No. A151654

IN THE

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION TWO

San Francisco Police Officers' Association,

Petitioner/Appellant,

v.

San Francisco Police Commission, et al.,

Respondents/Appellees.

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO
THE HONORABLE NEWTON LAM, PRESIDING
LOWER COURT CASE NO.: CPF 16-515408

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS/APPELLEES SAN FRANCISCO POLICE COMMISSION ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

I. INTRODUCTION

Amici curiae the League of California Cities and the California State Association of Counties ask this Court to affirm the trial court's ruling that the City and County of San Francisco is not obligated to arbitrate whether it failed to adequately negotiate amendments to its police department's use of force policy with Petitioner/Appellant the San Francisco Police Officers Association.

For four decades, California law has unequivocally held that local law enforcement agency policies governing peace officers' use of force are not subject to mandatory collective bargaining with peace officer labor unions. In this case, the Association challenges that well-settled precedent, albeit in an indirect way. The Association claims that its labor contract with the City requires the City to arbitrate whether it adequately negotiated with the union before adopting amendments to its use of force policy. But state law gives the City exclusive authority over determining its use of force policy, thereby triggering an exception to the labor contract's grievance procedure. Thus, for the Association to prevail, this Court must either (1) reverse long-standing precedent holding that use of force policies are not subject to mandatory collective bargaining or (2) find that the parties agreed in their labor contract to arbitrate this particular dispute, even though the City has no obligation under state law to negotiate changes to its use of force policy. Neither outcome is tenable under the law and the facts of this case.

As discussed below, this Court should not dilute local agencies' constitutional authority over peace officer use of force policies by subjecting them to the obligations of collective bargaining, including arbitration. Indeed, as courts have long recognized, such policies are so

fundamental to the proper operation of a law enforcement agency that they cannot be just another chip to be traded at the bargaining table. Further, as the City demonstrates in its Respondent's Brief, nothing in the parties' labor contract indicates that the City agreed to arbitrate a dispute over its use of force policy. Accordingly, this Court should affirm the trial court's ruling in favor of the City.

II. LEGAL ARGUMENT

For collective bargaining purposes, California law distinguishes between subjects that must be negotiated with labor unions and those that are left to the employer's discretion. (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638.) A law enforcement agency's use of force policy historically has fallen into the category of subjects that need not be negotiated with peace officer labor unions. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 664; *San Jose Peace Officers Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 945-946.) Here, the San Francisco Police Officers Association ("SFPOA") seeks to upend this well-established law by claiming the City and County of San Francisco ("City") is obligated under the parties' labor contract to arbitrate whether it adequately negotiated with SFPOA over amendments to the City's use of force policy.

Understanding how mandatory subjects of collective bargaining are determined under state law is essential to resolution of this case. It is also necessary to examine how courts have treated use of force policies under this legal framework. First, however, it is important to explain why this case is not merely about a demand to arbitrate a contractual dispute.

A. SFPOA'S RIGHT TO ARBITRATE THE UNDERLYING DISPUTE IS CONTINGENT ON WHETHER MODIFICATIONS TO A USE OF FORCE POLICY MUST BE COLLECTIVELY BARGAINED

This case is before the Court on appeal from the trial court's denial of SFPOA's petition to compel arbitration. But, despite SFPOA's focus on general principles favoring arbitration of labor disputes, this case is really about whether use of force policies must be negotiated with labor unions.

The grievance procedure in the parties' Memorandum of Understanding ("MOU") prohibits SFPOA from filing a grievance over actions by the City that are necessary to comply with federal, state, or local law, or that the City has reasonably determined to be necessary to ensure compliance with such laws. (Appellant's Appendix ("AA") vol. III, p. 88.) In the grievance that gave rise to the petition to compel, SFPOA alleged that the City violated Article I, Section 4 of the MOU, entitled "Negotiation Responsibility," by failing to negotiate in good faith before implementing two proposed amendments to the City's use of force policy – one banning an officer from firing a weapon at a moving vehicle, the other prohibiting use of a carotid restraint. (AA vol. III, pp. 593-599.) In deciding whether the MOU required arbitration of this grievance, the trial court examined state law governing the negotiability of use of force policies and, based on that review, concluded the City had made a reasonable determination that implementation of the policy amendments was necessary to comply with state law. The Court thus held that the MOU did not require arbitration of SFPOA's grievance. (AA vol. III, p. 676; p. 3, ln. 2-8.)

