IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, AFL-CIO, Petitioner and Appellant v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent	Case No. S172377
CITY OF RICHMOND, Real Party in Interest and Respondent.	

After a Decision of the Court of Appeal,
First Appellate District, Div. Three, Case No. A114959
Contra Costa County Superior Court, Case No. N05-0232
Honorable Steven K. Austin, Judge Presiding

AMICI CURIAE APPLICATION AND BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND THE INLAND PERSONNEL COUNCIL IN SUPPORT OF REAL PARTY IN INTEREST, CITY OF RICHMOND

[C.R.C. Rule 8.520(f)]

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CERTIFICATE OF INTERESTED PARTIES

[C.R.C. Rule 8.208(a)]

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

The undersigned, counsel of record for Amici Curiae, CSBA Education Legal Alliance and Inland Personnel Council, certifies that it knows of no entity or person other than the parties themselves that has: (1) an ownership interest of ten percent or more; or (2) a financial or other interest in the outcome of the proceeding that Amici Curiae reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: December 23, 2009

Respectfully submitted,

ATKINSON, ANDELSON, LOYA
RUUD & ROMO

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ADMINISTRATIVE DECISIONS

APPLICATION TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The Education Legal Alliance ("Alliance") of the California School Boards Association ("CSBA"), and the Inland Personnel Council ("IPC") respectfully request permission to file an amici curiae brief on the merits in support of Real Party in Interest and Respondent, City of Richmond. This application is timely made within 30 days after the filing of all briefs on the merits (California Rules of Court, Rule 8.520(f)(2).)

Applicant CSBA is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Alliance helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, more than 750 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

Applicant IPC is a consortium of public school districts, community colleges, and county offices of education located in Riverside and San Bernardino Counties. Participating IPC members are governed by a Joint Powers Agreement that is administered jointly by the offices of the San Bernardino and Riverside County Superintendents of Schools. The purpose

of the IPC is to make available expert legal advice, as well as coordinated services, assistance, and information to help participating IPC members better meet and respond to needs, problems, and issues in areas involving labor relations and school law.

The attached brief is authored by Atkinson, Andelson, Loya, Ruud & Romo and funded solely by the Alliance and IPC. (C.R.C., Rule 8.520(f)(4).) Atkinson, Andelson, Loya, Ruud & Romo represents over 400 school and community college districts, county superintendents of schools, and county boards of education.

The Alliance and IPC believe the Court of Appeal correctly determined, pursuant to decades of judicial and administrative rulings, that a decision to lay off public employees for economic reasons (as opposed to the "effects" of a decision to lay off public employees for economic reasons) is not subject to collective bargaining under the Government Code, and respectfully request that the reasoning and result of this portion of the Court of Appeal's decision be affirmed. The individual members of the K-12 school districts and county offices of education represented statewide by the Alliance, and of the K-12 school districts, community colleges, and county offices of education represented in San Bernardino and Riverside Counties by the IPC have a vital interest in ensuring that public employers retain exclusive, non-negotiable, managerial authority to make decisions to lay off workers due to financial constraints and to make determinations concerning changes in the way an entity's services are to be performed. Such decisions are matters of fundamental managerial concern which must be left to the public employer's prerogative.

The Alliance and the IPC also respectfully request that the Court vacate that portion of the Court of Appeal's ruling that contradicts the Legislature's express exemption from judicial review of a PERB decision

not to issue an unfair labor practice complaint. The individual members of the Alliance and the IPC are concerned that, given the identical language regarding judicial review in each of the PERB-administered statutes relating to public employment in California, permitting judicial review of a PERB decision not to issue a complaint under the Myers-Milias-Brown Act ("MMBA") would result in a catastrophic expansion of the scope of review of the PERB's decisions not to issue a complaint under other PERB-administered statutes, such as the Educational Employment Relations Act ("EERA") which governs public school and community college district employment. The Legislature has not authorized such an expansion.

Applicants have reviewed the Court of Appeal's opinion as modified on denial of rehearing, the briefs filed by the International Association of Fire Fighters, Local 188 ("Local 188") and by the Public Employment Relations Board ("PERB") before the Court of Appeal, the Petition for Rehearing filed by Local 188, the Petitions for Review filed by Local 188 and by the PERB, the Opening Briefs of the PERB and Local 188, the Answer Briefs filed by the PERB, Local 188 and the City of Richmond, and the Reply brief filed by Local 188. Thus, the Alliance and the IPC are familiar with the issues in this action and the scope of their presentation, and believe they may be of assistance to this Court by providing additional briefing that materially adds to and complements the briefing previously submitted by the parties. (C.R.C., Rule (f)(3).)

The brief on behalf of Amici Curiae discusses the plain and unambiguous statutory preclusion from judicial review of the PERB's decision not to issue a complaint, the Court of Appeal's erroneous reliance on *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551, and the nonreviewability of the PERB's decision not to issue a complaint, even if the *Belridge Farms* analysis was applied. The brief also

discusses the PERB's deferential expertise with respect to defining and determining matters that statutorily fall within the scope of representation, case law setting forth tests for assessing negotiability of subjects, balancing the transactional costs of the bargaining process against the value to be obtained from bargaining, the value of maintaining the long-settled rule that the decision to lay off public employees rests exclusively within the prerogative of public employers, and the protection guaranteed to public employees through the employer's obligation to negotiate with employees concerning the effects of any decision to lay off employees prior to implementation of such decision.

Resolution of these issues provides an independent basis for affirming in part and vacating in part the Court of Appeal's ruling, and will provide guidance on recurring issues of great public importance.

To properly inform the court regarding these and other related matters, Applicants Alliance and the IPC respectfully request an order granting permission to file an amici curiae brief in support of the City of Richmond, such brief submitted concurrently herewith.

Dated: December 23, 2009

Respectfully submitted,

ATKINSON, ANDELSON, LOYA
RUUD & ROMO

By: _____
Warren S. Kinsler

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Cathie L. Fields

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AMICI CURIAE BRIEF

INTRODUCTION

The Education Legal Alliance ("Alliance") of the California School Boards Association and the Inland Personnel Council ("IPC") submit this *amici curiae* brief in support of Real Party in Interest City of Richmond. Along with the City and Respondent Public Employment Relations Board ("PERB"), IPC and the Alliance respectfully ask the Court to (1) vacate that portion of the Court of Appeal's ruling that contradicts the Legislature's express exemption from judicial review of a PERB decision not to issue an unfair labor practice complaint; and (2) affirm the Court of Appeal's correct determination, pursuant to decades of judicial and administrative rulings, that a decision to lay off public employees for economic reasons is not subject to collective bargaining under the California Government Code.

