governments' authority on a regular basis and will provide a unique perspective on the issues before this Court. In their amici curiae brief, LOCC and CSAC will advance additional arguments not previously raised by any of the parties to the action that will allow this Court to consider this case in the broader context of local governmental authority as governed by the California Constitution, statutes, and relevant case law.

C. Conclusion

For all of the foregoing reasons, amici curiae the League of California Cities and the California State Association of Counties respectfully request leave to file the accompanying amici curiae brief in this action.

Dated: March 1, 2012

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra
Meredith Packer Garey
Attorneys for League of California Cities and California State Association of Counties

AMICUS CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CITY OF LOS ANGELES

I.

INTRODUCTION

For several years, California cities, counties, and other local governmental entities have struggled under the burden of severe, often crippling, budget deficits. Petitioner City of Los Angeles (hereinafter "City") is no different. During its 2009-2010 fiscal year, the City faced a $529 million General Fund deficit. (See Exhibits Submitted by City of Los Angeles in Support of its Petition for Writ of Mandate in the Court of Appeal, Vol. 8, p. 1752.) As a result of this situation, the City concluded it faced a "fiscal and cash crisis" that, if not remedied, threatened the

continuing provision of essential city services and jeopardized public health and safety. (*Id.* at pp. 1753-1754.) In response to this situation, the City took action – it adopted a plan to implement furloughs of civilian employees for up to 26 days during fiscal year 2009-2010. This action was rooted firmly in the City's authority under the California Constitution, California state law, the City's charter and ordinances, and the Memoranda of Understanding (MOU) between the City and its recognized employee bargaining units.

Despite the clear-cut need for employee furloughs to preserve vital city resources during its fiscal crisis, and despite the well-established legal authority supporting the City's decision to furlough its employees, Real Party in Interest Engineers and Architects Association (hereinafter "EAA"), along with its union allies, argue the City's decision to furlough its employees should be subject to grievance arbitration. In effect, EAA seeks to have the judgment of an arbitrator override the City's policy judgment regarding the need for furloughs to address the City's fiscal and budgetary crisis.

This Court should affirm the decision of the Court of Appeal. Compelling grievance arbitration of the City's furlough decision would infringe upon the City's authority, as a charter city, to control its fiscal and budgetary concerns and would amount to an impermissible delegation of the City's legislative functions to a third party. Furthermore, grievance

arbitration of the City's furlough decision is not warranted under the operative sections of the MOU between the City and EAA. A decision in favor of EAA threatens the ability of every local government in the State of California to manage effectively local government budgets and resources during fiscal and cash crises of the type the City faced in this case and of the type other local governments are facing throughout the state. Accordingly, amici the League of California Cities (hereinafter "LOCC") and the California State Association of Counties (hereinafter "CSAC") urge this Court to find in favor of the City by affirming the decision of the Court of Appeal.

II.

STATEMENT OF FACTS

Amici curiae LOCC and CSAC hereby adopt the Statement of Facts provided by the City of Los Angeles in its Answer Brief on the Merits filed with this Court. The City's Answer Brief on the Merits provides a complete and accurate discussion of the facts in this case.

III.

ARGUMENT

A. The City's Broad Municipal Powers Include The Authority To Manage The City's Fiscal Affairs And Set Compensation For Its Employees.

California local governments, including cities and counties, have broad powers of self-governance and the authority to manage their own municipal affairs. As a charter city, the California Constitution vests the

City of Los Angeles with all the powers enumerated in its charter and authority over its municipal affairs. The City's charter provides it with the authority to control its budget and to establish the compensation of its employees. The City's inherent municipal authority, as vested in it by the California Constitution, must be preserved by this Court and not delegated to a third party arbitrator by imposing an inapplicable grievance arbitration process on the City's policy decision to obtain personnel cost savings during a fiscal and budgetary crisis by furloughing city employees.

