

Case No. S177403

IN THE SUPREME COURT OF  
THE STATE OF CALIFORNIA

SUPREME COURT  
**FILED**

Second Appellate District Case No. B214119

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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

**REPLY BRIEF ON THE MERITS**

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

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**IN THE**

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**SUPREME COURT OF CALIFORNIA**

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UNITED TEACHERS LOS ANGELES,

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Defendant and Respondent.

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**LOS ANGELES UNIFIED SCHOOL DISTRICT'S  
REPLY BRIEF ON THE MERITS**

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**I. INTRODUCTION**

The clear language of Education Code section 47611.5(e) serves as a jurisdictional bar to arbitration and renders the negotiated provisions inarbitrable as a matter of law. UTLA's effort to give effect to the collective bargaining provisions flies in the face of the Legislature's mandates, interferes with public sovereignty over education, and undermines a school district's exercise of discretion in the delivery of education and the implementation of reform.

UTLA does not dispute that the Legislature intended for governing boards to review petitions in a positive light and with the understanding that the Legislature encourages the establishment of charter schools. (Ed. Code, § 47605(b).) Indeed, the Legislature made any decision to deny a charter petition conditioned upon specific findings – findings tied to the statute, not to any collectively negotiated procedures required of the Board when “processing or considering approval” of charter petitions. UTLA does not dispute that the Locke Charter Petition was approved by the Board in compliance with the requirements of Education Code section 47605. As the legislative history of Education Code section 47611.5(e) demonstrates, the establishment of charter schools is deemed beyond the scope of collective bargaining to further encourage the establishment of charter schools without impediment.

Here, the collective bargaining provisions are preempted and invalid pursuant to Education Code section 47611.5(e) and under Government Code section 3540 because they are inconsistent with section 47611.5(e) as well as section 47605. UTLA’s excessively narrow view of section 47611.5(e) and preemption is unsupported by the legislative history and by the relevant authority. Where preemption applies, it is applicable to the entire scope of the Education Code, not in the piecemeal fashion advocated

by UTLA. To give the collective bargaining provisions effect places the issue of establishment of a charter school in the hands of an arbitrator

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which is contrary to statute, the legislative intent, and contrary to the discretion vested in the school board in establishing charter schools.

Ignoring the language of Education Code section 47611.5(e), the lynchpin of UTLA's argument is that the Educational Employment Relations Act (EERA) provides for binding arbitration and sanctions a petition to compel arbitration where the other party to the agreement refuses to participate. However, UTLA cannot rely upon the procedures of the EERA to compel arbitration because the EERA is made inapplicable by Education Code section 47611.5(e) and by its own terms. Absent application of the EERA, its provisions offer no procedural basis upon which to compel arbitration. Moreover, Code of Civil Procedure sections 1281 and 1281.2, as well as the relevant case law, make clear that the right to compel arbitration is founded upon a valid contractual provision. Like any contract provision made contrary to public policy, the provisions of Article XII-B are deemed invalid and given no force or effect. This leaves an arbitrator with no jurisdiction and an arbitrator exceeds his authority by proceeding under a preempted collective bargaining provision.

The Court of Appeal opinion, requiring the parties to engage in arbitration, gives effect to provisions that the Legislature has expressly stated are contrary to law and without application of the nonsupercession clause, leading to the exact result the Legislature sought to avoid – union involvement in the chartering process impairing the implementation of the Charter Schools Act. If the Court of Appeal decision stands, the District and school districts across the state would be repeatedly required to either comply with illegal provisions or be put through the grievance process, including binding arbitration. Not only is submitting to arbitration under illegal provisions an “idle act,” this approach would unnecessarily drain already strained resources and is contrary to the intent of both Education Code section 47611.5(e) and Government Code section 3540 which is to “preclude” contracts that conflict with the Education Code. Because the subject provisions are invalid, the trial court properly denied UTLA’s Petition to Compel Arbitration.

## **II. ARGUMENT**

### **A. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1281.2 BARS ARBITRATION BECAUSE THE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT ARE INVALID**

UTLA asserts that the mere existence of an arbitration agreement mandates the court compel arbitration. Not so. The court has long

recognized the limitations on parties' ability to agree to arbitration specifically in the area of education because of the state's sovereign control over the education system. (Cal. Const., art. IX, § 5; *United Steelworkers of America Local 8599, AFL-CIO v. Board of Education* (1984) 162 Cal.App.3d 823, 839.) The District acknowledges that while disputes covered by a collective bargaining agreement will generally be subject to arbitration, there are limitations such as where the Legislature has expressed its intent that certain matters not be subject to collective bargaining, thereby invalidating the provisions that serve as the foundation for arbitration. This case presents such a situation.

By enactment of Education Code section 47611.5(e), the Legislature has determined that the process for establishing a charter school is outside the scope of collective bargaining and has taken the unique step of expressly stating this limitation.<sup>1</sup> Because consideration of a charter petition is statutorily barred from being the subject of negotiations, the District and UTLA were without the power to enter into any agreement purporting to govern the District's conduct, or that of the charter petitioner, with regard to processing or consideration of a charter petition.

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<sup>1</sup> All statutory references will be to the Education Code unless otherwise specified.

The limitation on the ability to agree to arbitration is further recognized in the EERA. The EERA limits the duty to negotiate and includes the nonsupersession clause which provides that collectively negotiated agreements that conflict with the Education Code are superseded. (Gov. Code, §§ 3540; 3543.2.) Under such circumstances, the collectively negotiated provision is without legal force or effect and therefore cannot serve as a basis for arbitration.

The trial court's denial of UTLA's Petition to Compel Arbitration was proper under Code of Civil Procedure section 1281.2, subdivision (b), where, as here, no *valid* agreement to arbitrate exists as to the issues presented by the grievance.

**1. The EERA Expressly Recognizes Limitations on Collective Bargaining and the Right to Arbitration**

UTLA looks to the EERA and its policy supporting employer-employee relations as a basis to compel arbitration. However, 1) section 47611.5(e) makes the EERA inapplicable; 2) the EERA limits the scope of negotiations; and, 3) the EERA provisions subjecting matters to arbitration are inapplicable where the collective bargaining agreement is outside the scope of negotiations.

Section 47611.5(e) very clearly provides that collective bargaining regarding the establishment of charter schools is not allowed:

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.

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Not only does section 47611.5(e) preclude the establishment of charter schools from being the subject of collective bargaining, it goes on to provide that the Public Employment Relations Board (“PERB”) has no jurisdiction to “review or regulate” the subject. Because PERB is charged with enforcement of the EERA, section 47611.5(e) reinforces the fact that establishment of a charter school is beyond the scope of the EERA.

Although the EERA does provide for collective bargaining agreements to include arbitration provisions, it is limited to matters within the scope of negotiations. Government Code section 3548.5 provides:

A public school employer and an exclusive representative who enter into a written agreement covering matters *within the scope of representation* may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement. (Emphasis added.)

Because the provisions of Article XII-B are outside the scope of negotiations pursuant to the express statutory mandate of section 47611.5(e), the EERA provides no authority to enter into an agreement requiring binding arbitration.

Additionally, where, as here, the Education Code preempts collectively negotiated provisions of the agreement, there is no authority to arbitrate. Government Code section 3540 mandates that the EERA “. . . shall not supersede other provisions of the Education Code . . .” UTLA does not address or in any way refute the application of the EERA’s nonsupersession clause. Because the nonsupersession clause bars the subject provisions, section 3548.5 of the EERA is again inapplicable as a basis for arbitration. Moreover, because the provisions are outside the scope of the EERA, UTLA may not rely upon Government Code section 3548.7 as a procedural basis to compel arbitration pursuant to Code of Civil Procedure section 1281.2.<sup>2</sup>

In *Board of Education of the Round Valley Unified School District v. Round Valley Teachers Association* (1996) 13 Cal.4<sup>th</sup> 269, 280 (“*Round Valley*”) this Court acknowledged the purpose of the EERA “to promote the improvement of personnel management and employer-employee relations

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<sup>2</sup> “Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6” (Gov. Code, § 3548.7.)

within the public school systems . . .” but recognized the limitations of the

EERA:

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*The scope of this duty [to negotiate] is limited to “matters relating to wages, hours of employment, and other terms and conditions of employment.” (Gov. Code, § 3543.2, subd. (a).) The statute defines the phrase “terms and conditions of employment” to “mean health and welfare benefits ..., leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, ... procedures for processing grievances pursuant” to specific Government Code sections relating to an agreement to submit to binding arbitration, and “the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code ....” (Gov. Code, § 3543.2 subd. (a), italics added.) . . . Government Code section 3543.2, subdivision (a) also expressly provides that all matters not specifically enumerated in the EERA are reserved to the public school employer and may not be a subject of meeting and negotiation. In addition, Government Code section 3540 further mandates that the provisions of the Government Code relating to collective bargaining agreements shall not supersede the Education Code. Causes and procedures for dismissal are not subject to negotiation. (Gov. Code, § 3543.2, subd. (b).) (*Id.* at 280; emphasis added.)*

Here, UTLA has failed to demonstrate how the provisions at issue are within the scope of the duty to bargain as defined by Government Code section 3543.2. Section 47611.5(e) expressly deems the subject of establishing a charter school as outside the scope of negotiations under the EERA and the provisions are preempted within the meaning of Government Code section 3540. In *Round Valley*, the Court held that where the terms of

the collective bargaining agreement contravene the state's interest as set forth in statute, the collective bargaining provisions, "violate Government Code section 3540's injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code." (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 284-285.) Notably, in *Round Valley*, the legislative intent relied upon to invalidate the provisions was implicit whereas here, it is express.

