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June 6, 2016

Honorable Chief Justice Tani Cantil-Sakauye
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***County of Riverside v. Public Employment Relations Board (Service Employees International Union, Local 721)***
Case No. S234326
After a Decision by the Fourth District Court of Appeal, Division One, Case No. D069065

Letter of Amici Curiae in Support of Petition for Review

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500(g), the League of California Cities (League) and the California State Association of Counties (CSAC) (collectively Amici) respectfully submit this letter in support of the petition for review filed by the County of Riverside (County) on May 5, 2016, asking this Court to review the above-referenced decision of the Fourth District Court of Appeal, Division One. The County's petition should be granted because this case presents two issues of exceptional importance to local government agencies across the state:

1. Whether the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) requires a local public agency employer to participate in factfinding upon the union's request when the parties reach an impasse in negotiations that would not result in a comprehensive memorandum of understanding.

2. Whether the Meyers-Milias-Brown Act's mandatory factfinding provisions violate the constitutional home rule authority of charter cities and counties.

I. Amici's Interest in Review

The League is an association of 474 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, which is 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.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County

Counsels' Association of California and is overseen by the Association'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 involves a matter affecting all counties.

Attorneys for amici are familiar with the issues involved, and have reviewed the County of Riverside's petition for review and the answer filed by the Public Employment Relations Board (PERB). Amici support the County's petition and write separately to explain how the issues presented in this case are of great importance to all local government employers in California.

II. Review Should Be Granted to Settle an Important Question of Law – the Scope of Mandatory Factfinding for Local Agency Labor Disputes

Contrary to the Court of Appeal's opinion, PERB's recent rulings on this issue are not entitled to deference. PERB issued these decisions *after* the San Diego Housing Commission filed a writ of mandate challenging PERB's authority to order the Commission to engage in single issue factfinding. In fact, PERB changed its own regulations precisely to allow it to render those decisions. The anomaly that PERB may issue a precedential decision on an issue while it is a party to court litigation over that very same issue unfairly gives PERB the ability to place its thumb on the scale in litigation. By giving unwarranted deference to PERB's decisions, the Court of Appeal essentially allowed PERB to usurp the judicial function of statutory interpretation. This relinquishment of judicial authority should not be allowed to stand.

As a practical matter, the Court of Appeal's decision requires almost all local agencies in California to submit to time-consuming and expensive factfinding proceedings over *any* dispute that arises between the agency and a labor union representing its employees. Specifically, the Court's ruling improperly expands statutory amendments that require factfinding when an agency and union cannot reach agreement on a labor contract to apply to *all* disputes over negotiable subjects. Not only is this ruling contrary to the text and structure of the amendments and their legislative history, but it is also contrary to longstanding practice in local agency collective bargaining. Should it stand, the Court of Appeal's decision will force local public agencies to substantially change how they negotiate over operational and policy issues that arise outside of negotiations for a full labor contract.

"The [Meyers-Milias-Brown Act (MMBA)] imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees." (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083, citing Gov. Code, § 3505.) Pursuant to this duty, local agencies and their employee unions negotiate comprehensive collective bargaining agreements – commonly known as a "memorandum of understanding" – governing terms and conditions of employment for the agency's employees. Typically, these "MOUs" are

the product of negotiations between full teams of union and management representatives over every subject the parties wish to address in the labor contract. Because they usually have a significant cost component, MOUs must be approved by the local agency's governing body before they take effect.

The MMBA also requires local agencies to negotiate with labor unions over any effects on terms and conditions of employment arising from management's decision to adopt, change, or eliminate a policy or practice. For example, in this case the County adopted a new background check policy for its information technology employees that required termination of employment if an employee did not pass the background check. Although the County had no obligation to negotiate over requiring background checks, it had to bargain with the union over the ability to discharge an employee who failed the background check.

Typically, such operational or "single issue"[1] negotiations do not involve full bargaining teams on both sides. Rather, they are done by a few individuals for each side, often at the department level. Because agreements on such issues usually do not involve significant costs, they frequently are approved by an authority below the level of the governing body, such as a city manager or county administrative officer. Moreover, if they are titled anything at all, it is common practice to call such agreements a "side letter" or "addendum" to a MOU. Rarely, if ever, do parties refer to a single issue agreement as a "memorandum of understanding."

The way the Court of Appeal interpreted the term of art – "memorandum of understanding" – is not how local agencies and labor unions have used that term for decades. This is not just a matter of semantics; it has concrete effects. The Court's decision will force local public agencies to drastically change long-established practices with respect to single issue negotiations. Having to treat single issue negotiations as full MOU negotiations will significantly increase the resources an agency must commit to those negotiations. With the possibility of factfinding and its resulting cost and delay looming over those negotiations, an agency may choose either to cave to union demands or simply not make the operational change at all. Such a chilling effect could have significant negative consequences on agencies' operations and finances.