The erroneous decision of the Court of Appeal to undertake judicial review of the PERB's determination not to issue a complaint circumvents the plain meaning of the applicable statute. The Court of Appeal's reliance on *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551 (hereafter *Belridge Farms*) was misplaced, as that case addressed an entirely separate statutory scheme, which differs in material respects from the statute at issue here. Moreover, even if the exceptional circumstances discussed in *Belridge Farms* did apply to a PERB refusal to issue a complaint, none of those circumstances was present in this case.

Of primary concern to IPC and the Alliance is affirmance of the Court of Appeal's correct determination that a public employer's decision to lay off workers due to financial constraints or changes in the way the entity's services are to be performed is not negotiable. This Court and the PERB,

which has exclusive initial jurisdiction over unfair labor practice claims filed under the statutes the PERB is charged with enforcing, have long held the decision to lay off public employees, whether firefighters, police, teachers, faculty or other staff of public agencies, is not negotiable.[1]

STATEMENT OF FACTS

As noted in the City's Consolidated Answer Brief at page 4, the Court of Appeal's recitation of the facts, included in the administrative record, is not in dispute. Since the facts in this matter are undisputed, and the parties and the Court of Appeal have supplied accurate statements of the facts, IPC and the Alliance do not provide a duplicative recital of the facts here.

ARGUMENT

The two issues presented here, where the facts are undisputed, are pure questions of law. The Court reviews a pure question of law de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

I. THE PERB'S DECISION NOT TO ISSUE AN UNFAIR LABOR PRACTICE COMPLAINT IS NOT SUBJECT TO JUDICIAL REVIEW.

The Court of Appeal erroneously determined the decision of the PERB not to issue a complaint pursuant to the unfair practice charge filed by Plaintiff/Appellant International Association of Fire Fighters, Local 188

[1] By contrast, as discussed further *infra*, the PERB recognizes that the "impact" or "effects" of such a decision are negotiable, but do not require delay in the implementation of a layoff. (See *Healdsburg Union High School District* (1984) PERB Decision No. 375; *Oakland Unified School District* (1981) PERB Decision No. 540.)

(Local 188) was subject to judicial review despite a clear and unambiguous statutory provision to the contrary. (Gov. Code, § 3509.5, subd. (a).)[2]

The Alliance and IPC adopt and incorporate the arguments put forward on appeal of this issue by the City and the PERB. More specifically, the Alliance and IPC raise the concern that, given the identical language regarding judicial review in each of the PERB-administered statutes relating to public employment in California, permitting review of a PERB decision under the Meyers-Milias-Brown Act (MMBA) would result in a catastrophic expansion of the scope of review of PERB decisions under these other statutes, such as the Educational Employment Relations Act (EERA; Gov. Code § 3540 et seq.), which governs public school and community college district employment. The Legislature has not authorized such an expansion.

As noted in the PERB's brief, the Court of Appeal in this case was the first in the PERB's 33-year history to affirm judicial review of a decision not to issue a complaint. (Respondent's Opening Brief at p. 10.) That ruling was erroneous, and must be reversed to prevent the judicial amendment of the statutes which the PERB is charged with enforcing.

A. The PERB Has Exclusive Jurisdiction Over Unfair Practice Charges

The Legislature enacted the EERA in 1975. (Stats. 1975, ch. 961, § 2, p. 2247, operative July 1, 1976.) The EERA requires a school district employer to meet and negotiate in good faith with the duly selected exclusive representative of its employees as to subjects within the statutorily defined scope of representation. (§§ 3543.3, 3543.5.)

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[2] All further statutory references are to the Government Code unless otherwise indicated.

The EERA created the PERB as an independent board appointed by the Governor "with broad powers and duties to administer the Act." (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 855 (hereafter *"San Mateo"*), citing § 3541.3.) The agency was initially designated the Educational Employment Relations Board ("EERB"). When the Legislature expanded the jurisdiction of the EERB to include adjudication of unfair practice charges under the Dills Act, applicable to State employees, the EERB was renamed the PERB. (See Gov. Code, §§ 3513, subd. (h), 3514.5, added by Stats. 1977, ch. 1159, §§ 6-7, pp. 3761-3763; *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1085 (hereafter *"Coachella Valley."*) The Legislature further expanded PERB's jurisdiction to include the MMBA in 2001. (Stats. 2000, ch. 901, § 8.)

The PERB is empowered to "oversee and facilitate the negotiating process established by the Act," among other obligations. (*San Mateo, supra*, 33 Cal.3d at p. 856.) The PERB thus "has *exclusive* initial jurisdiction over claims of unfair practices." (§ 3509, subd. (b); *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 413.) Where the PERB has exclusive initial jurisdiction, the courts retain "only appellate, as opposed to original, jurisdiction to review PERB's decisions." (*International Federation of Prof. & Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, 677; see § 3509.5; *California Teachers Ass'n v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1087.)

The courts appropriately recognize "the need to defer to the expertise of PERB so it can perform its mandated duty to effectuate and implement the purposes and policies of the EERA--that is, to promote the improvement of personnel management and employer-employee relations within the public

school systems of California. (§ 3540.)" (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 894 [the "cases all point to a general scheme of recognizing the importance of deferring to the expertise of PERB in appropriate circumstances"].)

B. The MMBA and the EERA, Like the Other Employment-relations Statutes Under the PERB's Jurisdiction, Plainly and Unambiguously Precludes Judicial Review of a Decision Not to Issue a Complaint

Section 3509.5 was added to the MMBA in 2002. (Stats. 2002, c. 1137 (A.B. 2908), § 3.) Subdivision (a) of that section could not state more clearly the intent of the Legislature with respect to the availability of judicial review of a PERB decision: "Any charging party, respondent, or intervenor aggrieved by a *final* decision or order of the board in an unfair practice case, *except a decision of the board not to issue a complaint* in such a case . . . ." (Emphasis added.) The same is true of the EERA. (See § 3542, subd. (b) ["Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for a writ of extraordinary relief from such decision or order."])

As this Court has often reaffirmed, the plain language of a statute is the "most reliable" indicator of the Legislature's intent. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888; *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919; *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.) "Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context. . . . When statutory language is clear and unambiguous, '"there is

no need for construction and courts should not indulge in it.'" (*Esberg v. Union Oil Co., supra,* 28 Cal.4th at p. 268, internal citations omitted.)

"If the statutory language on its face answers the question, that answer is binding unless we conclude the language is ambiguous or it does not accurately reflect the Legislature's intent." (*Palmer v. GTE California, Inc., supra,* 30 Cal.4th at p. 1271; accord, *Van Horn v. Watson* (2008) 45 Cal.4th 322, 326 ["If [the statutory] language is clear and unambiguous, our inquiry ends"]; *Miklosy v. Regents of University of California, supra,* 44 Cal.4th at p. 888; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211.) Moreover, "a court construing a statute is not authorized to insert qualifying provisions or exceptions not included by the Legislature or to rewrite the statute to conform to some assumed intention that does not appear from its language." (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 258, fn. 6.)