The California Constitution addresses the authority of local California governments, particularly of charter cities and counties, over local affairs. Article XI, section 7 of the California Constitution states, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Courts interpreting this constitutional provision have held that "[e]very California city may enact and enforce within its limits local ordinances not in conflict with general laws." (*Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 599.) Additionally, Article XI, section 11, of the California Constitution states, "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." These two constitutional provisions provide local governmental entities,

like the City, with the power of self-governance to manage their own municipal and fiscal affairs, including the budgeting and appropriation of local government funds. Pursuant to these constitutional provisions, the authority to manage local fiscal affairs belongs solely to the local governmental entity. Local governments must be allowed the freedom to exercise this authority guaranteed them by the California Constitution.

This is especially true for charter cities, like the City of Los Angeles.[1] In reference to the municipal authority of charter cities, California Constitution Article XI, section 5 states,

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.[2]

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[1] Cities are classified as either charter cities or general law cities. The powers of a general law city include "only those powers expressly conferred upon it by the Legislature, together with such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.'" (*G.L. Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092, quoting *Martin v. Superior Court* (1991) 234 Cal.App.3d 1765, 1768; see also *City of Orange, et al, v. San Diego County Employees Retirement Association* (2002) 103 Cal.App.4th 45, 52.)

[2] California Constitution, Article XI, section 4, enumerates the authority granted to charter counties.

For a charter city, the "charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." (*Domar Electric v. City of Los Angeles* (1994) 9 Cal.4th 161, 170; *see also Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150; *Taylor v. Crane* (1979) 24 Cal.3d 442, 450.) "Within its scope, … a charter is to a city what the state Constitution is to the state." (*San Francisco Fire Fighters, Local 798, et al. v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 898-99, quoting *Campen v. Greiner* (1971) 15 Cal.App.3d 836, 840.) By becoming a charter city, the city gains the accompanying autonomous rule, which means the city has "all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter." (*Domar, supra,* 9 Cal.4th at 171, quoting *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598; see also *Mullins v. Henderson* (1946) 75 Cal.App.2d 117, 129.) Under its "home rule" powers, the charter city has the authority to control the finances for all municipal affairs, without interference from general state laws not in conflict. (*City Council v. South* (1983) 146 Cal.App.3d 320, 326-327.) With respect to this authority, this Court has stated,

> The purpose of the constitutional provisions was to make municipalities self-governing and free from legislative interference with respect to matters of local or internal concern. "It was to enable municipalities to conduct their own

> business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs."

(*Butterworth v. Boyd* (1938) 12 Cal.2d 140, 147, quoting *Fragley v. Phelan* (1899) 126 Cal. 383, 387.)

The City's charter vests the City with the full range of legal authority available to it as a charter city. Section 101 of the Los Angeles City Charter states, "The City of Los Angeles shall have all powers possible for a charter City to have under the constitution and laws of this state as fully and completely as though they were specifically enumerated in the Charter, subject only to the limitations contained in the Charter." Accordingly, under authority granted it as a charter city by the California Constitution, the City must be allowed to exercise its full municipal powers as stated under its charter, including the exercise of authority over its budget and personnel costs.

The City's home rule power extends to budgeting discretion vested in the city council and the mayor. Budgeting and control of city finances is a vital part of municipal home rule because the "adoption of the budget is, of course, the primary tool by which the City Council translates policy into action." (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011,

1015.) The authority and duty to adopt a budget is an inherent and vital legislative function of local governmental entities and this authority is firmly encompassed by the home rule power of charter cities and counties. As the Court stated in *County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 698, "[t]his integrated process of determining the budget of a county... is a legislative function which 'may not be controlled by the courts.'" (quoting *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235.)

Control of municipal fiscal affairs and budgetary authority is vested in a city's governing body. Article XI, section 11 of the California Constitution specifically prevents the Legislature from delegating the power over a municipality's fiscal matters to *any* private body or person. In the case of the City of Los Angeles, the City's Charter firmly vests control over the City's fiscal affairs and budgetary authority in the City Council and the Mayor. (Los Angeles City Charter, §§ 310 – 315.) Therefore, the authority over budgeting and fiscal powers is municipal authority the City must be allowed to exercise independently, without interference from a third party.

