Case No. S177403

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Second Appellate District Case No. B214119

UNITED TEACHERS LOS ANGELES,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

On Appeal from the Superior Court of Los Angeles County,
Case No. BS116739, Honorable Mary Ann Murphy, Judge Presiding

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OPENING BRIEF ON THE MERITS

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

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LOS ANGELES UNIFIED SCHOOL DISTRICT'S OPENING BRIEF

ISSUES PRESENTED

1) Does Education Code section 47611.5(e)[1] which provides that "The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board" preempt and invalidate collective bargaining agreement

[1] All statutory references are to the Education Code unless otherwise stated.

provisions governing the process for establishment of a charter school?

2) Is a petition to compel binding arbitration properly denied where the collective bargaining provisions upon which the grievance is based are preempted by statute?

STATEMENT OF THE CASE

In May 2008, eight months after the Los Angeles Unified School District Board of Education ("Board") granted the Alain Leroy Locke Senior High School charter petition, United Teachers of Los Angeles ("UTLA") filed its Petition to Compel Arbitration alleging the District had violated Article XII-B of the collective bargaining agreement ("CBA") in granting the charter petition and should be compelled to participate in arbitration pursuant to the grievance procedure set forth in Article V of the CBA. (Joint Appendix ("JA") 8-30.) The District submitted its Opposition on May 30, 2008. (JA 81-156.) The case was ordered transferred to the courts of unlimited jurisdiction on August 27, 2009 (JA 2) and the transfer was completed on September 9, 2009 (JA 3). The District filed Opposition papers upon transfer. (JA 159-245.) UTLA never submitted any response to the District's Opposition papers.

The matter was ultimately heard by Judge Mary Ann Murphy on November 12, 2008. (JA 260.) After oral argument, Judge Murphy denied the Petition to Compel Arbitration and issued a minute order denying the Petition on the grounds that the grievance is not arbitrable "under the Charter Schools Act and Round Valley." (*Id.*; Reporter's Transcript ("RT") at p. 16.) Notice of Entry of Order Denying Petition was filed and served on December 17, 2009. (JA 261-266.) Appellant filed its Notice of Appeal on February 13, 2009. (JA 267-268.)

The Court of Appeal issued its Opinion on September 17, 2009, reversing the trial court's order denying the Petition to Compel Arbitration and holding that the question of whether the collective bargaining agreement is preempted or invalidated by section 47611.5(e) is a "defense" that must be determined by the arbitrator.

On October 1, 2009, the District filed its Petition for Rehearing on the grounds that the Court of Appeal's Opinion ("Opinion") fails to account for and conflicts with relevant authority, misstates or omits material facts, fails to address arguments made by the District within the meaning of California Rules of Court, rule 8.500(c)(2), and fails to consider the important public policy giving priority to the establishment of charter schools to improve the State of California's education system. Although

the Opinion was modified by Order dated October 16, 2009, the Petition for Rehearing was denied. (Orders: Modifying Opinion and Denying Rehearing Petition [No Change in Judgment].)

The District's Petition for Supreme Court Review was filed October 1, 2009. This Court's Order Granting Petition Review is dated December 23, 2009.

STATEMENT OF FACTS

On May 11, 2007, Green Dot Public Schools ("Green Dot") presented the Board with a petition seeking the conversion of Alain Leroy Locke Senior High School ("Locke") to a combination of charter schools to be operated by Green Dot. On September 11, 2007, the Board granted the Alain Leroy Locke Conversion Charter Petition ("Locke Charter Petition") pursuant to Education Code section 47605. (JA 113-130.) The Locke charter schools are now publicly funded charter schools which began instructional operations in Fall 2008. (JA 165, lines 10-12.) UTLA does not dispute that the District's decision to grant the Locke Charter Petition was made in compliance with Education Code section 47605.

UTLA is the union that serves as the exclusive representative of the certificated staff employed by the District as more specifically set forth in

the Recognition Clause of the CBA. (JA 8, lines 22-26; see also, Article 1, section 1.0, Exhibit 1 to Motion To Take Judicial Notice ("MJN") filed with the Court of Appeal.) On September 4, 2007, UTLA, on its own behalf, submitted a grievance alleging that the District had violated Article XII-B, Sections 2.0 and 3.0, of the CBA. (JA 68.)

The grievance sets forth the following "Statement of Complaint":

> On or about August 28, 2007, the District violated the above cited Article, in part by:
>
> 1. Not presenting complete Charter to employees;
>
> 2. Not giving ample time to permit affected employees and community a reasonable opportunity to review and discuss plan prior to seeking signatures;
>
> 3. Not giving UTLA a copy of the proposed Charter for review;
>
> 4. Not disclosing clearly and fully the basic terms and conditions of employment to be provided by the Charter School.

(JA 68.)

UTLA sought the following remedy:

> 1. Rescind Charter approval and all references thereafter;
>
> 2. Full and complete compliance with the Collective Bargaining Agreement;
>
> 3. Express acknowledgment of UTLA Rights;

4. Such further relief as may be granted under the Collective Bargaining Agreement.

(*Ibid.*)[2]

In response to the grievance, the District informed UTLA on December 4, 2007, that the grievance did not present an arbitrable dispute and is not properly the subject of collective bargaining. (JA 69.) The District also stated: "Pursuant to Article V, Section 1.5 of the Agreement, in scheduling this Step meeting, the District has not waived any of the positions or objections to arbitrability or any other defenses that may be raised on its behalf." (*Ibid.*) The grievance procedure set forth in Article V of the CBA provides in relevant part that processing and discussing the merits of a grievance shall not be considered a waiver by the District of a defense that the matter is not arbitrable or should be denied for other reasons which do not go to the merits. (JA 53.)

[2] On appeal, UTLA has incorrectly asserted that "there is no dispute as to the District's alleged violation of sections 2.0 and 3.0" (Appellant's Opening Brief ("AOB") p. 8). It is not that the District does not dispute the allegations; rather, neither the District's Response to the Petition to Compel Arbitration nor its briefs on appeal address the merits of the grievance in conformity with the point of law that "upon proceedings to compel arbitration the court is not to consider the merits of the dispute sought to be arbitrated." (*A.D. Hoppe Co. v. Fred Katz Construction* (1967) 249 Cal.App.2d 154, 160, citing Law Revision Commission; see also Code Civ. Proc., § 1281.2(c) "order to arbitrate controversy may not be refused on the ground the petitioner's contentions lack substantive merit"].)

On March 21, 2008, the District responded to UTLA's letter dated January 29, 2008, reiterating that the matter was not arbitrable and denying UTLA's request to participate in an optional preliminary hearing. (JA 131.)

The CBA between UTLA and the District addresses conversion charter schools at Article XII-B. (JA 19-26.) A conversion charter school refers to an existing district school that has "converted" to charter status by petition pursuant to Education Code section 47605. The other form of charter school is commonly referred to as "start-up" and represents a charter school established by a petition pursuant to section 47605 that has no connection to an existing school district program. The CBA does not address the process for establishment of a "start-up" charter petition.