The cases which have held provisions of a collectively bargained for agreement to be invalid as in conflict with the Education Code have all recognized the EERA's purpose "to promote the improvement of personnel management and employer-employee relations within the public school systems. ..." Nonetheless, the courts invalidated the provisions and disapproved arbitration as beyond the authority to bargain and beyond the jurisdiction of the arbitrator. (*Round Valley, supra* 13 Cal.4<sup>th</sup> at 280; *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* ("United Steelworkers"), *supra*, 162 Cal.App.3d at 840-841; *Fontana Teachers Association v. Fontana Unified School District* ("Fontana") (1988) 201 Cal.App.3d 1517; *Sunnyvale Unified School District v. Jacobs* ("Sunnyvale") (2009) 171 Cal.App.4<sup>th</sup> 168.)

As recognized by the court in *United Steelworkers, supra*, 162 Cal.App.3d at 840, “In comparison, the policy favoring public employer-employee collective bargaining is not of the highest magnitude. 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 . . . Moreover, the Supreme Court has recently held that the ‘intent of section 3540 is to preclude contractual agreements which would alter [certain] statutory provisions . . .’” (*Ibid.*, citing *San Mateo School Dist. v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 864-866.)

As held by the court in *Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> at 180, where the collective bargaining provisions attempt to regulate a decision of the school district that is outside the scope of negotiations, “it follows that the decision cannot be challenged as a breach of the collective bargaining provisions” and the arbitrator has no jurisdiction to consider the grievance.

The limitation upon bargaining rights under the EERA reflects the state’s interest in the constitutionally mandated statewide education system. “Perhaps the most fundamental objection to the granting of collective bargaining rights to teachers has been the concept of public sovereignty over education. An underlying principle is that the school board cannot

delegate this function. (Citations omitted.)” (*United Steelworkers, supra* 162 Cal.App.3d at 839.)

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Here, UTLA’s grievance seeks arbitration to challenge the District’s decision to grant the Locke High Charter Petition in violation of Article XII-B, sections 2.0 and 3.0. (JA 68.) However, because the process and decision to approve or deny a charter petition is outside the scope of negotiations as a matter of law, sections 2.0 and 3.0 contravene the state’s interest in establishing charter schools without union involvement and “violate Government Code section 3540’s injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code.” (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 284-285.) Indeed, establishment of charter schools is fundamental to implementing the statewide educational system. (*Wilson v. State Board of Education* (1999) 75 Cal.App.4<sup>th</sup> 1125-1136 [the Legislature holds the fundamental obligation to establish a system of public schools per Cal. Const., art. IX, §§ 1 and 5, and charter schools are part of California’s public school system].)

UTLA does not address or refute the limitations expressly set forth in the EERA and does not refute the cases applying the EERA’s limitations in affirming the denial of a petition to compel arbitration. (*United Steelworkers, supra*, 162 Cal.App.3d at 828; *Fontana, supra*, 201

Cal.App.3d at 1527.) Where there is no right under the EERA to bargain or arbitrate, the EERA policy of promoting employer-employee relations has no application. The EERA rejects arbitration of disputes that are legislatively barred from being the subject of negotiations and that are outside the scope of the EERA as a matter of law.<sup>3</sup>

**2. Petition to Compel Arbitration is Properly Denied Under Code of Civil Procedure Section 1281.2 Where There Is No Valid Agreement to Arbitrate**

UTLA appears to argue that invalidity of a collectively negotiated provision is not an exception to arbitration recognized by Code of Civil Procedure Section 1281.2. However, even the authority cited by UTLA acknowledges that an order compelling arbitration must be founded upon an enforceable agreement to arbitrate. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4<sup>th</sup> 677 [arbitration appropriate where agreement held to be enforceable].) Nor does UTLA refute the

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<sup>3</sup>UTLA again asserts without citation to the record that the “There is no dispute as to the validity of Article V of the Agreement . . . nor is there dispute as to the violation by the District of Sections 2.0 and 3.0 of Article XII-B of the Agreement as alleged in the grievance. (Brief of Respondent United Teachers Los Angeles (“Brief”) p. 12.) The District has consistently asserted that because the provisions upon which the grievance is raised are invalid, there is no agreement to arbitrate such disputes under Article V. The District has also repeatedly stated that it has not disputed the substantive merits of the grievance for purposes of the Petition to Compel Arbitration in conformity with the limitations of Code of Civil Procedure section 1281.2, subdivision (c), “an order to arbitrate such controversy may not be refused on the ground the petitioner’s contentions lack substantive merit.”

extensive case law providing that an agreement to arbitrate a dispute that is contrary to public policy is to be given no force or effect. (*Kelton v.*

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*Stravinski* (2006) 138 Cal.App.4<sup>th</sup> 941, 949, citing *Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-54 [“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 ...”].)

Contrary to UTLA’s unfounded statements, the District has consistently asserted that UTLA’s Petition to Compel Arbitration is properly denied pursuant to Code of Civil Procedure section 1281.2, subdivision (b), in conformity with the unrefuted legal authority that the invalidity of the subject provisions bars arbitration. As explained in the District’s Opening Brief, the courts have long recognized that certain contracts will not be enforced where they are contrary to public policy and that a petition to compel arbitration is properly denied pursuant to Code of Civil Procedure section 1281.2 under such circumstances. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4<sup>th</sup> 83, 98 (“*Armendariz*”); *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4<sup>th</sup> 531, 540; Rest.2d Contracts (2009) Ch. 8, Topic 1, § 178 [a 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].)

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In *Armendariz*, the Court considered whether a petition to compel arbitration was properly denied pursuant to Code of Civil Procedure section 1281.2 on the grounds that the contract provisions were invalid. The Court held that the agreement was invalid because it possessed a damages limitation that was contrary to public policy and was unconscionably unilateral. (*Armendariz, supra*, 24 Cal.4<sup>th</sup> at 104, 110.)

Because we conclude the imposition of substantial forum fees is *contrary to public policy*, and is *therefore grounds for invalidating or revoking an arbitration agreement and denying a petition to compel arbitration under Code of Civil Procedure sections 1281 and 1281.2*, we hold that the cost issues *should be resolved not at the judicial review stage but when a court is petitioned to compel arbitration*.

(*Id.* at 110; emphasis added.) As the Court explained, an arbitration agreement is “revoked” within the meaning of section 1281.2 where it is invalidated as contrary to public policy. “[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.” (*Id.* at p. 98, FN4, citing *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.) *Armendariz* also holds the issue is properly resolved when considering the

petition to compel arbitration “not at the judicial review stage.” (*Id.* at 110; emphasis added.) UTLA wholly fails to address or refute *Armendariz*.

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UTLA also fails to address or refute the precedent affirming denial of petitions to compel arbitration pursuant to Code of Civil Procedure section 1281.2 where the collectively negotiated provisions were invalidated under the EERA. In *United Steelworkers, supra*, 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, stating the school district was “barred from applying the binding arbitration step of its grievance procedure” where the collective bargaining provision was in conflict with the Education Code. The *Round Valley* Court favorably acknowledged that “[t]he *United Steelworkers* court affirmed the trial court’s decision to deny the motion to compel arbitration after concluding that the provisions of the agreement delegating disciplinary decisions to an arbitrator conflicted with the mandatory provisions of section 45113 . . . . The conflict, the Court of Appeal reasoned, precluded arbitration.” (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 286.)

The court in *Fontana, supra*, 201 Cal.App.3d at 1521, 1526, also held that where the collective bargaining agreement was preempted under the EERA, the issue “was not a proper subject of arbitration” and the

petition to compel arbitration was properly denied under Code of Civil Procedure section 1281.2. *Round Valley* affirmed *Fontana* as “having reached the correct result” with regard to the preemptive effect of the Education Code. (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 287.) While *Round Valley* could have disapproved these cases on the grounds they should have proceeded to arbitration subject to judicial review thereafter, it did not. Instead, it found an arbitrator exceeds his authority in proceeding under invalid provisions. (*Id.* at 272.)

These cases recognize that where the collective bargaining provisions are contrary to the Education Code, they are outside the scope of the EERA pursuant to Government Code section 3540. Where the provisions are outside the scope of negotiations as allowed under the EERA, the ability to negotiate binding arbitration under section 3548.5 of the EERA is barred as is reliance upon section 3548.7 to seek to compel arbitration.