Under the California Constitution, the authority to establish compensation for municipal or county employees also belongs exclusively to the governing body of the local governmental entity. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285 ["The constitutional

language is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees." Emphasis in original.]; accord *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 339, and cases cited therein.) In *Taylor v. Crane* (1979) 24 Cal.3d 442, 453, the court held the setting of employee compensation is considered an integral part of a city's general policymaking power. As this Court has stated "the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council." (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.) In fact, this Court found in *Bagley* that not only is a city's authority over employee compensation embodied in provisions of the state Constitution, but the Legislature similarly has recognized this authority in the Meyers-Milias-Brown Act (MMBA), Government Code section 3500, *et seq.* Government Code section 3505.1 provides that while a city and its recognized employee bargaining units may reach an agreement and reflect that agreement in a jointly prepared Memorandum of Understanding (MOU), the agreement "shall not be binding," but must be presented "to the governing body or its statutory representative for determination." This Court determined in *Bagley* that this statutory language reflects "the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative *and not by others*." (*Ibid.*, emphasis added.) In the end,

local government's legislative power to control both the budget and the salaries of its employees is a vital exercise of its legislative authority because consideration of budgetary matters "entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands… it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 343, quoting *County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699.)

In this case, the City exercises its constitutional authority over budgetary and compensation issues through its council, which, according to the City's charter, "shall set salaries for all officers and employees of the City." (Los Angeles City Charter § 219) Therefore, the City's authority under its home rule powers encompasses both budgetary issues as well as the establishment of municipal employee compensation. It is evident from the California Constitution and rulings from this Court that the City, as a charter city, has extensive home rule powers over its municipal affairs that it must be permitted to exercise independently without having such authority impermissibly delegated to a third-party. Compelling grievance arbitration that has as its aim the second-guessing of the City's decision to furlough city employees to achieve desperately needed personnel cost savings constitutes a direct and constitutionally impermissible infringement

of the City's exclusive authority over its budget and fiscal affairs. The Court of Appeal correctly understood this and, therefore, its decision should be affirmed.

B. The City's Authority Over Its Budget And Fiscal Affairs May Not Be Delegated To Any Third Party.

As this Court previously has ruled, the doctrine prohibiting delegation of legislative authority "is well established in California ... and precludes the delegation of the legislative power of a city." (*Kugler v. Yocum* (1975) 69 Cal.2d 371, 375.) The public powers or trusts granted by law or charter to a governing body of a city cannot be delegated to others. (*Thompson v. Board of Trustees of City of Alameda* (1904) 144 Cal. 281, 283; *Knight v. City of Eureka* (1898) 123 Cal. 192, 195.)

The authority and duty to manage municipal fiscal matters, including the authority and duty to establish a budget and make policy decisions essential to managing limited municipal resources, constitutes the type of fundamental policy making that may not be delegated to a third party. (See *Bagley v. City of Manhattan Beach, supra,* 18 Cal.3d at 26.) As stated by the court in *County of Butte v. Superior Court, supra,* 176 Cal.App.3d at 698, "a court is generally without power to interfere in the budgetary process." Furthermore, "this integrated process of determining the budget of a county...is a legislative function 'which may not be controlled by the courts.'" (*Ibid.*, quoting *Hicks v. Board of Supervisors, supra,* 69

Cal.App.3d 228, 235.) In *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 898, 901, the court held,

> [T]he principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others, unless so authorized by the legislature or charter. In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, as by submitting it to arbitration.

(quoting 2 McQuillin, *The Law of Municipal Corporations* (3d ed. 1966), § 10.39.)

