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# Public Sector Labor Relations Questions Take Center Stage: Multiple Courts of Appeal Consider Application of New California Government Code and Labor Code Changes to Strikes by City and County Employees

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# PUBLIC SECTOR LABOR RELATIONS QUESTIONS TAKE CENTER STAGE: MULTIPLE COURTS OF APPEAL CONSIDER APPLICATION OF NEW CALIFORNIA GOVERNMENT CODE AND LABOR CODE CHANGES TO STRIKES BY CITY AND COUNTY EMPLOYEES

ARI KRANTZ, MARGOT ROSENBERG AND DENISE DISKIN *

## I. INTRODUCTION

In six pending cases, the California courts of appeal are considering two threshold procedural questions arising out of litigation by cities and counties seeking to enjoin allegedly "essential" employees from striking.[1] More than 20 years ago, in *County*

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1. The authors are counsel of record for the unions in five of the six cases: (1) *City of San Jose v. Operating Engrs. Loc. Union No. 3*, H030272 (pending before the Sixth District of the Court of Appeal on the City of San Jose's appeal from a superior

*Sanitation District No. 2 of L.A. County v. L.A. County Employees Association, Local 660*,[2] the California Supreme Court established the right of public sector employees to strike, except for employees whose absence would pose a substantial and imminent threat to the health and safety of the public.[3] In the pending cases, the employers sought injunctions from local superior courts seeking to enjoin the strikes on the grounds that the absence of the striking employees would cause a threat to the public under the *County Sanitation* standard.[4] In each case, the Public Employment Relations Board (PERB) sought to intervene and assert its exclusive jurisdiction over the matter; the unions involved argued that PERB had exclusive jurisdiction and that Labor Code sections 1138-1138.5 barred the injunctions.

In five cases, the superior courts granted injunctions and the public employee unions and PERB appealed the decisions, while in one case the superior court dismissed the case on the basis of PERB's exclusive jurisdiction and the public sector employer appealed.[5] These six cases awaiting appellate decision will likely bring some clarity to the two crucial questions at issue.

The first question is whether, in seeking to obtain Temporary Restraining Orders (TROs) to partially enjoin a strike, local governments must initially bring their complaints to the state Public Employment Relations Board and ask PERB to seek an injunction, rather than directly requesting the injunction in local superior court. The second question is whether the provisions of Labor Code sections

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court order finding PERB to have exclusive initial jurisdiction over strike injunction actions); (2) *Co. of Contra Costa v. Pub. Employees Union Loc. One*, A115095 and A115118 (pending before the First District Court of Appeal on PERB's and the unions' appeals from a superior court order finding that PERB does not have exclusive initial jurisdiction); (3) *Co. of Sacramento v. AFSCME Loc. 146*, C054060 and C054233 (pending in the Third District of the Court of Appeal); and (4) *Co. of Santa Clara v. Serv. Employees Intl. Union Loc. 535*, H030937 (also pending in the Sixth District of the Court of Appeal on PERB's appeal).

2. *Co. Sanitation Dist. No. 2 of L.A. Co. v. L.A. Co. Employees Assn.*, 699 P.2d 835 (Cal. 1985).

3. *Id.* at 849.

4. *City of San Jose v. Operating Engrs. Loc. Union No. 3*, 1-06-CV-064707 (2006); *Co. of Contra Costa v. Pub. Empl. Union Loc. One*, C0601228, C0601227 (2006); *Co. of Sacramento v. AFSCME Loc. 146*, 06AS03704, 06AS03790 (2006); *Co. of Santa Clara v. Serv. Employees Intl. Union Loc. 535*, 106CV072226 (2006).

5. *Id.*

1138-1138.5[6] (which require live testimony to be heard and certain specific factual findings to be made before an injunction may issue) apply to actions seeking to enjoin public employee strikes.

The questions on appeal stem from two recent statutory changes made by the California Legislature. First, effective July 1, 2001, the Legislature expanded the jurisdiction of PERB, vesting PERB with exclusive jurisdiction over local agency labor relations and taking that jurisdiction away from the superior courts.[7] A year earlier, in 2000, the new limitations found in Labor Code sections 1138-1138.5 took effect, severely restricting the issuance of injunctions in labor disputes.[8]

Prior to July 1, 2001, PERB had jurisdiction over multiple labor relations statutes, including those governing local school districts, public universities and the State itself.[9] However, PERB did *not* have jurisdiction over the *Meyers-Milias-Brown Act* (*MMBA*),[10] which governs cities and counties. For that reason, prior to July 1, 2001, California superior courts had jurisdiction to resolve disputes regarding strikes by local government employees.[11] When the California Legislature specifically vested PERB with jurisdiction over cities and counties and the unions representing their employees in 2001, the Legislature made that jurisdiction coextensive with PERB's jurisdiction over other public sector employers.[12] Indeed, the California Supreme Court has explained that the Legislature amended the labor relations framework governing cities and counties to make it consistent with the analogous legal framework governing other public employers.[13]

There is long-standing California Supreme Court precedent holding that PERB has exclusive initial jurisdiction over a strike

6. Cal. Lab. Code Ann. §§ 1138-38.5 (West 2007).

7. *Coachella Valley Mosquito and Vector Control Dist. v. Cal. Pub. Empl. Rels. Bd.*, 112 P.3d 623, 625 (Cal. 2005).

8. *See* Cal. Lab. Code Ann. §§ 1138-1138.5.

9. *Coachella Valley*, 112 P.3d at 625.

10. Cal. Govt. Code Ann. §§ 3510-11 (West 2007).

11. *Coachella Valley*, 112 P.3d at 625.

12. *See* Cal. Govt. Code Ann. § 3509(a) (providing that the powers and duties of PERB with respect to the *MMBA* are the same as those set forth in Cal. Govt. Code Ann. § 3541.3, pertaining to PERB's jurisdiction over local school districts).

13. *Coachella Valley*, 112 P.3d at 634 (finding it "reasonable to infer" that the Legislature's extension of PERB jurisdiction to cover local agencies was intended to create "a coherent and harmonious system of public employment relations laws. . . .").

injunction action brought by a public employer covered under PERB's jurisdiction.[14] This precedent is now applicable to local governments because the Legislature expanded PERB's jurisdiction to cover cities and counties in 2001.[15] However, in five of the six cases awaiting appellate resolution, the superior court ruled that PERB did not have exclusive jurisdiction.[16] This occurred even though controlling precedent was brought to the superior courts' attention by the Unions and by PERB itself.[17] PERB intervened to assert its jurisdiction at the outset of these cases, and PERB has also appealed the superior courts' rulings.[18]

California Supreme Court and court of appeal precedent, beginning with *San Diego Teachers Association v. Superior Court*,[19] found that PERB is a specialized, quasi-judicial state agency that has exclusive jurisdiction over efforts by employers within its jurisdiction to enjoin strike activity.[20] Since the creation of PERB in 1976, every single appellate decision has reached the same conclusion: If an employer that is covered by PERB jurisdiction raises allegations in court regarding strike activity, the matter is referred to PERB's exclusive initial jurisdiction.[21] Courts have applied this overarching principle of exclusive jurisdiction even when the employer in question does not allege a violation of any labor relations statute, but rather frames its complaint and allegations in some other way.[22]

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14. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 846-47 (Cal. 1979).

15. Cal. Govt. Code Ann. § 3541.3.

16. *City of San Jose v. Operating Engrs. Loc. Union No. 3*, 1-06-CV-064707 (2006); *Co. of Contra Costa v. Pub. Empl. Union Loc. One*, C0601228, C0601227 (2006); *Co. of Sacramento v. AFSCME Loc. 146*, 06AS03704, 06AS03790 (2006); *Co. of Santa Clara v. Serv. Employees Intl. Union Loc. 535*, 106CV072226 (2006).

17. *Id.*

18. As the California Court of Appeal held in a prior case, PERB's "considered determination [regarding the scope of its jurisdiction] is of interest," and, at the very least, principles of judicial economy require a party to exhaust PERB's procedures so that the agency can first consider its jurisdiction, prior to judicial review. *Pub. Empl. Rels. Bd. v. Super. Ct.*, 17 Cal. Rptr. 2d 323, 332-33 (Cal. App. 3d Dist. 1993).

19. *San Diego Teachers Assn.*, 593 P.2d 838.

20. *Id.* at 846-47.

21. *See El Rancho Unified Sch. Dist. v. Natl. Educ. Assn.*, 663 P.2d 893, 902 (Cal. 1983); *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 846-47 (Cal. 1979); *Pub. Empl. Rels. Bd. v. Modesto City Schs. Dist.*, 186 Cal. Rptr. 634, 641-42 (Cal. App. 5th Dist. 1982); *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 897 (Cal. App. 5th Dist. 1981).

22. *See e.g. Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 890,

The local government employers in the cases on appeal argue that employee strikes posing a threat to public health and safety are *not* covered by the *MMBA*, but rather the common law.[23] The employers also argue that the Legislature did not intend for PERB to have exclusive jurisdiction over such strike cases when it vested PERB with jurisdiction over the *MMBA*.[24] This is demonstrated, they allege, both by the fact that the *MMBA* lacks strike language and by the fact that Assembly Bill 553,[25] recently vetoed by Governor Arnold Schwarzenegger,[26] would have resolved the pending issue by explicitly extending PERB jurisdiction to cover these cases.[27] The employers also assert that PERB lacks expertise in determining local public health and safety concerns potentially caused by public employee strikes.[28] As the authors proceed to show, these arguments are premised on fundamental misinterpretations of case law and statutory amendments.