Instead of addressing the relevant authority, UTLA looks to inapt case law to argue that the Court may not evaluate whether the arbitration agreement is invalid. Relying on *Posner v. Grunwald-Marx, Inc.* (“*Posner*”) (1961) 46 Cal.2d 169, and *Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority*

(“*Amalgamated*”) (2003) 107 Cal.App.4<sup>th</sup> 673, UTLA informs the Court that UTLA need only allege the existence of an arbitration agreement, and the District’s refusal to arbitrate, to obtain an order compelling arbitration. However, these cases do not hold that a petition to compel arbitration is properly granted where the agreement to arbitrate is invalid. In fact, neither case addresses the issue of an invalid agreement nor is either case decided under the EERA. Notably, these cases predate *Round Valley, United Steelworkers, Fontana*, and *Sunnyvale*, yet did not apply to require arbitration under the EERA in any of those cases.

In *Posner*, the issue presented was whether the dispute over vacation pay fell within the scope of the arbitration agreement. The court held the dispute to be within the scope of the agreement and on that basis held the matter subject to arbitration. (*Posner, supra*, 46 Cal.2d at 184.) *Posner* did not consider or decide whether a provision of a collective bargaining agreement that is contrary to law and public policy should nonetheless be given effect to require the parties to arbitrate. However, the *Posner* Court did acknowledge limitations on the right to arbitrate, finding that arbitrability is an issue for the court absent an express agreement to submit such issues to arbitration. (*Id.* at 181 [“[t]he arbitrability of a dispute may

itself be subject to arbitration if the parties have so provided in their contract.’ (Citations omitted).”].)

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In *Amalgamated*, the union filed a grievance on behalf of the employee alleging the employer’s failure to return the employee to work breached the contractual provisions. The trial court denied the petition to compel arbitration. The court first determined that the exclusive remedy rule under workers’ compensation law did not apply to bar the petition to compel arbitration because the motion to compel sought an equitable remedy rather than damages. (*Amalgamated, supra*, 107 Cal.App.4<sup>th</sup> at 682 [“The Union’s equitable petition to compel arbitration thus does not fall within the statutory language, which prohibits only actions at law for damages.”].) The court went on to hold that the issue in dispute, i.e., whether the employer’s failure to return the employee to work breached the contract provisions, was within the scope of the agreement and on that basis ordered arbitration. (*Id.* at 673.) The *Amalgamated* Court did not consider whether a contract provision contrary to law should nonetheless require the parties to arbitrate.

Like *Posner*, the *Amalgamated* Court recognized the limitations on the courts’ ability to compel arbitration under section 1281.2, and further acknowledged that the arbitrator decides *arbitrable* claims. (*Id.* at 686.)

“Unless the parties have clearly and unmistakably provided otherwise, the preliminary question of whether the parties to a collective bargaining

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agreement have agreed to arbitrate a particular dispute is decided by the court, not the arbitrator . . . Thus, the parties generally are not required to ‘arbitrate the arbitrability question.’” (*Id.* at 684.) *Amalgamated* further acknowledged, “there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.” (*Id.* at 685.)

Because the subject provisions are invalid pursuant to section 47611.5(e) and preempted by Government Code section 3540 as in conflict with sections 47611.5(e) and 47605, the relevant authority holds that the contract provisions are unenforceable under the EERA and a motion to compel arbitration is properly denied pursuant to Code of Civil Procedure section 1281.2(b).

### **3. There is No Policy Favoring Arbitration of an Agreement Made in Violation of Law**

UTLA argues that the general policy favoring arbitration applies even to an agreement made in contravention of law and the Legislature’s stated intent to bar collective bargaining on the issue. UTLA’s reliance on general proclamations does not overcome the well established rule that “[d]espite the strong policy favoring arbitration . . .” courts will refuse to enforce arbitration provisions that are “unconscionable or contrary to public

policy.” (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1278; see also, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 467.)

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As held in *Armendariz*, the California Arbitration Act, “does not prevent our Legislature from selectively prohibiting arbitration in certain areas.” (*Armendariz, supra*, 24 Cal.4<sup>th</sup> at 98.) Where the Legislature has so designated, arbitration is contrary to public policy and therefore provisions purporting to require arbitration are invalid. (*Ibid.*)

Nor can UTLA overcome the specific authority holding that collectively negotiated agreements made under the EERA are not subject to arbitration where the provisions conflict with the Education Code and are outside the scope of negotiations. (Gov. Code, §§ 3540; 3543.2; 3548.5; 3548.7.) Moreover, there is no policy under the EERA favoring arbitration of illegal provisions or even the issue of arbitrability unless the parties have expressly agreed to submit such issues to the arbitrator. (*Fontana, supra*, 201 Cal.App.3d at 1521.) Here, it is undisputed that no such agreement exists. (JA 53, 57.)

As cited in the Opening Brief, this Court recently recognized in *Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1200, that 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.

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The case law cited by UTLA is again, inapt. Not one case cited by UTLA addresses the question of an invalid contractual provision. Nor are any of the cited cases decided under the EERA which uniquely includes in section 3540 an “injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code.” (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 284-285; Gov. Code, § 3540.) Moreover, each of the cases cited by UTLA predates *Round Valley, United Steelworkers, Fontana*, and *Sunnyvale*, all of which confirm that the EERA precludes contract provisions at odds with the Education Code. Nor does UTLA identify any case where the question of the validity of the agreement was held to be the province of the arbitrator absent express agreement of the parties. (See also, Section III.A.1., *supra*, re irrelevance of EERA’s public policy promoting arbitration where collective bargaining provisions are contrary to law.)

UTLA again looks to *Posner, supra*, 46 Cal.2d, 169, for the rule that all matters must be submitted to arbitration and doubts as to whether the arbitration clause applies are to be resolved in favor of coverage. However, *Posner* does not stand for the proposition that the public policy favoring

arbitration requires invalid agreements to be arbitrated and *Posner* expressly recognizes that arbitrability is not for the arbitrator unless the parties have agreed to submit such matters to the arbitrator. (*Id.* at 180-181 [arbitrability may be subject to arbitration if the parties have so provided in their contract].)

The *Posner* Court analyzed the trilogy of United States Supreme Court cases holding that “where the parties have agreed to submit all questions of contract interpretation to the arbitrator,” the court’s role is limited. (*Posner, supra*, 56 Cal.2d 169, *United Steelworkers of America v. American Mfg. Co.*, (1960) 363 U.S. 564, 80 S.Ct. 1343, *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 80 S.Ct. 1347, and *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 80 S.Ct. 1358, (collectively “*Steelworkers*”).) Nowhere do *Posner* or the *Steelworkers* cases address an illegal arbitration provision nor do any of these cases hold that an invalid provision is properly submitted to arbitration.

UTLA suggests that *O’Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, stands for the proposition that arbitration is required because the parties have contracted for an arbitrator’s decision. This assertion is misleading. First, *O’Malley* does not address the question of arbitration

under an invalid agreement. Second, *O'Malley* states that parties contract for an arbitrator's decision on the *merits* of the dispute and therefore the merits of the grievance are the province of the arbitrator, not the court. (*Id.* at 484.) The merits of UTLA's grievance are not the subject of its Petition to Compel Arbitration. (Code Civ. Proc., § 1281.2(c).) The District challenges the legality of the provisions, not the merits of the grievance.

To the degree UTLA relies on the *Steelworkers* cases to suggest that the question of the validity of the agreement should be put before the arbitrator, such reliance is unavailing as evidenced by UTLA's chosen quote, "The function of the court is very limited when the parties have agreed to submit *all questions of contract interpretation* to the arbitrator." Here, it is undisputed that the parties reserved the question of arbitrability to the court. (JA 53.) Nor does this case present a question of contract interpretation, but rather a question of whether the contract is made invalid by Education Code section 47611.5(e)'s mandate that establishment of a charter school is outside the scope of negotiations under the EERA and by the nonsupersession clause of the EERA. Indeed, UTLA makes these arguments without a single citation to the collective bargaining agreement to suggest the parties have agreed to submit such questions to the arbitrator. Again, each of UTLA's cited cases predate the rulings in *United*

*Steelworkers* and *Fontana*, both of which affirm denial of a petition to compel arbitration and were approved by this Court in its *Round Valley* decision. (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 286-287.)

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Because the question of whether the subject provisions are invalid goes to arbitrability of the dispute, it is properly decided by the court, not the arbitrator. (*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.4<sup>th</sup> 148, 171 [the court not the arbitrator is to decide whether arbitration agreements or portions thereof are deemed to be unconscionable or contrary to public policy].) UTLA does not address or refute this cited authority.

The general policy favoring arbitration does not stand alone to compel arbitration where, as here, the provisions of the agreement to be arbitrated are illegal. Indeed, arbitration agreements that are contrary to law are void and unenforceable, there is no public policy favoring arbitration under such circumstances, and a petition to compel arbitration is properly denied under Code of Civil Procedure section 1281.2. (*Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153.)