As recognized in the CBA, charter schools, including conversion charter schools, operate independently from the District. (Ed. Code, § 47601 [legislative intent that Charter Schools Act establish and maintain schools that operate independently from the existing school district structure]; Ed. Code, § 47612(c) [charter school shall be deemed a "school district"].) Article XII-B, section 1.0(c) provides:

> Independence of Conversion Charters: Another purpose of this Article is to encourage Conversion Charters to assume proper independent responsibility for their employees, and to ensure that the District is not financially subsidizing charter schools. In this regard, it is important for all to understand that independent Conversion Charter Schools are generally

> independent of the District, much as are schools of neighboring separate school districts, and that charter schools have their own State income.

(JA 60.) Because the parties to the CBA are limited to the District and UTLA, neither a charter school petitioner/operator nor a charter school is a party to the CBA. Also, because the charter school rather than the District is the employer of the charter school employees (Ed. Code, § 47605(b)(5)(M)); charter school employees are not a party to the CBA. (Article 1, section 1.0, Exhibit 1 to MJN.) Moreover, by statute, it is the charter petitioner, not the District, that is required to obtain signatures to support a petition and that applies for charter petition approval by the Board. (Ed. Code, § 47605(a), (b).)

Article XII-B, Section 2.0 sets forth a series of procedures pertaining to processing and approval of charter petitions for conversion charters:

> 2.0 Charter Application Procedures: In addition to whatever procedures the Board of Education may establish in its discretion, the District shall adhere to the following procedures in processing or considering approval of any proposal to convert an existing District school to Charter School status:
>
> a. Presentation and Discussion of Proposed Conversion Charter Schools: District procedures and instructions shall urge that any petitioner, prior to soliciting signatures on a proposed Conversion Charter petition, first present the complete proposed charter to the employees (including counselors, specialists, nurses, psychologists, etc as well as teachers), and include a written

identification of the individuals who are, by virtue of their involvement in developing and initiating the plan, most knowledgeable and able to respond to questions about the plan. Ample time should then be allowed to permit the affected employees and community a reasonable opportunity for review and discussion prior to seeking signatures or voting. In addition, it will be expected that the final charter application submitted for Board of Education approval must be substantially the same as the charter school petition which was used as the basis for obtaining signatures in favor of the charter school.

b. Alternatives to Conversion Charter Status: In the case of charter applicants that are considering Conversion Charter status due to the desire to be exempt from certain State or District rules or policies or from certain parts of the collective bargaining agreement, the District's Charter Schools Office procedures and instructions shall urge that the charter applicants discuss such matters with District staff (at the Charter Schools Office), and also with UTLA, so that they can become fully aware of their options for seeking exemptions or waivers, or obtaining dependent charter status, without undertaking the burdens and responsibilities of Conversion Charter School status.

c. UTLA Participation: Within five days of receipt of a Charter School proposal from a formative Conversion Charter School, the District Charter Schools office shall forward a copy to UTLA. UTLA shall then be granted not less than 30 days in which to submit comments and/or recommendations to the Board of Education concerning the charter application; and

d. Disclosures: District procedures and instructions shall encourage Conversion Charter School applicants, and involved principals and chapter chairs of prospective Charter Schools, (1) to disclose their intentions to UTLA and to the District Charter Schools office at an early stage in their organizational activities, and (2) to comply with Section 3.0 below with respect to full disclosure of the planned terms and conditions of employment to be offered employees of the prospective Charter School.

(JA 60-61.)

Article XII-B, Section 3.0 sets forth a series of procedures pertaining to disclosures to be made by charter petitioners to employees at a school that is the subject of a conversion charter petition:

> 3.0 Full Disclosure by Charter Schools: Conversion Charter Schools operate independently of the District, and may or may not choose to adopt pay, benefits and other employment practices comparable to those of the District. Conversion Charter Schools (including proposed Charter Schools) therefore will be expected, in fairness to affected employees and all other concerned persons, to disclose clearly and fully the basic terms and conditions of employment to be provided by the Charter School -- and do so prior to asking the employees for any formal commitments of support and/or employment, and also to do so when the Charter School's employees annually decide whether to renew their District leaves of absence (see below) in order to remain employed by the Charter School. In such disclosure, the following terms and conditions of employment should be addressed, in addition to the educational program plans for the Charter School:
>
> a. Whether the Charter School intends to request that the District grant leaves of absence to the charter school's employees to facilitate their charter school service and protect their rights of return, as discussed in Sections 5.0 and 6.0 below;
>
> b. Whether the Charter School intends to request that the District provide, at charter school expense, continued coverage under the District health benefits programs, as described in Section 7.0 below;
>
> c. The salaries to be paid to the Charter School's employees, and the salary progression system to be observed, if any; also, the pay rates, if any, to be offered for identified extra duty assignments;
>
> d. Retirement pay arrangements to be provided by the Charter School (i.e., whether the Charter School will participate in STRS, Social Security or other retirement benefit plans);

e. The Charter School's plans for provision of Workers' Compensation liability insurance coverage;

f. Any paid absence benefits to be provided by the Charter School, particularly those covering illness, injury, or personal necessity. Specifically, employees should be informed as to whether the Charter School will transfer and honor their accrued illness leave balances from the District just as does any regular school district in California when hiring an employee from another California district -- and should also specifically address whether and how the Charter School will provide for salary protection in extended disability situations;

g. Provision for other employee absences and leaves of absence from the Charter School, and related pay, if any;

h. Any assurances or programs, such as liability insurance, to protect employees of the Charter School against personal expense and liability in the event of a claim or lawsuit arising out their performance of Charter School duties;

i. The hours of work, duties, and annual work schedules (calendars) expected of the Charter School's employees, and any paid non-work days to be provided;

j. Protections, if any, for current and future job continuity and security within the Charter School;

k. Employee performance evaluation and discipline (suspensions, terminations) system to be followed at the Charter School;

l. Class sizes and other assignment ratios to be followed by the Charter School;

m. Summer, winter, intersession or other extended assignment opportunities to be offered at the Charter School, if any, and the pay to be offered employees for such work; and

n. Any other significant terms and conditions of employment to be applied at the Charter School.

(JA 61-63.) According to UTLA's grievance, these procedures are a prerequisite to charter approval and failure to comply is grounds to rescind the Board's action approving the charter petition. (JA 68.)

STANDARD OF REVIEW

A trial order denying arbitration is generally reviewed for abuse of discretion. (See *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484, 17 Cal.Rptr.3d 88.) The de novo standard of review applies where the trial court's denial of a petition to arbitrate presents a pure question of law. (See *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425, 34 Cal.Rptr.3d 547.)

ARGUMENT

THE CHARTER SCHOOLS ACT

California's charter school legislation, first adopted in the early 1990's, was enacted to create opportunities for innovation and expanded school choice. The Charter Schools Act of 1992 ("the Act") was designed to facilitate these goals by exempting charter schools from many of the state laws governing public schools. The Act permits school districts to grant charters for the operation of charter schools. (Ed. Code, § 47600, et

seq.) Charter schools "are part of the Public School System," but "operate independently from the existing school district structure." (Ed. Code, §§ 47601, 47615(a)(1); see also, *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, 1139.) "The Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of education. Indeed, it bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation - the Legislature has plotted all aspects of their existence." (*Wilson v. State Board of Education, supra*, 75 Cal.App.4th at p. 1135; emphasis in original.)