The language limiting review of a PERB decision not to issue a complaint is not limited to the MMBA and the EERA. Each of the other statutes administered by the PERB includes an identical limitation. (See §§ 3520, subd. (b) [State Employer-Employee Relations Act]; 3564, subd. (b) [Higher Education Employer-Employee Relations Act]; 71639.4, subd. (a) [Trial Court Employment Protection and Governance Act]; 71825.1, subd. (a) [Trial Court Interpreter Employment and Labor Relations Act]; Pub. Util. Code, § 99562, subd. (b) [Transit Employer-Employee Relations Act].) The MMBA's provision is no anomaly.

The Legislature knows how to create an exception if it wishes to do so. (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.) In these parallel statutes, all administered by the same agency in furtherance of the same public policy of promoting employer-employee relations in public employment, the Legislature has repeatedly codified the availability

of judicial review *and the exception thereto*. The statutes do not indicate the Legislature intended to authorize *any* exception to the narrow exclusion of judicial review where the PERB determines not to issue an unfair practice complaint, as erroneously created and applied by the Court of Appeal here.

C. The Analysis in *Belridge Farms* Does Not Apply to the PERB's Decision Not to Issue a Complaint Under the MMBA

The Court of Appeal erroneously relied on the analysis in *Belridge Farms*, which construed the Agricultural Labor Relations Act ("ALRA;" Labor Code § 1140 et seq.). In that case, this Court held the Legislature framed the judicial review provision of the ALRA, Labor Code section 1160.8, in language substantially identical to that of the National Labor Relations Act ("NLRA;" 29 U.S.C. § 160(f)), thereby indicating an intention to adopt applicable federal rules limiting review of Agricultural Labor Relations Board decisions.

Notably, the operative language of Labor Code section 1160.8 provides:

> Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. . . .

Noticeably absent from section 1160.8 is the exception clause found in Government Code sections 3509.5(a) and 3542(b). The Legislature's utilization of different language in the statutes the PERB is charged with enforcing was erroneously written out of the Government Code by the Court of Appeal.

The Court in *Belridge Farms* held, "The [ALRB] general counsel's refusal to issue an unfair labor practice complaint does not constitute a final order of the board under section 10(f) [of the ALRA]." (21 Cal.3d at p. 556.) The Court needed to make this determination because it was not apparent from the ALRA statutory language. Here, by contrast, the MMBA specifically precludes review of one particular type of non-final decision by the PERB: the decision not to issue a complaint.

The Legislature is presumed to have known about the *Belridge Farms* decision when it enacted or left unchanged PERB-administered statutes, including the MMBA's limited-review language in 2001. (*Id.* at p. 557 ["This court has long recognized the principle of statutory construction that '[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation.'"])[3]

Being aware of the holding in *Belridge Farms*, the Legislature did *not* limit review under the PERB-administered statutes enacted thereafter only to "final" decisions, but specifically excepted *the decision not to issue a complaint.* This exception must be presumed to have been deliberate, specifically to *avoid* application of the holding in *Belridge Farms* to these statutes.

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[3] The PERB-administered statutes that include the exception for a decision not to issue a complaint were enacted both prior to and following the June 22, 1978 *Belridge Farms* decision. (See § 3520, added by Stats. 1977, c. 1159, p. 3756, § 4; § 3542, added by Stats. 1975, c. 961, p. 2252, §2; § 3564, added by Stats. 1978, c. 744, § 3; §71825.1, added by Stats. 2004, c. 227 (S.B. 1102), § 75; § 71639.4, added by Stats. 2004, c. 227 (S.B. 1102), § 70; Pub. Util. Code § 99562, added by Stats. 2003, c. 833 (A.B. 199), § 1.)

Critical to the Court's holding in *Belridge Farms* was the linguistic similarity between the ALRA and the NLRA. By contrast, the California Legislature expressly departed from this language by adding the phrase "except a decision not to issue a complaint" to the PERB-administered statutes, thereby deliberately removing those statutes from the scope of in *Belridge Farms* analysis.

> The principle as enunciated in *Belridge Farms*, *supra*, requires only that in the interpretation of the ALRA precedential value be given to the NLRA ***to the extent the provisions are derived from the federal act.*** (21 Cal.3d at p. 557, 147 Cal.Rptr. 165, 580 P.2d 665.) In *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 412-413, 128 Cal.Rptr. 183, 196, 546 P.2d 687, 700, the Supreme Court instructed: "In addition, we observe that section 1148 directs the board to be guided by the 'applicable' precedents of the NLRA, not merely 'the precedents' thereof. From this language the board could fairly have inferred that the Legislature intended it to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California agricultural scene." (*Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 374, emphasis added.)

The Legislature's deliberate addition of the phrase "except a decision not to issue a complaint"—not found in the NLRA—obviates any analysis of the PERB-administered statutes on this issue under federal precedent or the NLRA.

D. Even Applying the *Belridge Farms* Analysis, the PERB's Decision Not to Issue a Complaint Was Not Reviewable

The Court in *Belridge Farms* recognized three extremely limited circumstances in which judicial review of an ALRB decision would be appropriate under equitable principles: (1) there is a colorable claim that the decision violates constitutional rights; (2) the decision exceeds the specific grant of authority; or (3) the decision is based on an erroneous construction

of an applicable statute. (21 Cal.3d at pp. 556-557.) As subsequent courts have cautioned, "the *normal rule is nonreviewability* of intermediate decisions unless the order falls within the narrow exceptions summarized in *Belridge Farms*." (*Dessert Seed Co. v. Brown* (1979) 96 Cal.App.3d 69, 72, emphasis added (hereafter *Dessert Seed Co.*).) None of these narrowly prescribed circumstances existed here.

First, there is no constitutional right to bargain collectively. (See *Smith v. Arkansas State Highway Employees, Local 1315* (1979) 441 U.S. 463, 464-465, fn. 2.) Any such right is purely statutory. (See *Babbitt v. United Farm Workers Nat'l Union* (1979) 442 U.S. 289, 313-314; *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177 [discussing PERB-administered statutes affording collective bargaining rights to California public employees that were not previously available].) The PERB's decision not to issue a complaint cannot, by any stretch of the law, be construed as violating a constitutional right.

Second, the decision was entirely *within* the PERB's specific grant of authority under the MMBA. The PERB's statutory authority to issue or not to issue complaints is well settled. (See *Coachella Valley, supra*, 35 Cal.4th at p. 1082 [recognizing the PERB's authority to issue a complaint under the MMBA, eliminated by lapse of six-month limitations period found at Gov. Code, § 3541.5, subd. (a)]; *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 931, fn. 5 [to establish PERB's jurisdiction under HEERA, charging party must allege an unfair employer practice].)