**B. SECTIONS 2.0 AND 3.0 OF ARTICLE XII-B ARE IN CONTRAVENTION OF LAW**

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UTLA has determined that it is better policy to involve the union in the petition process rather than comply with the Legislature's expression of the state's policy to exclude the charter petition process from collective bargaining. However, it is the Legislature's policy determinations that rule the issue and reflect the state's interest in promoting the establishment of charter schools without impediment. UTLA does not refute that it is the state's policy to promote the establishment of charter schools as part of the public school system. (Ed. Code, 47605(b).) Nor does UTLA refute that it is the state's policy, as expressed in section 47611.5(e) and its legislative history, to preclude union involvement in the establishment of charter schools. (AB 631, District's Motion for Judicial Notice filed June 26, 2009.)

UTLA appears to argue that because section 47605 provides rights to charter petitioners, not the union membership, that the collective bargaining provisions do not conflict with the Education Code. UTLA further seeks to narrow the impact of the nonsupersession clause by contending that section 47611.5(e) only precludes bargaining with regard to a school board's "ultimate decision" to approve or deny a charter petition. On this faulty foundation, UTLA purports to harmonize Article XII-B with

the requirements of the Education Code despite conceding that the collective bargaining provisions include requirements above and beyond those set forth in the Education Code for processing and considering a charter petition.

Not only does UTLA misconstrue section 47611.5(e) and section 47605, the relevant precedent does not construe the EERA so narrowly. The court applying the nonsupersession clause has found the collective bargaining provisions preempted based upon an "implicit" legislative intent, whereas in this case, the legislative intent is express. Even to accept UTLA's position, *arguendo*, that section 47611.5(e) only bars negotiations as to the decision whether to approve or deny a charter petition, the case law still concludes that provisions seeking to control the procedures related to the decision are equally barred from being the subject of negotiations. (*Sunnyvale, supra*, 171 Cal.App.4th at 180, citing *Round Valley, supra*, 13 Cal.3d at 287 [where the board's decision is beyond the scope of negotiations so too are the "procedures and causes" related to the decision].)

**1. The Legislature Has Expressly Limited the Role of the Union in the Charter Petition Process**

To the degree the Legislature has determined teacher involvement in the petition process is appropriate, the Education Code provides for such

participation: 1) teachers are to sign a petition if they are meaningfully interested in teaching at the charter school (Ed. Code, § 47605(a)); and, 2) teachers have the right, as do “other employees of the district, and parents,” to voice their support or opposition at the public hearing (Ed. Code, § 47605(b)). Though teachers have a role, the union does not.<sup>4</sup> The Legislature has expressly provided that “[t]he 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.” The statutory scheme governing the proper subjects for collective bargaining (Gov. Code, § 3540 et seq.) and Education Code section 47611.5(e) make it clear that establishment of a charter school is controlled entirely by section 47605 and may not be the subject of collective bargaining. (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 287.)

As UTLA concedes, the “Charter Schools Act, first enacted in 1992, sets forth a detailed legislative scheme which, among other things,

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<sup>4</sup> It is worth noting that teacher support for charter schools is not subsumed in the union’s representation of teachers. The statutory scheme contemplates teacher input, not union involvement. The Charter Schools Act speaks to “opportunities for teachers” to “establish schools” “independent of the school district.” This opportunity is not so beneficial to unions that lose membership when teachers leave a school district to work in a charter school. Teachers’ interests are independent of unions in establishment of charter schools.

establishes the procedure that must be followed to establish a charter school.” (Brief p. 16.) UTLA further concedes that “. . . charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, . . . . the Legislature has plotted all aspects of their existence.” (Brief p. 17 citing *Wilson v. State Board of Education* (1999) 75 Cal.App.4<sup>th</sup> 1125, 1135; emphasis in original.) Indeed, this fact was critical to the *Wilson* Court’s determination that the Charter Schools Act was not an unconstitutional delegation of the state public school system. (*Ibid.*)

The fact that “the Legislature has plotted all aspects of their existence” and has defined by statute the exact procedures to be followed in establishing a charter school, only serves to confirm that collectively negotiated provisions seeking to impose procedures and criteria for charter petitions are preempted. (*United Steelworkers, supra*, 162 Cal.App.3d 832, “[S]ome parts of the Education Code exhibit a legislative intent to fully occupy the field to which they pertain thereby denoting the Legislature also clearly intended to preclude collective negotiations and agreements in the same field.’ (Citations omitted)”].) This could not be made more express than by the language of section 47611.5(e) and the preemption doctrine found in Government Code section 3540 of the EERA, articulated in *Round*

*Valley, supra*, 13 Cal.4th 269, *United Steelworkers, supra*, 162 Cal.App.3d 823, *Fontana, supra*, 201 Cal.App.3d 1517, and *Sunnyvale, supra*, 171

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Cal.App.4<sup>th</sup> 168.

UTLA appears to argue that the revision to Education Code section 47605 in 1998 by Assembly Bill 544 (“AB 544”) regarding teacher signatures somehow supports collective bargaining on the charter petition process. However, UTLA misinterprets the effect of AB 544. By way of background, AB 544 was a compromise bill passed to preclude a far more expansive ballot initiative that was strongly opposed by the California Teachers Association. AB 544 was designed to expand charter schools and provided for greater opportunities for the establishment of charter schools.<sup>5</sup>

Prior to the 1998 revision, a petition was to be signed by at least 10% of the teachers currently employed in the district or by at least 50% of the teachers currently employed at one school site. After enactment of AB 544, the petition for a “start up” charter school had to be signed by either one-half the number of teachers that the charter school estimates it will employ or one-half the number of parents the charter school estimates it will enroll in its first year. (Ed. Code, § 47605(a)(1)(A), (B).) After AB

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<sup>5</sup>UTLA offers a reference to legislative history without supporting documentation or citation to the record. The District seeks judicial notice of the cited provisions of the legislative history. (See Motion for Judicial Notice (“MJN”) filed concurrently herewith.)

544, for a conversion charter, the teacher signatures *were limited* to only those teachers that held *permanent status* at the school site.

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Nothing in the legislative history supports the notion that the signature process, which limited teacher participation in providing signatures, was designed to give the union a role in dictating the petition process or the criteria for consideration of whether to approve or deny a charter petition. (Exhibit 1 to MJN.) Moreover, the teacher signature simply “means that the teacher is meaningfully interested in teaching at the charter school” and does not mean that the teacher is agreeing to teach at the school site. (Ed. Code, § 47605(a)(3).) Nor is the petition signature requirement founded in teachers’ “constitutional and statutory rights in their employment” as asserted by UTLA without citation to authority. (Brief p. 19.)

When a school is converted to charter status, the teachers that work at the school site do not lose their employment with the District. Those teachers may choose to leave the District if they are hired by the charter school or they may remain employed in the District. (Ed. Code, § 47605(b)(5)(M) and (e).) The approval of a charter petition is not grounds

for termination of the District's tenured teachers. (Ed. Code, § 44955(a).)<sup>6</sup>

Teachers do not have a constitutional or statutory right to be employed at a

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particular school site. Instead, those teachers that have permanent status have a right to a *position* within the District. (*Ibid*; see also Ed. Code, § 35035(c).)

UTLA next asserts that “by requiring teachers to support the charter effort, the requirement helps ensure that a conversion to charter status will be successful” and “protects the public resources from being appropriated by entities that need not have any meaningful connection to the school community or to the school district.” (Brief p. 19.) These assertions are wholly conjured as evidenced by the lack of any cited authority. This also ignores other statutory provisions that allow for conversion of school sites without teacher signatures. (See Ed. Code, §§ 52055.5(b)(3)(B), 52055.55(b)(3); and, 52055.650(b)(2)(B).) The assertion is also contrary to the conclusion of the court in *Wilson v. State Board of Education, supra*, 75 Cal.App.4<sup>th</sup> at 1138-1140, that appropriation to a charter school is appropriation of public money to a school of the public school system.

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<sup>6</sup> Education Code section 44955(a): “No permanent employee shall be deprived of his or her *position* for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.” (Emphasis added.)

The purpose of AB 544 was not to provide protections for teachers or to encourage union participation in the chartering process. Instead, AB 544 was designed to further the Legislature's policy of promoting charter schools by: 1) adding language to section 47605(b) that "[i]n reviewing petitions for the establishment of charter schools pursuant to this section, 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"; 2) significantly increasing the "cap" on the number of charter schools in the state by allowing an increase of 100 new charter schools each year; 3) requiring an authorizing entity to deny a charter only after a public hearing and presentation of written findings of the reason for the denial; and, 4) providing more options for a charter petitioner to get approval if the governing board of the local district initially denied the charter by authorizing appeal to the county and state to become the charter authorizer. (MJN, Exhibit 1, p. 32-34.)

As UTLA acknowledges, "The Charter Schools Act . . . sets forth a detailed scheme which, among other things, establishes the procedure that must be followed to establish a charter school in California." (Brief p. 16.) To the degree the Legislature has deemed teacher input appropriate in the

chartering process, it has provided for same in Education Code section 47605. The interests of teachers in the petition process does not provide grounds to ignore the express legislative policy that the establishment of a charter school is beyond the scope of collective bargaining.