As previously noted, the Los Angeles City Charter requires the City to adopt a budget on an annual basis. (Los Angeles City Charter §§ 310-315.) As such, the municipal authority to adopt a budget is firmly vested in the City Council, the legislative body of the City, and cannot be delegated to a third party, including an arbitrator assigned to hear grievance arbitrations, the ultimate aim of which is to undo a fundamental policy decision of the City Council, namely, the decision to furlough city employees during a fiscal and budgetary crisis in order to obtain essential personnel cost savings. The City's authority and duty to manage the City's finances cannot be, and should not be, delegated to an arbitrator in the fashion advocated by EAA and the amici public employee unions.

C. Submitting The City's Decision To Furlough Municipal Employees To Arbitration Would Constitute An Impermissible Delegation Of The City's Legislative Authority To The Arbitrator.

Both EAA and the amici public employee unions that filed a brief in support of EAA argue that submitting the City's decision to furlough City employees to arbitration does not constitute an unlawful delegation of municipal power because the proposed arbitration would be grievance arbitration rather than interest arbitration. (EAA Opening Brief on the Merits, pp. 33 – 39, Union Amici Brief, p. 3.) EAA and its union supporters argue that because submission of the City's furlough decision to arbitration would merely interpret existing rights under the parties' MOU, as opposed to granting new rights, submitting the furlough decision to arbitration would not constitute an improper delegation of municipal authority. (EAA Opening Brief on the Merits, pp. 37 – 39, Union Amici Brief, p. 3.) Both EAA and the amici unions argue an arbitrator in grievance arbitration would not be asked to rule on the policy choice made by the City Council with respect to the use of furloughs to address the City's fiscal and budgetary crisis, but rather only interpret the parties' MOU to find if furloughs violate that agreement. (*Ibid.*) Thus, EAA and the amici unions argue grievance arbitration of the furlough decision would not constitute an impermissible delegation.

EAA's and the amici unions' proffered distinction between grievance and interest arbitration amounts to pure sophistry because the

grievance arbitrations EAA seeks have as their ultimate aim the replacement of the City's policy decision with the judgment of an arbitrator regarding the propriety of furloughs to address the City's fiscal emergency. As the record before this Court establishes, a budget that included the reduced salary expenditure appropriations resulting from the furloughs was passed by the City Council and approved by the Mayor on June 2, 2009. (Petitioner City of Los Angeles' Request for Judicial Notice, filed concurrently with Petitioner's Petition on November 10, 2010, ex. 20, Mayoral signing statement and Council Resolution, p. 5, ¶¶ 8 and 9 thereto.) Under the provisions of the Los Angeles Charter, City departments can only spend money that was specifically appropriated in the budget, including salary expenditures. (City of Los Angeles Charter §§ 262 and 320.) Thus, in order to overturn the furloughs, the arbitrator would have to either completely disregard the City's budget or effectively rewrite it in order to address the grievance presented in those arbitrations. Contrary to EAA's and the amici unions' argument, submission of the furlough decision to an arbitrator would constitute an impermissible delegation of the City's authority to determine its own budget and to control its fiscal affairs, matters which are legislative in nature and thus cannot be delegated to third parties.

In addition, compelling arbitration in this case would impermissibly delegate to an arbitrator the City's municipal authority and duty to set the

terms and conditions of employment for city employees, including compensation. As previously noted, in *Bagley v. City of Manhattan Beach, supra,* 18 Cal.3d at 25, this Court held that "the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council." Further, in *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 339, 342-343, the court held that the fixing of salaries is "unquestionably a legislative function," and an "integral part of the statutory procedure for the adoption of the county budget." (quoting *Hicks v. Board of Supervisors, supra,* 69 Cal.App.3d 228, 235.) In the City of Los Angeles, city employee salaries are set and paid pursuant to salary ordinances adopted by the City Council, but these ordinances cannot change or limit the provisions of the Charter and are subject to the mandated annual budget process. (City of Los Angeles Charter §§ 262 and 320.) Therefore, if grievance arbitration is compelled in this case, it will amount to ceding to an arbitrator the authority to rewrite the City's annual budget – a clearly impermissible delegation of the City's exclusive authority over its fiscal affairs.