Additionally, the injunctions issued in five of the six pending cases were improper because they were prohibited by newly enacted Labor Code sections 1138-1138.5. These sections of the Labor Code prohibit the granting of an injunction in a labor dispute unless each of several specific criteria are met.[29] The language of the Code is broad and applies to any and all cases involving labor disputes, including strike injunction actions involving city or county employees.

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896-97 (Cal. App. 5th Dist. 1981) (in a lawsuit by an employer challenging strike activity by three labor unions, appellate court held that PERB has exclusive jurisdiction over tort causes of action for conspiracy and interference with contract, and that third cause of action for breach of contract should also be stayed pending PERB's processes).

23. *City of San Jose v. Operating Engrs. Loc. Union No. 3*, H030272; *Co. of Contra Costa v. Pub. Empl. Union Loc. One*, A115095, A115118; *Co. of Sacramento v. AFSCME Loc. 146*, C054060, C054233; *Co. of Santa Clara v. Serv. Employees Intl. Union Loc. 535*, H030937.

24. *Id.*

25. Cal. Assembly 553, 2007-2008 Reg. Sess. (Feb. 21, 2007).

26. Governor Arnold Schwarzenegger, *Veto Message Regarding Assembly Bill 553*, http://gov.ca.gov/pdf/press/AB%20553%20veto%20message.pdf (last accessed Sept. 28, 2007).

27. Cal. Assembly 553, 2007-2008 Reg. Sess. (Feb. 21, 2007).

28. *City of San Jose v. Operating Engrs. Loc. Union No. 3*, H030272; *Co. of Contra Costa v. Pub. Empl. Union Loc. One*, A115095, A115118; *Co. of Sacramento v. AFSCME Loc. 146*, C054060, C054233; *Co. of Santa Clara v. Serv. Employees Intl. Union Loc. 535*, H030937.

29. Cal. Lab. Code Ann. §§ 1138-38.5 (West 2007).

The remainder of this article examines in detail the compelling reasons for the statutory interpretations the authors assert are correct.

## II. THE CALIFORNIA COURTS OF APPEAL SHOULD RECOGNIZE PERB'S EXCLUSIVE JURISDICTION IN CITY AND COUNTY STRIKE CASES

### A. *CALIFORNIA SUPREME COURT AND COURT OF APPEAL CASE LAW SUPPORTING PERB'S EXCLUSIVE JURISDICTION*

In *San Diego Teachers*, the San Diego Unified School District had obtained a superior court injunction prohibiting a teachers union from striking, and both the union and its president were later found in contempt of that injunction.[30] The California Supreme Court vacated the contempt finding, holding that the underlying injunction was improper because PERB had exclusive initial jurisdiction to resolve questions about strike injunctions.[31] Furthermore, the school district had improperly failed to exhaust PERB processes.[32]

*San Diego Teachers* arose under the labor relations statute governing local school districts, the *Education Employment Relations Act* (*EERA*).[33] *EERA*, just like the *MMBA* (governing labor relations between counties and unions representing county employees), does *not expressly mention strikes*, but rather generally protects the right of employees to participate in union activities.[34]

In *San Diego Teachers*, the trial court had enjoined the union from striking based upon a series of prior cases finding public employee strikes to be illegal under the common law.[35] The California Supreme Court, for its part, found that by 1979 there existed substantial uncertainty regarding whether and to what extent public employees possessed a legal right to strike.[36] However, the Court ultimately found that "it is unnecessary here to resolve the question of the legality

30. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 839-40 (Cal. 1979).

31. *Id.* at 846-47.

32. *Id.* at 842.

33. *Id.* at 840.

34. *See* Cal. Govt. Code Ann. § 3543 (West 2007) (*EERA* provides protection of the rights of employees); *see also* Cal. Govt. Code Ann. § 3502 (where the *MMBA* provides similar protection). For the definition of local "public agencies" that are covered by the *MMBA*, *see* Cal. Govt. Code Ann. § 3501(c).

35. *San Diego Teachers*, 593 P.2d at 841.

36. *Id.* at 842.

of public employee strikes if the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the *EERA*."[37]

In order to answer the exhaustion question, the Court found it had to decide whether or not "PERB [could] properly determine that the strike was an unfair practice under the *EERA*," and whether it could "furnish relief equivalent to that which would be provided by a trial court."[38] Furthermore, the Court had to determine whether or not the Legislature intended "that PERB would have exclusive initial jurisdiction over remedies against strikes that it properly could find were unfair practices."[39]

The Court answered all three questions affirmatively. On the central question of whether the strike could have been found to be an unfair practice, the Court found that there were at least two different violations of the *EERA* that could have been found.[40] Most significantly, the Court found that if the union's strike was illegal under the common law, then such striking could violate the *EERA*'s requirement that a union must bargain in good faith, as set forth in Government Code section 3543.6(c).[41]

The same reasoning applies to the cases at hand. As in the *EERA*, the *MMBA* does not explicitly mention strikes. Even to the extent that the *County Sanitation* holding arguably constitutes a purely "common law" rule,[42] *San Diego Teachers* held that violation of such a common law rule could constitute an unfair practice—specifically, bad faith bargaining.[43] Bad faith bargaining by a union constitutes an unfair practice under the *MMBA*, just as it does under the *EERA*.[44]

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 842-43.

41. *Id.* at 843.

42. Discussed *infra* at section C (the California Supreme Court's 1985 *County Sanitation* decision was based in large part upon its interpretation of how the *MMBA* altered the common law rule regarding public employee strikes).

43. *San Diego Teachers*, 593 P.2d at 843 (holding that if the union's strike "were held Legal it would not constitute a failure to negotiate in good faith. As an Illegal pressure tactic, however, its happening could support a finding that good faith was lacking").

44. Compare Cal. Code Regs. tit. 8, § 32604 (2007) (outlining the categories of unfair practices by labor unions under the *MMBA*) with Cal. Govt. Code Ann. § 3543.6 (West 2007) (comparable outline of unfair practices by labor unions under the *EERA*).

Thus, according to *San Diego Teachers*, illegality of particular strike conduct under the common law would make the same strike conduct at least "arguably prohibited" under the statutory labor relations law.[45] For this reason, PERB, the agency charged with interpreting and enforcing the *MMBA*, the *EERA*, and five other public sector labor relations statutes, is well supported in taking the position that strike conduct that is illegal under *County Sanitation* would arguably violate the *MMBA*.

In light of *EERA*'s silence on the issue of strikes, the school district in *San Diego Teachers* "contended that to require the district to apply to PERB before suing for injunctive relief would be to require an idle act," because PERB might have "refused to apply to a court for relief . . . ."[46] The California Supreme Court completely rejected this contention, finding that

> the EERA gives PERB discretion to withhold as well as pursue, the various remedies at its disposal. Its mission to foster constructive employment relations (s[ection] 3540) surely includes the long-range minimization of work stoppages. PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike . . . and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer.[47]

Indeed, the Court explicitly premised its holding on the Legislature's trust in PERB's expertise—expertise that the Court found lacking in the lower courts. As stated in *San Diego Teachers*,

> A court enjoining a strike on the basis of (1) a rule that public employee strikes are illegal, and (2) harm resulting from the withholding of teachers' services cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.[48]

In reaching this conclusion, the Court also found that PERB's processes for seeking an injunction provided an adequate alternative to the district's claimed right to file a lawsuit.[49] The district

45. *San Diego Teachers*, 593 P.2d at 846-47.
46. *Id.* at 846.
47. *Id.*
48. *Id.*
49. *Id.* at 844-45.

> contended, however, that even if PERB could have applied for judicial relief against the strike the grounds on which this might have been done would not necessarily encompass all grounds on which a judicial order could be granted. . . . PERB's determination to seek an injunction, as well as its application to the court, would reflect only a narrow concern for the negotiating process mandated by the EERA and would ignore strike-caused harm to the public . . . .[50]

The Court rejected this argument, too, finding that it

> erroneously presupposes a disparity between public and PERB interests. The public interest is to minimize interruptions of educational services. Yet did not an identical concern underlie enactment of the EERA? . . . PERB's responsibility for administering the EERA requires that it use its power to seek judicial relief in ways that will further the public interest in maintaining the continuity and quality of educational services.[51]

Four years after the California Supreme Court's decision in *San Diego Teachers*, the Court reaffirmed and further clarified PERB's exclusive jurisdiction in *El Rancho Unified School District* v. *National Education Association*.[52] In *El Rancho*, the trial court, following *San Diego Teachers*, had sustained the defendant unions' demurrers to a lawsuit alleging a tort cause of action against the unions' strike.[53] The court of appeal, in contrast, found that PERB had no jurisdiction because the lawsuit was premised upon a tort cause of action and there was no arguable basis on which the strike could be found to constitute an unfair practice under *EERA*.[54] However, the California Supreme

50. *Id.*

51. *Id.* at 845 (citations omitted). Notably, at the time that *San Diego Teachers* was decided, PERB had only recently been created and assumed jurisdiction over local school districts (in 1976). However, a long line of appellate courts before that time had ruled that public employee strikes were illegal under the common law. (*See e.g. L.A. Unified Sch. Dist. of L.A. Co. v. United Teachers*, 100 Cal. Rptr. 806, 808 (Cal. App. 2d Dist. 1972) (citing other cases). The *San Diego Teachers* Court recognized that when the Legislature enacted *EERA* and vested PERB with jurisdiction, exclusive jurisdiction over such issues was effectively transferred from the courts to PERB, exactly as the Legislature has since done with respect to the *MMBA*.