A. The Charter Petition Process is Governed by Education Code section 47605

Charter schools are established through submission of a petition by proponents of the charter school to the governing board of a public educational agency, usually a school district. (Ed. Code, § 47605.) Education Code section 47605 governs the approval or denial of charter schools by a school district.

Where petitioners seek to establish a charter school that is not affiliated with any existing school of a school district, commonly referred to as "start-up" charter school, the petition must be signed by either: (a) a

number of parents or legal guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school for its first year of operation; or, (b) by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year of operation. (Ed. Code, § 47605(a)(1)(A)-(B).) By signing, a parent indicates that he or she "is meaningfully interested in having his or her child or ward attend the charter school," or in the case of a teacher's signature, it reflects that the teacher is "meaningfully interested in teaching at the charter school." (Ed. Code, § 47605(a)(3).)

In the case of a charter petition that proposes to convert an existing public school to a charter school, a "conversion charter," the petition may be submitted to the governing board of the school district for review after the petition has been signed by not less than 50 percent of the permanent status teachers currently employed at the public school to be converted. (Ed. Code, § 47605(a)(2).) By signing, a teacher indicates that he or she is "meaningfully interested" in teaching at the charter school. (Ed. Code, § 47605(a)(3).) [3] The governing board of a school district shall not require any employee of the school district to be employed in a charter school,

[3] Contrary to UTLA's contention, a conversion charter school is not established, "by a vote of the permanent teachers at the school site." (AOB p. 3.)

regardless of whether the employee has signed a charter petition. (Ed. Code, § 47605(e).) Nor does signing the petition provide for employment with the charter school. (Ed. Code, § 47605(a)(2).) The sole distinction in the petition process between a start-up charter school and a conversion charter school is the signature requirement.

No later than 30 days after receiving a petition, the governing board of the school district must hold a public hearing on the provisions of the charter, at which time the governing board of the school district must consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents. (Ed. Code, § 47605(b).) Following review of the petition and the public hearing, the governing board of the school district must either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both the district and charter petitioner agree to the extension. (*Ibid.*)

> The governing board of the school district shall grant a charter for the operation of a school under this part if it is satisfied that granting the charter is consistent with sound educational practice. The governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the following findings:

(1) The charter school presents an unsound educational program for the pupils to be enrolled in the charter school.

(2) The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition.

(3) The petition does not contain the number of signatures required by subdivision (a).

(4) The petition does not contain an affirmation of each of the conditions described in subdivision (d).

(5) The petition does not contain reasonably comprehensive descriptions of [the sixteen elements set forth in section 47605(b)(5)(A)-(P)]

(Ed. Code, § 47605(b).) If a school district denies a charter petition, the charter petitioner may appeal the decision by electing to submit the petition to the county office of education. (Ed Code, § 47605(j)(1).) If granted, the county office of education becomes the chartering authority. (*Id.*) If denied, the charter petitioner may submit the petition to the State Board of Education. (*Id.*) If the State Board approves the charter petition it becomes the authorizing agency. (*Id.*) If a charter petition is not granted during the appeal process, a school district's decision to deny the charter petition is subject to judicial review. (Ed. Code, § 47605(j)(4).)

In section 47605(b), the Legislature expresses its intent that in "reviewing petitions for the establishment of charter schools..., the chartering authority shall be guided by the intent of the Legislature that

charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged."

Once a governing board has granted a petition, a charter school is created as an independent entity, governed according to the governance structure set forth in the charter. (Ed. Code, §§ 47601, 47612, 47615.) Once established, a charter school is exempt from all but a few provisions of the Education Code and other laws specific to school districts. (Ed. Code, § 47610.)

B. The Legislative History of the Charter Schools Act and Education Code section 47611.5

The Legislature has made clear its intent that charter schools are an integral part of the public school system, that the establishment of charter schools is to be encouraged, and impediments to education reform are to be overcome. One such impediment identified and addressed by the Legislature is union involvement in the establishment of charter schools. Not only is the ban on union involvement made clear in the express language of section 47611.5(e), but the legislative history of both the Act generally, and section 47611 specifically, demonstrates the legislative intent that unions not participate in the chartering process.

In signing the Act into law in 1992, the Governor considered two different bills proposed to enact the Act: Assembly Bill 2585 and SB 1448. The Governor rejected AB 2585 on the grounds that it provided for union involvement and collective bargaining as a part of the charter school process. Senate Bill 1448 did not provide for collective bargaining and ultimately was signed into law by Governor Wilson. In vetoing AB 2585, Governor Wilson stated:

> While I support the charter school concept, the restrictions in this bill [AB 2585] will not allow a fair test of this experimental approach. I have this date signed Senate Bill No. 1448, which permits the creation of charter schools without the excessive controls contained in this bill. The essential elements of the charter school concept are freedom from state regulation and employee organizational control, and choice on the part of parents, pupils, teachers, and administrators.
>
> This bill [AB 2585] requires teacher union approval of all charter schools, state review and approval of the charter application, continuation of elaborate collective bargaining processes, and limitations on who can attend a charter school. On all accounts this bill fails to embrace the basic ingredients of the charter school concept.

(JA 104.)

As the Governor's message makes clear, any union involvement in the review and approval process was specifically rejected as in contravention of the "charter school concept." (JA 104.) UTLA argued to the Court of Appeal that of the two charter bills proposed, the distinction

was that AB 2585 provided for Education Employment Relations Act ("EERA") jurisdiction over charter schools and the bill that was passed, SB 1448, did not. UTLA apparently makes this argument to suggest that the veto message is no longer relevant. However, the distinction was not EERA jurisdiction as UTLA asserts; rather the rejected bill included "teacher union approval of all charter schools . . . continuation of elaborate collective bargaining processes. . . ." (JA 104.) The legislative history did not focus on EERA jurisdiction but specifically addressed and rejected union involvement in the establishment of charter schools.

The Public Employment Relations Board ("PERB") is charged with interpreting the EERA, Government Code sections 3540 et seq. PERB also recognized that the omission of any role for a union in the chartering process was not inadvertent. (*United Educators of San Francisco v. San Francisco Unified School District* (2001) Docket No. SF-CE-2015 (adopted by PERB in PERB Dec. No. 1438 [25 PERC ¶ 32027]. PERB refused to exercise jurisdiction over a school district/union dispute regarding the creation of a charter school, citing Governor Wilson's veto message regarding the legislation attempting to permit collective bargaining as part of the chartering process: "The essential elements of the charter school concept are freedom from state regulation and employee organizational

control, and choice on the part of parents, pupils, teachers and administration..." (JA 102-108.)