D. The Policy Favoring Arbitration Of Labor Disputes Does Not Supersede The City's Non-Delegable Duty To Engage In The Type Of Discretionary Legislative Decision Making At Issue Here.

Throughout its briefs to this Court, EAA repeatedly invokes the public policy favoring arbitration as a means for resolving labor disputes. (EAA Opening Brief on the Merits, pp. 19-23.) Amici LOCC and CSAC

do not dispute this policy. However, this general policy only becomes relevant *if* the City's decision to furlough its employees to address a fiscal crisis is subject to arbitration. Seen in this light, the public policy on which EAA so heavily relies is not applicable or relevant to this case because the City's decision to furlough its employees to address a fiscal crisis is *not* subject to arbitration. As the United States Supreme Court recently held in *Granite Rock Company v. International Brotherhood of Teamsters* (2010) – U.S. –, 130 S.Ct. 2847, 2859-60, the presumption favoring arbitration of labor disputes applies "only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute."

In this case, the presumption favoring arbitration is inapplicable for at least two reasons. First, as discussed above, the grievance arbitration procedure contained in the MOU between the City and EAA cannot legally encompass arbitration of the City's decision to furlough its employees because the submission of that decision to arbitration would amount to an impermissible delegation of the City's discretionary legislative authority.

Second, the grievance arbitration procedure contained in the MOU was not intended to encompass the City's decision to furlough City

employees. This is evidenced by several MOU provisions, but most specifically in the Management Rights clause of the MOU.[3] The parties' MOU contains a broad Management Rights clause at Article 1.9 of the MOU. (See Exhibits Submitted By Petitioner City of Los Angeles In Support of Its Petition For Writ of Mandate, Vol. I, pp. 00093, 00153, 00218, and 00284.) The Management Rights clause in the parties' MOU vests the City with the "exclusive" responsibility "for the management of the City and direction of its work force." (*Ibid.*) In recognition of this fact, the parties expressly agreed that, except as otherwise provided in the MOU, "no provisions in [the] 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 the MOU." (*Ibid.*) In addition, the Management Rights clause of the parties' MOU contains a specific acknowledgement by EAA that the powers and authority retained by the City under the MOU include, among other things, the authority to "take all necessary actions to maintain uninterrupted service to the community and to carry out its mission in emergencies." (*Ibid.*) Thus, the MOU between the parties expressly grants the City the authority and responsibility to take action in an emergency to carry out its mission and to rely on all authority it possessed prior to the adoption of the MOU.

[3] The Management Rights clause is the same in all MOUs relevant to this action.

In fact, more than one appellate court has held that matters falling within the scope of Management Rights clauses cannot be delegated to an arbitrator. For instance, in *Engineers and Architects Association v. Community Development Department of the City of Los Angeles* (1994) 30 Cal.App.4th 644, the court had before it the exact same Management Rights clause that is at issue here. In that case, the court held that the provision in the Management Rights clause reserving to the City the exclusive authority and responsibility to manage and direct its workforce required denial of the union's petition to compel arbitration of the City's decision to layoff certain employees. The court ruled that "the memorandum of understanding excluded this management decision to lay off because of lack of work and/or lack of funds from grievance and arbitration." (*Engineers and Architects Association v. Community Development Department of the City of Los Angeles, supra,* 30 Cal.App.4th at 655.)

Similarly, in *Teamsters Local 315 v. Union Oil Co. of California* (9th Cir. 1988) 856 F.2d 1307, the Management Rights clause provided that "except as abridged by a specific provision of this Agreement, the Company reserves and retains the right to exercise solely and exclusively all lawful power to manage and control its business and its workforce." (*Teamsters Local 315 v. Union Oil Co. of California, supra,* 856 F.2d at 1310.) Based on this language, the Ninth Circuit held the employer was

under no obligation to arbitrate its determination of the medical fitness of an employee to return to work.

