No. H041407 No Fee (Gov. Code §6103)

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CITY OF PALO ALTO,
Petitioner,

vs.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1319, AFL-CIO
Real Party in Interest

Appeal of Public Employment Relations Board
Decision No. 2388-M
(Case No. SF-CE-869-M)

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES SUPPORTING THE APPEAL BY THE CITY OF PALO ALTO

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") respectfully requests permission to file this amicus curiae brief in support of the City of Palo Alto ("City").

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee") comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance.

The Committee has identified this case as having statewide significance because it involves serious limitations on the authority of cities to place matters of local governance on the ballot for consideration by the voters. Under the California Constitution, article XI, section 5, subsection (b), charter city voters have plenary authority to place matters governing public employment in their city charters. And under article XI, section 3, subsection (b), city councils in charter cities have the authority to submit those matters to the voters. Under article XI, section 7, a general law city has authority over local legislation. And under Elections Code section 9222, its city council may place matters on the ballot for consideration by the voters. In this case, the Public Employment Relations Board ("PERB") has announced, for the

first time, new barriers to placing matters on the ballot. These barriers interfere with the administration of local governance.

In a departure from settled authority under the Meyers-Milias-Brown Act ("MMBA"), the PERB decision at issue in this case: (1) effectively places the burden on a city, rather than a union, to request discussion of a proposed ballot measure; (2) finds for the first time that a city – which under settled authority has no duty to "meet and confer" under Government Code section 3505 over interest arbitration – now has a duty to "consult" under Government Code section 3507, and (3) requires a city to "consult" with a union over a subject that is outside the "scope of representation" under the MMBA – specifically whether an outside arbitrator or the city council has the final decision on employee compensation.

The submission of this brief by amicus curiae will assist the Court in understanding the practical ramifications of the PERB decision in cities across the state. The decision affects not only the City, but has negative consequences for all California cities. If the PERB decision stands, it will create uncertainty for cities on the additional steps they must take to place matters on the ballot while still complying with tight Elections Code deadlines and open meetings requirements under the Ralph M. Brown Act. It also will create uncertainty for cities as to whether they must confer with unions over core governmental functions such as delegation of city council authority to an interest arbitrator over employee compensation.

The attorneys representing the League have examined the briefs on file in this case and are familiar with the issues involved and the scope of the briefing. The

League agrees with and endorses the City's aguments made in ths case and does not seek to repeat those arguments in this brief. Rather, the League respectfully submits that a need exists for consideration by this Court of the statewide impact of the PERB decision on all California cities.

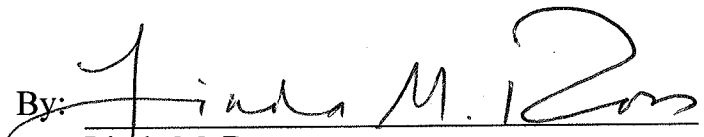
For the reasons stated in this application and further developed in the Introduction and Interest of Amicus portion of the proposed brief, the League respectfully requests leave to file the amicus curiae brief.

The amicus curiae brief was authored by the undersigned. No other party, person, or entity made a monetary contribution to fund its preparation of submission.

DATED: May 11, 2015

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 

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AMICUS CURIAE BRIEF

I. INTRODUCTION

A. Interest of Amicus

This case presents issues of vital importance to all California cities – the constitutional and statutory rights of cities to submit measures to the voters concerning core governance functions. The Public Employment Relations Board ("PERB") decision at issue burdens cities with uncertain and unworkable obligations to "meet and confer" or "consult" with public employee unions before placing a matter on the ballot for voter approval.

