Case No. E060047

Exempt from Fees
(Gov. Code, § 6103)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

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COUNTY OF RIVERSIDE,
*Plaintiff, Respondent, and Cross-Appellant*

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
*Defendant, Appellant, and Cross-Respondent,*

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 721,
*Real Party in Interest, Appellant, and Cross-Respondent.*

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Appeal from the Superior Court of the County of Riverside
Case No. RIC 1305661, Hon. John W. Vineyard

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# APPLICATION OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT COUNTY OF RIVERSIDE

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TABLE OF CONTENTS

TABLE OF CONTENTS ............ i

TABLE OF AUTHORITIES ............ iii

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF ............ 1

BRIEF OF *AMICI CURIAE* ............ 5

I. INTRODUCTION ............ 5

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY ............ 7

III. ARGUMENT ............ 7

A. AB 646 UNCONSTITUTIONALLY INTERFERES WITH CHARTER ENTITIES' HOME RULE AUTHORITY ............ 7

1. AB 646 Is Unconstitutional Because It Forces Charter Cities and Counties to Spend Money They Otherwise Would Not Spend ............ 8

2. Differences between Factfinding under EERA/HEERA and MMBA Show That AB 646 Substantially Impinges on Home Rule Authority ............ 13

B. AB 646 DOES NOT REQUIRE FACTFINDING OUTSIDE OF NEGOTIATIONS FOR A FULL COLLECTIVE BARGAINING AGREEMENT ............ 15

1. PERB's Recent Decisions Interpreting the Scope of AB 646 Are Not Entitled to Deference Because They Were Created as a Defense to This Litigation ............ 15

2. Statutory Language and Legislative History Show the Legislature Intended Factfinding to Be Available Only When There Is an Impasse over a Full Collective Bargaining Agreement ........................................ 18

a. "Differences" Has a Different Meaning under AB 646 than Under EERA/HEERA .................. 19

b. AB 646's Factfinding Criteria Show that Factfinding Is Available Only When There Is an Impasse over a Full Collective Bargaining Agreement .................................... 20

c. There is No Evidence the Legislature Intended to Import EERA/HEERA's Single Issue Factfinding into AB 646 ............... 21

3. AB 2126 Provides No Support for PERB's Reading of AB 646 .................... 24

IV. CONCLUSION ........................................................ 25

## TABLE OF AUTHORITIES

**Constitutional Provisions**


Cal. Const., art. XI, § 1, subd. (b) .................................................. 7

Cal. Const., art. XI, § 5, subd. (b) .................................................. 7

Cal. Const., art. XI, § 11, subd. (a) .......................................... 7, 12


**State Cases**


*County of Riverside v. Superior Court*
(2003) 30 Cal.4th 278 ...................................................... 8, 9, 15

*County of Sonoma v. Superior Court*
(2009) 173 Cal.App.4th 322.................................................. 8, 15

*Cumero* v. *Public Employment Relations Bd.*
(1989) 49 Cal.3d 575 ............................................................... 16

*Dyna–Med, Inc. v. Fair Employment & Housing Com.*
(1987) 43 Cal.3d 1379 .............................................................. 24

*Environmental Protection Information Center v.*
*Department of Forestry & Fire Protection*
(1996) 43 Cal.App.4th 1011 ..................................................... 22

*Howard Jarvis Taxpayers Assn. v. Fresno Metropolitan*
*Projects Authority*
(1995) 40 Cal.App.4th 1359 ...................................................... 12

*In re Austin P.*
(2004) 118 Cal.App.4th 1124 ..................................................... 20

*In re David*
(2012) 202 Cal.App.4th 675 ....................................................... 21

*Moore v. California State Bd. of Accountancy*
(1992) 2 Cal.4th 999 ................................................................. 22

*Moreno Valley Unified School Dist. v. Public Employment*
*Relations Bd.*
(1983) 142 Cal.App.3d 191 ......................................................... 9

*Peoples v. San Diego Unified School Dist.*
(2006) 138 Cal.App.4th 463 .......... 19

*San Mateo City School Dist. v. Public Employment Relations* Bd.
(1983) 33 Cal.3d 850 .......... 16

*Walt Rankin & Assoc. v. City of Murrieta*
(2000) 84 Cal.App.4th 605 .......... 20

*Western Security Bank v. Superior Court*
(1997) 15 Cal.4th 232 .......... 25

*Yamaha Corp. of America v. State Bd. of Equalization*
(1998) 19 Cal.4th 1 .......... 16, 18

**PERB Decisions**

*County of Contra Costa* (2014)
PERB Order No. Ad-410-M [38 PERC ¶ 154] .......... 16