Although the Act was amended in 1999 to provide that the EERA would apply to charter schools to the degree that charter school employees wish to organize, consistent with the bill originating the Act, Education Code section 47611.5, subdivision (e), expressly exempts the charter process from collective bargaining:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 *shall not be controlled by collective bargaining agreements* nor subject to review or regulation by the Public Employment Relations Board."

(Emphasis added.)

The legislative history of section 47611.5, enacted by Assembly Bill 631, reflects that in response to the concern that application of the EERA to charter schools would prevent the approval of new charters, AB 631 was revised to acknowledge that while charter school employees have the right to organize if they choose to do so, section 47611.5 would specifically preclude the establishment of charter schools as a subject of collective bargaining. The legislative history notes that the June 2, 1999 amendments to AB 631 "Clarifies that the process for approving charters is separate from collective bargaining." (Sen. Com. on Education, Background

Information Request of Assem. Bill No. 631 (1999-2000 Reg. Sess.) June 3, 1999 [Exhibit 2 to MJN pp. 32-35 and 63].)

The Legislature's intent that charter schools be established without interference from collective bargaining is apparent from the plain language of section 47611.5(e). Moreover, that the establishment of charter schools is to be governed solely by the requirements of section 47605, is clear from the Legislature's detailed statutory process which serves to preempt any provisions in a collective bargaining agreement purporting to dictate the charter petition process. Because the provisions of the CBA at issue are contrary to express public policy, the arbitration agreement is invalid and unenforceable.

STATE LAW PREMPTS AND INVALIDATES COLLECTIVE BARGAINING AGREEMENT PROVISIONS GOVERNING THE PROCESS FOR ESTABLISHMENT OF A CHARTER SCHOOL

Education Code section 47611.5, subdivision (e), specifically prohibits a collective bargaining agreement from controlling the chartering process, rendering the CBA provisions of Article XII-B invalid and unenforceable as contrary to law. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97-98 [arbitration agreement that is contrary to law is void and unenforceable under Code

Civ. Proc., § 1281.2(b)]; *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 540.4 [contract provisions contrary to public policy are unenforceable].) While the District concedes that the parties negotiated the provisions, because the charter petition process is statutorily barred from being the subject of either mandatory or permissive collective bargaining, the parties were without the power to do so. (*Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4th 269.) Therefore, the subject of charter petitions was improperly included in the CBA even if both parties believed at the time they could or should agree to such provisions. Denial of the Petition to Compel Arbitration is proper under Code of Civil Procedure section 1281.2, subdivision (b), because no *valid* agreement to arbitrate exists as to the issues presented by the grievance. (*Ibid.*)

Section 47611.5(e) is a jurisdictional bar to arbitration and renders the CBA provisions inarbitrable as a matter of law. (*Kashani v. Tsann Kuen China Enterprise Co., Ltd., supra,* 118 Cal.App.4th at p. 540 [""the law has a long history of recognizing the general rule that certain contracts ... will not be enforced, or at least will not be enforced fully, if found to be contrary to public policy. [Citations.]""; see also Rest.2d Contracts "A promise or other term of an agreement is unenforceable on grounds of

public policy if legislation provides that it is unenforceable or the interest in enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." (Rest.2d Contracts (2009) Ch. 8, Topic 1, § 178.) In addition, because the CBA provisions are inconsistent with Education Code section 47605 governing the establishment of a charter school, the preemption doctrine found in section 3540 of the EERA, i.e., the "nonsupercession clause," provides that the CBA agreement to arbitrate is invalid.

Where, as here, the CBA provisions are invalid, "the school district is barred from applying the binding arbitration step of its grievance procedure." (*United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 832 [petition to compel arbitration properly denied where collective bargaining provision conflicts with Education Code]; *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517 [preempted provisions of collective bargaining agreement are not subject to arbitration]; *Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at p. 286 [the intent of the EERA is to preclude contractual agreements that would alter the meaning of statutory provisions and preempted provisions are

invalid].) To give the provisions effect flies in the face of the statutory language, the legislative intent, undermines a school district's exercise of discretion in the delivery of education and its ability to implement reform.

Contrary to the ruling of the Court of Appeal, it is the court and not the arbitrator that must decide questions of arbitrability. (*United Public Employees, Local 790 v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021; [it is the court, not the arbitrator, which decides if the collective bargaining agreement creates a duty to arbitrate and what issues are subject to arbitration]; see also *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 171 [court not arbitrator is to decide whether arbitration agreements or portions thereof are deemed to be unconscionable or contrary to public policy].) The question of invalidity is not a "defense" to be presented to an arbitrator regarding the merits of the grievance. As held by this Court in *Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269, the effect of preemption is to preclude such collective bargaining agreements rendering the agreement to arbitrate invalid. This is consistent with the longstanding principal that arbitration agreements that are contrary to public policy are void and unenforceable. (*Sanchez v. Western Pizza* (2009) 172 Cal.App.4th 154, 167 citing *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 467.)

Importantly, as this Court recently recognized, the "enthusiasm for the expeditious and economical disposition of such matters" cannot "intrude upon our responsibility to determine whether the right to compel arbitration" has been established. (*Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1200, citing *Freeman v. State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 485-486.) Where, as here, such agreements are preempted as in conflict with the Education Code, they are precluded and there is no valid agreement to arbitrate. Absent a valid agreement to arbitrate, a petition to compel arbitration is properly denied. (Code Civ. Proc., § 1281.2(b).)

A. Section 47611.5(e) Precludes the Chartering Process as a Subject of Collective Bargaining

The language of Education Code section 47611.5, subdivision (e), clearly prohibits the collective bargaining agreement provisions related to the chartering process:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.

This statute specifically excludes the chartering process as a proper subject of mandatory or permissive collective bargaining. As recognized by this Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*,

supra, 24 Cal.4th at p. 98, the California Arbitration Act ("CAA"), Code of Civil Procedure section 1280 et seq., "does not prevent our Legislature from selectively prohibiting arbitration in certain areas." Where the Legislature has so designated, arbitration is contrary to public policy and therefore invalid. (*Id.* at p. 98, FN4 ["[T]he revocation of a contract is something of a misnomer. 'Offers are "revoked." . . . Contracts are extinguished by rescission.' . . . We will refer throughout to the "rescission" or simply "voiding" of an arbitration agreement."].) "A contract made contrary to public policy or against the express mandate of statute may not serve as the foundation of any action, either in law or in equity ..." (*Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 949, citing *Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-54.) This determination is made by the court prior to arbitration. (*Sanchez v. Western Pizza Enterprises,* Inc. (2009) 172 Cal.App.4th 154, 166-67 citing *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 at 171.)

Additionally, under Government Code section 3540, in any conflict between the EERA and the Education Code, the Education Code controls. Notably, this is not merely a case where a CBA provision is at odds with statutory requirements. Instead, we have the unique situation where the Legislature has expressly stated that the chartering process is not subject to

negotiation. As the legislative history of both the Act generally and section 47611.5(e) specifically, makes clear, the Legislature created a jurisdictional bar to union involvement in the review and approval process as in contravention of the "charter school concept" (JA 104) and based upon concern that union involvement would interfere with the establishment of charter schools. (Ex. 2 to MJN pp. 32-25, 63.)