These cases stand for the proposition that when an MOU does not expressly limit management's ability to make a decision impacting the terms and condition of employment, and that decision falls squarely within the ambit of the Management Rights clause of the parties' agreement, such a decision cannot be subjected to arbitration. The authority of the City to "take all necessary actions to maintain uninterrupted service to the community and to carry out its mission in emergencies" surely encompasses a decision to furlough city employees during a fiscal crisis and thereby preserve vital city resources to ensure the public health and safety. EAA has failed to demonstrate that the grievance arbitration provision contained in the MOU operates in any way to limit this authority. Accordingly, the City's fundamental policy-making authority cannot be vitiated by compelling grievance arbitrations of an otherwise non-delegable decision by the City on an issue such as employee furloughs impacting fiscal and budgetary considerations.

E. Local Governments Will Be Harmed If They Are Required to Arbitrate Policy Decisions Made Under Their Emergency Authority.

In its Opening Brief, EAA argues Government Code section 3504.5 does not provide substantive authority for enacting the furlough ordinance, but merely tolls the notice and meet and confer obligations the City would

otherwise have with respect to it. (EAA's Opening Brief on the Merits, p. 48.) In so arguing, EAA misconstrues section 3504.5 and its affect on the dispute at hand.

As this Court has opined, the power to declare and abate a public emergency represents a formidable undertaking and is the single most compelling and absolute exercise a sovereign governmental authority may pursue. (*Macias v. State of California* (1995) 10 Cal. 4th 844, 856.) This authority is no less compelling when the emergency in question is a governmental fiscal crisis. (*Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1182.)

Government Code section 3504.5, subdivision (a), states,

> Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

However, in the event of an emergency, fiscal or otherwise, as declared by the local government, subdivision (b) of section 3504.5 provides,

> In cases of emergency, when the governing body of the designated boards and commissions

> determine that an ordinance, rule, resolution or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing boards or the boards and commissions shall provide notice and an opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution or regulation.

In *Sonoma County Organization, etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, the court addressed the application of this statute. In that case, the court ruled the county was not required to bargain with one of its unions before implementing a new work rule giving local supervisors authority to put employees on unpaid leave of absence in the wake of job actions by union members. The court held that the county's *obligation to meet and confer was excused by an emergency*. (*Id.*, at 274.) The court also held that since the county already had determined there was an emergency, as reflected in the emergency ordinance, the burden shifted to the union to demonstrate there was not a bona fide emergency. (*Id.* at pp. 275-76, citing Evid. Code, § 664 [presumption that public officers have properly exercised their duties].)

In *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, this Court recently had occasion to address the effect of the emergency powers granted to the State of California under the Ralph C. Dills Act, Government Code section 3512, *et seq*. In *Professional Engineers,* the overarching issue before this Court was

the legality of the State of California's furlough program implemented pursuant to Executive Orders issued by then-Governor Arnold Schwarzenegger. In resolving the numerous sub-issues presented in that case, this Court had occasion to interpret Government Code section 3516.5, a statute contained in the Dills Act containing language similar to that found in section 3504.5 quoted above. In *Professional Engineers,* this Court held that section 3516.5 did not provide independent substantive authority for the Governor to order furloughs of state employees. As this Court stated in *Professional Engineers,*

> Instead, the statute, reasonably interpreted, simply provides that when an employer possesses the authority *from some other source* to take a particular type of action relating to matters within the scope of representation, the employer ordinarily must notify and meet and confer with the employee organization before taking such action, but in an emergency may take the action and thereafter notify and meet and confer with the organization as soon as practical.

(*Professional Engineers in California Government v. Schwarzenegger, supra,* 50 Cal.4th at 1032-1033.) Because this Court found the Governor lacked unilateral authority to furlough state employees as derived "from some other source," section 3516.5 was unavailing to him.