Finally, review pursuant to "erroneous construction of an applicable statute" is unavailable in this case. This exception derives from federal law (*Leedom v. Kyne* (1958) 358 U.S. 184) and "is viewed as a narrow one permitting intermediate review only where 'the fact of a statutory violation

cannot seriously be argued.'" (*Dessert Seed Co.*, *supra*, 96 Cal.App.3d at p. 72, quoting *Boire v. Miami Herald Publishing Co.* (5th Cir. 1965) 343 F.2d 17, 21.) The court in *Dessert Seed Co.* cited *Belridge Farms* for the proposition that "The decision of general counsel for the ALRB not to file an unfair labor practice charge complaint is nonreviewable." (96 Cal.App.3d at p. 73, citing *Belridge Farms*, *supra*, 21 Cal.3d 551.)

Under these standards, the PERB's decision not to file an unfair practice complaint is not reviewable under the extremely narrow "erroneous construction" exception. Unlike the NLRB or ALRB, the PERB has the absolute, nonreviewable discretion not to issue a complaint in unfair practice cases. It is the "primary responsibility" of the PERB alone to determine the scope of bargaining and to resolve unfair practice claims. (See *Oakland Unified School District v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1012.) The Legislature and the courts have determined that such discretion is not to be second-guessed:

> "PERB has a specialized and focused task—'to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by the [EERA].' . . . As such, PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804, internal citations omitted.)

As noted by the PERB, recognizing judicial review of a refusal to issue a complaint based on "erroneous construction of a statute" would open *every* PERB refusal to issue a complaint to such review. (Opening Brief at p. 19.) The PERB's authority is granted by statute and is limited to enforcement of specific statutes. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177 [PERB is "an expert, quasi-judicial

administrative agency modeled after the National Labor Relations Board, *to enforce the act*"]; *Coachella Valley*, *supra*, 35 Cal.4th at p. 1085 ["Legislature vested the EERB with authority to adjudicate unfair labor practice charges under the EERA"], citing Stats. 1975, ch. 961, § 2, pp. 2249-2252.)

Thus, *every* unfair practice charge that comes before the PERB must allege some violation of an applicable statute. The Legislature granted PERB the absolute and final authority to decide not to issue complaints when it determines, in its "expertise," that a violation has not occurred. Any other, final determination by the PERB remains reviewable by the courts as provided by the statutes. Allowing judicial review of those PERB decisions *not* to issue a complaint would not only violate the expressed intention of the Legislature in each of the PERB-administered statutes, it would open a floodgate of litigation by affording litigants the opportunity to seek review of heretofore final determinations. The Legislature did not intend to permit the courts to second-guess the PERB decisions with respect to the issuance of complaints.

II. THE PERB'S DECISION NOT TO ISSUE A COMPLAINT WAS CONSISTENT WITH WELL ESTABLISHED LAW

Even if this Court declines to vacate the appellate ruling regarding judicial review, as requested by the PERB, the City, IPC and the Alliance, any judicial review should result in upholding the determination that the City's decision to lay off the firefighters was not negotiable. That determination has been consistent throughout this matter, from the initial review of the unfair practice charge by the PERB agent, through appeal to the PERB itself, to the trial court, and finally in the Court of Appeal.

A. The Scope of Representation Is Determined Pursuant to the PERB's Statutory Authority

The scope of representation under the EERA and the MMBA is substantially identical. The scope of representation under the MMBA is defined as "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."[4] (§ 3504.)

Section 3543.2 sets forth the EERA's similar scope of representation: "The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."[5] Under the EERA, "All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating." (§ 3543.2, subd. (a).) By using this language, the Legislature "purposely" left the determination of "the negotiability of each of the myriad of specific, detailed contract proposals that would arise in the

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[4] The latter phrase was added to the original statute in 1968 "not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Fire Fighters Union, Local 1186, International Association of Fire Fighters, AFL-CIO v. City of Vallejo* (1974) 12 Cal.3d 608, 616 (hereafter *Vallejo*).)

[5] Likewise, the scope of representation under the National Labor Relations Act is limited to "wages, hours, and other terms and conditions of employment." (29 U.S.C. § 158(d); *First Nat. Maintenance Corp. v. N.L.R.B.* (1981) 452 U.S. 666, 674-675 ["Congress has limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment'"].)

course of collective negotiations . . . to PERB's expertise." (*San Mateo*, *supra*, 33 Cal.3d at p. 858.)

Interpretation of the statutory provision defining scope of representation "falls squarely within PERB's legislatively designated field of expertise." (*Id.* at p. 856.) The PERB's construction "is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous. (*Ibid*, citing *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859; *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29, 160 Cal.Rptr. 710, 603 P.2d 1306; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325, 109 P.2d 935.)

In *San Mateo*, this Court agreed with the PERB that the EERA's list of matters within the scope of collective bargaining is not exclusive. The Court approved and adopted the PERB's "three-step test for assessing negotiability" of subjects not specifically enumerated in the EERA:

> [A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission." (33 Cal.3d at p. 858, citing *Anaheim Secondary Teachers Assn. v. Anaheim Union High Sch. Dist.* (Oct. 28, 1981) PERB Dec. No. 177, at pp. 4-5.)

The Court held the PERB's test (known thereafter as the "*Anaheim* test") was "consistent with the purpose and intent of EERA. We hold also that PERB has properly interpreted the language of section 3540 which

provides that EERA does not supersede specific provisions of the Education Code." (*Id.* at p. 866.)

At the same time, public school employers and their employees' representatives are expressly *prohibited* from negotiating certain subjects. For example, a district cannot negotiate the causes and procedures for dismissing a credentialed teacher. (§ 3543.2, subd. (b).) A collective bargaining agreement also cannot supersede the Education Code. (Gov. Code, § 3540; see *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 283 ["section 3543.2, subdivision (a), evidences a general intent to *exclude* the procedures governing the reelection of probationary teachers as a proper subject of collective bargaining"].)

This Court in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (hereafter *Claremont*) clarified the three-part test to be applied when determining whether a matter falls within the scope of representation, thus requiring the parties to comply with the MMBA's meet-and-confer requirements:

> First, we ask whether the management action has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." . . . If not, there is no duty to meet and confer. . . . Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then . . . the meet-and-confer requirement applies. . . . Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action "is within the scope of representation only if the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." . . . In balancing the interests to determine whether parties must meet and confer over a

> certain matter . . ., ***a court may also consider whether the "transactional cost of the bargaining process outweighs its value.***" (39 Cal.4th at p. 638, internal citations omitted; emphasis added.)

The U.S. Supreme Court, interpreting the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et seq.), also recognized the balancing of collective-bargaining principles against operational realities:

> Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business. (*First Nat. Maintenance Corp. v. N.L.R.B.*, *supra*, 452 U.S. at p. 679.)