In 2011, voters in the City of Palo Alto ("City") enacted Measure D ("Measure D"), returning to the City Council – from a private unelected arbitrator – the final authority over public safety employee contracts. The PERB decision on appeal attempts to invalidate the City Council's action in placing Measure D on the ballot for failure to engage in "consultation" under Government Code section 3507. In doing so, PERB departs from long standing precedent interpreting the Meyers-Milias-Brown Act ("MMBA"), Government Code §§ 3500 et seq.[1]

Before the PERB decision, it was settled under the MMBA that a union must make an affirmative and timely request to "meet and confer" over an employer initiative, including a proposed ballot measure. The PERB decision, however, concluded that it was *the City's* obligation to divine that the International Association of Firefighters, Local 1319 ("Union") desired to meet over Measure D, despite Union

[1] All statutory references are to the Government Code unless stated otherwise.

silence during numerous ongoing contract negotiations, public meetings and other opportunities for the Union to raise the issue.

If PERB's decision stands, cities will be uncertain as to what triggers a city's obligation to "meet and confer" with employee unions under section 3505 or to "consult" with them under section 3507. Because of this lack of clarity, cities will be uncertain as to when they have satisfied those obligations, and thus can safely place on the ballot any measure that has an impact on employer-employee relations.

Before the PERB decision, it was settled that section 3505 did not require an employer to "meet and confer" with a union over a ballot proposal involving interest arbitration. The City relied on this rule when it placed Measure D on the ballot. Yet, in this case, *for the first time,* PERB found there is a requirement to "consult" under section 3507, and that the requirement to consult is the same as the requirement to meet and confer. PERB should not be permitted, three years after an election, to penalize the City, and its voters, for properly relying on existing PERB and judicial precedent in adopting Measure D.

Moreover, there is no reason why existing precedent under section 3505, holding there is no obligation to meet and confer over interest arbitration, should not also apply to section 3507. This is especially true given PERB's conclusion that the duty to "meet and confer" under section 3505 is not different than the duty to "consult" under section 3507.

Measure D involves a fundamental governmental function – whether the city council or an arbitrator will wield legislative authority to determine final

compensation decisions for city employees. For this reason, interest arbitration is outside the "scope of representation" and therefore beyond the reach of either section 3505 or 3507 of the MMBA.

These are matters of serious concern to the League and its member cities. The ability to manage employee compensation is a core function of all California cities, enshrined in the California Constitution, article XI, sections 5(b) and 7. Likewise, a city's authority to place matters before the voters is authorized by the State Constitution, article XI, section 3(b), state statute, or both. Under recent State law amendments, charter cities may place certain employee-related charter amendments on the ballot for voter approval only every two years. For cities facing economic challenges, two years can be the difference between preserving and losing essential city services.

The PERB decision threatens these constitutional and statutory functions. There is substantial PERB and judicial guidance on cities' obligations to "meet and confer" under section 3505. But PERB's new-found reliance on section 3507 creates uncertainty as to cities' obligations to "consult" under that section. Moreover, PERB's decision permits a union to delay in requesting "consultation" until a city's pre-election process is coming to a close, which is unworkable given open meeting requirements and tight elections deadlines. Under PERB's decision, cities' constitutional and statutory authority over key governance issues is now mired in uncertainty.

B. Description of Amicus Curiae

The League of California Cities (the "League") is an association of 475 California cities dedicated to protecting local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance, because it involves limitations on the constitutional and statutory power of local public agencies to place matters of governance on the ballot for consideration by the voters and creates confusion for cities on how to comply with the MMBA.

II. FACTUAL BACKGROUND

The key facts in this case are simple and compelling.

On July 26, 2010, the City first notified the Union that the Council was considering whether to place a measure on the ballot repealing binding interest arbitration. [AR XII, 2558] On August 2, 2010, the Council voted not to do so at that time. [AR XI, 2437-2440]

In 2011, the City began to reconsider a ballot measure. On May 3, 2011, the City sent a letter to the Union directly, notifying it that the City Council's Policy and Services Committee ("PSC") would be considering the issue of binding interest arbitration in upcoming meetings. [AR X, 2181]

Between May 10, 2011, and July 18, 2011, the Union met with the City in seven different bargaining sessions. [AR IX, 2062:10-14] Furthermore, during this time the City gave the Union notice of six different City Council and PSC meetings where the repeal of binding interest arbitration was publicly agendized and debated. [AR X, 2181, 2211, 2246; XI, 2301-2322; XIII, 2570]

On July 18, 2011, the City Council voted at a noticed public meeting to place Measure D on the ballot. [AR XI, 2372-2382]

At that meeting, the Union notified the City for the first time that its representatives desired to engage in consultation under section 3507. [AR XI, 2391].