52. *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893 (Cal. 1983).

53. *Id.* at 894-95.

54. *Id.* at 896.

Court reversed, giving in-depth treatment to the exclusive jurisdiction doctrine.[55]

First, the Court adopted the rule developed by the United States Supreme Court in determining whether the National Labor Relations Board has exclusive jurisdiction over a private sector labor dispute.[56] The Court found that the issues raised by strike activity qualified under both prongs—the conduct was both arguably protected and arguably prohibited.[57]

The Court further found that the "arguably prohibited" prong was satisfied even though the employer's amended complaint included tort causes of action.[58] The tort complaints were for "conspiring to cause and causing a violation of the California Compulsory Education Law by making it impossible for students to attend school by means of the allegedly illegal strike," as well as for encouraging, advising and inducing the teachers to strike illegally.[59] In addressing the threshold question of PERB's exclusive jurisdiction over such claims, the Court noted that

> [S]trikes are an unfair practice under EERA only if they involve a violation of the act's provisions. As a result, the District argue[d] that the issues which it could present in court [were] broader than the issues it could present to PERB. In the District's view, PERB would be concerned only with the existence of unfair labor practices—asserted to be a minor aspect of th[e] case—and not with the harm to the District and to the public flowing from the allegedly illegal strike itself.[60]

The Court rejected this argument for two reasons. First, "the issue before PERB would have been whether the strike itself was unlawful,"[61] which was the same question that the Superior Court would have to determine. This meant that "the controversy presented in both forums may fairly be termed the same."[62] Second,

55. *Id.* at 902.

56. *Id.* at 897 (stating that exclusive jurisdiction exists where the *conduct* at issue is "*arguably protected or prohibited*" by the statute (emphasis added)).

57. *Id.* at 901.

58. *Id.* at 894, 901.

59. *Id.* at 895-96.

60. *Id.* at 899-900 (citing *San Diego Teachers*, 593 P.2d 838 (Cal. 1979)).

61. *Id.* at 900.

62. *Id.*

> [T]he District's argument hinges on an assumption rejected by this court in San Diego Teachers. It "presupposes a disparity between public and PERB interests." . . . Thus, there is little chance that PERB will ignore "the larger harm" involved in a teachers' strike. Moreover, it is equally clear that PERB has the authority to take steps to alleviate that harm in order to effectuate its duties and the purposes of the act.[63]

While that branch of the exclusive jurisdiction doctrine alone was sufficient to find that PERB had exclusive jurisdiction, in *El Rancho* the Court also went beyond the *San Diego Teachers* analysis to look at the "arguably protected" prong of the doctrine. The Court held that even though *EERA* "does not provide express protection for economic strikes," the conduct was "arguably protected."[64] Moreover, the arguable protection of strike conduct under the *MMBA* is quite strong—stronger than under the *EERA*.[65]

In between the Court's decisions in *San Diego Teachers* and *El Rancho*, the courts of appeal also contributed to the developing doctrine of PERB's exclusive jurisdiction in strike cases. Significant decisions in *Fresno Unified School District v. National Education Association*[66] and *PERB v. Modesto City School District*[67] help to further explain the nature of PERB's jurisdiction over strike-related issues.

In *Fresno*, the court of appeals expanded upon the *San Diego Teachers* holding that a union, by engaging in a strike that may have violated the common law rule regarding public employee strike conduct, could be found to have committed an unfair practice.[68] Specifically, the *Fresno* court found that even a strike that is arguably illegal for an entirely different reason—because it violates a contract—also could be found to be an unfair practice.[69] In fact, the *Fresno* court noted that the employer's lawsuit included two causes of action—the

63. *Id.*

64. *Id.*

65. Discussed in detail *infra* at section C.

66. *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888 (Cal. App. 5th Dist. 1981).

67. *Pub. Empl. Rels. Bd. v. Modesto City Sch. Dist.*, 186 Cal. Rptr. 634 (Cal. App. 5th Dist. 1982).

68. *Fresno*, 177 Cal. Rptr. at 892-93.

69. *Id.* at 893.

employer's "first theory asserts the strike was illegal," while the "second theory is grounded in the tort of interference with contract."[70] According to the court, either theory "sets forth what would be . . . arguably an unfair labor practice."[71] The court therefore found, again, that PERB had exclusive jurisdiction [72]

Thus, under *Fresno*, both tort theories—that the strike violated the common law prohibition against public employee strikes, and that the strikes interfered with the contract—triggered PERB's jurisdiction because they could arguably constitute unfair practices. Nor did it matter that the employer chose not to assert any unfair practice charges—the mere fact that such charges could have been brought in front of PERB was sufficient. As the *Fresno* court also ruled,

> Sophistication of pleading actions is not the key to jurisdiction. Preemption exists "to shield the system (of regulation of labor relations) from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."[73]

For this reason, where the subject matter is germane to PERB's jurisdiction, PERB cannot be bypassed merely "to avoid the inconvenience" of having to petition PERB in the first instance.[74]

*Fresno* is especially significant because the court clearly explained that the crucial aspect of a preemption analysis is the *conduct* being challenged, not the formal description of the legal challenge to that conduct.[75] Thus, because the conduct at issue in *Fresno* was strike activity, the appellate court found that a stay pending exhaustion of PERB's exclusive jurisdiction was necessary.[76] This result occurred even though the particular causes of action alleged by the employer were tort and contract theories rather than violations of the labor relations statutes.[77] Indeed, this principle of deference is akin to abstention—as the California Supreme Court has similarly held, even if PERB may look at challenged conduct according to different standards

70. *Id.*
71. *Id.*
72. *Id.* at 893-94.
73. *Id.*
74. *Id.* at 894.
75. *Id.* at 893-97.
76. *Id.* at 897.
77. *Id.*

or based upon different theories than those which would govern in court, exclusive initial jurisdiction still requires that a court not interfere with PERB's review of the matter.[78]

The court of appeal reached the same conclusion recently in *City and County of San Francisco v. International Union of Operating Engineers, Local 39*.[79] In that case, the plaintiff (City and County) had alleged a violation of the city's charter, but not any violation of the *MMBA*.[80] Nevertheless, the court found that PERB had exclusive jurisdiction:

> While it is true the City's complaint does not mention the *MMBA*, "[a]t this stage in the proceedings, where the only question is PERB's jurisdiction, what matters is whether the underlying conduct on which the suit is based—however described in the complaint—may fall within PERB's exclusive jurisdiction" . . . It is irrelevant that the superior court may have jurisdiction to interpret charter provisions or grant declaratory relief in other types of disputes, or that the City declines to plead a claim for relief from an unfair labor practice.[81]

As the above cases make clear, even where a plaintiff has a legitimate legal claim not involving an unfair labor practice, superior courts must defer to PERB's exclusive jurisdiction if the same conduct could also be framed as an unfair labor practice.

Significantly, the *Fresno* court distinguished federal preemption cases such as *Farmer v. United Brotherhood Of Carpenters and Joiners of America, Local 25*,[82] where the claim alleged involved a labor dispute but "was not essentially about a labor dispute."[83] "Here" the *Fresno* court continued, "the tort is not a 'peripheral concern' of labor law. *Rather, the tort action goes to the essence of labor law—the*

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78. *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893, 902 (Cal. 1983) (finding PERB had exclusive jurisdiction over tort cause of action against strike).

79. *City and Co. of S. F. v. Intl. Union of Operating Engrs., Local 39*, 60 Cal. Rptr. 3d 516, 526 (Cal. App. 1st Dist. 2007).

80. *Id.* at 522.

81. *Id.* at 522-23 (internal citations omitted).

82. *Farmer v. United Bhd. of Carpenters and Joiners of Am., Loc. 25*, 430 U.S. 290 (1977).

83. *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 893 (Cal. App. 5th Dist. 1981).

*right to strike . . . .*"[84] The same is true in the instant cases, which involve the essence of labor law: Which County employees lose their protected right to strike because their absence would pose a substantial and imminent threat to the public's health and safety?