Contrary to the prohibition of section 47611.5(e), Article XII-B, Section 2.0 of the CBA sets forth a series of procedures pertaining to consideration of charter petitions for conversion charters:

> Charter Application Procedures: In addition to whatever procedures the Board of Education may establish in its discretion, *the District shall adhere to the following procedures in processing or considering approval of any proposal* to convert an existing District school to Charter School status: . . .

(JA 60; emphasis added.) As is apparent from this language, the CBA attempts to control the approval or denial of a charter petition by dictating the process and consideration for approval of a petition in direct contravention of section 47611.5(e). With this point, the Court of Appeal concurs: "The alleged violations of the collective bargaining agreement concern the district's approval of a charter school petition, which was made pursuant to The Charter Schools Act of 1992. (Ed. Code, § 47600 et seq.) ... Article XII-B of the collective bargaining agreement sets forth

procedures for converting a school to a charter school bargaining agreement sets forth procedures for converting a school to a charter school." (Opinion pp. 2-3.)

Although not argued to the trial court, UTLA argued on appeal that "[t]he exclusion of collective bargaining from the ultimate approval or denial of a charter petition is the only exception to the EERA's reach within the charter school context." (AOB p. 13.)[4] Apparently, UTLA argues that the decision to grant or deny a charter petition is somehow independent of the chartering process set forth in section 47605 and therefore the union is entitled to bargain the process for considering a charter petition. This argument is not supported by the plain language of the statute or the legislative history. (Sen. Com. on Education, Background Information Request of Assem. Bill No. 631 (1999-2000 Reg. Sess.) June 3, 1999 [Exhibit 2 to MJN p. 63].) Moreover, UTLA conceded at oral argument that the chartering process was *not* subject to collective bargaining:

> **MR. KIM** [UTLA COUNSEL]: I BELIEVE THE UNION CAN'T CONTROL THE CHARTER PROCESS IN AND OF ITSELF OR THE GRANTING OF A CHARTER IN AND OF ITSELF.

(RT p. 13.)

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[4] "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. [Citation.]'" (*Perez v. Grajales* (2009) 169 Cal.App.4th 580, 591)

Not only does UTLA's admission at trial preclude this new assertion, this argument contradicts the language of the CBA: "2.0 . . . the District shall adhere to the following procedures in *processing or considering approval* of any proposal to convert an existing District school to Charter School status: . . ." (JA 60; emphasis added.) Therefore, UTLA's attempt to limit the application of section 47611.5(e) to the "ultimate decision" does not save the subject provisions.

UTLA's excessively narrow view of section 47611.5(e) also ignores the language of the statutory exemption which encompasses the decision made "pursuant to subdivision (b) of Section 47605." Because section 47605, subdivision (b), governs the petition process, the scope of the exception in 47611.5(e) includes the petition process and does not treat the "ultimate decision" whether to grant or deny a charter petition as wholly independent from the process for making such decision. Nor could such a distinction be legitimately made.

When a school district considers whether to grant or deny a charter petition, it does so based upon the process and criteria set forth in section 47605(b). A district must follow the time frame set forth in section 47605(b) by holding a public hearing within 30 days of receipt of the petition and rendering a decision whether to grant or deny the charter

petition within 60 days. (Ed. Code, § 47605(b).) In making that decision, a chartering authority must evaluate whether the petition presents a sound educational program, whether the petitioners are demonstrably unlikely to successfully implement the program, whether petition contains the requisite signatures as required by section 47605(a), whether the petition contains the affirmations of section 47605(d), and whether the petition contains a reasonably comprehensive description of all of the criteria set forth in section 47605(b)(5)(A)-(P). (Ed. Code, § 47605(b)(1-5).) That the decision is not separate from the process is demonstrated by the following example: Section 2.0(a) of Article XII-B sets forth procedures related to the requirement to obtain the requisite signatures, which is a procedural obligation (Ed. Code, § 46705(a)) *and* serves as grounds for a decision to deny a charter petition (Ed. Code, § 47605(b)(3)). As is apparent, the decision whether to grant or deny a charter petition is part and parcel of the process set forth in section 47605.

Even to accept UTLA's suggestion that only the "ultimate decision" is precluded from negotiation, each of the procedures set forth in the CBA that UTLA seeks to enforce interferes with the District's ability to make the

ultimate decision whether to approve or deny a charter petition.[5] Indeed, the grievance itself demonstrates that the CBA provisions impact the decision whether to grant or deny a charter petition by virtue of the fact that UTLA's grievance seeks to invalidate the Board decision granting the Locke Charter Petition by seeking to, "Rescind Charter approval and all references thereafter." (JA 68.)

The language of section 47611.5(e) is plain; the process of establishing a charter school is not subject to negotiation. Because the Legislature has deemed collective bargaining in this context as contrary to public policy, the arbitration agreement is invalid and unenforceable.

B. The Nonsupercession Clause of the EERA Precludes the Chartering Process as a Subject of Collective Bargaining

The effect of section 47611.5(e) is to preclude the petition process from being the subject of either mandatory or permissive collective bargaining and the provisions violate the statute and are contrary to public policy. In addition to the statutory bar codified in section 47611.5(e), pursuant to the California Supreme Court's ruling in *Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4th 269, and the nonsupercession clause (Gov. Code., § 3540) of the EERA,

[5] The District demonstrates in Section B, beginning at p. 31, how the requirements of the CBA are in conflict with Education Code section 47605.

Education Code section 47605 supersedes and thereby invalidates the provisions of the CBA.

In *Round Valley*, the Court considered whether a school district could, through collective bargaining, agree to give greater procedural protections to probationary employees than those set forth in Education Code section 44929.21. The collective bargaining agreement at issue gave greater notice and disclosure rights to a probationary teacher prior to nonreelection than provided by the statute. The school district successfully argued that: 1) it had the statutory right to not retain a probationary teacher without cause or a right to a hearing; and, 2) the entire reelection issue cannot, pursuant to Government Code section 3540, be made the subject of collective bargaining. (*Id.* at p. 276.) "It is clear that the intent of section 44929.21(b), is to vest *exclusive* discretion in the school district to decide whether or not to reelect probationary teachers, and the procedures sets forth in article 19, section B(1), effectively supersede that discretion." (*Id.* at p. 287 (emphasis in original); see also, *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District, supra,* 162 Cal.App.3d at p. 833 [statutory authority given to school district cannot be usurped by provisions of collective bargaining agreement].)

The Court concluded that because the collective bargaining provisions were contrary to section 44929.21 and contravened the legislative scheme, the collective bargaining agreement violated the nonsupercession requirement of Government Code section 3540. (*Id.* at p. 285.) The Court held that "the Legislature has determined that due process protection enjoyed by permanent employees should not apply to probationary employees, and that the state's interest in discharging unsuitable teachers in the first two years of employment outweighs any due process rights sought by these teachers." (*Id.* at p. 284-85.)

Citing *San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, the *Round Valley* Court further concluded that "the intent of the Government Code is to preclude contractual agreements that would alter the meaning of other statutory provisions." (*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at p. 286.) The contractual provisions at issue were invalidated because they altered the meaning and intent of the Education Code provisions. (*Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269 at p. 287.)

