Case No. S177403

IN THE

SUPREME COURT OF CALIFORNIA

UNITED TEACHERS LOS ANGELES,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division 5
Case No. 2nd Civil No. B214119

REPLY TO ANSWER TO PETITION FOR REVIEW

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[Exempt from filing fees pursuant to Gov. Code, § 6103]

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INTRODUCTION

United Teachers Los Angeles's ("UTLA") Answer to Los Angeles Unified School District's Petition for Review reinforces the need for Supreme Court review of the Opinion. Rather than convince this Court that review is unnecessary either by demonstrating that long standing law supports the Court of Appeal Opinion or that the issues are so unique that they will not arise again, UTLA simply restates the reasoning in the

Opinion, and, as such, offers the same defects as the Court of Appeal analysis. Indeed, UTLA concedes, as it must, the conflict in law created by the Opinion and its contrary conclusion to *Fontana* and *United Steelworkers*; and fails to refute the contradiction to the holdings in *Sunnyvale* and *Round Valley*.[1] While UTLA disparages the implications of the Court of Appeal ruling to education reform as "fluff and bluster," it offers no challenge to the fact that hundreds of charter schools are on the horizon and that the issues presented in this case involve the future of education reform, a matter of great public importance.

Review is necessary to settle an important issue of law related to the efficient implementation of the Charter Schools Act to improve public education through the application of Education Code section 47611.5(e), to set forth the application and effect of the preemption doctrine under the Educational Employment Relations Act ("EERA") on arbitration agreements, to secure uniformity of decisions including the Supreme Court's authority, to protect education resources, and to address the important policy issues impacting education reform in California. (Cal. Rules of Court, rule 8.500(b)(1).)

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[1] *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517; *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823; *Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal.App.4th 168; *Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4th 269.

LEGAL DISCUSSION

UTLA's Answer is a rehash of the Court of Appeal Opinion, relying entirely upon the "strong policy favoring arbitration" and the fact that the EERA authorizes a motion to compel arbitration. However, it is fundamental that the policy favoring arbitration does not include invalid agreements nor does it trump the express legislative exemption found in Education Code section 47611.5(e), prohibiting the charter petition process from being the subject of collective bargaining. UTLA offers no challege to the fact that Education Code section 47611.5(e), renders the subject of charter petition approval non-negotiable as a matter of law. Like the Court of Appeal, UTLA asserts a purported policy favoring arbitration without analyzing this statute.

UTLA's reliance upon the policy of the EERA also fails in that the Education Code expressly provides that the subject of charter establishment is exempt from collective bargaining and Public Employment Relations Board ("PERB") jurisdiction. In other words, section 47611.5(e) renders the subject outside the scope of the EERA and therefore the EERA reference to a motion compelling arbitration has no application to this matter. The failure of UTLA to acknowledge or analyze section 47611.5(e)

is a tacit concession that the Opinion cannot be supported in view of the jurisdictional bar found in Education Code section 47611.5(e).

Nor does UTLA acknowledge the case law barring arbitration under preempted provisions (*Fontana*, *United Steelworkers*) or the language of this Court's decision in *Round Valley* that invalidates collective bargaining provisions and precludes arbitration where, as here, the collective bargaining agreement is inconsistent with the Education Code.[2]

A. CODE OF CIVIL PROCEDURE SECTION 1281.2 ONLY APPLIES TO VALID ARBITRATION AGREEMENTS

UTLA, like the Court of Appeal, relies upon the policy favoring arbitration to require the District to submit to arbitration on an issue expressly made exempt from collective bargaining by the Legislature. (Ed. Code, § 47611.5, subd. (e).) Notably missing from the analysis is the long standing case law which requires a *valid* agreement to arbitrate. The right to compel arbitration depends upon the existence of a valid contract between the parties. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 245; *Marsch v. Williams* (1994) 23

[2] UTLA suggests in footnote that the Collective Bargaining Agreement ("CBA") is not in conflict with the Education Code. This is incorrect. The Court of Appeal acknowledged the provisions "concern the district's approval of a charter school petition, which was made pursuant to The Charter Schools Act of 1992" which is expressly governed by Education Code section 47605. (Opinion p. 2.)

Cal.App.4th 250, 253.) There is no policy favoring arbitration where, as here, there is no valid agreement. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 893 [". . . the strong policy in favor of enforcing arbitration agreements does not arise until an enforceable agreement is established"]; see also, *Mitchell v. American Fair Credit Assn.* (2002) 99 Cal.App.4th 1345, 1355, 122.)