Finally, the *Fresno* court held that

> [a] preemption rule is of overriding significance. The rule must stand even against the argument that to require PERB procedures to be commenced and PERB to seek injunctive relief might cause irreparable injury should PERB decide against seeking court injunctive relief.[85]

In *Modesto*, the court of appeal further explained the exclusive jurisdiction rule, citing with approval federal precedent holding that

> The doctrine of preemption is a procedural safeguard against conflicting application of labor law principles . . . . [A] primary factor in [the doctrine's] development was the perceived incapacity of common-law courts and state legislatures, acting alone, to prove an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.[86]

The *Modesto* court noted that even a "competent, thorough, and informed" trial judge knows far less about labor relations than the parties to the case, which "amply exemplifies the need to defer to the expertise of PERB" so that it can "promote the improvement of personnel management and employer-employee relations."[87] Thus, the court continued

> We do not believe it would serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results. One of the basic purposes for the doctrine of preemption is to bring expertise and uniformity to the task of stabilizing labor relations.[88]

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84. *Id.* (emphasis added).

85. *Id.* at 895 (emphasis added).

86. *Pub. Empl. Rels. Bd. v. Modesto City Schs. Dist.*, 186 Cal. Rptr. 634, 641-42 (Cal. App. 5th Dist. 1982) (citations and internal quotations omitted).

87. *Id.* at 642.

88. *Id.* at 643.

### B. *EXTENSION OF PERB'S INITIAL JURISDICTION TO COVER CITIES AND COUNTIES*

In the California Supreme Court's 2005 decision in *Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board*,[89] the Court described the Legislature's recent grant to PERB of jurisdiction over all employers and unions operating under the *MMBA*.

> The [MMBA] governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and special districts. Before July 1, 2001, an employee association claiming a violation of the MMBA could bring an action in superior court. . . . Effective July 1, 2001, however, the Legislature vested the [PERB] with exclusive jurisdiction over alleged violations of the MMBA.[90]

Thus, prior to July 1, 2001, superior court was the proper forum for local agencies and municipal unions to resolve legal disputes regarding strikes. In contrast, employers and unions subject to PERB jurisdiction have always resolved legal disputes concerning strikes by exhausting PERB's jurisdiction, with PERB seeking injunctive relief in court where appropriate. In every appellate case in which a PERB-covered employer has attempted to deviate from this exclusive jurisdiction by going directly to court to resolve a strike-related legal dispute, the appellate courts have upheld PERB's exclusive jurisdiction.[91]

The Legislature, in vesting PERB with jurisdiction over the *MMBA*, explicitly defined PERB's powers and duties to be equivalent to its powers and duties under *EERA*.[92] In vesting PERB with the same powers and duties under the *MMBA* as it already had under *EERA*, the

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89. *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rels. Bd.*, 112 P.3d 623 (Cal. 2005).

90. *Id.* at 625.

91. *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893, 902 (Cal. 1983); *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 846-47 (Cal. 1979); *Modesto*, 186 Cal. Rptr. at 643; *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 897 (Cal. App. 5th Dist. 1981).

92. *See* Cal. Govt. Code Ann. § 3509(a) (Lexis 2007) (incorporating by reference *EERA*, Cal. Govt. Code Ann. § 3541.3).

Legislature is presumed to have known the existing state of judicial interpretations regarding the nature of those powers and duties.[93]

In *Coachella*, the California Supreme Court clearly explained that PERB's jurisdiction over cities and counties should be interpreted as being equivalent to PERB's pre-existing jurisdiction over other public employers.[94] The Court was asked to determine whether the Legislature's act vesting PERB with jurisdiction over the *MMBA* had altered in any way the statute of limitations for filing an unfair labor practice charge under the *MMBA*.[95] Prior to PERB having jurisdiction over the *MMBA*, that limitations period had been judicially determined to be three years, the general limitations period for suit brought pursuant to statute.[96] However, the limitations period for *EERA* and the other statutes over which PERB had jurisdiction was six months.[97] While *EERA* and other statutes under PERB's jurisdiction have a six-month limitations period written into the statute,[98] the *MMBA* contains no such provision. This fact led some to argue that the judicially determined three-year limitations period should continue in effect even after PERB was vested with exclusive jurisdiction.[99]

The Court found that in vesting PERB with exclusive initial jurisdiction over the *MMBA*, the Legislature intended to abrogate the judicially created three-year limitations period.[100] Instead, the court would have PERB apply its traditional six-month limitations period, just as it does with all other statutes under its jurisdiction, even though the *MMBA* does not reference a limitations period within its text.[101] As the Court found,

> Here, what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges. . . . By changing the forum—vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA

93. *See e.g. Viking Pools, Inc. v. Maloney*, 770 P.2d 732, 736 (Cal. 1989); *Bailey v. Super. Ct.*, 568 P.2d 394, 398, n. 10 (Cal. 1977).

94. *Coachella*, 112 P.3d at 631.

95. *Id.* at 625-26.

96. *Id.*

97. *Id.* at 626.

98. *Id.* at 632 (citing the various statutory provisions).

99. *See id.* at 630.

100. *Id.* at 635.

101. *Id.*

> charges—the Legislature abrogated the three-year statute of limitations . . . and we assume that this abrogation was intentional and not inadvertent.[102]

Significantly, the *Coachella* Court also found it important to harmonize the labor relations law governing cities and counties with that governing other public sector entities, writing:

> Finally, and perhaps *most importantly*, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided. . . . The MMBA, which we construe here, is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB. The PERB suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations laws within the PERB's jurisdiction. . . . The PERB suggests no rational ground upon which the Legislature could have decided to treat MMBA unfair practices charges so differently in regard to the limitations period. We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws.[103]

For the same reasons identified by the California Supreme Court in the passages above, in giving PERB exclusive initial jurisdiction over the *MMBA*, the Legislature must have intended to make the scope of that exclusive jurisdiction comparable to the scope of PERB's exclusive jurisdiction over *EERA*. Additionally, PERB's exclusive jurisdiction, as definitively explained in *San Diego Teachers*,[104] *El Rancho*,[105] *Fresno*,[106] and *Modesto*,[107] extends to claims that a strike

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102. *Id.* at 633-34.
103. *Id.* at 634 (emphasis added).
104. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 845 (Cal. 1979).
105. *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893, 902 (Cal. 1983).
106. *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 895 (Cal. App. 5th Dist. 1981).
107. *Pub. Empl. Rels. Bd. v. Modesto City Schls. Dist.*, 186 Cal. Rptr. 634, 643 (Cal. App. 5th Dist. 1982).

will cause irreparable harm to the public, no matter what legal theory or allegation the employer claims it is asserting.

There are simply no appellate cases in which any employer under PERB's jurisdiction has ever been permitted to go directly to court to seek to enjoin a strike, for any reason or based upon any legal theory or allegation. As discussed above, in every case in which an employer has attempted to do so, the employer's allegations have been referred to PERB's exclusive jurisdiction. Now that the Legislature has vested PERB with jurisdiction over local agency labor relations, local governments are governed by the same rule as other public sector employers in California, including school districts, public universities and the State itself.

### C. *No Violation of the MMBA Must Be Alleged In Order For PERB to Have Jurisdiction Over City and County Employee Strike Cases*

In each of the cases presently on appeal, the employers have argued that PERB lacks jurisdiction because the employers did not allege any unfair labor practice or other violation of the *MMBA*. There are multiple reasons why this reasoning is erroneous.

First, this reasoning ignores the California Supreme Court and court of appeal cases discussed above. Those cases arose under *EERA*, which, like the *MMBA*, does not contain any language explicitly mentioning any prohibitions or protections regarding strikes. However, the appellate courts have nevertheless uniformly held that strike activity is both "arguably prohibited" and "arguably protected" by *EERA*. This means that school districts' legal claims challenging strike activity—including injunction actions to prevent irreparable harm to the public—must be brought to PERB irrespective of whether the employers allege violations of *EERA*.

Also, the argument that PERB lacks jurisdiction because employers raised issues in court that are not mentioned in the *MMBA* was rejected in *San Diego Teachers* and *El Rancho*.[108] Notably, in *El*

108. *See e.g. El Rancho*, 663 P.2d at 899-900 (employer argued that "the issues which it could present in court are broader than the issues it could present to PERB" and "PERB would be concerned only with the existence of unfair labor practices—asserted to be a minor aspect of this case—and not with the harm to the District and to the public flowing from the allegedly illegal strike itself." However, the California Supreme Court found that "the issue before PERB would have been whether the strike

*Rancho* the Court found that PERB had exclusive jurisdiction even though the employer framed its claim as a tort cause of action.[109] The Court further held that even though the "EERA does not provide express protection for economic strikes," strike conduct is "arguably protected."[110] Therefore, PERB also has exclusive jurisdiction because the conduct at issue is "arguably protected."

This holding applies equally under the *MMBA*, as that statute, like *EERA*, generally protects union activity without specifically mentioning strikes.[111] The "arguable protection" of strike conduct is, in fact, even stronger for employees under the *MMBA*. The California Supreme Court has held that all *MMBA*-covered employees have a protected right to strike, other than those whose absence imminently and substantially threatens the public's safety.[112]

As the *County Sanitation* Court held, the *MMBA* "removed many of the underpinnings of the common law per se ban against public employee strikes."[113] Therefore the *MMBA*'s "implications regarding the traditional common law prohibition [against strikes] are significant."[114] The court went on to note that the *MMBA* specifically extended the right to engage in union activities to city and county employees, and "the right to unionize means little unless it is accorded some degree of protection . . . . A creditable right to strike is one means of doing so."[115]

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itself was unlawful" and "there is little chance that PERB will ignore 'the larger harm' involved in a teachers' strike. . . . PERB has the authority to take steps to alleviate that harm in order to effectuate its duties and the purposes of the act.").