*County of Fresno* (2014)
PERB Order No. Ad-414-M [39 PERC ¶ 8] .......... 16

*Workforce Investment Bd. of Solano County* (2014)
PERB Order No. Ad-418-M [39 PERC ¶ 65] .......... 14

**Statutes**

Gov. Code, § 3500 .......... 2, 5

Gov. Code, § 3505.4 .......... 10

Gov. Code, § 3505.4, subd. (a) .......... 10

Gov. Code, § 3505.4, subd. (c) .......... 10

Gov. Code, § 3505.4, subd. (d) .......... 20, 21

Gov. Code, § 3505.5, subd. (a) .......... 11

Gov. Code, § 3505.5, subds. (b)-(d) .......... 12

Gov. Code, § 3505.5, subd. (e) .......... 10

Gov. Code, § 3505.7 .......... 11

Gov. Code, § 3540 .......... 13

Gov. Code, § 3548 .......... 13, 19

Gov. Code, § 3548.1, subd. (a) .......... 14

Gov. Code, § 3560 .......... 13

Gov. Code, § 3590 .......... 13, 19

Gov. Code, § 3591 .......... 14

**Rules**

California Rules of Court, rule 8.200(c) .......... 1

**Regulations**

Cal. Code Regs., tit. 8, § 32792 .......... 13

Cal. Code Regs., tit. 8, § 32793 .......... 13

Cal. Code Regs., tit. 8, § 32797, subd. (a) .......... 14

Cal. Code Regs., tit. 8, § 32802, subd. (c) .......... 10

Cal. Code Regs., tit. 8, § 32804 .......... 10

Cal. Code Regs., tit. 8, §§ 32792-32800 .......... 22

Cal. Reg. Notice Register 2013, No. 17-Z, p. 613 .......... 17

Cal. Reg. Notice Register 2013, No. 17-Z, p. 614 .......... 17

**Other Authorities**

Assem. Bill No. 2126 (2013-2014 Reg. Sess.) .......... 6, 24, 25

Assem. Bill No. 646 (2011-2012 Reg. Sess.) .......... passim

Assem. Com. on Appropriations, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) as amended May 11, 2011, p. 2 .......... 13

Assem. Com. on Public Employees, Retirement, and Social Security, Analysis of AB 2126 (2013-2014 Reg. Sess.) Mar. 28, 2014, p. 4 .......... 25

## APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

To the Honorable Presiding Justice:

Pursuant to California Rules of Court, rule 8.200(c), *amici curiae* League of California Cities and California State Association of Counties hereby respectfully request leave to file the attached brief in support of Respondent and Cross-Appellant County of Riverside. This application is timely made within 14 days after the filing of the reply brief on the merits.

## THE *AMICI CURIAE*

The League of California Cities (League) is a non-profit 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 are of statewide – or nationwide – significance. The Committee has identified this case as being of great significance due to its potential impact on many California cities and their citizens.

The California State Association of Counties (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 is a matter with the potential to affect all California counties.

## THE INTEREST OF *AMICI CURIAE*

As local public agencies, all members of the League and CSAC (collectively, the "*amici*") are subject to mandatory factfinding under the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., if they fail to reach agreement with employee organizations over terms and conditions of employment. Whether a local public agency must submit to factfinding only upon reaching an impasse on a collective bargaining agreement or upon reaching impasse over any negotiable subject at any time is of crucial importance to the public agencies that *amici* represent. The resolution of this issue could have a substantial impact on agencies' resources and ability to enact annual budgets in a timely manner. Additionally, the MMBA's mandatory factfinding provisions significantly interfere with charter agencies' constitutional authority to set compensation for their employees. For these reasons, the *amici*, on behalf of the cities and counties they represent, have a substantial interest in the present matter.

## THE NEED FOR FURTHER BRIEFING

Representing the interests of California public agencies, *amici* are uniquely positioned to explain the practical ramifications for public agencies should this Court adopt the Public Employment Relations Board's erroneous interpretation of the MMBA, and require agencies to submit to mandatory factfinding over an impasse in single issue negotiations. Additionally, as many of their members are charter agencies, *amici* are familiar with the constitutional restraints imposed on the Legislature with regard to charter entities' authority to set compensation for their employees, and the ways in which that authority is undermined by mandatory factfinding.

The attorneys representing *amici* have examined the briefs on file in this case and are familiar with the issues involved and the scope of the briefing. *Amici* do not intend to repeat arguments made in the parties' briefs, but to amplify and illuminate certain points so this Court can fully consider the statewide impact of mandatory factfinding on local public agencies.

## ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.520(f)(4), *amici* confirm that no party or their counsel authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief, except *amici*, their governing boards, their members, and their counsel.