The contractual provisions at issue here are invalid for the same reasons. In enacting section 47611.5(e), the Legislature has vested *exclusive* discretion in the school district to decide whether or not to grant or deny a charter petition pursuant to the defined process set forth in section 47605 and has expressly stated the public policy that the process is not subject to collective bargaining. As recognized in *Wilson v. State Board of Education, supra*, 75 Cal.App.4th at p. 1135, ". . . the Legislature has plotted all aspects of their [a charter school's] existence" further demonstrating that the Legislature has preempted collective bargaining on these issues.

Moreover, in section 47605, the Legislature has defined exactly the process and disclosures that are required in connection with granting or denying a charter petition. Nowhere does section 47605 require the District to make disclosures to District employees, potential charter school employees or the union prior to considering a charter petition as required by Article XII-B, Sections 2.0 and 3.0. (JA 60-63.) Failure to comply with a collective bargaining agreement is *not* a basis for denial of a charter petition and to deny a charter petition based upon same would place the District in violation of section 47605, impair the statutory rights of charter petitioners and place the District in jeopardy of a suit by the charter petitioner. Nor

does the Act allow for different treatment in the establishment of conversion charter schools versus start-up charter schools as does the CBA.

It is clear that Sections 2.0 and 3.0 of the CBA do, in fact, contravene Education Code section 47605. As described by UTLA: "Article VII-B, Charter Schools, of the Agreement outlines the parties' agreement with regard to certain procedures and terms to be applied when a District school attempts to 'convert' to charter school status." (JA 10, ¶ 7].) Article XII-B, Section 2.0 provides that "the District shall adhere" to such procedures "in processing or considering approval" a conversion charter petition. (JA 60.)

The procedures in Section 2.0 call for the District to "urge" the charter petitioner to present the charter petition to the employees at the school site and provide for sufficient opportunity for discussion of the charter terms prior to obtaining signatures; to "urge" the charter petitioner to discuss alternatives to charter status where the primary purpose of the conversion is to avoid state laws or regulations; to provide UTLA with a copy of the charter petition within 5 days of the District's receipt and also provide UTLA 30 days to review and provide comments on the charter petition; and to "encourage" charter petitioners to disclose their intentions

to UTLA and to comply with procedures set forth in Section 3.0. (JA 60-61.)

Notably, nowhere does Education Code section 47605 require a school district to undertake any of these requirements as a prerequisite to granting a charter petition. Indeed, under Education Code section 47605, it is the charter petitioner, not the school district, that is solely responsible for obtaining signatures and complying with requirements in connection with obtaining signatures. A school district is not connected to the charter petitioners' process of obtaining signatures and presenting the petition to the school board. (*Ibid.*) Moreover, it is inconsistent with 47605 to attempt to impose additional obligations upon petitioners than those set forth in 47605. Were a district to deny a charter petition based upon a petitioner's failure to make disclosures required by the CBA, the district would be in violation of section 47605 and subject to legal challenge.

Article XII-B, Section 3.0 sets forth a series of procedures pertaining to disclosures to be made by charter petitioners to employees at a school that is the subject of a conversion charter petition and states in part as follows:

> Full Disclosure by Charter Schools: *Conversion Charter Schools operate independently of the District*, and may or may not choose to adopt pay, benefits and other employment practices comparable to those of the District. Conversion Charter Schools (including

> proposed Charter Schools) therefore will be expected, in fairness to affected employees and all other concerned persons, to disclose clearly and fully the basic terms and conditions of employment to be provided by the Charter School -- and do so prior to asking the employees for any formal commitments of support and/or employment, and also to do so when the Charter School's employees annually decide whether to renew their District leaves of absence (see below) in order to remain employed by the Charter School.

(JA 61; emphasis added.)

The subdivisions of Section 3.0 set forth the form of disclosures to be made by the charter petitioners/operators regarding the "terms and conditions of employment" at the charter school regarding: leaves; health benefits coverage; salary; retirement pay; workers' compensation coverage; paid absence benefits; liability protections; hours, duties and schedules; protections for job security; performance evaluation; class size and other assignment ratios; extended assignment options; "any other significant terms and conditions of employment to be applied to the Charter School." (*Ibid.*) Notably, the CBA provides the disclosures are required to be made

not by the District but by the charter petitioner who is not a party to the CBA.[6]

Nowhere does Education Code section 47605 require a district to provide for disclosures to school district personnel regarding the terms and conditions of employment at a charter school. The statute only requires the charter petition state "[t]he manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security" (Ed. Code, § 47605(b)(5)(K)) and provide "[a] description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school" (Ed Code, § 47605(b)(5)(M)).

[6] It is this scenario that is the basis for the District's argument challenging the union's standing. To the degree that UTLA seeks to promote the interests of charter school employees or to enforce the purported obligations of charter school petitioners/operators, it has no standing to seek to compel arbitration. (Code of Civ. Proc., § 1281.2; *Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Company of Maryland* (1992) 6 Cal.App.4th 1266, 1271 [an agreement to arbitrate does not extend to those that are not parties to it].) The Court of Appeal misconstrued the argument as challenging the union's ability to represent charter employees that were members of the union at the time of the alleged violation and did not address the fact that charter petitioners/operators are not subject to the CBA. Nor are all charter employees former District employees. It remains the District's position that because charter school employees are not within the recognized unit, they have no rights under the CBA and UTLA is without standing to pursue any claims on their behalf and may not seek to enforce provisions of a CBA to which charter school petitioners and/or employees are not a party.

Indeed, the law specifically provides that no school district may require any employee of the school district to be employed in a charter school, even if they have signed a petition in support of the charter. (Ed. Code, § 47605(e).)

In fact, because information is to be disclosed by a charter petitioner, these collective bargaining provisions purport to hold the District responsible for such obligations, thereby shifting obligations from charter school petitioners to the District. These provisions clearly alter the meaning of section 47605 and interfere with the District's ability to consider a charter petition in conformity with the statutory requirements.

Because Sections 2.0 and 3.0 purport to obligate the District to additional procedural steps beyond what is required by Education Code section 47605 prior to granting a charter petition, the CBA is in direct conflict with the Education Code, not only impairing the District's ability to comply with its statutory obligations but also serving to impair charter petitioners' rights. As held by the Court in *Round Valley, supra*, "the intent of the Government Code is to preclude contractual agreements that would alter the meaning of other statutory provisions." (*Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269 at p. 286 citing *San Mateo City School District v. Public Employee*

Relations Board (1983) 33 Cal.3d 850; emphasis in original.) "Preclude: to make impossible by necessary consequence: rule out in advance." (Webster's Collegiate Dict. (10th ed. 1993) p. 917.) (See also, *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 833 [statutory authority given to school district cannot be usurped by provisions of collective bargaining agreement].)