109. *Id.* at 901; *accord Fresno*, 177 Cal. Rptr. at 893-94 (exclusive jurisdiction analysis turns on the type of conduct at issue, not the legal theories asserted regarding that conduct).

110. *El Rancho*, 663 P.2d at 900-01.

111. *See generally* Cal. Govt. Code Ann. § 1138 (West 2007).

112. *Co. Sanitation Dist. No. 2 v. L.A. Co. Employees Assn., Loc. 660*, 699 P.2d 835, 849 (Cal. 1985) (holding that "the right of public employees to strike is by no means unlimited," and proceeding to limit that right only for "essential" employees).

113. *Id.* at 843.

114. *Id.*

115. *Id.* at 851. The *County Sanitation* Court specifically recognized the importance of the right to strike in the public sector, just as in the private sector: "In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith." *Id.* at 847; *see also id.* at 852 (noting that "[a] union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness" and that "the right to strike is fundamental to the existence of a labor union").

Furthermore, the California Supreme Court's finding that the *MMBA* provides the foundation for the right of most city and county employees to strike[116] places those strikes under the *MMBA* and not the "common law." In *Santa Clara County Counsel Attorneys Association v. Woodside*,[117] the California Supreme Court discussed the import and reasoning of its decision in *County Sanitation* as follows: "We found the traditional common law rule [barring public employees from striking] without basis in modern labor law, *particularly in light of the MMBA* . . . ."[118]

Moreover, the *County Sanitation* Court's reasoning that the "right to unionize" should include a "creditable right to strike"[119] is very significant for the instant analysis. The right to unionize referenced by the Court appears in Government Code section 3502,[120] and any interference with the rights set forth in section 3502 constitutes an unfair practice under PERB regulations.[121]

The *County Sanitation* Court crafted the general rule that *MMBA*-covered employees have the right to strike unless they are essential to the public's safety.[122] However, the California Supreme Court's landmark decisions in *San Diego Teachers* and *El Rancho* leave no doubt that the Court considers PERB to be more expertly qualified to apply this general rule by making specific strike-related determinations, on a case-by-case basis, regarding particular labor disputes within its jurisdiction.[123]

Therefore, even looking only at the "arguably protected" prong of preemption analysis, PERB must have jurisdiction to determine which employees are so "essential" that they may not strike. That is the only means by which PERB can determine the converse—which employees have the protected right to strike. PERB must regularly make such determinations, for instance, when employees file charges claiming that their employers have retaliated against them for strike activity which

116. *Id.* at 843.

117. *Santa Clara Co. Counsel Attys. Assn. v. Woodside*, 869 P.2d 1142 (Cal. 1994).

118. *Id.* at 1150 (emphasis added).

119. *Co. Sanitation*, 699 P.2d at 851.

120. Cal. Govt. Code Ann. § 3502 (Lexis 2007).

121. *See* Cal. Code Regs. tit. 8, § 32603(a) (2007).

122. *Co. Sanitation*, 699 P.2d at 854.

123. *See e.g. San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 846-47 (Cal. 1979) (finding that a court "cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB." *Id.* at 846).

PERB claimed to have been protected.[124] For this reason, if superior courts were to retain jurisdiction to determine whether employees should be enjoined from striking, the risk of conflict with PERB's determination of employee rights is quite high. As the California Supreme Court noted in *El Rancho*, the purpose of the exclusive jurisdiction doctrine is "to avoid conflict 'in its broadest sense' in the regulation of labor-management relations . . . ."[125]

At the time that *County Sanitation* was decided, PERB did not have jurisdiction over cities and counties, and therefore determination of these issues was left to the courts.[126] As noted above, the Legislature changed all that effective July 1, 2001.[127] In *Santa Clara County Counsel Attorneys Association*, the Court specifically confirmed that the *MMBA* (as of that time) was enforceable in court.[128] However, if this holding is researched, it can easily be found that the holding was superseded by statute—namely, the Legislature's act vesting PERB with exclusive jurisdiction over the *MMBA*.[129] Indeed, the act vesting PERB with jurisdiction over the *MMBA* twice directs PERB to follow standards previously adopted and followed by the courts.[130]

Accordingly, *County Sanitation* does not permit counties to go directly to court to seek injunctions against strikers on public safety grounds. The fundamental error in logic in arguing otherwise is that *County Sanitation* was decided before jurisdiction was switched from the courts to PERB.[131]

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124. *See* Cal. Code Regs. tit. 8, § 32603(a) (2007) (PERB Regulation promulgated to enforce the *MMBA*, declaring any interference with employees' rights to be a violation of the *MMBA*).

125. *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893, 897 (Cal. 1983) (citing federal precedent).

126. *Co. Sanitation,* 699 P.2d at 837-41 (discussion of various appellate court decisions).

127. *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rels. Bd.*, 112 P.3d 623, 625 (Cal. 2005).

128. *See Santa Clara Co. Counsel Attys. Assn. v. Woodside*, 869 P.2d 1142, 1147 (Cal. 1994).

129. *See Coachella*, 112 P.3d at 625 (noting that Cal. Govt. Code Ann. § 3509, added by 2000 Cal. Stat. 901 § 8, constitutes a "fundamental change" which supersedes the Supreme Court's holding in *Santa Clara County Counsel Attorneys Assn.* that courts have jurisdiction over the *MMBA*).

130. Cal. Govt. Code Ann. §§ 3509(b), 3510(a) (Lexis 2007).

131. While this article deals with the common threads between each case, additional

### D. *The Legislative History of Senate Bill 739 Illustrates The Authority of PERB to Interpret County Sanitation and All Other Pre-Existing Cases*

The Government Code provisions vesting PERB with jurisdiction over the *MMBA* were enacted via Senate Bill 739 (SB 739).[132] Prior to enactment, SB 739 went through multiple drafts.[133] In the version showing all amendments adopted through August 16, 1999, the bill added to Government Code section 3510(b)[134] language affording special status to the California Supreme Court's 1985 decision in *County Sanitation*, as follows:

> The holding of *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn* (1985) 38 Cal. 3d 564 is hereby adopted and shall be applied for the purposes of this chapter.[135]

Ultimately, however, the Legislature determined to excise that added language.[136] As noted above, section 3510(a) of the Government Code directs that "[t]he provisions of this chapter shall be interpreted and applied *by the board* in a manner consistent with and in

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side issues have also been raised in individual cases regarding PERB's jurisdiction over public employee union conduct. For example, in *County of Sacramento*, the superior court thought that it was free to enjoin legal conduct. *County of Sacramento v. AFSCME Loc. 146*, 06AS03704, 06AS03790 (2006). In so finding, the superior court interpreted *County Sanitation* to allow limited injunctions to issue against legal strike conduct, and ignored that conduct is potentially enjoinable only to the extent that it may be illegal. *See e.g. M Rests., Inc. v. S.F. Local Jt. Exec. Bd.*, 177 Cal. Rptr. 690, 695 (Cal. App. 1st Dist. 1981) ("The preliminary injunction is a decree continuing in nature, directed at future events. It creates no right, but merely assumes to protect a right from unlawful and injurious interference.") (citing other cases).

132. Cal. Sen. 739 (Feb. 24 1999) (available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0701-0750/sb_739_bill_20000929_chaptered.pdf (last accessed Sept. 28, 2007)).

133. Cal. Sen. 739 (Feb. 24, 1999) (available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_739&sess=9900&house=B&author=solis (last accessed Sept. 28, 2007)).

134. Cal. Sen. 739 (Aug. 16, 1999) (available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0701-0750/sb_739_bill_19990816_amended_asm.pdf (last accessed Sept. 28, 2007)).

135. *Id.*

136. Cal. Govt. Code Ann. § 3510(b) (showing deletion via amendment in later version of bill); Cal. Sen. 739 (September 29, 2000) (available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0701-0750/sb_739_bill_20000929_chaptered.pdf (last accessed Sept. 28, 2007)).

accordance with judicial interpretations of this chapter."[137] The final sentence of newly-added section 3509(b) of the Government Code similarly instructed that "[*t]he board*" shall follow "existing judicial interpretations" of the *MMBA*.[138]

The Legislature thus rejected language which would have enshrined *County Sanitation* and would have thereby left in place the system in which courts, rather than the PERB, decided "essential employee" issues in strike cases. This pre-existing judicial jurisdiction, if left in place, would have made the scope of PERB's jurisdiction under the *MMBA* materially different than its jurisdiction under *EERA*. Instead, the Legislature rejected that proposal and explicitly declared that all existing judicial law should now be applied "by the [PERB] board."[139]

In the absence of the proposed language enshrining *County Sanitation*, there are no relevant differences between the *MMBA* and the *EERA*. In *Coachella*, the California Supreme Court found that when the Legislature vested PERB with jurisdiction over the *MMBA*, they intended that PERB's *MMBA* jurisdiction be interpreted in a manner that is harmonious with PERB's jurisdiction over *EERA*.[140] Based upon *Coachella*, and particularly in light of the Legislature's specific decision not to insert into the *MMBA* language that was different from the *EERA* that would have enshrined *County Sanitation*, there is no doubt that jurisdiction shifted from the courts to PERB. This was just as the *San Diego Teachers* Court found that the passage of *EERA* gave PERB jurisdiction over teacher strike cases,[141] despite the fact that courts had for many years prior to *EERA* taken jurisdiction over allegations that teacher strikes violated the common law.[142]

The city and county employers point to the fact that there was a recently-proposed piece of legislation that would have definitively resolved this question—Assembly Bill 553 (AB 553).[143] Introduced in

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137. Cal Govt. Code Ann. § 3510(a) (Lexis 2007) (emphasis added).