On July 28, 2011, the Union filed an unfair practice charge with Respondent PERB. [AR I, 1-16] The Chief ALJ concluded that the Union waived its right to consult over the measure because it had notice that the City intended to amend or repeal Article V, yet never made a request to consult until the meeting at which the City Council acted to place the measure on the ballot. [AR VII, 1612-1645] On December 5, 2011, the Union filed exceptions to the Chief ALJ's proposed decision. [AR VII, 1646-1681]

On August 6, 2014, Respondent PERB issued its final decision in this matter, reversing the Chief ALJ. [AR VIII, 1773 -1769] PERB acknowledged that the IAFF had not made an affirmative demand to meet and confer or consult over Measure D in 2011 prior to the City Council vote. But PERB found that the City *was aware* of the Union's desire to confer, and therefore had an obligation to consult with the

Union under section 3507 before placing Measure D on the ballot. [AR VIII, 1807-1810][2]

On September 3, 2014, the City of Palo Alto filed a petition for writ of extraordinary relief in this matter, seeking to have this Court overturn PERB's erroneous decision.

III. ARGUMENT

A. The PERB Decision Wrongly Placed The Burden On The City To Initiate Discussions, And Unduly Burdens Cities' Constitutional And Statutory Rights To Propose Measures To The Electorate

1. Under The MMBA, The City Is Only Required To Notify The Union Of The Proposed Ballot Measure; It Is The Union's Obligation To Timely Request Conferral

It has long been the rule under the MMBA that a union must make a timely and affirmative request to meet and confer over a change being proposed by a public employer. In reversing the ALJ, PERB departs from established precedent and introduces uncertainty that threatens cities' abilities to perform their constitutional functions.

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[2] Under Government Code section 3505, a public agency must "meet and confer in good faith regarding wages, hours and other terms and conditions of employment" with union representatives. (§ 3505.) "Meet and confer in good faith" means a "mutual obligation personally to meet and confer promptly upon request by either party" concerning "matters within the scope of representation" prior to adoption of a final public agency budget. (*Ibid.*)

Under Government Code section 3507 a public agency may adopt "reasonable rules and regulations" for the "administration of employer-employee relations under this chapter" after "consultation in good faith" with union representatives of a recognized employee organization. (§ 3507.)

It is a union's obligation to make an affirmative request to confer with the public entity. "While it is not essential that a request to negotiate be specific or made in a particular form [citations], it is important for the charging party to have signified its desire to negotiate to the employer by some means." (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 [6 PERC ¶ 13162, pp. 7-8] [employee union's protest over layoffs did not constitute a demand to bargain over the *effects* of the layoffs]; *Delano Joint Union High School District* (1983) PERB Decision No. 307 [7 PERC ¶ 14146, pp. 7-8] [protests over an employer's contemplated unilateral action is not the same as a demand to bargain]; *Sylvan Union Elementary School Dist.* (1992) PERB Dec. No. 919 [16 PERC ¶ 23107, pp. 5-6] [even when formal notice is not given, but the association receives actual notice of a decision, the effects of which it believes to be negotiable, the burden is on the association organization to request bargaining].) These cases demonstrate that the burden to request a meeting is on the union, not the employer.

When a union fails to make a timely request, the union waives any right to confer, and the employer may act unilaterally. (See *Stockton Police Officers Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 66-68 [union waived because request to negotiate was untimely]; *Metropolitan Water Dist. of Southern California* (2009) PERB Dec. No. 2055-M [33 PERC ¶ 144, pp. 3-4] [union's failure to request negotiations after district advised union of proposed policy waived union's right to negotiate over the policy after it was implemented].)

As stated by the ALJ in this case, a "last minute request is tantamount to a waiver by inaction to consult in good faith with the agency." (*International Assn. of Firefighters v. City of Palo Alto*, Unfair Practice Case No. SF-CE-869-M, Proposed Decision (November 15, 2011) [36 PERC ¶ 83, p. 28].) The Chief ALJ's decision was consistent with existing law. PERB's decision, on the other hand, departed from its own precedent, as demonstrated above.