Because the CBA requirements replace, set aside and annul the statutory process and interfere with the discretion that has been vested exclusively in the school board as to whether or not to deny a charter petition, the CBA provisions are preempted. Were the Board to deny the Locke Charter Petition for failure to include this additional information, it would be in violation of section 47605. Indeed, were an arbitrator to make an order related to the District's action in consideration of a charter petition, the rights of the charter petitioner would be trampled. For example, upon denial of a charter petition, the charter petitioner has a statutory right to appeal. (Ed. Code, § 47605(j).) However, the charter school would have no statutory basis to appeal from an arbitrator's decision. Indeed, the arbitration would be conducted without the participation of the charter

petitioner despite the fact that the arbitration would directly affect the status of the charter school. (See Footnote 6, p. 38.)

In accord with *Round Valley*, the scope of preemption is not to be narrowly construed. The question is whether the contractual provisions alter the meaning of statutory provisions and/or interfere with statutorily conferred discretion vested in the school district. (*Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269 at p. 287.) Article XII-B sets forth certain actions that are to be taken prior to the Board's consideration of a petition to establish a charter school. Requiring procedures over and above those required by section 47605 fundamentally interferes with the petition process and serves to "alter the meaning" of the statutory provisions.

While UTLA has suggested that Article XII-B does not regulate the charter petition process "but rather implements procedures meant to maintain meaningful dialogue between the school's employees and the District," this assertion is contrary to language of CBA which states that it does, in fact, govern the "process and approval" of the charter petition. (Section 2.0; JA 60.) Moreover, the remedy sought by UTLA belies the assertion that the CBA intends to maintain meaningful dialogue without impact upon the process or the decision whether to grant a petition. UTLA

asks an arbitrator to "Rescind Charter approval and all references thereafter." (JA 68.) This remedy seeking to invalidate a Board decision to grant a charter petition is clearly in violation of statute.

The courts have held an arbitrator serving under a collective bargaining agreement cannot issue a remedy that would interfere with or essentially override the District's statutory rights and/or duties. (*Round Valley Unified School District v. Round Valley Teachers Association, supra*, 13 Cal.4th 269 at p. 289; *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, 1526; *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App.3d 805, 814; *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1378.) Because the remedy of invalidating a Board decision to grant a charter petition is directly in conflict with section 47611.5(e), and would interfere with and essentially override the District's obligations and authority under section 47605, it is clear that to effect such a remedy would be in excess of the arbitrator's authority. Although the District's argument of preemption does not rely upon UTLA's requested remedy, the requested remedy clearly demonstrates that the CBA provisions are in conflict with statute.

A PETITION TO COMPEL BINDING ARBITRATION IS PROPERLY DENIED WHERE THE COLLECTIVE BARGAINING PROVISIONS UPON WHICH THE GRIEVANCE IS BASED ARE PREEMPTED BY STATUTE

UTLA argued before the trial court that arbitration was mandated by the ruling in *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198. The trial court responded by pointing out that to rely upon *Peace Officers* requires the court to "ignore the California Supreme Court decision [*Round Valley*] that appears to be right on-point?" (RT p. 14.) In reversing the trial court, the Court of Appeal did rely on *Peace Officers* to the exclusion of all other cited case law, holding that section 47611.5(e) is a defense to be presented to the arbitrator and, "if the arbitrator concludes that the district violated the collective bargaining agreement, it may then challenge the award in the trial court based upon its defense that section 49711.5 [sic], subdivision (e) preempts the union's grievance rights." (Opinion p. 13.)

However, this ruling not only ignores precedent, it places school districts in an untenable position, especially when faced with an arbitrator's decision to invalidate a charter school established in compliance with section 47605. In such a case, a school district must either comply with the award, facing a lawsuit from the charter school, or the district must continue to spend resources fighting the arbitrator's award. In any case, the

Opinion would require the District to proceed to arbitration despite the fact there is no valid agreement to arbitrate as required by Code of Civil Procedure section 1281.

A. Collective Bargaining Provisions Inconsistent with Education Are Not Subject to Arbitration

The Opinion conflicts with the long-standing authority interpreting Government Code section 3540 of the EERA, holding that where the collective bargaining provision is inconsistent with the Education Code it is preempted and the school district is barred from proceeding to arbitration under preempted provisions. Notably, the Court of Appeal did not address the cases decided under the EERA which hold that a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2(b) is properly denied where the collective bargaining provisions are preempted.

In *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823, 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 Education Code section 45113: "[W]e hold that the school district is barred from applying the binding arbitration step of its grievance procedure to disciplinary decisions of the governing board...." The court further stated:

"Pursuant to these statutes [Ed. Code, § 45113 and Gov. Code, § 3540] . . . the potential double remedy of subjecting a conclusive governing board decision to the subsequent final and binding arbitration of the general collective bargained for agreement simply was neither authorized nor intended by the California Legislature." (*Id.* at p. 840.)

In *Fontana Teachers Association v. Fontana Unified School District* (1988) 201 Cal.App.3d 1517, the court considered whether to compel arbitration where the collective bargaining provisions were, as here, preempted by the Education Code. 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. (*Id.* at p. 1521.) In the instant case, it is undisputed that the parties have not granted the arbitrator authority to determine arbitrability, (JA 53, 57) and the Court of Appeal provides no reference to the collective bargaining agreement to support its conclusion that the question of arbitrability is to be considered by the arbitrator. Moreover, the arbitrator would not have the authority to invalidate the provisions of the CBA. If compelled to arbitrate this issue,

the District would have no opportunity to present legal arguments regarding the unenforceability of Article XII-B as the arbitrator has no power to invalidate the CBA provisions. (*Fontana Teachers Association v. Fontana Unified School District, supra,* 201 Cal.App.3d at p. 1521.)

The *Fontana* court further held that where the arbitrator would have no power to provide the requested remedy, arbitration is an idle act barred by Civil Code section 3532. (*Id.* at p. 1526.) Here, the law is clear that the arbitrator would have no authority to order compliance with the collective bargaining agreement or grant the requested relief, which is rescission of the Board's approval of the charter petition, as to do so would violate both Education Code sections 47611.5(e) and 47605.

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 p. 286.) The Court of Appeal Opinion also conflicts with the Court of Appeal, Sixth District's recent decision in *Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal.App.4th 168, which recognized the preclusive effect of preemption: "In sum, as *Round Valley* specifically held, a school district's decision not to reelect a probationary teacher cannot be the subject of collective bargaining. *It follows that the decision cannot be challenged as a breach of*

the collective bargaining agreement. The decision is outside the scope of the agreement, as a matter of law." (*Id.* at p. 180; emphasis added.) Here, section 47611.5(e) prohibits the establishment of charter schools from being the subject of collective bargaining. Moreover, the CBA provisions are preempted as inconsistent with the procedures set forth in Education Code section 47605. Therefore the decision to approve the Locke Charter Petition cannot be challenged as a breach of the collective bargaining agreement. (*Id.* at p. 180.)