The EERA "expresses a legislative determination that the process of collective negotiations furthers the public interest by promoting the improvement of personnel management and employer-employee relations within the public school systems. (§ 3540.)" (*San Mateo*, *supra*, 33 Cal.3d at p. 862.) As this Court noted not long after the enactment of the EERA:

> The process of collective bargaining between public school employees and school districts is, of course, affected by the differences between motivations and responsibilities of private and public sector employers. Public entities do not operate for profit but must accommodate the needs of their constituents for efficient and affordable public services. ***Particularly in the field of education a strong public policy renders the welfare of those receiving the service a primary consideration.*** (See, *Serrano v. Priest* (1971) 5 Cal.3d 584, 605, 96 Cal.Rptr. 601, 487 P.2d 1241; *Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High Sch. Dist.* (1974) 37 Cal.App.3d 35, 43, 112 Cal.Rptr. 27; *Knickerbocker v. Redlands High Sch. Dist.* (1942) 49 Cal.App.2d 722, 727, 122 P.2d 289.) (*San Mateo*, *supra*, 33 Cal.3d at p. 863, emphasis added.)

The Court's current review in this matter must take into account the "welfare of those receiving the service" and whether the "transactional costs of the bargaining process outweighs its value"—not only in public education, but in other public agencies that would be negatively impacted by a curtailment of the agencies' authority to determine the level and manner of services they can afford to provide. At a time when the tax-paying public is demanding greater efficiency from its government, and funding is declining precipitously, causing statewide reductions in employment and the manner in which services are offered, public employers should not be further hampered in their efforts to find creative means to continue providing needed services with fewer resources.

B. The Decision to Lay Off Public Employees Has Long Been Recognized as an Employer's Managerial Prerogative

The PERB, as the administrative agency charged with regulating public employment relations in California, is the "expert" in the matter of determining whether a subject is negotiable. (*San Mateo*, *supra*, 33 Cal.3d at p. 858.) Under long settled PERB precedent, the *actual decision* to lay off is not within the scope of representation, as it has been determined by the PERB that such a decision is a "matter of fundamental managerial concern" which must be "left to the employer's prerogative." (See *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *Anaheim Union High School District* (1981) PERB Decision No. 177; *Healdsburg Union High School District* (1980) PERB Decision No. 375; see *California School Employees Assn. v. Pasadena Unified School District* (1977) 71 Cal.App.3d 318 (hereafter *Pasadena*).)

In *Healdsburg Union High School District*, the union had attempted to negotiate a "notice of layoff" provision which required that the affected classified employees and their union be notified in writing by a certain date

of an impending layoff and that failure to give such notice would invalidate the layoff itself. The proposal, an ostensible attempt to negotiate notice and timing of layoffs (negotiable impacts), intruded impermissibly upon the employer's right to lay off employees (a managerial right). The PERB noted that proposals seeking to impose a deadline for layoffs are outside the scope of representation. In accord is *San Mateo City School District* (1984) PERB Decision No. 383, in which the PERB held proposals to restrict layoffs to a particular date unlawfully intrude on management's right to lay off classified employees for lack of work or lack of funds as authorized by the Legislature in the Education Code.

Recognition of this settled rule is not limited to PERB holdings. In *San Mateo*, *supra*, this Court upheld the nonnegotiability of the Education Code's layoff scheme for classified school employees (Ed. Code, §§ 45101, subd. (g), 45114, 45115, 45117, 45298, and 45308), when it *agreed* with the PERB "that these particular statutes mandate certain procedures, protections and entitlements for classified employees who are to be laid off or disciplined. The intent of section 3540 is to *preclude contractual agreements* which would alter these statutory provisions." (*San Mateo*, *supra*, 33 Cal.3d at p. 866, emphasis added.) The Court also noted, "Where such statutory schemes are involved, a contract proposal may be in conflict without 'annulling' the statute, and negotiations should be prohibited." (*Ibid.*)

> Where statutes are mandatory, *as are these*, a contract proposal which would alter the statutory scheme would be nonnegotiable under PERB's application of section 3540 because the proposal would "replace or set aside" the section of the Education Code. (*Ibid.*, emphasis added.)

The statutes relating to the layoff of *certificated* (teaching) school employees[6] are likewise mandatory and even more exacting. (See Ed. Code, §§ 44949, 44955.) The courts recognize the duty and discretion of governing boards to initiate such layoffs. (See *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174 ["Since by statute the board was required to determine whether a particular kind of service is to be reduced or discontinued, we cannot say that the board acted unfairly or improperly simply because they made a decision that they were empowered to make under the statute"].)

Thus, the decisions in *San Mateo* and other cases leave no room to doubt that the layoff process for school employees is not negotiable pursuant to the EERA.

The "managerial" and discretionary nature of a public agency's layoff decision is reflected in other rulings as well. (See *First Nat. Maintenance Corp. v. N.L.R.B.*, *supra*, 452 U.S. at p. 681 [declining to require bargaining over decision to close plant and lay off workers, as such a requirement would not "advance the neutral purposes of the [National Labor Relations] Act".) In *Pasadena*, *supra*, the Court of Appeal rejected the classified employee union's claim that a layoff of classified employees was not *financially* necessary. The court held:

> The determination of the amount needed for reserves is committed to the discretion of the board. ([Former Ed. Code] §§ 20604, 20605.) In our view that determination could not be set aside by a court unless it was "fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of

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[6] There are two general categories of public school employees under California law: certified employees, or teachers, and classified employees, who are not subject to the certification requirements of teachers. (*Gately v. Cloverdale Unified School Dist.* (2007) 156 Cal.App.4th 487, 493, citing Ed. Code, §§ 44800 et seq., 45100, 45103, subd. (a).)

> discretion as a matter of law." (*City and County of S.F.* v. *Boyd*, 22 Cal.2d 685, 690 [140 P.2d 666]; *Anderson v. Board of Supervisors*, 229 Cal.App.2d 796, 798 [40 Cal.Rptr. 541].) The trial court came pretty close to the mark in stating that it did not feel the board's decision was reviewable unless the board acted in bad faith. (See *Fuller v. Berkeley School Dist.*, 2 Cal.2d 152, 161 [27 P.2d 109, 40 P.2d 831].) (71 Cal.App.3d at pp. 322-323.)