2. Without An Affirmative Request By The Union, Government Codes Section 3505 And 3507 Become A Trap Even For The Wary

PERB's decision places a burden on the employer not only to give notice of a proposed action, but to take further – and undefined – action to invite the union to confer. The result is unworkable. Without clear rules, the legal status of employer initiatives, including ballot measures, will be uncertain.

PERB has never held that the employer must anticipate a union request to meet and confer. "A request to bargain must adequately signify a desire to negotiate sufficient to put the public employer on notice that the exclusive representative desires to bargain the negotiable subject." (*El Centro School District* (1996) PERB Decision No. 1154 [20 PERC ¶ 27106, p. 5] [holding that even though Association stated in writing that it was "not waiving" any rights to bargain on this issue, this was not equivalent to an affirmative request to bargain].) "A party's words or conduct must clearly convey to the other party that a request to negotiate is being made." (*Ibid.*) [Emphasis included in original.] (See also *American Buslines, Inc.* (1967) 164 NLRB 1055 [under NLRB, employer's unilateral change was lawful where

Union's reaction to proposal "was merely to protest the proposal in a letter by characterizing it as an invasion of its statutory rights"].)

Here, the City did everything it was required to do under the MMBA. The City gave the Union notice, on multiple occasions, of the proposal to place a matter on the ballot concerning interest arbitration. When the Union requested that the City return the matter to committee for further discussion, the City agreed. In the meantime, the Union and the City were at the table in contract negotiations, giving the Union many opportunities to raise the topic. The Union, however, waited until the final City Council vote on whether to place the measure on the ballot before it asked to meet over the ballot measure. The Union president even testified that he purposefully waited to raise the issue until the City Council meeting. [AR VIII, 1989:1-6]. Nonetheless, the PERB decision concluded that the City was aware of the Union's interest and thus had the burden to take further action.

PERB's decision departs from its own settled authority requiring a clear and timely request by a union. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 [6 PERC ¶ 13162, pp. 7-8], *supra* ; *Delano Joint Union High School District* (1983) PERB Decision No. 307 [7 PERC ¶ 14146, pp. 7-8], *supra, Sylvan Union Elementary School Dist.* (1992) PERB Dec. No. 919 [16 PERC ¶ 23107, pp. 5-6], *supra.*) The PERB decision replaces the requirement of an affirmative *union* demand, with a requirement that the *employer* take action. It leaves unclear what constitutes "notice" to the employer that a union desires to

consult, and what steps an employer with "notice" must take to invite a union to the table or establish that a union has waived its rights.

If the PERB decision stands, city obligations to "meet and confer" under section 3505 or to "consult" under section 3507 with unions over any employer initiative will be unclear and unworkable. In light of PERB's decision, cities will be uncertain when they can safely place a measure on the ballot that impacts employer - employee relations. Under PERB's decision, a union may frustrate city action on a proposed ballot measure by its own inaction.

The National Labor Relations Board ("NLRB") does not permit the type of delay that occurred here, and neither should PERB. (*AT&T Corporation,* (2002) 337 NLRB 68, 692-93 [union, which affirmatively refused to meet and bargain with employer over terms of new compensation and benefit plan and instead filed an unfair labor practice charge, waived its statutory bargaining rights].) This Court should not let stand a ruling that is not supported by the MMBA or the case law.

3. Allowing A Labor Union To Assert Its Rights After The Conclusion Of The City's Public Deliberative Process Undermines The Political Process

Not only does PERB's ruling create general confusion for cities over their obligations to confer with unions, it places an unreasonable burden on cities' exercise of their constitutional and statutory rights to home rule and to place governance matters on the ballot.