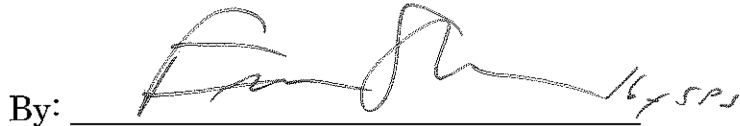
## CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: August 20, 2015

Respectfully submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP



By: ________________________

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## BRIEF OF *AMICI CURIAE*

## I. INTRODUCTION

Although there are many issues at play in this case, this brief addresses only two of particular interest to *amici* and their members: (1) whether the mandatory factfinding procedures enacted by Assembly Bill 646[1] interfere with charter entities' constitutional home rule authority; and (2) whether AB 646 factfinding applies to all issues subject to negotiation or only to negotiations for a full collective bargaining agreement.

Charter cities and counties have constitutional authority over budgeting and municipal functions with which the Legislature may not interfere. AB 646 violates that constitutional prohibition by forcing agencies to spend money they otherwise would not spend and allowing private third parties to substantially influence the substance and timing of the agency's budgeting process. Thus, AB 646 is unconstitutional as applied to charter cities and counties.

As for the scope of AB 646, the trial court correctly ruled that local public agencies may only be compelled to submit to factfinding when they have reached an impasse in negotiations over a full collective bargaining agreement. That ruling is consistent with the statutory language enacted by AB 646, as well as its legislative history. Nothing in the briefs filed by

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[1] AB 646 amended several sections of the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. For ease of reference, *amici* use the term "AB 646" to describe the amendments as a whole, while referencing specific Government Code sections within AB 646 as necessary.

Appellants and Cross-Respondents Public Employment Relations Board (PERB) and Service Employees International Union, Local 721 (SEIU), compels a contrary conclusion.

Further, PERB's repeated refrain that "we've always done it this way under other statutes" is unavailing. There are significant differences between AB 646 and the pre-existing statutes that require factfinding for school districts and public universities – differences PERB fails to adequately acknowledge. These important differences impact not only the statutory interpretation issue but the constitutional issue as well. Consequently, this is a case of first impression – not a case that has already been decided under existing law.

Finally, PERB's reliance on a vetoed bill and its own recent decisions – all created in response to this case and *San Diego Housing Commission v. PERB* – is misplaced. As with all bills that fail to become law, the vetoed legislation, Assembly Bill 2126, has little interpretive value. And PERB's recent decisions are entitled to no deference because they were created for the purpose of assisting PERB in litigation over the scope of AB 646.

Both the Legislature and PERB have tried to pre-determine the outcome of this case. But the Governor's wisdom in vetoing AB 2126 should prevail: this Court should decide this important issue of first impression.

For the reasons discussed below, as well as those amply briefed by Respondent and Cross-Appellant County of Riverside (County), *amici* ask this court to rule AB 646 unconstitutional as applied to charter cities and counties, and further that AB 646

applies only to an impasse over a full collective bargaining agreement.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

*Amici* join in and incorporate by reference the Relevant Factual and Procedural Background section found at pages 11-13 of the County's Combined Opposition on Appeal and Opening Brief on Cross-Appeal.

## III. ARGUMENT

### A. AB 646 UNCONSTITUTIONALLY INTERFERES WITH CHARTER ENTITIES' HOME RULE AUTHORITY

The California Constitution grants charter entities such as the County of Riverside home rule authority over their budget processes and employee compensation. AB 646 is unconstitutional on its face because it impermissibly interferes with this authority. And while the trial court appears to have limited the reach of AB 646 to avoid this very issue, even that narrow reading cannot cure the statute's constitutional infirmity.

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).) Taken together, these constitutional provisions prohibit the Legislature from

substantially interfering with a charter entity's plenary authority over employee compensation. (See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 339-340.) But this is exactly what AB 646 does: it allows *two* private bodies – the employee organization and the factfinding panel – to substantially interfere with a charter entity's municipal function of setting employee compensation. This cannot withstand constitutional muster.

PERB and SEIU argue that AB 646 does not violate Article XI because it does not preclude the governing body from ultimately setting the terms and conditions of employment. But this procedural/substantive dichotomy is not conclusive. Rather, it is the extent to which the statute impinges on constitutional home rule powers that determines its constitutionality. (*County of Riverside v. Superior Court, supra,* 30 Cal.4th at p. 287; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 339-340.) Under this test, AB 646 is unconstitutional because it *substantially* impinges on charter entities' budgetary authority.