Likewise, the court in *Short v. Nevada Joint Union High School District* (1985) 163 Cal.App.3d 1087, 1098 recognized school districts' "broad budgetary discretion" as articulated in *Pasadena*; such discretion "is *not limited*; it is, however, confined to truly 'budgetary' issues." (Emphasis added.) In that case, a classified management employee alleged his termination was based partly on disciplinary grounds, but was characterized by the district as a layoff for financial reasons. The court adopted a "but for" test:

> A termination may be reasonable and within permissible discretion on strictly budgetary grounds, but if the actual decision to terminate would not have been made but for disciplinary reasons, the termination may not stand unless notice and hearing have been afforded the employee. Conversely, if the termination would have been made *on budgetary grounds alone*, it will be allowed to stand. This rule fully protects the legislative intent underlying section 45117, that classified school employees not be employed where there is no existent funding with which to pay them. (*Id.* at pp. 1098-1099, citing *California School Employees Assn. v. King City Union Elementary School Dist.* (1981) 116 Cal.App.3d 695, 700; see also *Gately v. Cloverdale Unified School Dist.* (2007) 156 Cal.App.4th 487, 496 [school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was "fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law"].)

In *none* of the plethora of decisions involving public school employee layoffs has a court suggested the decision to reduce staff for underlying

economic or programmatic reasons is negotiable. (See, e.g., *Gassman v. Governing Board* (1976) 18 Cal.3d 137; *California Teachers Ass'n v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135; *Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 840; *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648; *Rutherford v. Board of Trustees*, *supra*, 64 Cal.App.3d 167.)

Public employers have reasonably relied on the PERB's decades-old rule that layoff decisions are non-negotiable. Repudiation of this rule, particularly in these unpredictable economic times, would send public agencies into a fiscal and labor-relations tailspin. The Court is bound to consider years of reliance on a settled rule when "count[ing] the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 855-856 (hereafter "*Casey.*") Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." (*Payne v. Tennessee* (1991) 501 U.S. 808, 827, quoting *Burnet v. Coronado Oil & Gas Co.* (1932) 285 U.S. 393, 406, dis. opn. of Brandeis, J.) As Justice O'Connor explained in *Casey*:

> Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham,* 382 U.S. 111, 116, 86 S.Ct. 258, 261, 15 L.Ed.2d 194 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and

> add inequity to the cost of repudiation, *e.g., United States v. Title Ins. & Trust Co.,* 265 U.S. 472, 486, 44 S.Ct. 621, 623, 68 L.Ed. 1110 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union,* 491 U.S. 164, 173-174, 109 S.Ct. 2363, 2370-2371, 105 L.Ed.2d 132 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g., Burnet, supra,* 285 U.S., at 412, 52 S.Ct., at 449 (Brandeis, J., dissenting). (505 U.S. at pp. 854-855.)

These "prudential and pragmatic considerations" in no way lead to a determination that the longstanding holdings of the PERB, never once called into question by our courts, is "unworkable" or a "remnant of abandoned doctrine." The legal conclusion that public-agency layoff decisions are not negotiable is alive and well, and absolutely essential to continued operations of many agencies during an unprecedented state budget crisis.

Nor does the Court's decision in *Vallejo* require any different result. In the portion of that holding related to a reduction in force, the Court held: "As to Personnel Reduction, the proposal to reduce personnel is arbitrable *only insofar* as it affects the working conditions and safety of the remaining employees." (*Id.* at p. 623, emphasis added.) Moreover, the Court specifically distinguished between the non-negotiable *decision* to lay off workers and the negotiable *effects* of that decision:

> A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large ***would not be arbitrable*** in that it is an issue involving the organization of the service.
>
> Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (*N.L.R.B.*

> *v. United Nuclear Corporation* (10th Cir. 1967) 381 F.2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (*Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203 [13 L.Ed.2d 233, 85 S.Ct. 398, 6 A.L.R.3d 1130].) The fact, however, that the decision to lay off results in termination of one or more individuals' employment is not *alone* sufficient to render the decision itself a subject of bargaining. (*N.L.R.B.* v. *Dixie Ohio Express Co.* (6th Cir. 1969) 409 F.2d 10.)
>
> On the other hand, because of the nature of fire fighting, a reduction of personnel may ***affect the fire fighters' working conditions*** by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. ***To the extent***, therefore, that the decision to lay off some employees affects the workload and safety ***of the remaining workers***, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal. (12 Cal.3d at p. 621, emphasis added.)

Indeed, the Court of Appeal in this matter correctly held, "Consistent with our Supreme Court's decision in [*Vallejo*], we conclude a decision to lay off firefighters is not subject to collective bargaining." (*International Ass'n of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2009) 91 Cal.Rptr.3d 551, 555.) Local 188 continues to allege, as it has from the inception of this litigation, that first the PERB and then the Court of Appeal misinterpreted and misapplied this Court's decision in *Vallejo*. To the contrary, the Court of Appeal correctly construed the *Vallejo* ruling.

The *Vallejo* Court recognized, "As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of 'wages, hours and terms

and conditions of employment'" and determined "the federal precedents provide reliable if analogous authority on the issue." (12 Cal.3d at p. 617.) Moreover:

> Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (*N.L.R.B. v. Transmarine Navigation Corp.* (9th Cir. 1967) 380 F.2d 933). Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held 'clearly within the realm of managerial discretion' and not subject to bargaining on the union's demand (*N.L.R.B. v. Rapid Bindery, Inc.* (2d Cir. 1961) 293 F.2d 170, 176). (*Id.* at p. 617, fn. 8.)

Local 188's interpretation of *Vallejo* is at odds with the clear direction of the Court's holding. As urged by the City and the PERB, this Court should conclude the Court of Appeal correctly construed the *Vallejo* decision.

C. In Some Cases, Requiring Employers to Negotiate Layoff Decisions Would Render Such Decisions Virtually Impossible

The courts recognize that certain interpretations of statutes will place public agencies in impossible positions. (See *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 807, citing *Rutherford v. Board of Trustees*, 37 Cal.App.3d 775 ["If the normal sequence (of the Winton Act[7] ([former] Gov. Code, § 13080 et seq.)) acts, in effect, to prohibit the employer from making the final decision, this sequence may be required to yield." (*Certificated Employees Council v. Richmond Unified Sch. Dist.* (1974) 43 Cal.App.3d 435, 439-440, 117

[7] The Winton Act was the predecessor to the EERA.

Cal.Rptr. 921, 924; see also *San Juan Teachers Assn. v. San Juan Unified Sch. Dist.* (1974) 44 Cal.App.3d 232, 248, 258.)

This Court likewise has noted, "Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (*Claremont, supra*, 39 Cal.4th at p. 631, quoting *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 663; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 937 ["To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented, would place an intolerable burden upon fair and efficient administration of state and local government"].)