A charter city's authority to place matters on the ballot involving public employees and their compensation is constitutionally enshrined. Article XI, section

5, subdivision (b) of the California Constitution delegates to city voters the "plenary authority" to provide in their city charters for "the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and *for their compensation*, and for the number of deputies, clerks, and other employees that each shall have, and for the *compensation*, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees." [Emphasis added.] Moreover, a city council has the constitutional authority to present fundamental governance issues, such as binding interest arbitration, to the voters by way of a charter amendment. (Cal. Const., art. XI, §3 (b).)

Similarly, under article XI, section 7 of the California Constitution, a general law city has authority over local legislation and, under Elections Code section 9222, its city council may place matters on the ballot for consideration by the voters.

Because binding interest arbitration involves governance over employee matters and compensation, it is a local affair under the State Constitution. (*County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278, 290-295 [state statute requiring mandatory interest arbitration for county police officers and firefighters violated home rule provisions of article XI, section 1, subsection (b) and article XI, section 11, subsection (a)]; *Edgerly v. City of Oakland* (2012) 211 Cal. App.4th 1191, 1204 ["If salaries and wage levels are municipal affairs, then surely the manner in which a

charter city enforces its own charter and local rules and ordinances constitutes a municipal affair and cannot be considered a statewide concern"].)

The decision by a city council to place a matter on the ballot is a lengthy process, sometimes spanning months, and involves tight planning. Under the Ralph M. Brown Act, Government Code section 54950, *et seq.*("Brown Act"), all city council actions must be made at publicly noticed meetings of the city council or a council committee. (§54950 ["It is the intent of the law that (actions of public bodies) be taken openly and that their deliberations be conducted openly."]) Accordingly, a city must schedule publicly noticed hearings to discuss or take any official action, such as the discussion or approval of a ballot measure. (§54952.6 [Definition of action taken].) Each public hearing requires advance notice, a publicly posted agenda, and availability at the meeting of any document to be considered by the council. (§54954.2(a) [Agenda requirements; Regular meetings]; § 54957.5(b) [Agendas and other materials; Public records].)

The Elections Code also includes stringent timelines that govern when a city council must make a decision to place a matter on the electoral ballot. Based on recent amendments to the Elections Code, a city council may place certain charter amendments on the ballot only once every two years, at the time of a statewide general election. (Elec. Code § 9255.) A city council must take a final vote on whether to place a matter on the ballot at least 88 days (almost three months) before the election. (Elec. Code § 34458, subd. (a).) Complying with that deadline – being sure to have the public hearing process completed, a final draft available and a

quorum of city council members present to take a final vote – is in itself a difficult scheduling task.

PERB's decision wreaks havoc on cities' ability to complete the "meet and confer" or "consultation" process within the strictures of the Brown Act and the Elections Code. The process of meet and confer or consultation may involve union-employer communications and meetings over a period of time. Moreover, the PERB decision leaves it unclear what "impasse" procedures PERB may decide to impose if there is no union-employer agreement.[3] In any event, the entire process must occur before a city council votes to place a matter on the ballot.

If a union is permitted to delay a request to "meet and confer" or "consult" until the date of a city vote to place a matter on the ballot, cities will be unable to meet statutory deadlines, threatening their ability to make timely decisions concerning ballot measures. This potential delay places an unreasonable burden on cities' constitutional and statutory authority to place matters on the ballot for voter approval.

Moreover, based on the recent amendments to the Elections Code, should a charter city fail to take a vote in a timely manner, it may be two years before the city has another opportunity to present a charter measure to the voters. For cities facing economic challenges, two years can be the difference between preserving and losing essential city services.

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[3] See Government Code sections 3505.5-3505.7 (concerning mediation and fact finding)

B. The City Was Entitled To Rely On Existing Precedent When It Made The Decision To Place Measure D On The Ballot

Prior to PERB's ruling in this case, no PERB or judicial decision had suggested that – whereas there is no obligation to "meet and confer" under *section 3505* – there is a requirement of "consultation" under *section 3507.* The City was entitled to rely on existing precedent that did not require the City to confer over interest arbitration. Any other outcome jeopardizes the election process, which cannot be successfully administered in the absence of clear rules.