### 1. AB 646 Is Unconstitutional Because It Forces Charter Cities and Counties to Spend Money They Otherwise Would Not Spend

Put simply, AB 646 is unconstitutional because it forces charter entities to spend money they otherwise would not spend. Prior to AB 646, if a charter entity reached an impasse in labor negotiations before the end of the budget year, it could implement its last, best, and final offer and incorporate those compensation

and benefit costs into its budget for the next fiscal year. AB 646, however, allows an employee organization and a factfinding panel to delay this implementation until months into the new fiscal year. Under these circumstances, AB 646 forces the entity to either enact a timely budget that maintains the status quo or delay enacting a budget (if possible) until factfinding is complete. Under either scenario, the entity is forced to spend a substantial amount of money it would not otherwise spend – an amount that is ultimately borne by the taxpayers. (See *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 198-199 [an employer must maintain existing terms and conditions of employment until mandatory factfinding procedures are complete].) It is a hallmark of unconstitutional interference with home rule authority for the Legislature to require a charter entity to pay compensation it has neither agreed to pay nor budgeted for. (See *Riverside, supra,* 30 Cal.4th at p. 291 [SB 440 "interfere[d] with county money (by potentially requiring the county to pay higher salaries than it chooses)…"].)

PERB acknowledges that AB 646 can substantially delay budget implementation but denies this has any constitutional significance. [PERB Opp. & Reply, pp. 95-99] The unconstitutionality of AB 646 rests not solely on the delay, but also on the fact that unaccountable third parties determine whether – and for how long – a delay occurs.

Prior to AB 646, when a charter entity reached impasse with an employee organization, it was only required to participate in any impasse resolution procedure adopted by the

voters or the entity's governing board, and contained in its charter, ordinances, or resolutions. The entity could then implement its final offer once those procedures were exhausted. (County's RJN, Exh. 6, p. 23, former Gov. Code, § 3505.4.) Under this system, the entity had a say in whether and when impasse procedures applied.

With one exception,[2] AB 646 took that control out of the hands of the voters and the governing body, and gave it to employee organizations and the factfinding panel. Under the AB 646 amendments to the MMBA, and PERB's regulations implementing those amendments, factfinding takes at least 85 days:

| | |
|---|---|
| Time after impasse before fact-finding must be requested (Gov. Code, § 3505.4, subd. (a).) | +30-45 days |
| Time for PERB to determine if fact-finding authorized (Cal. Code Regs., tit. 8, § 32802, subd. (c).) | +5 working days |
| Panel member selection after PERB makes determination (Cal. Code Regs., tit. 8, § 32802, subd. (c).) | +5 working days |
| Panel chairperson appointed by PERB (Cal. Code Regs., tit. 8, § 32804.) | +5 working days |
| Time before hearing must begin (Gov. Code, § 3505.4, subd. (c).) | +10 days |

[2] The AB 646 factfinding requirements do not apply to any bargaining unit that is subject to binding interest arbitration of labor contract impasses under a local entity charter. (Gov. Code, § 3505.5, subd. (e).)

| Findings of fact and recommended terms of settlement issued (if no settlement and no agreed-upon extension, 30 days from appointment of chairperson) (Gov. Code, § 3505.5, subd. (a).) | +20 days |
|---|---|
| Earliest possible implementation date (assumes public hearing could be held same day) (Gov. Code, § 3505.7.) | +10 days |
| **Total minimum additional time for full process** | **85-100 days** |

In practice, factfinding often takes much longer. Unfortunately, most of the factfinding reports posted on PERB's website do not contain a procedural history from which one can determine the elapsed time from the factfinding request to the factfinding panel's report. Nonetheless, the responses to the County's Public Records Act requests attached to the County's RJN show that factfinding is often a four to five-month process. (E.g., County's RJN, Exh. 14 [four months]; Exh 23 [four months]; Exh. 27 [five months]; Exh. 34 [four months]; Exh. 39 [five months]; Exh. 41 [five months].) In the experience of counsel for *amici*, this often results from the unavailability of the neutral panel chair within the statutory timeframes. Additionally, many panel chairs are unwilling to hold a hearing and issue recommendations within the timelines set out in AB 646. As a result, factfinding often takes one or two months longer than the statutory timeline.

Because a local agency cannot implement terms and conditions of employment until at least ten days after the factfinding panel's recommendations are issued, AB 646 allows

an employee organization to put an agency to the choice of adopting a budget that continues existing compensation levels or delaying budget adoption until the factfinding process is complete. The simple fact that AB 646 forces an agency to make such a choice shows that it substantially impinges on a charter entity's home rule authority over employee compensation and on its budget process as a whole.