In a recent case where a permanent teacher was dismissed on the grounds that she failed to obtain an English-language Learner (EL) certificate, the teacher argued the lack of the EL certificated was not an appropriate basis for her termination. The Court of Appeal disagreed:

> [Teacher's] point also trivializes the dilemma faced by the District. The District is required to provide its EL students with equal opportunity to all of the District's programs. And the Legislature has required all teachers who teach EL students to be certified to do so. (Ed. Code, §§ 44253.1, 44253.10.) A district is subject to monitoring and penalties if it assigns an EL student to a teacher who has not been certified to teach them. (Ed. Code, §§ 44258.9, 45037.) As a result of [teacher's] refusal to become EL certified, if an EL student registers for a music class, the District can either deny the student the opportunity to take the class, or it can risk sanctions for assigning the student to [teacher]. Neither of these options is viable. (*Governing Bd. of Ripon Unified School Dist. v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379, 1386-1387.)

Similarly, this Court recognized that "[i]n balancing the interests to determine whether parties must meet and confer over a certain matter . . ., a court may also consider whether the '*transactional cost of the bargaining process* outweighs its value.'" (*Claremont*, *supra*, 39 Cal.4th at p. 638, emphasis added.)

The "transactional cost" of requiring negotiation over the decision to lay off public employees can be enormous. This cost becomes readily apparent when considering the matter of reducing teaching staff of a school district as mandated by the Legislature. The school district must make the decision whether to reduce staff for the following school year, and notify all employees who *might* be laid off pursuant to that decision, no later than March 15 of a given year. (Ed. Code, § 44949, subd. (a).)[8] Often as of that date, the state budget for the ensuing school year[9] is many months away from being finalized. A school district that *may* face a shortfall, having insufficient information as to whether it will be able to employ its entire staff during the next year, *must* proceed as though the shortfall will materialize and require a reduced workforce.

Individual teachers who receive preliminary notices of layoff by March 15 have a brief period in which to request a hearing, whereupon the provisions of the Administrative Procedure Act (§ 11500 et seq.) are triggered. A hearing must be conducted in the month of April by an administrative law judge of the Office of Administrative Hearings, who must issue a recommended decision no later than May 7. (Ed. Code, §

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[8] As this Court recognized more than 30 years ago, the layoff statutes are the *exclusive* method by which a school district can reduce certificated staff because of financial difficulties. (*Gassman v. Governing Board*, *supra*, 18 Cal.3d at p. 143 [citing former Ed. Code § 13447].)

[9] The Education Code defines a school as beginning on July 1 and ending on June 30. (Ed. Code, § 37200.)

44949, subd. (c)(3).) The governing board of the school district must adopt, reject, or modify the ALJ's decision and notify all employees who will receive final notices of layoff (by personal service or registered mail) *before* May 15. (Ed. Code, § 44955, subd. (c).)

Failure to meet the deadlines for any of these actions, unless extended with permission of the ALJ, renders the layoff invalid. (See, e.g., *Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.*, *supra*, 145 Cal.App.4th at pp. 1301-1302 [failure to give notice of layoff to persons improperly classified as temporary employees resulted in those employees being effectively reemployed for the following school year]; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 632-633 [criticizing the statutory timetable as "unrealistic" in requiring final action by May 15 "even though the school board does not know until the state budget is chaptered late in June exactly what state funding will be available to the district for the ensuing school year"; but noting "any changes in that timetable are the responsibility of the Legislature"[10]]; *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 807 ["the board's action to reduce staff would be thwarted unless initial notices were given to the affected employees prior to March 15, because the notice deadline requirement of [former] section 13443 of the Education Code is jurisdictional"]; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 699 [layoff statute sets March 15 as the last day for notification of employees of termination "and makes reemployment assured absent notice"].)

This tightly regulated and time-constrained statutory process simply does not allow for negotiations with the employees' exclusive

[10] Despite this 1983 criticism, the Legislature has not revised the layoff statutes for certificated employees.

representative over the *decision* to lay off employees. Given school districts' primary reliance on the State for operational funds,[11] the employer may have no idea prior to the initial deadline of March 15 that a layoff is necessary to ensure solvency for the next three years. (See *San Jose Teachers Assn. v. Allen*, *supra*, 144 Cal.App.3d at p. 633 ["the school district cannot accurately ascertain its financial circumstances for the ensuing school year until the chaptering of the state budget"]; Ed. Code, § 42131.) Likewise:

> It is true that the governing board hoped that when its final budget was adopted it would not be necessary to terminate all of the enumerated services. Although the governing board wanted to keep as many certificated employees as possible, the school district was facing many financial uncertainties, and the board acted in an attempt to allow the district maximum flexibility in determining staffing for the ensuing school year in light of both available resources and needs. . . . It cannot be said that the board's action [to reduce services and staff] was capricious. (*Campbell Elementary Teachers Assn., Inc. v. Abbott*, *supra*, 76 Cal.App.3d at p. 808.)

The U.S. Supreme Court in *First National Maintenance Corp. v. N.L.R.B.*, *supra*, noted that the "practical purpose" of the union's desire to negotiate a plant closing with resulting layoffs "will be largely uniform: it will seek to delay or halt the closing." (452 U.S. at p. 681.) In the case of public employers faced with often sudden, unpredictable, and catastrophic reductions in state funding, a "delay or halt" in a proposed layoff may drive the agency into insolvency. This is particularly true in the case of a school district attempting to comply with the complex and time-sensitive requirements of a layoff described above.

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[11] This consideration applies with equal force to any state-funded public agency.

The "transactional costs" of concluding that layoff decisions are negotiable, in addition to reversing decades of precedent from the agency charged with interpreting the scope of negotiable subjects, would be enormous and unsustainable.

D. The Longstanding Requirement that Public Employers Negotiate the "Effects" or "Impact" of Layoff Decisions Adequately Protects the Collective Bargaining Process

Under decades-long precedent, a layoff for lack of work or lack of funds obligates the public employer to negotiate only about the *effects* of that action. (*Healdsburg Union High School District* (1980) PERB Decision No. 375.) Thus, even where an employer is free to exercise its managerial prerogative in reaching a decision, the effects of that decision may not be accomplished unilaterally if doing so would otherwise change a condition of employment about which the employer is obligated to engage in decision-bargaining. (See *Solano County Community College District* (1982) PERB Decision No. 219 [bargaining required where employer laid off classified employees and shortly thereafter unilaterally transferred their work to certificated employees].)

In addition, under PERB law, an employer is required to negotiate about the decision to *reduce hours* short of a layoff. (*Pittsburg Unified School District* (1983) PERB Decision No. 318.) The decision to remove work from a bargaining unit is similarly negotiable, provided it impacts on a negotiable item. (*Rialto Unified School District* (1982) PERB Decision No. 209.)

