RPLG Renne Public Law Group

Arthur A. Hartinger
Ryan P. McGinley-Stempel
415-848-7200

August 12, 2019

Presiding Justice Sandra L. Margulies
Associate Justice Kathleen M. Banke
Associate Justice Gabriel P. Sanchez
California Court of Appeal
First Appellate District, Division One
350 McAllister Street
San Francisco, California 94102

Re: *City and County of San Francisco v. Public Employment Relations Board*, Case No. A152913
Request for Partial Publication of Opinion

Honorable Justices:

Pursuant to rules 8.1105(c), 8.1110, and 8.1120 of the California Rules of Court, the City and County of San Francisco ("San Francisco") respectfully requests that the Court certify for partial publication Sections I, II.C.1 and II.D of its opinion filed on July 22, 2019, in the above-referenced case. The League of California Cities also joins in this request.[1]

Sections II.C.1 and II.D of the opinion meet the standards for certification under rule 8.1105(c) because both sections (1) "explain[] . . . an existing rule of law"; (2) apply that existing rule of law "to a set of facts significantly different from those stated in published opinions"; and (3) "[i]nvolve[] a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2), (3), (6).) Section I, in turn, should be published as well because it provides factual and procedural background that is necessary to understand the opinion's analysis in Sections II.C.1 and II.D.

San Francisco, like all public employers in California, has a strong interest in the law governing the standard for evaluating facial challenges to local rules and regulations under the Meyers-Milias-Brown Act ("MMBA") and the determination of which portions of those rules and regulations may be severed even when others are found to violate the MMBA. Additionally,

[1] The League of California Cities is an association of 478 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, 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.

as the Petitioner in this case, San Francisco has an interest in ensuring that the Court's modification of PERB's decision is given full effect and made known to all public agencies, labor unions, and employees subject to PERB's jurisdiction.

I. Section II.C.1's Discussion of the Facial Challenge Standard Explains an Existing Rule of Law, Applies It to a Significantly Different Set of Facts, and Involves a Legal Issue of Continuing Public Interest

In Section II.C.1, the Court held that when evaluating a facial challenge to local rules or regulations under the MMBA—here, bargaining rules in the San Francisco Charter—courts must "consider whether there are any circumstances under which the [local rules or regulations] would not conflict with the reasonableness requirement of section 3507." (Opn. at pp. 11-12.) PERB had argued that the "no set of circumstances" test "only applies to constitutional challenges and a party challenging a local regulation under section 3507 [i.e., on statutory grounds] must only demonstrate that it is unreasonable." (Opn. at p. 10.) The opinion rejected that argument. While acknowledging that the "vast majority" of facial challenges are on constitutional grounds, the opinion recognized that a facial challenge may be premised on an inconsistency with statutory law, and cited several cases applying the "no set of circumstances" test to non-constitutional challenges to local laws. (Opn. at p. 11.) The opinion explained why the California Supreme Court's decision in *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, is consistent with its holding because it "instructs our interpretation of when an ordinance conflicts with the reasonableness requirement of section 3507." (Opn. at p. 11.) The Court held that while an "as applied" challenge analyzes a specific set of actions, a facial challenge requires a "broader perspective" where PERB or a Court must "consider whether circumstances exist under which [the local rule or regulation] does not conflict with the reasonableness requirement of section 3507." (Opn. at p. 12.)

The opinion's analysis of the facial challenge standard warrants partial publication under subdivisions (c)(2), (c)(3) and (c)(6) of rule 8.1105. First, the opinion's facial challenge analysis explains how an existing rule of law—the "no set of circumstances" standard for evaluating facial challenges—applies to a challenge under the MMBA and addresses how *City of Gridley* provides guidance in making this evaluation. (See Cal. Rules of Court, rule 8.1105(c)(2-3); Opn. at pp. 10-12.) Indeed, the fact that PERB acknowledged the "no set of circumstances" test, yet persisted in arguing that the test does not apply when evaluating the facial validity of a local rule or regulation under the MMBA, demonstrates the need for partial publication of the opinion's analysis of this existing rule of law in this context.

Second, the opinion's analysis of the facial challenge standard "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), because it provides further

guidance to courts and PERB on how to evaluate the facial validity of local enactments under the MMBA—an important legal issue involving the public interest that is sure to recur in the future. Here, PERB's application of the wrong facial challenge standard led it to invalidate more portions of Proposition G—a duly enacted local voter initiative—than it should have. (See Opn. at pp. 17-18 [explaining that "PERB's conclusion that the first, second, and fourth sentences of subdivision (o) violate section 3507, subdivision (a)(5), was not supported by substantial evidence" under proper facial challenge standard].) As a result, valid portions of Proposition G that San Francisco voters enacted to strengthen the City's Transit First policy and promote transparency in labor relations and negotiations have been mistakenly held in limbo for nearly a decade. Without further published guidance about the proper standard for evaluating facial challenges under the MMBA, more local enactments may be the subject of premature challenge or invalidation.

II. Section II.D's Severability Analysis Explains an Existing Rule of Law and Involves a Legal Issue of Continuing Public Interest

In Section II.D, the Court held that PERB erred in invalidating subdivisions (o) and (q) of San Francisco Charter section 8A.104 in their entirety because Proposition G contained a severability clause and the valid portions of subdivisions (o) and (q) were grammatically, functionally, and volitionally separable from the invalid portions. (See Opn. at pp. 30-33.)

The opinion's severability discussion also warrants partial publication under subdivisions (c)(2), (c)(3) and (c)(6) of rule 8.1105. First, the opinion's severability discussion explains an existing rule of law—the presence of a severability clause establishes a presumption in favor of severance that can be rebutted only if the invalid portions are not grammatically, functionally, and volitionally separable (see Opn. at pp. 30-31)—and applies that existing rule of law to a charter amendment enacted by voter initiative. (See Cal. Rules of Court, rule 8.1105(c)(2-3); Opn. at pp. 31-33.)

Second, the opinion's severability discussion "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), because it provides further guidance for courts and PERB on how to preserve as much of a voter initiative as possible when a portion of it is held invalid under the MMBA.

III. Section I Warrants Publication Because It Provides Background Facts and Procedural History Necessary to Understanding Sections II.C.1 and II.D

Section I sets forth the factual and procedural background leading to the Court's opinion in this case. (See Opn. at pp. 2-8.) It discusses the San Francisco Charter prior to Proposition G, the effect of Proposition G on the Charter, and the unfair practices charge that led to PERB's invalidation of subdivisions (o) and (q). This factual and procedural background is critical to fully understanding the opinion's analysis regarding the standard for evaluating facial challenges to local enactments under the MMBA and the severability of portions of such enactments found to be invalid. Accordingly, if the Court grants partial publication of Sections II.C.1 and II.D, it should also grant partial publication of Section I.

For the foregoing reasons, the City and County of San Francisco and the League of California Cities respectfully request that the Court publish Sections I, II.C.1, and II.D of its opinion in the above-referenced case.

Sincerely,

Arthur A. Hartinger
Ryan P. McGinley-Stempel

cc: Service List