138. *Id.* at § 3509(b) (emphasis added).

139. *Id.* at §§ 3509(b), 3510(a).

140. *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rels. Bd.*, 112 P.3d 623, 634 (Cal. 2005).

141. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 846-47 (Cal. 1979).

142. See *supra*, n. 50.

143. Cal. Assembly 553 (Feb. 21, 2007) (available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0551-0600/ab_553_bill_20070221_introduced.pdf (last accessed Sept. 28, 2007)).

February 2007, AB 553 would have explicitly provided that PERB has exclusive initial jurisdiction in strike injunction cases.[144] The bill was passed by both the California Assembly and Senate, but was vetoed by Governor Schwarzenegger on September 26, 2007.[145]

The employers are misplaced in their reliance on AB 553. The bill clearly stated in both its original and amended versions that it was "clarifying of existing law" and *did not* purport to "expand the Public Employment Relations Board's jurisdiction or authority beyond that previously authorized by the Legislature."[146]

It is hardly surprising that the Legislature attempted to clarify the meaning of its earlier action. The Legislature did so precisely because superior courts—when faced with this issue for the first time in 2006, at multiple TRO hearings in which immediate decisions were needed—struggled to get up to speed quickly on this complex area of law (as noted above, in some but not all cases the superior courts failed to recognize the import of the Legislature's grant of exclusive jurisdiction to PERB over *MMBA* disputes).[147]

By passing AB 553, both the Assembly and the Senate are now on record as to their interpretation of their 2000 act vesting PERB with jurisdiction (SB 739)—both houses believe that PERB's *MMBA* jurisdiction was intended to be comparable to its jurisdiction over other labor relations statutes, including its jurisdiction in strike cases.[148] It is

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144. *Id.*

145. *See* Cal Assembly 553 (available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0551-0600/ab_553_bill_20070904_enrolled.pdf (last accessed Oct. 14, 2007)); Governor Arnold Schwarzenegger, Veto Message Regarding Assembly Bill 553, http://gov.ca.gov/pdf/press/AB%20553%20veto%20message.pdf (last accessed Sept. 28, 2007).

146. *Id.* at § 1(a)-(b); Cal. Assembly 553 § 1(a)-(b) (May 8, 2007) (available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0551-0600/ab_553_bill_20070508_amended_asm_v98.html (last accessed Sept. 28, 2007)).

147. *See* Cal. Assembly 553 (Assembly Floor Analysis May 8, 2007) (available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0551-0600/ab_553_cfa_20070509_165724_asm_floor.html (last accessed Sept. 28, 2007)) ("Supporters go on to state, 'There is currently confusion and uncertainty by some over the jurisdictional issue. There have been some courts which have issued injunctions against strike activity at the request of local agency employers despite the laws passed by the Legislature . . . AB 553 does not change the law, but simply clarifies what the Legislature already did and intended in enacting SB 739 in 2000.'").

148. Well-settled precedent concerning legislative amendments holds that "consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true

irrelevant to the meaning of SB 739 that now-Governor Schwarzenegger, who was not in office when SB 739 was enacted, states in his veto message that PERB should not have such jurisdiction. In these circumstances, the legislative history of AB 553 undercuts the Employers' argument more than it supports their argument.[149]

## E. *No Exception To PERB's Jurisdiction Apply In The Six Pending Cases*

### 1. *The "Irreparable Harm" Exception and PERB's Injunctive Relief Procedures*

PERB is authorized by its governing statutes and regulations to seek injunctive relief in court.[150] Within five days of a party's request, PERB's general counsel recommends to PERB's Board whether to

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meaning....One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: ' "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute." ' ". *W. Sec. Bank v. Super. Ct.*, 933 P.2d 507, 514 (Cal. 1997) (citations omitted).

149. While "the Legislature's expressed views on the prior import of its statutes are entitled to due consideration," and courts "cannot disregard them," they are certainly not binding on any court. *W. Sec. Bank*, 933 P.2d at 514. In this case, where the Legislature's expressed views on the meaning of its prior statute was vetoted by the governor, the courts are unlikely to find that the history of AB 553 provides guidance as to legislative intent. Indeed, precedent is clear that proposed legislation which never became law is a poor indication of legislative intent. *See, e.g., Snyder v. Michael's Stores, Inc.*, 945 P.2d 781, 788 n. 4 (Cal. 1997) ("The parties draw conflicting inferences from the fact that in 1991 the Legislature passed a bill, which was vetoed by the Governor, to abrogate [a court decision]. On reflection, we are unable to draw any relevant inference from this event; it provides no guidance on whether the political branches approved or disapproved of [the court decision] as an interpretation of the existing statutes."); *People v. Escobar*, 837 P.2d 1100, 1106 (Cal. 1992) (" 'In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. "Legislative inaction is 'a weak reed upon which to lean.' " ' ") (Citations omitted).

150. *See e.g.* Cal. Govt. Code Ann. § 3509(a) (Lexis 2007) (incorporating by reference Cal. Govt. Code § 3541.3(j) (Lexis 2007)); Cal. Code Regs tit. 8, § 32450 (2007). In determining whether injunctive relief is appropriate, PERB considers (1) whether there is "reasonable cause" to believe a violation has been or may be committed; and (2) whether injunctive relief is "just and proper." *Pub. Empl. Rels. Bd. v. Modesto City Schs. Dist.*, 186 Cal. Rptr. 634, 643 (Cal. App. 5th Dist. 1982).

seek injunctive relief.[151] Practitioners familiar with PERB know that when a party requests that PERB seek injunctive relief, PERB acts quickly to process the case in a timely enough manner that injunctive relief will still be effective if and when it is ultimately obtained.

The California Supreme Court has definitively determined that PERB's procedures to enjoin strikes are adequate. In *San Diego Teachers*, the Court stated that in order "[t]o provide an adequate alternative to a party's own lawsuit for an injunction, PERB's power to apply for injunctive relief should be exercisable in response to any aggrieved party's request, not simply on its own motion."[152] The Court found that the standard had been satisfied in that case.[153] In fact, even though PERB had not developed any procedures for processing parties' requests for injunctive relief, the Court nevertheless found that the purely ad hoc approach that PERB was using to resolve injunctive relief requests at the time was adequate.[154]

Several decades later, PERB now has specific regulations in place and a well-developed history of working as quickly as necessary to process injunctive relief requests. Injunctive relief, if warranted and if sought and obtained, will be obtained in a timely enough manner to be effective. In these circumstances, there could hardly be cause to re-litigate the "adequacy of relief" issue already decided by the Supreme Court in 1979.[155]

Lastly, even assuming that the holding of *San Diego Teachers* (that PERB's remedies are adequate) could somehow be subject to attack now, the court of appeal also has held that the doctrine of exclusive jurisdiction is of such importance that it must govern even against the assertion that it would lead to irreparable harm. "A preemption rule is of overriding significance. *The rule must stand even against the argument that to require PERB procedures to be commenced and PERB to seek injunctive relief might cause irreparable injury* should PERB decide against seeking court injunctive relief."[156]

151. *See* Cal. Code Regs. tit. 8, §§ 32147, 32460 (2007).

152. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 844 (Cal. 1979).

153. *Id.* at 844-45.

154. *Id.* at 845.

155. *San Diego Teachers*, 593 P.2d at 844.

156. *Fresno Unified Sch. Dist. v. Natl. Educ. Assn.*, 177 Cal. Rptr. 888, 895 (Cal. App. 5th Dist. 1981) (emphasis added).

Given this overriding principle, it is not surprising that an "irreparable harm" exception to PERB's jurisdiction has only been applied under very different and unusual circumstances. In *Department of Personnel Administration v. Superior Court*,[157] the appellate court found two applicable exceptions to PERB's exclusive jurisdiction—futility and irreparable injury—which the court found to be "interrelated" exceptions.[158] First, the court noted that PERB had completely disavowed all jurisdiction over the dispute.[159] For that reason, it would have been futile to invoke PERB's jurisdiction, and there was no "separation of powers" issue between the executive and judicial branches.[160] However, the circumstances in *Department of Personnel Administration* could not be more different than in the cases currently awaiting appellate decision. In those cases PERB, far from disavowing jurisdiction, has actively asserted its jurisdiction from the very outset of the cases.[161]

In *Department of Personnel Administration*, since PERB refused to assert jurisdiction, there was no chance that PERB would determine what remedies were appropriate, including whether it was necessary to go to court to seek an injunction against irreparable injury.[162] Indeed, the appellate court noted that it was faced with an "unusual" circumstance,[163] and that application of the irreparable injury exception was warranted even though that exception is "rarely applied."[164] This is also why the court found the two exceptions to be "interrelated"—the futility of going to PERB given its disavowal of jurisdiction assured that there would be no potential check on any threatened irreparable harm.[165]

Lastly, the court in *Department of Personnel Administration* also noted that it was faced with "unique" circumstances in that there was an "unprecedented" fiscal crisis leading to "questions of first

157. *Dept. of Personnel Administration v. Super. Ct.*, 6 Cal. Rptr. 2d 714, 729-30 (Cal. App. 3d Dist. 1992).