The U.S. Supreme Court recognized the duty to bargain over effects:

> A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. The Court has observed: "The words of [§ 8(d)] ... plainly cover termination

> of employment which ... necessarily results" from closing an operation. *Fibreboard* [*Paper Products Corp. v. NLRB* (1964) 379 U.S. 203,] 210, 85 S.Ct., at 402. The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs. ***It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions.*** There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8(a)(5). See, *e. g., NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (CA3 1965); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (CA8 1965), cert. denied, 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 256 (1966). And, under § 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy. A union, by pursuing such bargaining rights, may achieve valuable concessions from an employer engaged in a partial closing. It also may secure in contract negotiations provisions implementing rights to notice, information, and fair bargaining. See BNA, Basis Patterns in Union Contracts 62-64 (9th ed., 1979). (*First Nat. Maintenance Corp. v. N.L.R.B.*, *supra*, 452 U.S. at pp. 681-682.)

The well settled duty to bargain over the negotiable effects of a layoff amply protects the bargaining rights of public employees and their representatives, while leaving in place the essential managerial prerogative of the employer to determine when criteria such as budget cuts, revenue reductions, grant terminations, or a lesser need for services, among others, require a reduction in staffing.

CONCLUSION

The Court must not permit the improper addition to Government Code section 3509.5, subdivision (a), and the other statutes the PERB is charged

with implementing and enforcing, of an exception that would undermine the finality of the PERB's decision to issue or not issue complaints in unfair practice proceedings. To permit the Court of Appeal-created exception to persist would invade the Legislature's authority to determine the jurisdiction of the PERB, an entity it has created.

Further, and particularly as public agencies subject to the PERB's jurisdiction begin to grapple with how to balance their budgets for the 2010-2011 fiscal year and beyond, this Court must make clear that the decision to lay off public employees, and thereby change the manner in which public services are provided by entities subject to the statutes enforced by the PERB, is one left to the managerial discretion of the decision-making bodies of those entities. While the value of additional bargaining obligations may enhance the position of some public employees, the transactional costs and procedural burdens of such negotiations will further jeopardize the quality of service the taxpaying public of California has a right to expect from the entities they have created. Nothing in the collective bargaining laws the PERB is charged with enforcing undermines this conclusion.

Dated: December 23, 2009

Respectfully submitted,

ATKINSON, ANDELSON, LOYA
RUUD & ROMO

By: _____
Warren S. Kinsler

By: _____
Cathie L. Fields

By: _____
Barbara J. Ginsberg
Attorneys for Amici Curiae
CSBA Education Legal Alliance
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COUNSEL'S CERTIFICATE OF COMPLIANCE

[C.R.C. Rule 8.520(c)(1)]

Counsel for Amici Curiae hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, this brief (1) has been produced using 13-point Roman type font and, (2) has a word count of 9,241 as determined by the MS Word word processing program, including footnotes but excluding tables, this certificate, and the application. Including the application, the word count is 10,289.

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

Executed on December 23, 2009, at Cerritos, California.

ATKINSON, ANDELSON
LOYA, RUUD & ROMO

By: _____
Barbara J. Ginsberg
Attorneys for Amici Curiae
CSBA Education Legal Alliance and
Inland Personnel Council

PROOF OF SERVICE

(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive, Suite 300, Cerritos, CA 90703-9364.

On December 23, 2009, I served the following document(s) described as: **CERTIFICATE OF INTERESTED PARTIES; AMICI CURIAE APPLICATION AND BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND THE INLAND PERSONNEL COUNCIL IN SUPPORT OF REAL PARTY IN INTEREST, CITY OF RICHMOND [C.R.C. Rule 8.520(f)]; COUNSEL'S CERTIFICATE OF COMPLIANCE; AND PROOF OF SERVICE** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as shown on the attached Mailing List.

☒ **BY MAIL:** I deposited such envelope in the mail at Cerritos, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 23, 2009, at Cerritos, California.

TRACI A. SILVA

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Initial Proposal of the Lucia Mar Unified School District
to CSEA Chapter #275

May 4, 2010

The Lucia Mar Unified School District presents the following initial proposal in negotiations to reach an agreement on reopener negotiations with CSEA Chapter #275 for 2010-2011 In the spirit of interest-based negotiations, the District presents its initial proposal by identifying the following interests which are in alignment with the District's published goals. The District seeks to hear CSEA's interests and to explore all options in an effort to come up with solutions which best meet the needs of the District and CSEA members:

1. **Assess, Leverage & Maximize Resources**

The District faces the serious and urgent challenge of achieving long-term fiscal solvency in light of reduced State revenues and declining enrollment. The District is in a position of having to make wide-ranging cuts to meet its budget parameters for 2010-2011. In order to ensure the District's short-term and long-term financial health, the District is interested in exploring with CSEA options for personnel cost reductions. Of course, each bargaining unit and each group of unrepresented employees is being called on to share equitably to do what is necessary to keep the District solvent, now and in future years.

In furtherance of the interest of financial solvency, the District reopens Article V (Wages), Article VIII (Vacations), and Article XI (Health and Welfare Benefits).

The District's other expressed interests are the following:

2. **Improve Teamwork & Collaboration Throughout the Organization**
3. **Acknowledge, Communicate & Celebrate Success**
4. **Ensure All Students Make Progress**

Board Parameters in CSEA Negotiations

1. **Article V -- Wages:**

____% salary reduction (equivalent to 5 work day reduction) and classified employee work year reduced by 5 work days.

Fall back position:

The salary and work year reductions are for 2010-2011 only (i.e. furloughs) and then in 2011-2012 the salary and work year shall revert to salary level/work year of 2009-2010 unless negotiated otherwise.

2. **Article VIII -- Vacations:**

Unit members may carry over from one fiscal year to the next only as many days of vacation as the member accrues in one (1) fiscal year.

Fall back position

Unit members may carry over from one fiscal year to the next only as many days of vacation as the member accrues in one (1) fiscal year. Vacation days not carried over shall be paid out to the unit member at the conclusion of the fiscal year. Unit members who serve less than six (6) months shall not receive payment for accrued but unused vacation as vacation is not vested until completion of the initial six months of service.

3. **Article XIII -- Health Benefits:**

No increase to Maximum District Contribution (MDC) of $8,671.90 for 40 hours/week employee.

New hires effective July 1, 2010 not eligible for District-paid retirement health benefits. OK to give up on this only if absolutely necessary to achieve salary reduction.

Todd A. Goluba

From: Todd A. Goluba
Sent: Friday, April 16, 2010 4:45 PM
To: 'Michelle Ellis'
Subject: CSEA -- Initial Proposal and Board Parameters [AALRR-PLEASANT.005906.00002]
Follow Up Flag: Follow up
Flag Status: Green
Categories: Filed To Worksite
Attachments: 246109_1.DOC

Michelle,

Per your request, here is a draft initial proposal and request for Board parameters for discussion at the April 20 closed session. Note that I was unsure whether a 5 work day reduction for classified bargaining unit members would be the equivalent of a 2.78% wage reduction as it was for teachers. Please confirm and fill in. Let me know if you need any changes. -- Todd

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