**2. Education Code Section 47605 Exclusively Governs the Charter Petition Process**

Education Code section 47605 alone sets forth the procedures for establishment of a charter within a school district and exclusively governs the criteria and considerations for approving or denying a charter petition. Altering this statutory scheme by requiring the District and charter petitioners to meet additional requirements renders the subject collective bargaining provisions invalid and without force or effect. (Ed. Code, § 47611.5(e); Gov. Code, § 3540; *Round Valley, supra*, 13 Cal.4th 269, *United Steelworkers, supra*, 162 Cal.App.3d 823, *Fontana, supra*, 201 Cal.App.3d 1517; *Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> 168.) Because the provisions of Article XII-B are outside the scope of negotiations as a matter of law, there is no basis to compel arbitration.

UTLA cites to the signature requirement and the fact that a charter petition may be denied by statute if it does not contain a reasonably comprehensive description of the 16 elements of a charter petition found in section 47605(b)(5)(A)-(P), in an apparent attempt to suggest that these

issues may be addressed in a collective bargaining agreement. However, UTLA offers no authority to support the proposition that the District may treat section 47605 as “guidelines” and require additional procedures or criteria to establish a charter school. To suggest that the District may do so in a collective bargaining agreement is directly contrary to section 47611.5(e) and is contrary to the requirements of section 47605.

UTLA’s purpose in reciting the requirements for a charter petition under section 47605 is unclear. However, it is clear that the cited requirements pertain to the District’s obligations to process and consider a charter petition in conformity with the mandates specified by the Education Code to the exclusion of “negotiations and agreements *in the same field*”. (*United Steelworkers, supra*, 162 Cal.App.3d 832; emphasis added.)

Moreover, the District’s decision as to whether the information in the petition is reasonably comprehensive is squarely within the discretion vested in the school board as part of the Legislature’s implementation of charter schools as part of California’s public school system. (*Wilson v. State Board of Education, supra*, 75 Cal.App.4th 1134-1136; Cal. Const. Art. IX, §§ 1, 5.) The District has no authority to impose the requirements of the collective bargaining agreement upon the charter petitioners. (See

also discussion III.B.4, *infra*, re inability to “harmonize” Article XII-B with the Education Code.)

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### **3. The EERA Invalidates Article XII-B**

UTLA next argues that because the EERA was made applicable to charter school employers in their relations with charter school employees through section 47611.5(a), somehow the legislative policy denying unions a role in the chartering process set forth in section 47611.5(e) is undermined. This is nonsensical. Section 47611.5(a) made the EERA applicable to charter employer-charter employee relations to the degree charter school employees seek to organize - it does not change the limitations of the EERA expressed in Government Code section 3540 or the limitation of section 47611.5(e). Section 47611.5(e) emphasizes that despite application of the EERA to charter employer-employee relations, unions have no role in the charter petition process.

Contrary to UTLA’s assertions, the distinction in the two bills considered to initiate the Charter Schools Act (Senate Bill 1448 and Assembly Bill 2585) was not the application of the EERA in Assembly Bill 2585 (“AB 2585”), but rather the broader notion that union involvement would hinder the establishment of charter schools. Unions have an interest in maintaining their school district employee membership and conversion

of an existing public school to charter status creates the risk the union will lose membership.<sup>7</sup> Rejected AB 2585 specifically required teachers to remain employees of the district for purposes of collective bargaining and provided for approval of a conversion charter petition by the teacher union representative as well as the majority of teachers and parents at the school site. The legislative history did not focus on EERA jurisdiction in declining to enact AB 2585 but instead rejected union involvement as an impediment to the establishment of charter schools:

This bill [AB2585] requires teacher union approval of all charter schools, . . . continuation of elaborate collective bargaining processes . . . On all accounts this bill fails to embrace the basic ingredients of the charter school concept.” (JA 104.)

UTLA does not refute the legislative history of section 47611.5, enacted by Assembly Bill 631 (AB 631). In response to the concern that application of the EERA to charter schools would prevent the approval of new charter petitions, AB 631 was revised to specifically preclude the establishment of charter schools as a subject of 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 filed June 26, 2009, pp. 32-35 and 63].)

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<sup>7</sup> There is no provision in the Charter Schools Act or the EERA that provides for rollover of exclusive representation for the public school to the conversion charter school.

As explained in Section III A, (1), *supra*, the EERA expressly limits its application where the terms of the collective bargaining agreement contravene the state's interest as set forth in statute because they "violate Government Code section 3540's injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code." (*Round Valley, supra*, 13 Cal.App.4th at 284-285.) This limitation is emphasized by the enactment of 47611.5(e) which makes it crystal clear that the chartering process is simply not a subject for collective bargaining. So strong is the state's interest in establishing charter schools that the Legislature has taken the unique step of enacting a statute that definitively excludes collective bargaining on this subject.

UTLA's apparent effort to minimize the effect of section 47611.5(e) to apply only to the decision to approve or deny the charter petition so as to allow a myriad of extra-statutory requirements for petition approval is factually and legally unsupportable. Notably, UTLA offers no explanation as to how the process for consideration of a charter petition is separate from the decision on whether to approve the petition as compliant with the statutory requirements. Nor does UTLA refute that the reference in section 47611.5(e) to approve or a deny of a charter petition made "pursuant to subdivision (b) of Section 47605" renders the statutory bar applicable to

both the process for establishment of a charter and the “ultimate decision” to approve or deny a charter petition. Moreover, the preemption doctrine is not so narrowly construed. Where the decision is not the subject of collective bargaining the “field” is preempted including “procedures and causes” related to the decision. (*United Steelworkers, supra*, 162 Cal.App.3d 832; *Sunnyvale, supra*, 171 Cal.App. 4<sup>th</sup> 180.) Therefore, all the collective bargaining provisions regarding processing and approval of charter petitions are preempted.

UTLA’s conclusory assertion of a distinction between the process and the “ultimate decision” flies in the face of the plain language of section 47611.5(e), ignores the EERA’s limitations on the scope of negotiations, and is offered without any ability to show a legitimate distinction between the process and the decision to approve or deny the petition.

**4. Article XII-B Conflicts with Education Code Sections 47611.5(e) and 47605**

**a. The Relevant Precedent Confirms the Provisions Are Invalid and Cannot Provide a Basis to Compel Arbitration**

Incomprehensibly, UTLA suggests that the case law addressing the issue of whether arbitration is required in the context of a collective bargaining provision deemed invalid under the EERA, is not relevant to the analysis here. There is one key distinction in this matter from the cases

relied upon by the District: Here, there is a specific statute expressly stating the Legislature's intent that the subject of establishing a charter school is

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beyond the scope of negotiations, whereas in the cases relied upon, the court was required to analyze the Legislature's implicit intent to determine whether a conflict existed with the Education Code. Because the legislative intent barring negotiations is expressed in section 47611.5(e) and leaves no room for interpretation, the matter is conclusively outside the scope of negotiations and in conflict with the Education Code.

Not only are the provisions invalid under section 47611.5(e), they conflict with the process governed by Education Code section 47605 for establishing a charter school and are thereby preempted under Government Code section 3540. UTLA has not and cannot demonstrate "harmony" between the collectively bargained for requirements and statute.

UTLA's weak effort to distinguish *Round Valley, United Steelworkers*, and *Fontana* is unavailing. (UTLA does not address or refute *Sunnyvale* in its opposition.) Like each of these cases, this matter presents a collective bargaining agreement contrary to the Legislature's intent, public policy and the Education Code, rendering the provisions preempted under the EERA.

UTLA concedes that Article XII-B imposes upon the District and charter petitioners specific procedures related to conversion of a District school to charter status and requires the District to take specified actions in the context of processing or approving a charter petition. (Brief p. 6.)

UTLA further concedes that “the Charter Schools Act, first enacted in 1992, sets forth a detailed legislative scheme which, among other things, establishes the procedure that must be followed to establish a charter school in California.” (Brief p.16.) UTLA thereby concedes the Article XII-B is in conflict with the Charter Schools Act in that it seeks to govern the procedures of the petition process already governed by the Education Code. (See discussion Section III.B.4 (b) *infra*, re inability to harmonize collective bargaining provisions.)

UTLA’s assertion that *Round Valley*, *United Steelworkers*, and *Fontana* are inapt because they do not address Education Code sections 47611.5 or 47605 cannot stand. Each case articulated the standard for finding a collective bargaining provision invalid under the EERA. Because the right to arbitrate is founded in contract, the invalidity of the contract provisions precludes arbitration. The fact that the standard articulated in these cases under the EERA was applied to different Education Code statutes does not render the cases any less applicable to evaluating the

provisions at issue here. In fact, in the cited cases, the court evaluated whether the collective bargaining provisions were *implicitly* preempted, whereas in this case the provisions are *expressly* preempted. Moreover, each of these cases held that a provision in conflict with the Education Code has no force or effect and therefore may not be the basis to compel arbitration.