Under section 3505, interest arbitration clauses are a permissive subject of bargaining. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 257 (quotations omitted) [Santa Clara County's negotiation proposal that unions not support a ballot initiative calling for binding interest arbitration was a "permissive" but not a "mandatory" subject of bargaining].) Interest arbitration "is not a mandatory subject of bargaining, since its effect on terms and conditions of employment during the contract period is at best remote." (*DiQuisto*, supra, 1818 Cal.App.4th at p. 257, quoting *N.L.R.B. v. Columbus Printing Pressmen and Assistants' Union No. 252* (5th Cir. 1976) 543 F.2d 1161, 1166 [interest arbitration providing for arbitral resolution of future contract terms is a non-mandatory subject of bargaining because it substitutes a third party for labor and management, the appropriate parties in the collective bargaining process].)

Under this case law, binding interest arbitration is not a mandatory subject of bargaining, but rather a governance issue that remains under a charter city's plenary

power. Based on this reasoning, in 2010, two PERB decisions held that section 3505 did not require public employers to meet and confer over proposed charter amendments relating to interest arbitration. (*Santa Clara County Registered Nurses Professional Assn.* (2010) PERB Decision No. 2120-M [34 PERC ¶ 109, p. 10]; *Santa Clara Correctional Peace Officers' Assn.* (2010) PERB Decision No. 2114-M [34 PERC ¶ 97, p. 10].)

PERB was required to base its decision on existing law. (Gov. Code § 3509, subd. (b) and § 3510, subd. (a) [requiring PERB to "apply and interpret unfair practices consistent with existing judicial interpretations of this chapter"].) Where PERB's construction of the MMBA is inconsistent with prior precedent, deference to PERB is not required. (*United Public Employees v. Public Employment Relations Board* (1989) 213 Cal.App.3d 1119, 1125-27.) Here, the application of PERB's new rules, which are a clear departure from past precedent, would be unfair to the City and its voters. The City did its due diligence, researched the applicable case law and charted its course. Elections are expensive and time-consuming. Cities need clear rules on pre-election procedures to avoid unnecessary risk and expense to the taxpayers.

Moreover, any balancing of interests counsels against retroactive application. As explained by the California Supreme Court in *Claxton v. Waters* (2004) 34 Cal.4th 367:

> Considerations of fairness and public policy may require that a decision be given only prospective application. Particular considerations relevant to the retroactivity determination include the reasonableness of

> the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.

(*Id.* at p. 378-379 [citations and quotations omitted].)

Here, the City's actions were in reasonable reliance on existing precedent. PERB's announcement of a new rule – that "consultation was required under section 3507 – was unanticipated. PERB's new rule has serious constitutional consequences, potentially depriving City voters of their right to amend the City Charter. On the other hand, the City's adherence to the existing rule, which did not require any consultation with the union, had minimal effect on the union. Even if the PERB's conclusion was correct – that the City had an obligation to "consult" with the Union on the charter amendment – the City was under no obligation to make any substantive changes to Measure D.

PERB's governing statute requires it to decide unfair practices charges according to "existing judicial interpretations of this chapter." (Gov. Code § 3509, subd. (b) and § 3510, subd. (a).) This rule is especially important in the election context. If a city cannot rely on existing precedent in determining proper pre-election procedures, cities may be hesitant to commit the resources to placing measures on the ballot.

C. Binding Interest Arbitration Involves Fundamental Issues Of Municipal Governance That Do Not Require A City To Confer With Employee Unions Under Either Section 3505 Or 3507

Contrary to the PERB decision, there was no requirement to confer concerning interest arbitration under either section 3505 or 3507. Interest arbitration

involves a core governance function that is outside the "scope of representation," as defined in Government Code section 3504, and thus beyond the reach of the MMBA. PERB's decision creates uncertainty as to what other governmental functions PERB may decide are exempt from section 3505, but subject to "consultation" under section 3507.