Finally, in addition to the delay inherent in factfinding, there is the substantial cost of factfinding itself. The main purpose of Article XI, section 11(a) is "to prevent the giving of unlimited discretion to create debts or burdens which the local authorities must pay." (*Howard Jarvis Taxpayers Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1368, citation and internal quotations omitted.) That is exactly what AB 646 does by allowing an employee organization – and by extension PERB – to mandate that a public agency spend money on factfinding.

AB 646 requires the parties to split the cost of the neutral panel member and "[a]ny other mutually incurred costs." (Gov. Code, § 3505.5, subds. (b)-(d).) As the responses to the County's Public Records Act requests attached to the County's RJN show, very few public agencies are able to proceed through factfinding without the assistance of outside attorneys or consultants. As a result, local agencies have spent more than $2 million on factfinding over the past three years. AB 646 thus substantially interferes with agency finances by allowing an employee

organization to force an agency to spend money it otherwise would not spend.[3]

### 2. Differences between Factfinding under EERA/HEERA and MMBA Show That AB 646 Substantially Impinges on Home Rule Authority

In its briefing, PERB relies heavily on the existence of factfinding procedures in the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., that predate those under AB 646. [PERB Opp. & Reply, pp. 39-42] Contrary to PERB's contention, the differences between EERA/HEERA factfinding on the one hand, and MMBA factfinding pursuant to AB 646 on the other, are significant. In fact, two differences in particular constitute substantial impingement on charter entities' home rule authority.

EERA/HEERA factfinding provides two "gatekeeper" functions. First, PERB makes the initial determination that the parties are at impasse. (Gov. Code, §§ 3548, 3590; Cal. Code Regs., tit. 8, §§ 32792, 32793.) PERB thus has the authority to grant or withhold the entire impasse resolution process from the

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[3] At this time it is unclear whether factfinding costs are reimbursable as a state mandate. (See Assem. Com. on Appropriations, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) as amended May 11, 2011, p. 2 ["The Commission on State Mandates has approved a test claim for any local government subject to the jurisdiction of PERB that incurs increased costs as a result of a mandate, meaning their costs are eligible for reimbursement."].)

requesting party at the outset. Second, the parties cannot proceed to factfinding unless, following unsuccessful mediation, "the mediator declares that factfinding is appropriate to the resolution of the impasse." (Gov. Code, §§ 3548.1, subd. (a), 3591; Cal. Code Regs., tit. 8, § 32797, subd. (a).) Thus, at this stage the mediator has the authority to grant or deny factfinding.

These crucial "gatekeeper" functions are entirely absent from AB 646.[4] When an employee organization files a factfinding request with PERB, PERB does nothing more than determine whether the request was filed within the statutory timeline. (*Workforce Investment Bd. of Solano County* (2014) PERB Order No. Ad-418-M [39 PERC ¶ 65].) PERB does not determine whether an impasse actually exists. Nor does AB 646 require that a mediator declare factfinding to be appropriate before factfinding can be granted. Thus, unlike EERA/HEERA, where a party must pass two "gatekeepers" to reach factfinding, AB 646 provides for no gatekeepers, other than PERB's cursory review of the employee organization's request.

The lack of gatekeeper functions in AB 646 factfinding puts the employee organization, and later the factfinding panel, in control of whether and when factfinding occurs. Consequently, unlike EERA/HEERA where factfinding is available only when warranted – as determined by two different neutrals – AB 646 factfinding is available to any employee organization that can file

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[4] Interestingly, AB 646 originally included both gatekeeper functions but they were removed by later amendments. (Assem. Bill No. 646 (2011-2012 Reg. Sess.) as introduced February 16, 2011; County's RJN, Exh 9, p. 8.)

a proper request within the statutory timeline. This unprecedented amount of control over the factfinding process renders two private bodies functionally capable of substantially influencing the substance and timing of an agency's budget adoption. Thus, because it is substantive, not just procedural, AB 646 impermissibly impinges on charter entities' home rule authority over their budgets. (*County of Riverside*, *supra*, 30 Cal.4th at p. 289; *County of Sonoma*, *supra*, 173 Cal.App.4th at p. 340.)

**B. AB 646 DOES NOT require factfinding outside of negotiations for a full collective bargaining agreement**

Although the trial court avoided ruling on the constitutional issue, it nonetheless correctly ruled that AB 646 applies only to negotiations for a full collective bargaining agreement, not to single issues that arise during the term of an agreement. Because the statutory language and legislative history support this narrow reading of AB 646, *amici* urge this Court to affirm the trial court's ruling.