*Round Valley* identifies the precedent that where the collective bargaining provisions contravene the legislative scheme, they “violate Government Code section 3540’s injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code.” (*Round Valley, supra*, 13 Cal.App.4th at 285.) *Round Valley* further explained the rule articulated by the *San Mateo* Court that the Education Code preempts collective bargaining agreements if the provisions of the code would be ‘replaced, set aside, or annulled’ by the agreement.” (*Id.* at 285 citing *San Mateo School Dist. v. Public Employment Relations Board, supra*, 33 Cal.3d at 864-866.) Where the agreement is preempted, the arbitrator has no jurisdiction to proceed. (*Id.* at 274.) In *Round Valley*, the court held that the EERA implicitly exempted the nonreelection decision from the permissible scope of bargaining. The Court did not narrowly

apply preemption to only invalidate collective bargaining provisions governing the decision to nonreelect:

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When the Legislature vests exclusive discretion in the body to determine the scope of procedural protections to specific employees, the subject matter may not be the subject of either mandatory or permissive collective bargaining. (*Id.* at 287; emphasis added.)

The Court held that the decision and the “causes and procedures” related to the decision were outside the scope of collective bargaining. (*Ibid.*) Just as in *Round Valley*, the subject provisions contravene the legislative scheme per sections 47611.5(e) and 47605. Therefore the provisions are preempted and the arbitrator has no jurisdiction to proceed.

*United Steelworkers* held that under the EERA, “when Education Code provisions and collective bargaining rights conflict the latter must give way” acknowledging that “the Supreme Court has recently held that the ‘intent of section 3540 is to preclude contractual agreements which would alter [certain] statutory provisions.’ . . .” (*United Steelworkers, supra*, 162 Cal.App.3d at 840 citing *San Mateo School Dist. v. Public Employment Relations Board, supra*, 33 Cal.3d at 864-866.) *United Steelworkers* also broadly applied preemption holding that where the Legislature demonstrates “intent to fully occupy the field” the Legislature intends to “preclude collective negotiations and agreements in the same

field.” (*Id.* at 832.) Under this standard, *United Steelworkers* expressly held the petition to compel arbitration was properly denied pursuant to Code of Civil Procedure section 1281.2(b). (*Id.* at 827.) For the same reasons the trial court properly denied UTLA’s Petition to Compel Arbitration.

*Fontana* also applies to confirm that where, as here, the collective bargaining provision is in conflict with the intent of the Education Code, there is no arbitrable dispute and the petition to compel arbitration is properly denied pursuant to Code of Civil Procedure section 1281.2. (*Fontana, supra*, 162 Cal.App.3d at 1521 and 1525.)

*Sunnyvale*, which UTLA does not address or refute, holds that where the district’s decision is outside the scope of negotiations pursuant to Government Code section 3540 of the EERA, it cannot be challenged as a breach of the agreement. (*Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> at 180.) The *Sunnyvale* court recognized that the *Round Valley* decision was not to be narrowly construed. (*Id.* at 180.) Any effort to harmonize the collective bargaining agreement requirements with the statutory procedures fails where the decision itself is beyond the scope of negotiations. (*Ibid.*)

The [*Round Valley*] holding is not limited to procedural requirements for nonreelection; it applies to the “decision” as a whole. Indeed, the court specified that the Education Code preempted collective bargaining agreements “as to causes and

procedures” governing the reelection decision. (*Ibid*; emphasis in original.)

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Because the Board is exclusively charged with the decision to approve or deny a charter petition and that decision is admittedly beyond the scope of negotiations, the action of granting the Locke Charter Petition cannot be challenged as a breach of the agreement.

ULTA next argues that “no direct conflict exists between the Education Code and the provisions of Article XII-B, Sections 2.0 and 3.0 in the Agreement.” Yet, UTLA never explains how these sections “harmonize” with the express legislative directive that the charter process is not subject to collective bargaining. (Ed. Code, § 47611.5(e).) UTLA cannot assert that the collective bargaining provisions “have absolutely no effect on the Charter Schools Act” when the grievance itself seeks to rescind the Board’s approval of the Locke High Charter Petition for alleged failure to comply with the requirements of the agreement in processing a charter petition. (JA 68.) Nor can its assertion be supported upon review of the collective bargaining provisions as compared to Education Code section 47605. (See Section II, B, 4b, *infra*, for further discussion re conflict with Education Code.) The fact that the charter petition was granted and the school opened in September 2008 does not establish that there is no conflict between the Education Code and the agreement as suggested by UTLA.

Indeed, the grievance is founded upon UTLA's contention that the District failed to comply with the provisions.

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UTLA next seeks to distinguish *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4<sup>th</sup> 1267 and *Gentry v. Superior Court* (2007) 42 Cal.4<sup>th</sup> 443, asserting these cases involved unconscionable provisions rather than collective bargaining provisions in violation of public policy. Both of these cases held that courts will "refuse to enforce arbitration provisions that are unconscionable *or* contrary to public policy." (*Nyulassy v. Lockheed Martin Corp.*, *supra* 120 Cal.App.4<sup>th</sup> at 1278; see also, *Gentry v. Superior Court*, *supra*, 42 Cal.4<sup>th</sup> at 467; emphasis added.) The District has exhaustively shown that the provisions at issue are contrary to public policy as expressly stated by the Legislature in section 47611.5(e) and by their violation of Government Code section 3540.

UTLA also fails to distinguish *Kelton v. Stravinski* (2006) 138 Cal.App.4<sup>th</sup> 941, 949 and *Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-454, which held "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*, *supra*, 138 Cal.App.4<sup>th</sup> at 949.) This means that collective bargaining provisions that are made in violation of the public policy articulated in section 47611.5(e)

and Government Code section 3540, may not be relied upon for any purpose including in an action to compel arbitration. Where there is no arbitrable dispute, a petition to compel arbitration is properly denied pursuant to Code of Civil Procedure section 1281.2.

An arbitrator has no jurisdiction to consider a dispute founded upon an illegal provision of the collective bargaining provision under general contract principles cited above, nor under the specific case law addressing collective bargaining provisions under the EERA. (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 272; *United Steelworkers, supra*, 162 Cal.App.3d at 829-830; *Fontana Teachers, supra*, 201 Cal.App.3d at 1521; *Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> at 172-173.)

**b. Sections 2.0 and 3.0 Conflict with Education Code Section 47611.5(e) and Section 47605 Rendering the Provisions Preempted and Invalid**

Ignoring the conflict with Education Code section 47611.5(e) which precludes the chartering process from being the subject of negotiations, UTLA seeks to avoid the obvious conflict with section 47605 by concluding that it “touches only on the requirements that a chartering applicant needs to meet in submitting a charter proposal to the District.” Thus, UTLA suggests, the agreement may appropriately govern the District’s actions with regard to processing a charter petition. (Brief p. 26.)

This proposition fails to acknowledge that section 47605 also charges *the District* with statutory obligations to evaluate the charter petition under the requirements and within the timelines set by statute. It is the District's responsibility to evaluate the criteria under which a petition may be granted, exercise its discretion to determine whether the charter petition presents a sound educational program, determine compliance with the statutory requirements and prepare findings where a charter petition is denied. (*Wilson v. State Board of Ed., supra*, 75 Cal.App.4<sup>th</sup> at 1139-40 [“The chartering authority controls the application approval process, with sole power to issue charters.”].) UTLA's position further ignores the fact that the negotiated provisions do, in fact, impose additional requirements upon the charter petitioners than those presented by section 47605.

As UTLA acknowledges, the agreement imposes “procedural obligations on the District” which is contrary to the express terms of section 47611.5(e). UTLA contends that the requirements of the agreement are “completely harmonized with the Charter Schools Act.” (Brief p. 27.) Yet, UTLA fails to even identify how sections 2.0 and 3.0 even fall within the scope of negotiations under the EERA. (*Round Valley, supra*, 13 Cal.4th at 280 [“The scope of this duty [to negotiate] is limited to ‘matters relating to wages, hours of employment, and other terms and conditions of

employment.’ (Gov. Code, § 3543.2, subd. (a).)”.) While asserting harmony with the Education Code, UTLA does not dispute that not one of the obligations imposed upon the District or the charter petitioners by the agreement is required by section 47605. In *Round Valley*, the Court overturned the Court of Appeal’s effort to harmonize the Education Code and the EERA that UTLA offers here. The Court of Appeal reasoned that because the Education Code did not expressly preclude the additional procedural protections negotiated in the agreement, by “harmonizing the applicable provisions of the Education Code and Government Codes, a collectively negotiated contract may supplement the [statutory] procedures contained in [the statute] . . .” (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at 285.)

Rejecting this analysis, the Supreme Court held:

In considering the “context of the statutory framework as a whole” (citations omitted), we conclude the statutes at issue here cannot be “harmonized” in the manner advocated by Association or attempted by the Court of Appeal. Section 44929.21(b) is explicit in its terms of notice for a decision against reelection of probationary teachers after the second year of employment. Government Code section 3540 specifically states its provisions governing collective bargaining “shall not supersede other provisions of the Education Code.” Thus, harmony is provided by the fact that the statutes are consistent on their face. (*Id.* at 285-286.)

The *Round Valley* Court determined that where the implicit intent of the Legislature was to vest the school district with the decision to nonreelect,

collective bargaining was precluded as to the decision and the “causes and procedures” related to such decision. (*Id.* at 284, 287.)