The issue before this Court, then, is not an abstract one of whether general principles favoring arbitration compel arbitration of SFPOA's

grievance. Rather, the issue is whether SFPOA's grievance falls under the specific exception to the MOU's grievance procedure because it involves an action that the City reasonably determined to be necessary to comply with state law. As discussed below, the trial court correctly concluded that the exception applies in this case because, under state law, the authority to adopt or modify a use of force policy rests solely with the city or county, and thus is not amenable to mandatory collective bargaining.

B. THE SCOPE OF MANDATORY COLLECTIVE BARGAINING UNDER CALIFORNIA LAW

The Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 et seq., governs collective bargaining for California cities and counties. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) Under the MMBA, a city or county must "meet and confer in good faith" with labor unions representing its employees over matters that fall within the "scope of representation." (Gov. Code, § 3505.) The "scope of representation" includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." (Gov. Code, § 3504.)

The "scope of representation" does not, however, include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Gov. Code, § 3504.) This language was added to the MMBA to "forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616.) Thus, "fundamental managerial or policy decisions" are outside the scope of representation, and city and county

employers are not required to negotiate them with labor unions. (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631-632.)

The MMBA does not clearly define what constitutes a "fundamental managerial or policy decision." (*Id.* at p. 631.) In making this determination courts typically look at whether the decision "directly affect[s] the quality and nature of public services." (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 664.)

Most of the cases finding a subject to be a fundamental managerial policy decision – and thus not a subject for mandatory collective bargaining – have involved peace officers. For example, in *Claremont*, the California Supreme Court found that the city's decision to take measures to prevent racial profiling by its police officers was a non-negotiable policy decision. (39 Cal.4th at p. 632.) In *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, the court of appeal concluded that police department policies allowing a member of the citizens' police review commission to attend police department hearings on citizen complaints and sending a department representative to answer questions from commission members about individual citizen complaints were fundamental policy decisions excluded from collective bargaining requirements. (*Id.* at p. 937.)

Courts also have found policies relating to investigations of peace officers to be fundamental policy decisions outside the scope of mandatory bargaining. In *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, the court held the county had no obligation to negotiate with the deputies' union over a policy that denied deputies access to the department's investigation file prior to being interviewed as part of the investigation. (*Id.* at pp. 44-45.) In so holding, the court noted that the policy was adopted to implement "best practices" in

investigations and "to ensure the integrity and reliability of future internal affairs investigations." (*Id.* at p. 45.)

Similarly, in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, the court found a policy prohibiting deputies from speaking with each other about an officer-involved shooting before being interviewed about the event was a fundamental policy decision excluded from mandatory bargaining. (*Id.* at p. 1644.) The court noted that the policy's objective "was to collect accurate information regarding deputy-involved shootings," thereby "foster[ing] greater public trust in the investigatory process." (*Ibid.*)

In sum, California law does not require cities or counties to negotiate with labor unions over fundamental policy decisions. Such decisions include adoption of policies that foster greater public trust in law enforcement agencies by bringing their practices in line with accepted norms, such as eliminating racial profiling and ensuring the integrity of internal investigations into officer misconduct. As discussed next, use of force policies fall squarely within this category of non-negotiable fundamental policy decisions.

C. USE OF FORCE POLICIES ARE NOT SUBJECT TO MANDATORY COLLECTIVE BARGAINING

The first court of appeal decision involving a labor union's challenge to a local agency's use of force policy, *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364, did not address whether the policy was subject to mandatory bargaining. The decision nonetheless is instructive for what it says about a city's authority to adopt such policies. First, the court declared that adopting and enforcing a use of force policy is an exercise of the police power granted to cities and counties by Article XI,

section 7 of the California Constitution. (*Id.* at pp. 371-372.) Second, the court made the following observation about who is best suited to determine the parameters of a use of force policy:

> The formulation of a policy governing use of deadly force by police officers is a heavy responsibility involving the delicate balancing of different interests: the protection of society from criminals, the protection of police officers' safety, and the preservation of all human life if possible. This delicate judgment is best exercised by the appropriate legislative and executive officers.