Furthermore, even if, as PERB claims, single issue factfinding has been the practice among school districts and the statewide university systems for years, this does not mean it is required under the MMBA. In fact, significant differences between the MMBA and the statutes governing public educational entities strongly suggest that MMBA factfinding is limited to full MOU negotiations. In its briefing below, PERB cited a handful of "single issue" factfinding decisions over the last nine years from school districts and the California State University

[1] Consistent with the parties' usage, amici use this term to refer to any negotiations that are not negotiations for a comprehensive MOU, even if they include more than one subject or issue.

system. Yet it provided no empirical evidence that this practice is common or has been going on for decades under the educational labor relations acts. But even if it had, local public agencies have followed a *different* practice with regard to single issue negotiations for decades. Nothing in the statutory language or legislative history indicates that the Legislature intended to eliminate this existing practice and replace it with the practice followed by school districts or the statewide university systems. The Court of Appeal's failure to recognize the distinctions between local public agencies and educational entities will result in a sea change in how local agencies deal with negotiable issues outside of full MOU negotiations.

III. Review Should Be Granted to Ensure a Uniform Standard for Unconstitutional Impingement on Home Rule Authority

A charter entity's governing body has plenary authority over the compensation of the entity's employees. (Cal. Const., art. XI, § 1, subd. (b), § 5, subd. (b).) Additionally, "[t]he 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." (Cal. Const., art. XI, § 11, subd. (a).) The Court of Appeal erroneously concluded that the MMBA's mandatory factfinding provisions did not violate these home rule principles because the factfinding panel's decision is advisory, not binding. In so concluding, the Court applied the wrong legal standard.

This Court has long recognized that a statute which only minimally impinges on home rule authority is constitutional. (*County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 288; *Baggett v. Gates* (1982) 32 Cal.3d 128, 137.) On the other hand, substantial impingement "conflicts with the Constitution's reservation of this power to local governments." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 348.) Thus, the proper inquiry is the extent to which the state statute impinges on the charter entity's constitutionally reserved authority over municipal affairs. (*Ibid.*)

The Court of Appeal failed to apply this standard below. Instead, the Court created a new rule that there is no home rule violation unless a statute allows a private body to make a binding decision on terms and conditions of employment. Because it fails to determine relative impingement, the Court of Appeal's bright line rule is inconsistent with the rule set forth in this Court's precedent and applied by the First District Court of Appeal in *County of Sonoma, supra*. The Court of Appeal's deviation from existing law in itself warrants granting review.

Furthermore, under the proper test, the MMBA's mandatory factfinding provisions substantially impinge on charter entities' home rule authority. First, there is the substantial cost of the factfinding process itself, which can be forced upon a charter entity simply by a union filing a form with PERB. Second, the factfinding process could significantly delay the charter entity's ability to implement cost saving measures. Thus, a union and/or a factfinding panel could force the entity to spend a substantial amount of money it would not otherwise spend – an

amount that is ultimately borne by the taxpayers. It is the ability to compel a charter entity to spend its funds, rather than the advisory nature of the factfinding panel's decision, that constitutes a substantial impingement on home rule authority.

This issue is of statewide concern because much of California's population resides or conducts business within a charter jurisdiction. Many of the most populous cities in the state are charter cities, such as Fresno, Long Beach, Los Angeles, Oakland, Sacramento, San Diego, San Francisco, and San Jose. Similarly, a large percentage of the state's population and businesses are within charter counties, such as Alameda, Los Angeles, Orange, Sacramento, San Diego, San Mateo, and Santa Clara. Thus, the state's ability to compel a charter entity to participate in factfinding potentially impacts a majority of the state's taxpaying residents and businesses.

IV. Conclusion

Amici respectfully request that this Court grant review to resolve the important question of whether local public agencies must change decades of practice and submit to factfinding over single issues. The answer to this question will have a substantial impact on the finances and operations of amici's members, as well as those of the hundreds of local government agencies throughout the state that are also subject to the MMBA.

Additionally, this Court should grant review to ensure uniformity in the legal standard for whether a state statute violates a charter entity's constitutional home rule authority. The Fourth District Court of Appeal's standard is contrary to that established by this Court and applied by other courts of appeal. Moreover, under the correct standard the ability of a labor union or factfinding panel to force a local agency to spend funds it otherwise would not spend unconstitutionally impinges on a charter entity's home rule authority.

Sincerely,

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Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

PROOF OF SERVICE

State of California
County of San Francisco
Court of Appeal Case No.: E060047
Supreme Court Case No.: S234326

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On June 6, 2016, I served the following document(s) by the method indicated below:

Letter of Amici Curiae in Support of Petition for Review

MANNER OF SERVICE:

✓ By United States Mail, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California.

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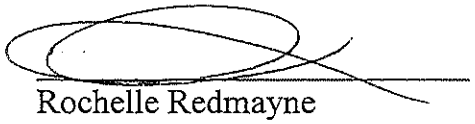
I declare, under penalty of perjury that the foregoing is true and correct. Executed on June 6, 2016, in San Francisco, California.



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