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In *Sunnyvale*, the court also found that where the decision itself is not subject to collective bargaining, preemption precluded any procedures related to the decision from being the subject of collective bargaining. (*Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> 180 citing *Round Valley, supra*, 13 Cal.4<sup>th</sup> at 287.)

In *United Steelworkers*, the union argued that the collective bargaining provisions harmonized with the Education Code. In finding the provisions invalid as contrary to the Education Code, the court acknowledged the holding of *San Mateo* that where the Education Code exhibits “a legislative intent to fully occupy the field to which [the collective bargaining provisions] pertain” the Legislature thereby denotes that it also “clearly intended to preclude collective negotiations and agreements in the same field.” (*United Steelworkers, supra*, 162 Cal.App.3d at 832-833.) By acknowledging the broad reach of preemption to cover the “same field,” *United Steelworkers* holds the provisions of the collective bargaining agreement purporting to govern the process for establishing a charter school cannot be harmonized with the Education

Code and the collective bargaining provisions are preempted. (*Id.* at 840 citing *San Mateo, supra*, 33 Cal.3d at 864-866.)

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While UTLA states that sections 2.0 and 3.0 “completely harmonized with the Charter Schools Act” it offers this conclusion without demonstrating *how* the provisions harmonize. UTLA cites to only one of the numerous requirements in sections 2.0 and 3.0, stating it is “a minimal procedural obligation” to require the District to provide the union with a copy of the charter within five days of the District’s receipt of same. But UTLA misrepresents the obligations that the collective bargaining agreement imposes on the District. Section 2.0(c) actually requires as follows:

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. (JA 60-61.)

Contrary to UTLA’s description of an inconsequential requirement, this provision not only requires the District to ensure the union receives the petition within five days but also mandates that UTLA shall be granted *not less than 30 days in which to submit comments and/or recommendations to the Board*. This is entirely inconsistent with of section 47605(b).

To the degree that teachers have comments for the Board with regard to a charter petition, they are properly made at the public hearing which is to be held *within 30 days* of the receipt of the charter petition. (Ed. Code, § 47605(b) [“No later than 30 days after receiving a petition . . . the governing board of the school district shall hold a public hearing *on the provisions of the charter*, at which time the governing board of the school district shall *consider the level of support for the petition by teachers* employed by the district, other employees of the district, and parents.”]; emphasis added.) Therefore, the requirements of section 2.0(c) contradict the timing and process set forth in the statute. Moreover, by requiring the Board to receive union “comments and/or recommendations” before it renders a decision, the agreement provides for union involvement in the decision, contrary to the letter and spirit of the Education Code.

Notably, UTLA does not attempt to reconcile any other collective bargaining provision nor can it in light of the fact that they impose obligations beyond those called for by the Education Code: Section 2.0(a) requires the District to adopt procedures and instructions for charter petitioners to make disclosures prior to soliciting signatures despite the fact that section 47605 puts responsibility for gathering signatures upon the charter petitioner and does not involve the District in the signature

gathering process; Section 2.0(a) further provides that the charter petition considered by the Board must be substantially the same as the petition used

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for obtaining signatures though this requirement is not found in the statute; Section 2.0(b) requires the District to adopt procedures and instructions for charter petitioners to discuss with UTLA options to seeking a charter petition which contradicts the legislative intent expressed in section 47605 that establishment of charter schools is to be encouraged; Section 2.0(d) requires the District to adopt procedures and instructions for charter petitioners to disclose “their intentions” and involve UTLA early on in the charter petition organizational stages which is not required by statute and which, again, contradicts the legislative intent expressed in section 47605 that charter schools be encouraged. (JA 60-63.) Each of these provisions is directly contrary to section 47605 as well as the legislative intent set forth in AB 631 and section 47611.5(e) that the union not be involved with, or create an impediment to, the establishment of charter schools.

UTLA does not address the fact that Section 3.0 sets forth a variety of substantive requirements for a charter petition, none of which is required by statute. Section 3.0 requires a charter petitioner to provide information to obtain signatures and disclose terms and conditions of employment far beyond the requirements of section 47605 (e.g. leaves of absence; whether

charter will seek District coverage for benefits; salaries, pay rates and extra duty assignments; workers compensation; assurance programs; hours, duties and work schedules; job security; performance evaluation; class size; extended assignment duties; and “any other significant terms and conditions to be applied at the Charter School.” (JA 61-63.) This clearly conflicts with section 47605 which does not require any disclosures to obtain signatures other than what is required to be in the proposed charter (i.e., retirement benefits; district leave rights; declaration of public school employer). (Ed. Code, § 47605 (b)(5)(A) – (P).)

UTLA’s assertion that “not a single provision of the collective bargaining agreement touches upon the approval or denial of such a petition” is simply false. (Brief, p. 27.) On their face the provisions involve UTLA in the process and decision including by virtue of the obligation for the Board to receive UTLA comments and recommendations before granting a charter petition. The provisions seek to govern the content that a petition must include to obtain the Board’s approval by mandating the District to “adopt procedures and instructions” to compel charter petitions to include the additional information. (JA 60, 61.) These requirements are contrary to both section 47611.5(e) and section 47605. By attempting to mandate the District to require charter petitions to comply

with additional procedures and include additional content in their petitions, “when processing or considering approval,” the agreement places the

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District at odds with the Education Code and subject to challenge for failure to comply with section 47605 in considering a charter petition.

UTLA appears to concede that the requested remedy of rescission of the charter approval violates 47611.5(e) but nonetheless argues that the arbitrator could evaluate whether “this non-collective-bargaining-agreement-based remedy” is deemed to conflict with statute. (Brief, p. 28.) Notably, UTLA fails to identify any remedy that an arbitrator could provide that would not interfere with the District’s statutory rights and/or duties, making arbitration an idle act. (*Fontana, supra*, 201 Cal.App.3d at 1526 citing Civ. Code, § 3532 [“The law neither does nor requires idle acts”].) An arbitrator has no jurisdiction where, as here, the provisions upon which arbitration is sought to be compelled are superseded and preempted as in conflict with the Education Code and contrary to clearly stated public policy.

**C. Preemption Clearly Bars Arbitration Where the Collective Bargaining Provisions Are Invalid As Contrary to Public Policy, Outside the Scope of Collective Bargaining or In Conflict with the Education Code**

As has been established, arbitration may only be compelled under Code of Civil Procedure section 1281 where there is a *valid* agreement to

arbitrate. The court, not the arbitrator is charged with determining whether the agreement is valid. In making its argument that arbitration must be ordered even when the collective bargaining provisions are preempted, UTLA, like the Court of Appeal below, does not acknowledge, address or refute the precedent applying Code of Civil Procedure section 1281.2 to bar arbitration under the EERA. UTLA further ignores the holding in *Armendariz* that the determination is made before arbitration, not upon judicial review of the arbitration award. (*Armendariz, supra*, 24 Cal.4<sup>th</sup> at 110.) UTLA simply fails to explain how contractual arbitration is to be compelled where there is no valid contractual provision upon which to order the parties to arbitrate.

Nor may UTLA rely upon the procedural provisions of the EERA as its foundation to assert the right to compel arbitration where the EERA has been made inapplicable by Education Code section 47611.5(e) and by its own terms. (See Section III.A.1 re inapplicability of EERA procedures to compel arbitration.)

Despite its attempts to distinguish *Round Valley*, UTLA fails to refute that the Supreme Court held the effect of preemption is to preclude such collective bargaining agreements rendering the agreement to arbitrate invalid and further held an arbitrator exceeds his authority in purporting to

enforce preempted provisions. (*Round Valley, supra*, 13 Cal.4th at 282 citing *San Mateo, supra*, 33 Cal.3d 850.) UTLA cannot overcome the fact

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that 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.4<sup>th</sup> 154, 167.)

Indeed, UTLA misrepresents the holding of *Round Valley* “to only permit judicial review of an arbitrator’s award to ensure harmony with public policy” or if arbitration “results in an award that conflicts with Education Code section 47611.5(e).” In fact, the ruling provides that a preempted provision has no force or effect. (*Round Valley, supra*, 13 Cal.4th at p. 272 [“the arbitrator exceeded his powers in this case by purporting to give effect to those preempted provisions.”]; see also *Sunnyvale, supra*, 171 Cal.App.4<sup>th</sup> at 183 [arbitrator acted in excess of powers in adjudicating issue under preempted provisions].)<sup>8</sup> Absent any effect, the collective bargaining provisions provide no basis to arbitrate.

Like the Court of Appeal, UTLA simply ignores the holdings of *United Steelworkers* and *Fontana*, both of which held that the school district properly refused to proceed to arbitration and the lower court

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<sup>8</sup> Notably, in *Round Valley*, it was acknowledged that the issue of validity of the agreement was not within the arbitrator’s jurisdiction. (*Id.* at 273 [“Although District challenged the validity of the contractual provisions, the arbitrator left that issue to judicial determination.”].)

properly denied a petition to compel under Code of Civil Procedure section 1281.2 where the collective bargaining provisions were preempted.