**1. PERB's Recent Decisions Interpreting the Scope of AB 646 Are Not Entitled to Deference Because They Were Created as a Defense to This Litigation**

Before turning to the substantive argument, it is imperative to discuss PERB's plea for deference in light of the unique circumstances of this case. As it always does, PERB asserts the Court should defer to PERB's interpretation of the MMBA. [PERB Opening Brief, pp. 16-19] Ordinarily, deference is appropriate when a case involves a pure issue of labor law under one of the statutes PERB administers. However, not only does

this case present constitutional issues outside PERB's purview, it also has a unique procedural backstory that weighs against granting PERB *any* deference.

PERB's construction of a statute under its jurisdiction "will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd. (1983)* 33 Cal.3d 850, 856.) Nevertheless, it is "the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute ... even though this requires the overthrow of an earlier erroneous administrative construction." (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587.) Thus, this Court is not required to blindly defer to PERB's interpretation of AB 646. Instead, this Court must exercise its independent judgment in construing the statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

In its briefing, PERB urges this Court to defer to the agency's interpretation of AB 646 in two recent PERB decisions: *County of Contra Costa* (2014) PERB Order No. Ad-410-M [38 PERC ¶ 154] and *County of Fresno* (2014) PERB Order No. Ad-414-M [39 PERC ¶ 8]. [PERB Opening Brief, pp. 35-37; PERB Opp. & Reply, pp. 29-32] A brief timeline of events leading up to these decisions demonstrates why deference is not warranted here.

AB 646 took effect on January 1, 2012. PERB's initial regulations implementing AB 646 provided that a decision by PERB's Office of the General Counsel on the sufficiency of a factfinding request was not appealable to the Board itself. (Cal.

Reg. Notice Register 2013, No. 17-Z, p. 613.) On December 14, 2012, the San Diego Housing Commission filed a petition for writ of mandate against PERB challenging the General Counsel's decision to compel the Commission to factfinding over the effects of a layoff.

On April 26, 2013, the California Regulatory Notice Register included a notice of proposed rulemaking stating that PERB sought to delete the regulation exempting a decision on the sufficiency of an AB 646 factfinding request from Board review. (Cal. Reg. Notice Register 2013, No. 17-Z, p. 613.) One of the stated purposes of the amendment was "the development of precedent to further guide parties." (Cal. Reg. Notice Register 2013, No. 17-Z, p. 614.)

The County filed the petition for writ of mandate in this case on May 13, 2013. PERB's amended appeal regulation took effect October 1, 2013. Since that date, PERB has issued six precedential decisions concluding that AB 646 factfinding applies to single issues.

From this sequence of events, it is obvious that PERB amended its regulations to serve its own purposes in the ongoing litigation over AB 646 factfinding. PERB's regulatory sleight of hand had two effects.

First, it precluded local agencies from challenging the sufficiency of an AB 646 factfinding request in superior court. This eliminated the potential for future adverse trial court rulings on that issue, ensuring that this case and *San Diego Housing Commission* stand alone.

Second, the regulatory change allowed PERB to issue precedential decisions on the scope of AB 646 factfinding that are binding in future PERB proceedings. It also allows PERB to argue, as it does here, that the Court should defer to those decisions because PERB is better suited than the courts to interpret this new law.

If PERB had issued a precedential decision interpreting the scope of factfinding under EERA or HEERA – or on the scope of AB 646 factfinding before the San Diego Housing Commission filed suit – there might be a colorable argument for deferring to that decision in this case. But the decisions PERB seeks deference on were manufactured specifically as a defense for *San Diego Housing Commission* and this case. Under these circumstances, PERB's decisions are entitled to no deference at all. (See *Yamaha Corp., supra,* 19 Cal.4th at p. 8, quoting Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81 ["The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."].)

### 2. Statutory Language and Legislative History Show the Legislature Intended Factfinding to Be Available Only When There Is an Impasse over a Full Collective Bargaining Agreement

PERB's arguments on the language and legislative history of AB 646 are permeated with the theme that AB 646 factfinding is exactly the same as factfinding under EERA and HEERA, and thus the three statutes should be treated identically. However,

both the statutory language and legislative history demonstrate important differences that compel a more narrow reading of the scope of AB 646 factfinding.

#### a. "Differences" Has a Different Meaning under AB 646 than Under EERA/HEERA

PERB relies heavily on the fact that EERA, HEERA, and AB 646 allow parties to submit "differences" to factfinding. [PERB Opp. & Reply, pp. 40-41] Under EERA, the impasse resolution process starts with the following language:

> Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.

(Gov. Code, § 3548.)[5] EERA and HEERA thus define "differences" as an impasse over "matters within the scope of representation." AB 646 contains no similar language.