(*Id.* at p. 371.)

Two years later, this Court in *San Jose Peace Officers Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, built upon the foundation laid by the *Long Beach* court. In *San Jose*, the city's police chief issued a revised use of force policy without negotiating the policy with the officers' union first. (*Id.* at p. 938.) The union filed suit claiming the city violated its duty under the MMBA to meet and confer over the policy. (*Id.* at p. 941.)

After surveying case law on the scope of representation under the MMBA and the federal National Labor Relations Act, the court noted that a use of force policy could have an effect on a police officer's safety, and thus might be considered a term or condition of employment. (*Id.* at pp. 945-946.) Nonetheless, the court concluded:

> the use of force policy is as closely akin to a managerial decision as any decision can be in running a police department, surpassed only by the decision as to whether force will be used at all. While private managerial concepts do not translate easily to the public sector, we can imagine few decisions more 'managerial' in nature than the one which involves the conditions under which an entity of the state

will permit a human life to be taken.

(*Id.* at p. 946.) The court then observed (after quoting the language from *Long Beach* quoted above) that, unlike a situation where hiring more employees or purchasing better equipment could alleviate dangerous working conditions – a situation that might trigger a duty to negotiate over safety impacts of a managerial decision – "the safety of the policeman, as important as it is, is so inextricably interwoven with important policy considerations relating to basic concepts of the entire system of criminal justice that we cannot say that the use of force policy concerns 'primarily' a matter of wages, hours or working conditions." (*Ibid.*)

Building on *Long Beach*, the court then reiterated that adoption of a use of force policy is an exercise of local police power under Article XI, section 7 of the state constitution, and went on to note that a local agency "may not suspend, bargain or contract away its police power." (*Id.* at p. 947.) Rejecting the union's argument that the city need only negotiate over the use of force policy, not reach agreement on it, the court concluded that "[t]he forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises [citation] is no place for the 'delicate balancing of different interests: the protection of society from criminals, the protection of police officers' safety, and the preservation of all human life, if possible.' [citation]." (*Id.* at p. 948.)

Although the California Supreme Court has not directly addressed the issue of the negotiability of use of force policies, it has approved the holding in *San Jose*. In *Building Material & Construction Teamsters' Union*, *supra*, the City and County of San Francisco argued that its decision to transfer work from employees in one bargaining unit to those in another bargaining unit was a fundamental managerial decision that was not subject

to mandatory negotiations. (41 Cal.3d at p. 662-663.) In rejecting the City's reliance on *San Jose* and *Berkeley*, the Court stated:

> Decisions involving the betterment of police-community relations and the avoidance of unnecessary deadly force are of obvious importance, and directly affect the quality and nature of public services. The burden of requiring an employer to confer about such fundamental decisions clearly outweighs the benefits to employer-employee relations that bargaining would provide.

(*Id.* at p. 664.)

No published decision has directly addressed the negotiability of use of force policies in the forty years since *San Jose* was decided. Nonetheless, courts continue to cite *San Jose* when describing what constitutes a fundamental managerial policy decision under the MMBA. And no court has rejected the California Supreme Court's approval of *San Jose* in *Building Material & Construction Teamsters' Union.*

Indeed, the Court's approval of the holding in *San Jose* is supported by its more recent ruling in *Claremont*, which set out the current balancing test for determining negotiability of a subject under the MMBA. Quoting the U.S. Supreme Court, the *Claremont* Court noted:

> The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. [Citations.] This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process.

(39 Cal.4th at p. 637, quoting *First National Maintenance Corp. v. N.L.R.B.* (1981) 452 U.S. 666, 678.)

Although courts have not addressed use of force policies under the *Claremont* standard, it is easy to see that such policies are not amenable to collective bargaining. Often, changes to use of force policies are the result of changes in how courts interpret the Fourth Amendment. Compliance with court rulings is not negotiable, nor are disputes over how to comply with them the type of dispute that can be resolved through negotiations, factfinding,[1] or arbitration.