Under section 3505, a public agency must "meet and confer in good faith regarding wages, hours and other terms and conditions of employment." Under section 3507, a public agency may adopt "reasonable rules and regulations" for the "administration of employer-employee relations under this chapter" after "consultation in good faith." But both sections are predicated on a matter being within the "scope of representation" under the MMBA, which does *not* include "the merits, necessity, or organization of any service or activity provided by law or executive order." (Gov. Code § 3504; *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 92, 96-97 ["we conclude the minimum salary formula of Fresno City Charter section 809 was not a mandatory subject of bargaining; that is, it was not a matter within the scope of representation].)[4]

Here, a proposal to rescind binding interest arbitration, and have the Palo Alto City Council be the final decision maker on contract matters, is not within the "scope

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[4] Government Code section 3504 states: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

of representation" under the MMBA section 3504 because it directly relates to the "merits, necessity or organization" of any "activity provided by law." It has long been recognized that an interest arbitrator wields a form of legislative power. "[T]he interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations." (*County of Sonoma v. Super. Ct.* (2009) 173 Cal.App.4th 322, 341-342.) As explained by a leading authority on labor relations:

> Under a regime of collective bargaining . . . the public employer retains ultimate power to approve or disapprove the agreement, and the decision is therefore a product in part of political influence. In the case of binding interest arbitration, however, this ultimate power to decide is given to a person who, typically, is neither elected nor directly responsible to any elected official.

Joseph R. Grodin, *Political Aspects of Public Section Interest Arbitration*, (1976) 1 Berkeley J. Emp. & Lab. L. 1, p. 4. "[A] system of legislatively mandated interest arbitration may intrude upon the central democratic premise that governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate." (*Id.* at p. 3.)

For the same reason that interest arbitration is not subject to "meet and confer" under section 3505 it also is not subject to "consultation" under section 3507. In both cases, the issue of interest arbitration involves a governmental function that is not within the "scope of representation" under the MMBA and thus neither sections 3505 or 3507 apply.

PERB's decision results in general uncertainty for cities over their obligations to public employee unions. Given PERB's novel application of section 3507 to interest arbitration, the decision generates new questions as to what other governance matters PERB may decide are subject to section 3507 "consultation." This lack of clear boundaries could be extremely disruptive for cities, as they make decisions in areas that PERB has traditionally viewed to be within the employer's prerogative.

IV. CONCLUSION

If upheld, the PERB's decision will have serious and disruptive consequences for California cities. PERB has upended settled rules that cities have relied upon in their relationships with public employee unions and specifically when placing measures on the ballot. Under the PERB decision, cities will be uncertain what procedures must be followed in conferring with unions before placing a measure on the ballot, whether they can rely on prior PERB and current case law in doing so, and what types of core governance matters will be deemed subject to "consultation" under section 3507. The PERB decision creates uncertain and unworkable rules that threaten cities' constitutional and statutory authority to place matters concerning public employment on the ballot. The League therefore urges this Court to overturn the PERB decision.

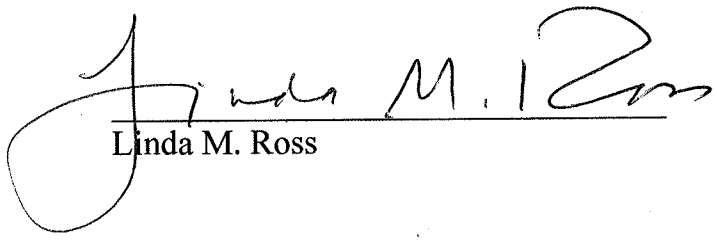
DATED: May 11, 2015

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
Linda M. Ross
Attorneys for Amicus Curiae
League of California Cities

WORD CERTIFICATION

I hereby certify that, as counted by my word-processing system, this brief contains 4,876 words exclusive of the tables, signature block and this certification.



Linda M. Ross

DECLARATION OF SERVICE

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Meyers, Nave, Riback, Silver & Wilson, 555 12th Street, Suite 1500, Oakland, CA.

On May 11, 2015, I served the within:

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES SUPPORTING THE APPEAL BY THE CITY OF PALO ALTO

on the parties in this action, by placing a true copy thereof in a sealed envelope(s), each envelope addressed as follows:

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(X) (**BY FIRST CLASS MAIL**) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California.

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

Cynthia Sauceda

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