UTLA's position as well as that of the Court of Appeal, is that arbitration is always favored, without exception. That is simply not the rule. UTLA's position would suggest that arbitration should proceed even under a collective bargaining provision that stated only men could be unit members or that teachers must be at least 35 years of age to teach. Would the Court of Appeal then agree with UTLA's position that the parties must go through the process of arbitration even though such provisions are clearly unlawful? In fact, arbitration is not favored when it is clear, as it is here, that the Legislature did not wish for a collective bargaining agreement to interfere with the charter petitioning process. Thus, contrary to UTLA's position, it is *against* public policy to favor arbitration in this case.

It is not the public policy of this state to give effect to illegal provisions that exist in an arbitration agreement, whether they were negotiated or not. (*Round Valley Unified School District v. Round Valley*

Teachers Assoc. (1996) 13 Cal.4th 269, 286 [the intent of the EERA is to preclude contractual agreements that would alter the meaning of statutory provisions and preempted provisions are invalid.] Nor is it the policy of this state to require arbitration under a contractual provision that is a clearly illegal. Illegal provisions should be given no force or effect. (*Id.* at 273 ["the arbitrator exceeded his powers in this case by purporting to give effect to those preempted provisions"].) To give effect to illegal and invalid provisions is an "idle act" and one that creates waste of already strained resources. (*Fontana Teachers Assoc. v. Fontana Unified School District* (1998) 201 Cal.App. 3d 1517, 1526 [denied petition to compel arbitration where collective bargaining provision preempted].) Public policy does not support the notion that parties should arbitrate under illegal provisions only to ultimately be back before the court to challenge the arbitrator's decision founded on an illegal provision. Instead, public policy supports the protection rather than waste of public education resources.

Here, the Court of Appeal assumed, without analysis, that both section 47611.5(e) and the preemption doctrine are offered as a "defense" to the grievance rather than a jurisdictional bar serving to invalidate the agreement. UTLA attempts to support this conclusion; however, the ruling is based upon inapposite law (*California Correctional Peace Officers Assn.*

v. State of California (2006) 142 Cal.App.4th 198) and ignores established authority holding under the EERA that a petition to compel arbitration under a collective bargaining agreement with a school district is properly denied where the provisions are in conflict with the Education Code:

> The legislative history of the EERA as expressed in Government Code section 3540 indicates that when Education Code provisions and collective bargaining rights conflict the latter must give way. (See *San Mateo School Dist. v. Public Employment Relations Bd., supra*, 33 Cal.3d at pp. 864-866,191 Cal.Rptr. 800, 663 P.2d 523.) Moreover, the Supreme Court has recently held that the "intent of section 3540 is to preclude contractual agreements which would alter [certain] statutory provisions," including Education Code section 45113. ([*Round Valley*] *Id.*, 33 Cal.3d at p. 866, 191 Cal.Rptr. 800, 663 P.2d 523.) Pursuant to these statutes, discussed in detail above, the potential double remedy of subjecting a conclusive governing board determination to the subsequent final and binding arbitration of the general collectively bargained for agreement simply was neither authorized nor intended by the California Legislature.

(*United Steelworkers of America, AFL-CIO v. Board of Education of Fontana Unified School District* (1984) 162 Cal.App.3d 823, 840; see also *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517.)

UTLA's reference to EERA policy to promote employer-employee relations is equally unavailing. This policy does not apply where, as here, Education Code section 47611.5(e) bars the establishment of a charter school from being the subject of collective bargaining and denies PERB

jurisdiction. Section 47611.5(e) and, by its own terms, the EERA, render the EERA inapplicable where the agreement covers matters that are outside the scope of collective bargaining and/or are preempted by the Education Code. (Gov. Code, § 3540.) Pursuant to both Education Code section 47611.5(e) and Government Code section 3540, "the potential double remedy of subjecting a conclusive governing board determination to the subsequent final and binding arbitration of the general collectively bargained for agreement simply was neither authorized nor intended by the California Legislature." (*United Steelworkers of American, AFL-CIO v. Board of Education of Fontana Unified School District, supra*, 162 Cal.App.3d at 840.)

B. UTLA ACKNOWLEDGES THE OPINION CREATES CONFLICT IN CASE LAW

While UTLA asserts there is "uniform case law directing statutory arguments to be heard by arbitrators before reaching the courts," UTLA cites the single case of *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198. As discussed fully in the District's Petition for Review, *Peace Officers* is inapposite in that: 1) it was decided under the Dills Act, not the EERA; 2) there is no nonsupercession clause in the Dills Act; and, 3) the validity of the collective bargaining

provisions in *Peace Officers* were not at issue. The *Peace Officers* Court determined that it is proper for an arbitrator to consider statutory defenses authorizing the conduct alleged in the grievance in an "*otherwise arbitrable case*." (*Id.* at 208.) Unlike in *Peace Officers*, this case does not present an "otherwise arbitrable case" upon which a statute is relied upon in defense of conduct alleged in the grievance. Neither section 47611.5(e) or section 3540 is relied upon to defend any act or omission alleged in the grievance. Rather, these statutes render the arbitration agreement preempted, precluding the parties from giving any force and effect to the preempted provisions and thereby barring arbitration.