158. *Id.* at 720-21.

159. *Id.* at 719.

160. *Id.* at 719-21.

161. *See Co. of Sacramento v. AFSCME Loc. 146*, 06AS03704, 06AS03790 (2006).

162. *Dept. of Personnel Administration*, 6 Cal. Rptr. 2d at 719-21.

163. *Id.* at 719-20.

164. *Id.* at 720.

165. *Id.* at 721.

impression."[166] In the instant disputes, in contrast, application of an "irreparable harm" exception would divest PERB of jurisdiction every time any city or county in California is faced with the threat of a strike and believes that the public's health or safety may be threatened by certain employees striking.[167] Thus, the extremely unusual facts that gave rise to the decision in *Department of Personnel Administration* do not support a ruling that would allow cities and counties to bypass PERB every time they are threatened with a strike.

2. *The "Local Concern" Exception to PERB's Jurisdiction*

In *San Diego Teachers*, the California Supreme Court borrowed preemption principles from private-sector labor relations law, noting that the purpose of an exclusive jurisdiction rule is "to help bring expertise and uniformity to the delicate task of stabilizing labor relations."[168] The Court found that, in contrast with PERB, a court "cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB."[169] The courts of appeal have similarly left no question that they view PERB, not the courts, as having the expertise necessary to balance all competing interests regarding public employee strikes.[170]

The California Supreme Court and courts of appeal have clearly held that legal issues pertaining to strikes are at the core of PERB's expertise and jurisdiction, including the potential harm to the public that strikes may cause. Therefore, it would be clearly erroneous to apply the "local concern" exception to PERB jurisdiction set forth in *Pittsburg Unified School District v. California School Employees Association*.[171]

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166. *Id.* at 716, 720.

167. Because irreparable harm is an element that must be shown in order to obtain temporary injunctive relief, application of an irreparable harm exception to PERB's exclusive jurisdiction over strike injunction actions would divest PERB of jurisdiction in every instance except where the employer cannot show a likelihood of irreparable harm, in which case the application for injunctive relief would be untenable in the first place.

168. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 845 (Cal. 1979).

169. *Id.* at 846.

170. *See Pub. Empl. Rels. Bd. v. Modesto City Sch. Dists.*, 186 Cal. Rptr. 634, 642 (Cal. App. 5th Dist. 1982); *see also supra* at section A.

171. *Pittsburg Unified Sch. Dist. v. Cal. Sch. Employees Assn.*, 213 Cal. Rptr. 34, 39 (Cal. App. 1st Dist. 1985).

In *Pittsburg*, there was no actual or threatened strike. Rather, the defendant school employees union engaged in picketing and leafleting outside of the private business offices of school board members.[172] The trial court enjoined such conduct on the ground that it violated the Education Code.[173] The appellate court reversed, finding the conduct to be protected by constitutional free speech provisions.[174]

Before reaching the merits, the *Pittsburg* court found the matter to lie outside of PERB's exclusive jurisdiction.[175] The court stated,

> the central issue presented to the trial court and on this appeal is whether appellants' conduct represents a corrupt practice within the meaning of Education Code section 35230 or unlawfully places respondent board [of Education] members in a conflict of interest of the sort proscribed by Government Code section 1090.[176]

As the court of appeal determined, PERB had no jurisdiction to enforce the Education Code, nor did PERB have jurisdiction to enforce the First Amendment.[177] This meant that the "central legal and constitutional questions . . . presented certainly are not within PERB jurisdiction."[178]

While the *Pittsburg* court had already determined that the matter was outside of PERB's jurisdiction, the court also found that the case would fall under a "local concern" exception to PERB's jurisdiction.[179] This exception was applicable to those cases where "decisions of local courts do not present substantial danger of interference with administrative adjudication."[180]

There are three primary reasons why this "local concern" exception would not apply to the cases on appeal presently. First, the appellate courts have never remotely extended the "local concern" exception to cover fact patterns involving strike activity. This should not be surprising, as the *Pittsburg* court specifically distinguished *San*

172. *Id.* at 36.
173. *Id.* at 38.
174. *Id.* at 52-53.
175. *Id.* at 41.
176. *Id.* at 40.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 39 (citation omitted).

*Diego Teachers* and *El Rancho*.[181] The court held that "*under the facts of those cases [San Diego Teachers and El Rancho] there was no disparity between the public and PERB interest at stake, which uniformly related to minimizing interruptions in educational services*."[182]

This crucial passage in *Pittsburg* is entirely dispositive in the six cases currently on appeal. The employers admittedly brought their lawsuits to minimize interruption in services during a strike—precisely the issue which the California Supreme Court has found to be at the core of PERB's mission, as the *Pittsburg* court itself acknowledged.[183]

Indeed, if the "local concern" exception applied to an employer's claim that strike activity threatened the public's safety, then school districts covered under *EERA* could go directly to court to seek to enjoin school district strikes. However, as discussed at length above, in every case in which a school district has attempted to do so, the appellate courts have referred the matter to PERB's exclusive jurisdiction.

As the California Supreme Court and courts of appeal have repeatedly acknowledged, the Legislature found there to be an overriding statewide interest in expert and uniform regulation of labor relations.[184] This includes the delicate balancing of threats to the public and the rights of workers and unions to engage in collective activity.[185] The "local concern" exception cannot apply to any matter where there is a "risk of interference with the regulatory jurisdiction of the administrative agency."[186] Numerous appellate decisions (*San Diego Teachers*, *El Rancho*, *Fresno* and *Modesto*) leave no doubt that allowing local superior courts of general jurisdiction to make crucial determinations regarding complex strike issues would entail such a risk.

Second, the *Pittsburg* court found that the "arguably protected" branch of the exclusive jurisdiction doctrine could not apply given that individual school board members had no means of invoking PERB's

181. *Id.* at 41.
182. *Id.* (emphasis added).
183. *Id.*
184. *San Diego Teachers Assn. v. Super. Ct.*, 593 P.2d 838, 845 (Cal. 1979).
185. *Id.* at 846.
186. *Pittsburg*, 213 Cal. Rptr. at 39.

jurisdiction.[187] Even if PERB somehow had jurisdiction over Education Code violations, only employers, employees and labor organizations may bring actions in front of PERB.[188] In contrast, local government employers are free to file charges with PERB and ask PERB to seek an injunction to protect the public interest; in other words, the controversy brought before superior court is the same as it would be before PERB.[189]

Lastly, it is well settled that the "local concern" exception applies to only a very narrow range of court actions—those involving picketing, violence and very limited torts such as infliction of emotional distress. While no appellate court has ever followed or applied the *Pittsburg* court's holding in any other fact setting at all, prior precedent is instructive. To begin with, in the same year as the *San Diego Teachers* decision, the California Supreme Court also decided *Kaplan's Fruit & Produce Company v. Superior Court.*[190] The Court found that PERB's sister agency, the Agricultural Labor Relations Board ("ALRB"), did not have exclusive jurisdiction over actions seeking to enjoin mass picketing which blocks ingress to and egress from a local premises.[191]

The dichotomy of *Kaplan* on the one hand and *San Diego Teachers* on the other hand set the framework for cases to follow. These cases uniformly hold that strike activity is at the heart of PERB's jurisdiction, and PERB is fully empowered to act in order to protect the public's interest in strike cases. However, picketing activity that interferes with ingress to and egress from a local premises is much further outside the sphere of core labor relations issues.[192] This means that superior courts are not divested of jurisdiction over such picketing cases.[193]

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187. *Id.* at 41.

188. *Id.*

189. *See supra* n. 50; *San Diego Teachers*, 593 P.2d at 846; *El Rancho Unified Sch. Dist.* v. *Natl. Educ. Assn.*, 663 P.2d 893, 900 (Cal. 1983) (holding that the employer's legal action based upon threatened harm to the public constitutes the same controversy that would go before PERB, and "there is little chance that PERB will ignore 'the larger harm' involved in a teachers' strike" and "PERB has the authority to take steps to alleviate that harm in order to effectuate its duties and the purposes of the act").

190. *Kaplan's Fruit & Produce Co. v. Super. Ct.*, 603 P.2d 1341 (Cal. 1979).

191. *Id.* at 1347.

192. *Id.* at 1349-50.

193. *See e.g. Serv. Employees Intl. Union, Loc. 102 v. Super. Ct.*, 169 Cal. Rptr. 494,

For all of these reasons, the appellate court's decision in *Pittsburg*, which involved picketing of school board members' businesses rather than strike activity,[194] could not possibly take precedence over the California Supreme Court's decisions in *San Diego Teachers* and *El Rancho* establishing PERB's exclusive jurisdiction over employers' injunction actions and other legal claims regarding strike activity. As noted above, the *Pittsburg* court itself acknowledged that, explicitly distinguishing cases involving strike activity.