Critical distinctions exist between the situation presented in *Professional Engineers* and the situation presented here that warrant a different conclusion regarding the nature of the City's authority to furlough

City employees during a fiscal emergency. As this Court noted in *Professional Engineers*, the Dills Act is a supersession statute, which means that "the terms and conditions embodied in an MOU supersede most of the general statutory provisions that govern the terms and conditions of state employment in the absence of an MOU." (*Professional Engineers, supra,* 50 Cal.4th at 1040.) The MMBA, however, is not a supersession statute. As such, unlike the state, the City's emergency authority to furlough city employees is not limited solely to whatever authority is found in the MOUs. Rather, the City is entitled to rely on its charter and ordinances as providing the source of authority to furlough city employees during a fiscal emergency. In other words, the City's authority to furlough city employees derives "from some other source" than section 3504.5. Because the City's charter and ordinances provide the City with the substantive authority to take actions, such as furloughing city employees, to address a fiscal emergency, section 3504.5 permits the City to take such action outside the collective bargaining process. As a result, section 3504.5, subdivision (b), provides the City with the authority to act efficiently to protect its citizens during a fiscal and budgetary emergency by preserving vital resources to ensure the public health and safety.

Local governments must be able to respond quickly in any emergency in order to protect the safety, health and fiscal security of their citizens and section 3504.5, subdivision (b), constitutes a determination by

the Legislature that the collective bargaining process must yield to the greater needs of the public during such emergencies. Because the City possessed the authority under its charter and ordinances to furlough city employees to address its fiscal crisis, section 3504.5 provided the City with the means of taking that action without the constraints imposed by the collective bargaining process, including grievance arbitration.

F. Recognizing A City's Authority To Take Action, Such As Furloughing City Employees, To Address A Fiscal Emergency Does Not Risk Permitting An Unconstitutional Impairment Of Contract.

Article I, section 10, clause 1 of the United States Constitution provides that "[n]o State shall … pass any … Law impairing the Obligations of Contracts …." Similarly, Article I, section 9 of the California Constitution provides that "[a] law impairing the obligations of contract may not be passed." In determining whether a particular legislative enactment constitutes an unconstitutional impairment of contract, "courts undertake a threshold inquiry to determine whether contract rights have been impaired, first examining 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" (*San Diego Police Officers' Assn. v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 736-737, quoting *Energy Reserves Group, Inc. v. Kan. Power & Light Co.* (1983) 459 U.S. 400, 411.) This threshold inquiry includes; (1) whether a contract exists addressing the specific terms allegedly at issue, (2) whether the law

in question impairs an obligation under that contract, and (3) whether the discerned impairment can fairly be characterized as substantial. (*San Diego Police Officers' Assn, supra,* 568 F.3d at 736-737.) Legislative actions "that substantially impair state or local contractual obligations are nevertheless valid if they are 'reasonable and necessary to serve an important public purpose.'" (*Id.*, quoting *United States Trust Co of New York. v. New Jersey* 431 U.S. 1, 25.) California courts have summarized the process for analyzing impairment of contract claims as requiring "a two-step inquiry into (1) the nature and extent of any contractual obligation … and (2) the scope of the Legislature's power to modify any such obligation." (*Teachers' Retirement Bd v. Genest* (2007) 154 Cal.App.4th 1012, 1027, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 785.)[4]

In *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305-306, this Court, after tracing the history of U.S. Supreme Court jurisprudence regarding impairment of contract cases, concluded that the prohibition against impairment of contract "is not to be read with literal exactness like a mathematical formula. [Citation.]

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[4] See also, *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 444-447, in which the U.S. Supreme Court listed as factors for determining whether a legislative enactment constitutes an unconstitutional impairment of contract: (1) whether there was emergency justification for the enactment; (2) whether the enactment was for the protection of a basic interest of society as opposed to advantaging a particular individual or group; (3) whether the enactment was appropriate to the emergency and the conditions it imposed were reasonable; and (4) whether the enactment was temporary and limited to the exigency which provoked the legislative response.

[The government's] police power remains paramount, for a legislative body 'cannot bargain away the public health or public morals.'" (quoting, *Home Building & Loan Assn. v. Blaisdell, supra,* 290 U.S. 398, 428, 436.)