While the Court of Appeal views the *Round Valley* decision as only applying to undo an improper arbitration decision post binding arbitration pursuant to Code of Civil Procedure section 1286.4, this does not take into account the following Supreme Court statement:

> Moreover, in contrast to assertions made by Association and the Court of Appeal below, *San Mateo, supra,* 33 Cal.3d 850, observed that *the intent of the Government Code is to preclude contractual agreements that would alter the meaning of other statutory provisions. As District observes, if we were to validate the requirements of article 19, section B(1) of the agreement with Association, we would severely undermine section 44929.21 (b).* Indeed, under *San Mateo, supra,* enforcement of article 19, section B(1), would result in replacing or setting aside a nonnegotiable and mandatory provision of the Education Code, a result the *Fontana* court explained Government Code section 3540 et seq. sought to avoid.

(*Round Valley Unified School District v. Round Valley Teachers Association, supra,* 13 Cal.4th at p. 286; emphasis added.)

This statement demonstrates that although this Court received the issue post arbitration in *Round Valley*, and did hold the matter subject to review under Code of Civil Procedure section 1286.4, it also held that the contract provisions were invalid, precluded, and should be given no force or effect. (*Ibid.*) It further confirms that the *Round Valley* Court approved the result in *Fontana*, i.e., the conclusion that the petition to compel arbitration is properly denied.

The Court of Appeal assumes, *ab initio*, that the parties to a collective bargaining agreement must pursue arbitration because Code of Civil Procedure section 1281 provides that an agreement to arbitrate a dispute is enforceable. However, this analysis disregards longstanding precedent and did not consider the overriding authority, the *preemptory effect*, of the particular statutes set forth in the Charter School Act and the EERA that are paramount and abrogate the general statutes, including Code of Civil Procedure sections 1281 et seq. (See Code Civ. Proc., § 1859 [in construing statute "a particular intent will control a general one that is inconsistent with it"].) The "particular intent" of the Legislature in enacting section 47611.5 (e) and section 3540 is to abrogate and override

inconsistent general statutes found in Code of Civil Procedure sections 1281.1 et seq. While section 3540 makes 1281 et seq. applicable to collective bargaining agreements under the EERA, that application is limited by the nonsupercession clause, which acknowledges that EERA does not apply where, as here, there is conflict with the Education Code.

B. Longstanding Case Law Holds Arbitration Provisions That Are Contrary to Law Are Unenforceable

The Court of Appeal decision is inconsistent with the longstanding principle that contracts that are contrary to public policy are not to be given any force or effect. "'Despite the strong policy favoring arbitration, there are circumstances in which California courts may invalidate or limit agreements to arbitrate. Employing "general contract law principles," courts will refuse to enforce arbitration provisions that are "unconscionable or contrary to public policy." [Citations.]'" (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1278; see also, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 467.) "A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity." (*Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 949, citing *Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-454.) Here, the contract provisions of the CBA are in direction contravention of statute and thus contrary to public

policy. As a consequence, the provisions are void, invalidated, and may not serve as the foundation of any action, including a petition to compel arbitration under Code of Civil Procedure section 1281.

C. *California Correctional Peace Officers Assn. v. State Bar of California* Is Not Controlling

The Court of Appeal incorrectly relied upon *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, as the sole basis to compel arbitration. *Peace Officers* was decided under the Dills Act rather than the EERA. (*Id.* at p. 202.) Importantly, there was no similar jurisdictional statute to 47611.5(e) at issue in *Peace Officers,* nor does the Dills Act include a nonsupercession clause like the EERA (Gov. Code, § 3540). In *Peace Officers*, the Department opposed the Union's petition to compel arbitration based upon Government Code section 3529 of the Dills Act, which states that supervisory employees "shall not participate in meet and confer sessions on behalf of" rank-and-file employees, and vice versa. (*Id.* at p. 201.) In other words, the Department defended the conduct alleged in the grievance by relying upon a statute *in an otherwise arbitrable case*. "While no California case has expressly ruled on the exclusive right of judges to consider *otherwise arbitrable cases raising issues of statutory interpretation*, the Department's position runs counter to the assumptions that underlie many California decisions, which

anticipate that arbitrators will engage in statutory interpretation." (*Id.* at p. 208; emphasis added.) The court held that the arbitrator may interpret statutes asserted as a defense to the grievance. (*Id.* at p. 210.)

Unlike in *Peace Officers*, this matter is not an "otherwise arbitrable case" upon which a statute is relied upon in defense of conduct alleged in the grievance. Neither section 47611.5(e) nor section 3540 is relied upon to defend any act or omission alleged in the grievance, but rather to demonstrate the invalidity of the provisions within the meaning of Code of Civil Procedure section 1281.2, subdivision (b).

Because the District does not seek to assert a defense but rather seeks the court's ruling that the arbitration agreement is invalid, *Peace Officers* is not controlling authority.

CONCLUSION

California's charter school legislation was enacted to provide education reform to improve the quality of education for California's children. (Ed. Code, § 47601.) However, by holding that the arbitrator, rather than the court, must evaluate whether the Education Code preempts and invalidates collective bargaining provisions, the Court of Appeal Opinion defies the Legislature's intent that establishment of a charter

school not be subject to collective bargaining, creates a barrier to California school districts' delivery of educational reform, and unnecessarily taxes school district resources by requiring participation in binding arbitration even where the collective bargaining provision is preempted and invalid as a matter of law. The implications of the Court of Appeal Opinion reach beyond the application of Education Code section 47611.5, subdivision (e), to impact and undermine the preemption doctrine under the EERA generally. Moreover, the statutory rights of charter petitioners are ignored.

The Opinion puts school districts in an impossible position: comply with illegal provisions of a collective bargaining agreement or face binding arbitration. School districts are bound to face legal challenge either from the charter school or the union, undermining the Court of Appeal suggestion that allowing matters to proceed through binding arbitration will preserve the court's resources.

The Court of Appeal, by giving effect to provisions that violate the law, further opens the door to unions asserting a right to negotiate over the charter petition process, despite the express language of section 47611.5(e) which specifically prohibits the charter petition process from being controlled by collective bargaining agreements.

Arbitration is not an available remedy, is barred as a matter of law, and requiring arbitration is the type of "idle act" the *Fontana* court rejected. In conformity with precedent, arbitration agreements that are contrary to law are unenforceable.

The District asks this Court to settle an important issue of law related to the efficient implementation of the Charter Schools Act designed to improve public education, to give effect to the mandate of the Legislature by enforcing section 47611.5(e) and by holding that section 47611.5(e) and the preemption doctrine under the EERA, preempt and invalidate the agreement, barring arbitration.

Dated: March 5, 2010

DANNIS WOLIVER KELLEY

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 8.204(c) of the California Rules of Court, this Opening Brief On The Merits was produced using 13-point Roman type including footnotes and contains approximately 12,404 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 brief.

Dated: March 5, 2010

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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 **OPENING BRIEF ON THE MERITS** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1 Copy:
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Honorable Mary Ann Murphy
Los Angeles Superior Court, Central District
111 N. Hill Street
Los Angeles, CA 90012

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☒ **(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.

Executed on March 5, 2010 at Long Beach, California.

Ila Friend
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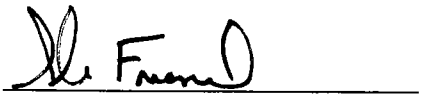
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