Moreover, UTLA fails to overcome the fact that the Opinion conflicts with the long-standing authority holding that where the collective bargaining provision is inconsistent with the Education Code it is preempted and a petition to compel arbitration is properly denied because the school district is barred from proceeding to arbitration under preempted provisions. (*United Steelworkers of American, AFL-CIO v. Board of Education of Fontana Unified School District* (1984) 162 Cal.App.3d 823, 840 [the court affirmed the trial court's denial of a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2 where the collective bargaining provision was in conflict with the Education Code];

see also *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1521 [the court confirmed that absent an agreement to submit the question of arbitrability to the arbitrator, it is the *duty of the court*, not the arbitrator, to determine whether or not the parties' agreement to arbitrate covers the particular dispute. The court further held that since the collective bargaining agreement was preempted, the petition to compel arbitration was properly denied].) UTLA offers only a footnote to suggest without basis that *United Steelworkers* was wrongly decided but does not deny the fact that the Opinion is in direct conflict with the holdings in *United Steelworkers* and *Fontana*.

Nor does UTLA challenge the fact that this Court in *Round Valley* cited both *United Steelworkers and Fontana* with approval (*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at 286), or that the Opinion conflicts with *Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal.App.4th 168.

It remains uncontested that the Opinion has created a conflict in law that must be settled by this Court.

C. THE ARBITRATOR HAS NO AUTHORITY TO HEAR MATTERS RE ARBITRABILITY

UTLA attempts to support the Opinion by asserting arbitrators are to consider statutory interpretation; however, the arbitrator has no authority to consider issues of arbitrability absent an express agreement granting the arbitrator such authority. (*Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1521.) In the instant case, it is undisputed that the parties have not granted the arbitrator authority to determine arbitrability (JA 53, 57) and UTLA does not challenge this fact in its Answer.

While UTLA and the Court of Appeal cite to the fact that *Round Valley* considered the case after arbitration as some sort of implicit approval of a preempted matter proceeding to arbitration, this argument fails to consider key points of the *Round Valley* decision. First, "although District challenged the validity of the contractual provisions, the arbitrator left that issue to judicial determination." (*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at 273.) The issue of the validity of the contractual provisions was not put to the arbitrator therefore *Round Valley* cannot stand for the proposition that the validity of contractual provisions must be put to the arbitrator. "It is axiomatic that

cases are not authority for propositions not considered." (*Environmental Charter High School v. Centinela Valley Union High School* (2004) 122 Cal.App.4th 139, 150.) Moreover, case law provides that arbitrability is a question for the courts, not arbitrators. (*Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1521.)

Secondly, UTLA, like the Court of Appeal, ignores the key language of the *Round Valley* holding: ". . . the intent of the Government Code [section 3540] is to *preclude contractual agreements that would alter the meaning of other statutory provisions*"; "[t]he collective bargaining provisions in this case contravene this legislative scheme, and therefore violate Government Code section 3540's injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code"; "[a]s District observes, if we were to validate the requirements of . . . the agreement with Association, we would severely undermine section 44929.21(b)." (*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at 285-286.) UTLA and the Court of Appeal further disregard the fact that the result in both *Fontana* and *United Steelworkers,* denying the petition to compel arbitration, was cited with approval by this Court in its *Round Valley* decision. (*Id.* at 283, 286-87.)

It is apparent that review is needed to answer the question whether there is a policy requiring arbitration even where the Legislature has exempted the subject from collective bargaining and there is no legal basis to arbitrate.

CONCLUSION

Review is necessary to define the process for review of illegal and invalid provisions both under express statutory authority (Ed. Code, § 47611.5(e).) and under the preemption doctrine (Gov. Code, § 3540) of the EERA. The Court of Appeal Opinion creates conflict in law as to these issues and the District respectfully requests review to clarify this conflict.

Dated: November 23, 2009

MILLER BROWN & DANNIS

SUE ANN SALMON EVANS

By 

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Attorneys for Respondent
LOS ANGELES UNIFIED SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, Respondent's Reply to Answer to Petition for Review was produced using 13-point Roman type including footnotes and does not exceed 4,200 words and contains approximately 3,271 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: November 23, 2009

MILLER BROWN & DANNIS

SUE ANN SALMON EVANS

By _____
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LOS ANGELES UNIFIED SCHOOL DISTRICT

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1 Copy:
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1 Copy:
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Los Angeles Superior Court, Central District
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Los Angeles, CA 90012

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid.

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☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

AND:

I declare that on November 23, 2009 the original and 13 copies have been hand delivered for filing on this date to:

Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Executed on November 23, 2009 at Long Beach, California.

Sue Hardlund
Type or Print Name

Signature