Contrary to EAA's assertion, therefore, a finding by this Court that the City may act to furlough employees during a fiscal emergency is not of "dubious constitutional validity." (EAA Opening Brief, p. 51.) Rather,

> "[t]he constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their just and reasonable purport; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order … The contract clause and the principle of continuing governmental power are construed in harmony …"

(*Teachers' Retirement Bd v. Genest* (2007) 154 Cal.App.4th 1012, 1026-27, internal quotations and citations omitted.)

Here, in light of the severity of the City's fiscal emergency, the threat it posed to the public health and safety, and the authority to take action such as furloughing City employees provided by the City's charter and ordinances, the harmonious balance of the City's exercise of its authority to furlough City employees must triumph over the dubious argument that those furloughs violated City employees' contract rights.

IV.

CONCLUSION

Based on the foregoing discussion, amici LOCC and CSAC respectfully urge this Court to find in favor of the City of Los Angeles by affirming the decision of the Court of Appeal.

Dated: March 1, 2012

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra
Meredith Packer Garey
Attorneys for League of California Cities

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Amici Curiae League of California Cities and California State Association of Counties, hereby declare under penalty of perjury that the number of words in the Application of League of California Cities and California State Association of Counties For Leave to File Amici Curiae Brief; Proposed Amici Curiae Brief By League of California Cities and California State Association of Counties in Support of Petitioner City of Los Angeles equals 6,876 words, as per the word count feature in Microsoft Word.

Dated: March 1, 2012

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra
Attorneys for League of California Cities and California State Association of Counties

PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On March 2, 2012, I served the within documents:

APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED AMICI CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CITY OF LOS ANGELES

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

Attorneys for Petitioner City of Los Angeles
Janis Levart Barquist
Jennifer Maria Handzlik
Carmen A. Trutanich
Office of the City Attorney
200 North Main Street
800 City Hall East
Los Angeles, CA 90012-4131

Attorneys for Amici International Federation of Professional and Technical Engineers, Local 21, Public Employees Union Local One, State Employees Trades Council—United, University Council-American Federation of Teachers, Academic Professionals of California, University Professional and Technical Employees, CWA Local 9119, and Marin Association of Public Employees
Arthur A. Krantz
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

Attorneys for Real Party in Interest Engineers and Architects Association
Adam Nathan Stern
Myers Law Group
9327 Fairway View Place, Suite 304
Rancho Cucamonga, CA 91730

Attorneys for Respondent S.C.L.A.
Frederick Bennett
Superior Court of Los Angeles County
111 North Hill Street, Room 546
Los Angeles, CA 90012

Attorneys for Real Party in Interest Engineers and Architects Association
Gary M. Messing
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Carroll, Burdick & McDonough
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Trial Judge
Hon. Gregory Alarcon
Los Angeles Superior Court
111 North Hill Street, Dept. 36
Los Angeles, CA 90012

Attorneys for Amici Los Angeles Police Protective League, San Francisco Police Officers' Association, CDF Firefighters, California Correctional Peace Officers' Association, Ventura County Deputy Sheriffs' Association, San Bernardino County Safety Employees' Benefit Association, Deputy Sheriffs' Association of Santa Clara County, Los Angeles County Professional Peace Officers' Association (PPOA), Fresno Deputy Sheriffs' Association, Santa Monica Police Officers' Association, Manhattan Beach Police Officers' Association, Anaheim Firefighters' Association, Costa Mesa Firefighters' Association, Inc., Huntington Beach Firefighters' Association, Fullerton Firefighters' Association, Orange City Fire Fighters, Inc., Orange County Employees' Association and Peace Officers Research Association of California Legal Defense Fund
Stephen H. Silver
Silver, Hadden, Silver, Wexler & Levine
1428 Second Street, Suite 200
P.O. Box 2161
Santa Monica, CA 90407-2161

California Court of Appeal
Second District, Division Three
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 2, 2012, at Sacramento, California.

May Marlowe