Further, law enforcement agencies and policy experts continually evaluate the effectiveness and consequences of particular uses of force. As best practices change, agencies modify their use of force policies accordingly, as the City did here. Whether to adopt, modify, or eliminate a particular use of force is not the type of issue that can be resolved through a process designed to resolve disputes over working conditions. (*San Jose*, 78 Cal.App.3d at p. 948.)

Additionally, subjecting every change in law or best practices to mandatory bargaining, and its attendant dispute resolution procedures, would place a tremendous burden on law enforcement agencies. Thus, the "transactional cost" of subjecting use of force policies to mandatory bargaining would outweigh any value bargaining might have in such circumstances. (See *Claremont*, 39 Cal.4th at p. 638 [the "transactional cost" analysis "helps to ensure that a duty to meet and confer is invoked

[1] The MMBA allows a labor union to demand factfinding by a tripartite panel over any dispute within the scope of mandatory bargaining. (Gov. Code, §§ 3505.4, 3505.5, 3505.7; *San Diego Housing Commn. v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, 18.)

only when it will serve its purpose"].) [2]

Put simply, nothing in the legal landscape over the past four decades indicates that the law or policy underlying *San Jose* is no longer valid. Thus, there is no basis for this Court to overrule settled precedent and hold that the City's use of force policy is subject to mandatory bargaining under the MMBA.

D. SFPOA'S GRIEVANCE IS NOT SUBJECT TO ARBITRATION BECAUSE UNDER STATE LAW THE CITY MUST EXERCISE SOLE AUTHORITY OVER ITS USE OF FORCE POLICY

As *Long Beach*, *San Jose*, and *Building Materials* recognize, a use of force policy is so fundamental to the operation of a law enforcement agency that it cannot be subject to mandatory collective bargaining. This is because under Article XI, section 7 of the California Constitution, the power to adopt or modify a use of force policy rests exclusively with the city or county as an exercise of its police power. As the case law recognizes, the burden of exercising this great responsibility falls to legislative and executive officers who are directly accountable to the public

[2] Under the MMBA, an employer may be required to bargain over the *effects* of the policy on working conditions, as opposed to the policy decision itself. (See *Claremont Police Officers Assn.*, *supra*, 39 Cal.4th at p. 633 [recognizing the distinction between an employer's fundamental policy decision and the effects of that decision, the latter of which may be subject to mandatory bargaining].) This distinction is irrelevant here, however, because by the time SFPOA amended its grievance on December 28, 2016, the parties had completed negotiations over all of the effects of the proposed use of force policy amendments on officers' working conditions that the Union had identified, such as the training officers would receive on the new policy and when they would be subject to discipline under it. (AA vol. III, p. 477, ¶ 17; pp. 507-508.) SFPOA's suggestion on pages 8-10 of its Reply Brief that additional unidentified effects remained to be negotiated at the time the grievance was amended has no support in the record.

for their decisions. (*San Jose Peace Officers Assn., supra,* 78 Cal.App.3d at pp. 948-949; see Grodin, *Author's Comments to Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1999) 50 Hastings L.J. 761, 767 [noting that the "fundamental policy decisions" exemption to mandatory bargaining reflects the "political nature of the public sector"].)

Subjecting a use of force policy to mandatory bargaining would impermissibly –and unconstitutionally – give publicly unaccountable peace officer labor unions the ability to control the formulation and modification of such policies. Of course, the MMBA allows the employer to confer voluntarily with the union and ultimately reject its proposals regarding a use of force policy, as the City did here. (*International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271.) But, as case law acknowledges, determining an appropriate use of force policy involves a "delicate balancing of different interests" that does not comport with the collective bargaining process set forth in the MMBA. (*San Jose Peace Officers Assn., supra,* 78 Cal.App.3d at p. 948.) Thus, *requiring* the agency to negotiate with a labor union over the policy impermissibly infringes on its exercise of constitutional police powers.