Where one statute contains certain language but a second similar statute does not, it is presumed "the Legislature intended to omit the concept in the second statute." (*Peoples v. San Diego Unified School Dist.* (2006) 138 Cal.App.4th 463, 472.) Here, the Legislature chose not to define "differences" – as it did in EERA and HEERA – as any dispute over a "matter within the scope of

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[5] HEERA's language is identical except instead of "a public school employer" the statute simply states "an employer." (Gov. Code, § 3590.)

representation." As a result, "differences" must have a different meaning under AB 646 than under EERA and HEERA. Absent the expansive definition found in those statutes, "differences" in AB 646 can only mean a dispute over the terms of a full collective bargaining agreement. Consequently, the plain language of AB 646 does not support PERB's reading of the statute.

#### b. AB 646's Factfinding Criteria Show that Factfinding Is Available Only When There Is an Impasse over a Full Collective Bargaining Agreement

As part of its continuing theme that AB 646 factfinding is identical to EERA/HEERA factfinding, PERB claims the factfinding criteria in Government Code section 3505.4, subdivision (d), are optional. [PERB Opp. & Reply, pp. 38-39] That subdivision reads, in relevant part: "In arriving at their findings and recommendations, the factfinders *shall* consider, weigh, and be guided by *all* the following criteria." (Emphasis added.)

"[I]f the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1129.) As a general rule, "shall" is mandatory "unless the context requires otherwise." (*Walt Rankin & Assoc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614.) Nothing in AB 646 indicates that consideration of the criteria is optional. Nor does any "context" in AB 646 indicate that "all" means "some." Accordingly, "shall" and "all" should be given their plain meaning and the factors should be considered mandatory.

PERB's wishful reading of Government Code section 3505.4, subdivision (d), is based largely on its contention that not all of the criteria may apply in factfinding over a full collective bargaining agreement. [PERB Opp. & Reply, p. 41] Without conceding the point, these criteria apply even less in many single issue disputes, such as the background investigations at issue in this case. The "financial ability of the public agency," which includes a comparison of wages, hours, and working conditions of employees in comparable agencies, the consumer price index, and employees' overall compensation, has no relevance to background investigations. It does, however, have relevance in most negotiations over full collective bargaining agreements. Thus, the criteria the factfinding panel must consider indicates that factfinding applies only to full contract negotiations, not to single issue disputes.

An appellate court may not "rewrite the clear language of [a] statute to broaden the statute's application." (*In re David* (2012) 202 Cal.App.4th 675, 682.) Because Government Code section 3505.4, subdivision (d) clearly provides that the factfinding panel "shall" consider "all" of the listed criteria, this Court must resist PERB's attempt to rewrite the statute.

### c. There is No Evidence the Legislature Intended to Import EERA/HEERA's Single Issue Factfinding into AB 646

PERB also relies heavily on the presumption that, in enacting AB 646, the Legislature was aware that factfinding over single issues occurred under EERA and HEERA and that it approved of that practice. [PERB Opening Brief, pp. 19-23; PERB

Opp. & Reply, p. 41] "[A] presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it. [Citations.]" (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-1018.) However, the presumption may be rebutted by evidence to the contrary. (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1026.) In this case, the presumption is not supported by the record.

Typically, knowledge is presumed when an agency adopts a regulation implementing the statute and the Legislature later amends the statute without addressing the subject of the regulation. (*Moore, supra*, 2 Cal.4th at pp. 1017-1018.) Knowledge may also be presumed from court decisions or legislative correspondence. (*Id.* at p. 1018.)

None of these bases for presuming legislative knowledge is present here. PERB's regulations governing factfinding under EERA and HEERA are silent as to whether factfinding applies to single issues, full collective bargaining agreements, or both. (Cal. Code Regs., tit. 8, §§ 32792-32800.) There is no reported court or administrative decision addressing whether factfinding under EERA or HEERA applies to single issues. Nor is there any legislative correspondence in the record that would indicate the Legislature was aware prior to enactment of AB 646 that single issues were subject to factfinding under EERA and HEERA. In fact, there is not a single mention of what EERA/HEERA

factfinding actually applies to in any of the committee bill analyses of AB 646.

Instead of these types of evidence, PERB relies on written factfinding panel recommendations issued pursuant to EERA and HEERA that involved single issues. [PERB Opening Brief, pp. 22-23] None of these recommendations addressed whether the scope of factfinding under those statutes includes single issues. And PERB has presented no evidence that the Legislature was aware of these recommendations at the time it considered AB 646. Without such evidence, there is no basis to apply the presumption of awareness and approval.

Furthermore, the fact that employers acquiesced in PERB's interpretation of the scope of factfinding under EERA and HEERA does not establish that PERB's interpretation is correct. Employers subject to those statutes may have decided not to challenge PERB's interpretation for any number of reasons. It is important to remember that, unlike AB 646, EERA and HEERA allow an employer to initiate the impasse resolution process and provide "gatekeeper" functions to weed out disputes that are not appropriate for factfinding. Thus, the instances where an employer was compelled to engage in factfinding over its objection likely were much fewer than under the AB 646 system.