## III. THE CALIFORNIA COURTS OF APPEAL SHOULD REVERSE LOCAL INJUNCTIONS ISSUED IN VIOLATION OF LABOR CODE SECTIONS 1138-1138.5

California Labor Code sections 1138-1138.5, enacted into law in 1999 via Assembly Bill 1268,[195] imposed strict new limitations upon the issuance of injunctions in labor disputes. Specifically, under section 1138.1(a), no injunction may be granted in a labor dispute unless, *"after hearing the testimony of witnesses in open court, with opportunity for cross-examination,"* the court finds that *all* of the following specific facts are present:

> (1) That unlawful acts have been threatened and will be committed unless restrained . . .[;] (2) That substantial and irreparable injury to complainant's property will follow[;] (3) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief[;] (4) That complainant has no adequate remedy at law[; and] (5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.[196]

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496 (Cal. App. 4th Dist. 1980) (following *Kaplan* and holding that "[l]ocal courts retain power to adjudicate such matters when they are of 'particular local concern,' meaning when they constitute violations of local law or torts, most typically, obstructions of access or violent picketing. . . . The historic exceptions to the preemption rule are few and deal with illegal or wrongful conduct such as violence, infliction of emotional distress, and mass picketing . . . .").

194. *Pittsburg Unified Sch. Dist. v. Cal. Sch. Employees Assn.*, 213 Cal. Rptr. 34, 36 (Cal. App. 1st Dist. 1985).

195. Cal. Assembly 1268, 1999 Reg. Sess. (1999).

196. Cal. Lab. Code Ann. § 1138.1(a) (Lexis 2007) (recognized in *United Food &*

Therefore, the TROs and preliminary injunctions issued by the superior courts in the six cases presently on appeal constitute clear legal error to the extent that the courts ruled that Labor Code sections 1138 *et seq.* did not apply.[197] The plain wording of the statute leaves no question that it applies broadly to all cases involving labor disputes. These cases include strike injunction actions involving city or county employees (which, since July 2001, can only be brought by PERB). Labor Code section 1138.4 dictates that the statute's requirements are applicable to any case involving a "labor dispute."[198] The statute incorporates by explicit reference the broad definition of "labor dispute" set forth in Code of Civil Procedure section 527.3(b)(4)(i), (ii) and (iii), which includes virtually any dispute involving an employer and a labor organization.[199] This plain, broad language is more than sufficient to show that the statute would have to be applied to any case involving a strike injunction.

Moreover, the statutory framework as a whole supports the plain language. Twenty-four years prior to the enactment of Labor Code sections 1138-1138.5, the Legislature adopted less stringent procedural requirements for the issuance of injunctions in labor disputes in the form of section 527.3 of the Code of Civil Procedure.[200] At that time, the Legislature exempted public employers and public employees from section 527.3 via explicit language codified at section 527.3(d).[201] However, when the Legislature enacted Labor Code sections 1138-1138.5 nearly a quarter century later, it explicitly incorporated by

*Commercial Workers Union v. Super. Ct.* (Gigante USA, Inc., real party in interest), *"all five elements must be satisfied."* 99 Cal. Rptr. 2d 849, 856 (Cal. App. 2d Dist. 2000) (emphasis in original)).

197. Inexplicably, in *County of Sacramento*, the superior court judge decided that application of section 1138 would interfere with PERB's exclusive jurisdiction—after finding on an earlier issue in the same case that PERB did not have exclusive jurisdiction. *County of Sacramento v. AFSCME Loc. 146*, 06AS03704, 06AS03790 (2006); Additionally, in *County of Contra Costa*, the superior court mistakenly interpreted section 1138.1(b) to allow for the issuance of a TRO lasting not longer than five days without an evidentiary hearing, when in fact section 1138.1(b) provides an exception to the statute's *notice* requirements, allowing a TRO of five days or less to be issued without notice of the hearing. *Co. of Contra Costa v. Pub. Employees Union Loc. One*, C0601228, C0601227 (2006).

198. Cal. Lab. Code Ann. § 1138.4.

199. Cal. Civ. Proc. Code Ann. § 527.3(b)(4)(i)-(iii) (Lexis 2007).

200. *Id.* at § 527.3(d).

201. *Id.*

reference the broad definition of labor dispute found in section 527.3(b)(4)(i), (ii) and (iii).[202] This was accomplished *without the exemption for public employers and public employees*.[203]

In fact, rather than exempting all public employees, the Legislature instead exempted *only* certain peace officers.[204] Clearly, had the Legislature already intended to exempt all public employees, then the specific exemption for peace officers would be superfluous.

While the statutory language and framework are plain and unambiguous, the legislative history further supports the finding that Labor Code sections 1138-1138.5 apply to the strike disputes between local government employers and public employee unions. At the time of the Senate Judiciary Committee hearing regarding Assembly Bill 1268,[205] the Committee's report indicated that the Committee was aware that enactment of the new provisions, without any exemption for public employees, would make it more difficult for an injunction to issue against public employee strikes.[206] Specifically, the Committee's report stated,

> The California State Association of Counties (CSAC) and the City of Los Angeles and Los Angeles Police Department each write to oppose the new Labor Code provisions for injunctions against labor activity. CSAC states that "under existing law certain public employees may collectively bargain, but do not have the right to strike." The City of Los Angeles adds, "The new language would make it much more difficult for public entities to obtain and enforce injunctions which threaten public health and safety. For example, current law provides that a city may obtain an injunction against a 'blue flu' by police officers during labor negotiations. [(*City of Santa Ana v. Santa Ana Police Benv. Assn.*, 255 Cal. Rptr. 688 (Cal. App. 4th Dist. 1989)).] The proposed statute would impose significant procedural hurdles to such an

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202. Cal. Lab. Code Ann. § 1138.4.

203. *See id.* (adopting definition of "labor dispute" found in Cal. Civ. Proc. Code Ann. § 527.3(b)(4)(i), (ii) and (iii), but not the exception found in § 527.3(d)).

204. *See* Cal. Lab. Code Ann. § 1138.5.

205. Cal. Sen. Comm., *Bill Analysis of Assembly Bill 1268,* 1999 Reg. Sess. (April 14, 1999), (available at http://www.leginfo.ca.gov/pub/99-00/bill/ab_1251_1300/ab_1268_cfa_19990818_105824_sen_comm.html (last accessed Sept. 28, 2007)).

206. *Id.*

injunction." The California State Association of Counties asks that the bill be amended to clearly exempt public employers.[207]

Even though the Senate Judiciary Committee was aware of the effect that the new provisions would have on public employers, the bill was passed and signed into law without any general exclusion for governmental entities. Instead of adding an exemption for public employers, on September 3, 1999 (following the August 17, 1999 hearing in front of the Senate Judiciary Committee), the Legislature added *only* the above-referenced exemption for certain peace officers.[208] In doing so, the Legislature thereby addressed the concern that a "blue flu" or other strike activity by police officers should be quickly enjoinable.[209]

As noted above, this amendment to exclude certain peace officers would be completely superfluous if the statute was not generally intended to apply to cases involving public sector strikes. Broadly accepted principles of statutory construction dictate that statutory provisions not be rendered superfluous, and that a list of exceptions is generally deemed to be exclusive—in this case, the list of exceptions includes only certain peace officers and no other types of public employees.[210]

## IV. CONCLUSION

The local governments in the cases awaiting appeal would prefer that they still had the right to go directly to court to seek to enjoin strike activity on health and safety grounds—a right that they held up until July 1, 2001, when PERB became vested with exclusive initial

207. Cal. Sen. Comm., *supra* n. 208 (*as amended* April 14, 1999 for the August 17, 1999 Hearing of the Senate Judiciary Committee).

208. Cal. Lab. Code Ann. § 1138.5.

209. *See id.*; Compare AB1268 *as introduced on* February 26, 1999 (original version of bill, containing no § 1138.5 and therefore no exception for peace officers) *with* AB1268 *as amended on* September 3, 1999, *and* AB1268 *as amended on* September 8, 1999 (later versions of bill, showing two stages of amendments to include exemption for certain peace officers) *and* AB1268 *as chaptered on* October 10, 1999.

210. Just as the Legislature exempted certain peace officers from its 1999 enactment of Labor Code §§ 1138-1138.5, in order that strike activity by police officers could be quickly enjoinable, the next year when the Legislature vested PERB with exclusive jurisdiction over labor relations between local agencies and unions representing local agency employees, the Legislature exempted certain peace officers from PERB's exclusive jurisdiction. *See* Cal. Govt. Code Ann. § 3511 (Lexis 2007).

jurisdiction.[211] They would also prefer that there be no requirement for them to comply with Labor Code sections 1138-1138.5.[212] However, the policy arguments underlying these points of view must be brought to the Legislature. The judicial branch can neither second-guess the wisdom of the Legislature's decisions, nor undercut the Legislature's comprehensive scheme by giving PERB a more limited jurisdictional role with respect to just one out of the seven public sector labor relations statutes that it administers.

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211. *Id.*
212. Cal. Lab. Code Ann. §§ 1138-1138.5.