Further, existing case law does not even consider the potential that a use of force policy could be modified through contractual grievance arbitration, as SFPOA seeks to do here. The Union claims that the scope of arbitration would be limited to whether the City negotiated in good faith before implementing the use of force policy amendments. (AOB p. 18.) But to remedy this alleged contract breach, the grievance seeks an order that the City adopt SFPOA's proposals on the issues of firing a weapon at a moving vehicle and use of a carotid restraint. (AA vol. III, pp. 593-599.) The

parties' MOU provides for final and binding arbitration of grievances. (AA vol. III, p. 89, ¶ 25.) Thus, if SFPOA's grievance goes to arbitration, a publicly unaccountable arbitrator could establish the terms of the City's use of force policy – an even more troubling delegation of the City's police power than the one rejected by the *San Jose* court. Similar unconstitutional delegation of police power would occur if the parties' dispute over the use of force policy amendments were subject to binding interest arbitration under the City's charter –a mandatory impasse resolution procedure that allows a publicly unaccountable arbitrator to impose final terms on the parties. (*Hess Collection Winery v. California Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1596-1597.)

In sum, the City's constitutional authority to modify its use of force policy cannot be delegated to a union or an arbitrator; it must be exercised exclusively by the City itself. Because state law allows only the City to modify the policy, its determination that implementing its proposed amendments was necessary to ensure compliance with state and local law was reasonable. For that reason, the exception to the MOU's grievance procedure for actions reasonably determined necessary to comply with state law applies, and SFPOA is not entitled to arbitration of its grievance.

III. CONCLUSION

Although cloaked in the mantle of arbitration, the fundamental issue in this case is whether modification of the City's use of force policy is subject to mandatory collective bargaining, as must be found for SFPOA's grievance to be arbitrable under the parties' MOU. Four decades of case law unequivocally hold that a use of force policy need not be negotiated with labor unions. SFPOA has presented no compelling reasons for this Court to rule otherwise. In fact, the legal prohibition on delegating decision

making regarding a use of force policy to anyone other than city or county leaders holds especially true where, as here, arbitration would result in a publicly unaccountable arbitrator setting the final terms of the policy.

Because state law prohibits the City from delegating decisions about the use of force policy to other parties, the City reasonably determined that implementing the challenged amendments to the use of force policy was necessary to comply with state law. Accordingly, the reasonable determination exception in the MOU's grievance procedure applies, and SFPOA is not entitled to arbitrate its grievance challenging the adoption of those amendments.

Of course, amici do not suggest that peace officer unions should never have a role in formulating use of force policies. The experience and insight unions and their members can offer as to how such policies do and should operate in the field are invaluable. But existing law does not compel a local law enforcement agency to receive this input via the formal collective bargaining process. On the contrary, the obligations of this process, and those that may flow from it such as arbitration or mandatory impasse resolution procedures, unconstitutionally impinge on the agency's police power. Consequently, a local law enforcement agency cannot be compelled to negotiate or arbitrate its use of force policy.

For these reasons, amici respectfully request that this Court affirm precedent holding that use of force policies are not subject to mandatory collective bargaining, and affirm the trial court's ruling that SFPOA's grievance challenging the City's amendments to its use of force policy is not subject to arbitration.

Dated: January 30, 2018

LIEBERT CASSIDY WHITMORE

By: */s/ Erich W. Shiners*

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1)

I, Erich W. Shiners , declare:

I am an attorney at law duly admitted and licensed to practice in the State of California and am one of the attorneys of record for Amici Curiae League of California Cities and California State Association of Counties.

The text of this brief consists of 4,412 words, including headings and footnotes, as counted by the Microsoft Word 2010 word processing program used to generate this brief.

Executed on January 30, 2018, at Sacramento, California.

Dated: January 30, 2018 LIEBERT CASSIDY WHITMORE

By: *_/s/ Erich W. Shiners_*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: **400 Capitol Mall, Suite 1260, Sacramento, CA 95814.**

On **January 30, 2018**, I served the foregoing document(s) described as **BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT/APPELLEES SAN FRANCISCO POLICE COMMISSION ET AL.** in the manner checked below on all interested parties in this action addressed as follows:

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Executed on **January 30, 2018**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Mariana Wibbenhorst

Mariana Wibbenhorst