Finally, even if the Legislature were presumed to have knowledge of PERB's view of the scope of factfinding under EERA and HEERA, this does not mean the Legislature intended to adopt the same scope in AB 646. In fact, the legislative history shows just the opposite. As introduced, AB 646 contained language virtually identical to the impasse resolution provisions

of EERA and HEERA. (Assem. Bill No. 646 (2011-2012 Reg. Sess.) as introduced Feb. 16, 2011.) As the bill made its way through the Legislature, it was amended several times to remove some of that language and insert language unique to AB 646. PERB's position that the Legislature intended to make AB 646 factfinding identical to EERA/HEERA factfinding is therefore not supported by the bill's legislative history. Accordingly, there is no reason to presume the Legislature agreed with PERB's view that EERA/HEERA factfinding applied to single issues and adopted that same scope in AB 646.

### 3. AB 2126 Provides No Support for PERB's Reading of AB 646

In its Reply Brief, PERB asserts that Assembly Bill 2126 – passed almost three years after AB 646 – supports its interpretation of the scope of factfinding under the prior bill. [PERB Opp. & Reply, pp. 24-29] AB 2126 purported to "clarify" that AB 646 factfinding applies to any dispute over a matter within the scope of representation and not just to negotiations for a full collective bargaining agreement. (Assem. Bill No. 2126 (2013-2014 Reg. Sess.) as enrolled Sept. 4, 2014.) Crucially, however, the Governor vetoed AB 2126. [County's RJN to Opp. & Opening, Exh. 3]

A bill that does not become law has little value as evidence of legislative intent. (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396.) This is so even where the failed bill states it is declaratory of existing law. (*Ibid.*) Thus, little, if any, weight should be given to AB 2126 when interpreting AB 646.

Nevertheless, to the extent AB 2126 may be relevant, it does not supports PERB's interpretation of AB 646. Although AB 2126 stated it was declaratory of existing law, that statement is not binding nor conclusive. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.) As the legislative committee analyses explicitly stated, AB 2126 was a direct response to the trial court's decision in this case as well as the trial court decision in *San Diego Housing Commission v. PERB.* (Assem. Com. on Public Employees, Retirement, and Social Security, Analysis of AB 2126 (2013-2014 Reg. Sess.) Mar. 28, 2014, p. 4.) Consequently, the Legislature's stated intent was to change the law in light of the first two court decisions to interpret AB 646. But because AB 2126 did not become law, it is not necessary to decide whether the bill clarified existing law or not.

In sum, AB 2126 tells us little about the meaning of AB 646. What it does say, however, weighs against PERB's interpretation of the statute. Accordingly, to the extent this Court finds AB 2126 relevant at all, it should conclude that the vetoed bill does not state the true intent of the Legislature when it enacted AB 646.

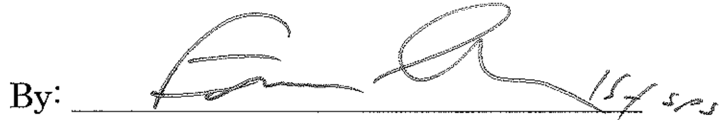
## IV. CONCLUSION

For all of the foregoing reasons, *amici curiae* League of California Cities and the California State Association of Counties respectfully request that this Court conclude that AB 646 is unconstitutional as to charter entities, and that factfinding under AB 646 is only available for an impasse regarding a full collective bargaining agreement, not over single issues that may arise during the term of an agreement.

Dated: August 20, 2015

Respectfully submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: 

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## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel certifies that the foregoing brief contains 5,151 words, as counted by the Microsoft Word 2013 word processing program used to generate the brief.

Dated: August 20, 2015

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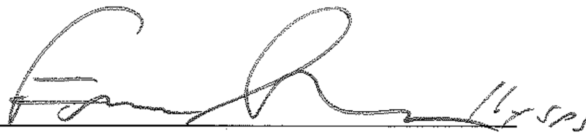
By: 

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## CERTIFICATE OF SERVICE
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State of California
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Court of Appeal Case No.: E060047

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 August 20, 2015, I served the following document(s) by the method indicated below:

**APPLICATION OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT COUNTY OF RIVERSIDE**

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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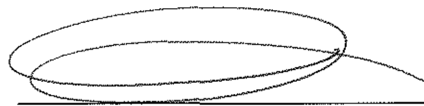
I declare, under penalty of perjury that the foregoing is true and correct. Executed on August 20, 2015, in San Francisco, California.



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