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(*United Steelworkers, supra*, 162 Cal.App.3d at 832-833; *Fontana, supra*, 201 Cal.App.3d at 1521, 1526.) UTLA further ignores the fact that both of these cases were cited with approval by *Round Valley*. (*Round Valley, supra*, 13 Cal.4th at 287.) *Round Valley* did not hold, as UTLA suggests, that a school district must proceed to arbitration under illegal, invalid, unenforceable provisions of a collective bargaining agreement. Instead, it acknowledged that where the court determines the provisions are preempted, there is no contractual foundation upon which an arbitration may proceed. (*Ibid.*)

Looking to inapt cases that were not decided under the EERA, UTLA argues that the issue of preemption under the EERA must be presented for the arbitrator's decision. UTLA argues that the Court of Appeal decision in *California Correctional Peace Officers Association v. State of California* ("*Peace Officers*") (2006) 142 Cal.App.4<sup>th</sup> 198, requires the parties submit the issue of whether "an alleged conflict between a statute and a provision in a labor agreement preempts arbitration." (Brief, p. 29.) This is neither a correct statement of the issue presented nor does it accurately reflect the *Peace Officers* case.

Unlike *Peace Officers*, this case does not present the issue of whether a statute authorizes the conduct complained of in the grievance.

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Instead, the issue is whether statutory law invalidates the contractual terms that serve as the foundation for arbitration. *Peace Officers* is not controlling because it does not address the validity of the contractual provisions.

UTLA cannot refute the fact that *Peace Officers* was decided under the Dills Act, not under the EERA.<sup>9</sup> Unlike the Dills Act, the EERA conditions arbitration on the collective bargaining provisions being within the scope of the duty to negotiate and not being superseded by the Education Code. (Ed. Code, §§ 3540; 3543.2; 3548.5, 3548.7.)

UTLA quotes from *Peace Officers* that “[e]ven assuming . . . that the [statutory code] supersedes any inconsistent provisions of the [memorandum of understanding], [the statute] in no way prevents the presentation of this argument to the arbitrator.” (Brief p. 30.) UTLA does not dispute that in *Peace Officers*, the case was “otherwise arbitrable” and the reliance on statute was an attack on the merits of the grievance, not the validity of the contract provisions. (*Peace Officers, supra*, 142 Cal.App.4<sup>th</sup> at 208.) Because *Peace Officers* analyzed whether a statutory defense was

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<sup>9</sup> The Ralph C. Dills Act is found at Government Code sections 3512-3524 and codifies collective bargaining rights for State employees, not educational employees which are covered by the Educational Employment Relations Act at Government Code section 3540 et. seq.

subject to arbitration under the Dills Act which undisputedly does not have a nonsupercession clause as does EERA, it is inapposite authority. Nor was

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there a legislative mandate as exists in this case, that the collective bargaining provision was beyond the scope of negotiations as a matter of law. To apply *Peace Officers* here would nullify section 47611.5(e) and Government Code section 3540. (*American Nurses Ass'n. v. O'Connell* (2010) 185 Cal.App.4<sup>th</sup> 393, 408 [the court is to avoid an interpretation that renders any portion of a statute superfluous, unnecessary, or a nullity because the court presumes that the Legislature does not engage in idle acts].)

The relevant case law decided under the EERA provides that where there is a conflict with the Education Code, the contract provision is invalid under section 3540 of the EERA and therefore cannot serve as the basis to arbitrate under the EERA. *Peace Officers* is simply inapt as is UTLA's reliance upon unidentified "federal judiciary decisions." It is the collective bargaining provisions themselves, not the claims or defenses involved with the merits of the grievance, that are invalidated by section 47611.5(e), section 47605, Government Code section 3540, and the case law interpreting the EERA.

The remaining cases cited by UTLA are equally inapposite.

*Broughton v. Cigna Healthplans* (1999) 21 Cal.App.4<sup>th</sup> 1066, considered,

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under the Federal Arbitration Act, whether a statutory claim under Consumer Legal Remedies Act (“CLRA”) may be subject to arbitration under a private arbitration agreement or whether there was “an inherent conflict between arbitration and the CLRA” based upon the damages sought under CLRA. Though the case did not address any issues presented to this Court, the *Broughton* court, not an arbitrator, considered the arbitrability of the dispute as the court is asked to do in this matter.

*Moncharsh v. Heily & Blase* (1992) 3 Cal.4<sup>th</sup> 1, does not assist UTLA as *Moncharsh*, like the other cases cited by UTLA, was not decided under the EERA and did not hold that the issue of contractual validity may only be challenged after arbitration. *Round Valley*, acknowledging *Moncharsh*, recognized the unique nature of the EERA nonsupercession clause, “[s]hould District’s interpretation of the law prevail, we would be faced with an ‘explicit legislative expression of public policy’ that issues involving the reelection of probationary teachers not be subject to arbitration. . . . This expression of public policy would thus conflict with the expressed legislative intent to limit private arbitration awards to statutory grounds for judicial review.” (*Round Valley, supra*, 13 Cal.4<sup>th</sup> at

277.) This language makes clear that *Round Valley* held that where the collective bargaining provisions are invalidated by conflict with the Education Code, an arbitrator is without jurisdiction to proceed. (*Id.* at 272.) *Round Valley* went on to affirm that *United Steelworkers and Fontana*, which both denied petitions to compel arbitration under the EERA, “reached the correct result under the statutory scheme.” (*Id.* at 277.)

*Service Employees International Union, Local 1000 v. Department of Personnel Administration* (2006) 142 Cal.App.4<sup>th</sup> 866, also fails to assist UTLA. In that case, the union did not challenge the validity of the collective bargaining agreement nor did the court consider whether to compel arbitration under Code of Civil Procedure section 1281. Rather, the court reviewed a ruling on demurrer that the union must first exhaust its contractual rights under the grievance procedure. The union did not challenge the collective bargaining provisions as invalid but rather argued that the employer was “manipulating the grievance procedure to impose a prior restraint on the union’s constitutional right to communicate with employees,” and that it should not have to exhaust the collective bargaining procedures because “the dispute presents a constitutional, not a contractual, issue.” (*Id.* at 870-871.) As is evident, the case is of no assistance in

evaluating whether an invalid agreement made contrary to law is subject to arbitration under the EERA.

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The instant case does not present the question of whether an arbitrator may analyze statutory construction when considering *the merits* of the grievance. UTLA offers no authority for the proposition that the arbitrator is charged with evaluating the validity of the arbitration agreement absent an express agreement to submit questions of arbitrability to the arbitrator. Nor does UTLA refute the case law holding that the arbitrator has no authority to invalidate the collective bargaining provisions under the EERA. (*Fontana, supra*, 201 Cal.App.3d at p. 1521.) Because the issue is the purview of the court, there is no basis to submit the question to an arbitrator.

### **III. CONCLUSION**

Reflecting the basis for the Court of Appeal decision, UTLA contends that the public policy favoring arbitration mandates arbitration even when the terms are contrary to law. This position asks this Court to read Education Code section 47611.5(e) as well as the nonsupersession clause of the EERA, out of the law and deny them any effect. UTLA's position is contrary to law and ignores the Legislature's express statement

of the public policy to encourage the establishment of charter schools by declining to allow it to be the subject of collective bargaining.

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Because the Legislature has expressly stated that the process to establish a charter school is not subject to collective bargaining, the provisions of Article XII-B are invalidated. (Ed. Code, § 47611.5(e).) This is consistent with the statutory language that it is “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.” (Ed. Code, § 47605(b).) Moreover, the EERA itself bars the subject provisions by virtue of Government Code section 3540. Here, the subject provisions call for procedures and disclosure over and above the statutory requirements of Education Code section 47605 such that to comply with the the agreement would put the District in violation of the statute.

Under these circumstances the law is clear: Article XII-B is preempted by Education Code sections 47611.5(e) and 47605 and its provisions are therefore invalid. Absent valid collective bargaining provisions, there is no agreement to arbitrate. The trial court properly denied the Petition to Compel Arbitration based upon section 47611.5 and *Round Valley* finding that it was beyond the District’s power to agree to the

subject provisions. Because the trial court's ruling is consistent with law,  
the District respectfully requests this Court affirm the ruling.

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Dated: July 22, 2010

DANNIS WOLIVER KELLEY

SUE ANN SALMON EVANS

By 

SUE ANN SALMON EVANS  
Attorneys for Respondent  
LOS ANGELES UNIFIED SCHOOL  
DISTRICT

## CERTIFICATE OF COMPLIANCE

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Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this Reply Brief On The Merits was produced using 13-point Roman type including footnotes and contains approximately 13,902 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: July 22, 2010

DANNIS WOLIVER KELLEY

SUE ANN SALMON EVANS

By

  
SUE ANN SALMON EVANS  
Attorneys for Respondent  
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 BRIEF ON THE MERITS** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1 Copy:  
Jesus Quinonez  
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Second Appellate District  
300 South Spring Street  
Los Angeles, CA 90012

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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.

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Executed on July 22, 2010 at Long Beach, California.

Ila Friend

\_\_\_\_\_  
Type or Print Name



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Signature