

No. 09-2187

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRATERNAL ORDER OF POLICE LODGE 89, *et al.*,

Plaintiffs-Appellees,

v.

PRINCE GEORGE'S COUNTY, MARYLAND,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland

***AMICUS CURIAE* BRIEF OF AMERICAN FEDERATION OF
LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS**

LYNN RHINEHART
JAMES B. COPPESS
AFL-CIO
815 Sixteenth Street, NW
Washington DC 20006
202-637-5337

Counsel for Amicus Curiae AFL-CIO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-2187 Caption: FOP Lodge 89 v. Prince George's County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

AFL-CIO who is Amicus, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
- 2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on January 29, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Darragh L. Inman & Joel Smith
Kahn Smith & Collins PA
201 N. Charles St. 10th Fl.
Baltimore, MD 21201

William W. Wilkins
Kristen E. Small
Nexsen Pruet, LLC
55 East Camperdown Way
Greenville, SC 10648

Rajeshanand Kumar
Prince Georges County
14741 Governor Oden
Bowie Dr.
Upper Marlboro, MD
20772

Bruce R. Lerner
Bredhoff & Kaiser PLLC
805 15 St., N.W. Sutie 100 Washington, D.C. 20005

s/ James B. Coppess

(signature)

1/29/2010

(date)

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	1
I. If the County Had Used Its Reserve Funds To Avoid Impairment Of Its Contracts, It Would Have Acted In Accordance With, And Not Contrary To, The “Best Practices” of the Government Finance Officers’ Association That Might Be Applicable To The County	4
A. The Underlying Empirical Facts	4
B. The IMLA Argument	5
II. The County Would Not Have Lost Its AAA Bond Rating If It Had Used A Small Portion Of Its Reserve Funds To Avoid The Impairment And, Even If It Would Have, Maintaining A Bond Rating Not Previously Enjoyed By The County and Not Enjoyed by 99% of Counties Cannot Justify Impairment	22
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

<i>Baltimore Teachers Union v. Mayor and City Council of Baltimore</i> , 6 F.3d 1012 (4th Cir. 1993)	2, 3
<i>Fraternal Order of Police Lodge 89 v. Prince George's County</i> , 645 F. Supp. 2d 492 (D. Md. 2009).....	<i>passim</i>
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977).....	3

STATUTES

Fed. R. App. P. 29(a)	1
-----------------------------	---

MISCELLANEOUS

100 Largest Counties,” Population Division, U.S. Census Bureau, <i>available at</i> http://www.census.gov/popest/counties/tables/CO-EST2007-07.csv	11
Center for Business and Economic Research, University of Tennessee, <i>Rainy Day Funds: Analysis and Recommendations for Tennessee</i> , (May 2007), <i>available at</i> http:// taxpolicycenter.org/UploadedPDF/1000606.pdf	19, 24
Clabaugh, “Montgomery County bonds get Fitch’s AAA,” <i>Washington Business Journal</i> , Oct. 30, 2009	24
Daniel G. Thatcher, <i>State Budget Stabilization Funds</i> , <i>available at</i> http://www.ncsl.org/?TabId=12630	11, 12, 16
Elizabeth C. McNichol, Center on Budget and Policy Priorities, <i>Is it Raining Yet?: Yes, And It's Time for Many States to Use Their Rainy Day Fund</i> (2008), <i>available at</i> http://www.cbpp.org/files/2-21-08sfp2.pdf	12, 15, 16

FitchRatings, *The 12 Habits of Highly Successful Finance Officers: Management's and Disclosure's Impact on Municipal Credit Ratings*, available at <http://www.nafoa.org/pdf/12Habits.pdf> 16, 19

Gary C. Corina & Ray D. Nelson, “Rainy Day Funds and Value at Risk,” *State Tax News*, Aug. 25, 2003, available at <http://www.state.tn.us/comptroller/bf/pdf/RainyDayFundReport5-7-07.pdf> 12, 16

GFOA, *Best Practices and Advisory Announcement*, available at http://www.gfoa.org/index.php?option=com_content&task=view&id=1175 20, 21

GFOA, *Best Practices: Appropriate Level of Unrestricted Fund Balance*, (2009), available at http://www.gfoa.org/downloads/AppropriateLevelUnrestrictedFundBalanceGeneralFund_BestPractice.pdf 8, 9, 10, 11, 13, 18

Prince George’s County Fiscal Year 2010 Operating Budget, Budget Overview, available at http://www.princegeorgescountymd.gov/Government/AgencyIndex/OMB/Proposed_Budget_FY2010/Approvedpdfs/budget_overview.pdf 9

Raymond, “Salt Lake County gets AAA bond rating,” *Desert News*, Dec. 8, 2009, available at <http://www.desertnews.com/article/print/705350101/Salt-Lake-County-gets-AAA-bond-rating.html> 25

Robin Prunty, Alexander M. Fraser, Steven J. Murphy, *Commentary: The State of the States*, Standard & Poor’s, October 18, 2001 23

Standard & Poor's, *Global Credit Portal: RatingsDirect, Sector Review: The Ranks of AAA' Municipalities Swell Despite Hard Times* (Nov. 3, 2009) available at http://www2.standardandpoors.com/spf/pdf/fixedincome/ranks_of.pdf 26

Standard & Poor’s, *RatingsDirect, Prince George’s County, Maryland: General Obligation* (Nov. 25, 2009), available at <http://www.standardandpoors.com/general/generalsearch/en/us/?npSortBy=Relevance&search=%27Prince%20Georges%20County%27&pageNav=Yes&navType=NP&pStart=0&pSortBy=relevance&start=10&range=10> 22

Standard & Poor’s, *RatingsDirect, Sector Review: Exclusive ‘AAA’ County Club Opens Door to Six New Members* Jan. 24, 2008, available at http://www.co.washington.mn.us/client_files/documents/fsd/FSD-AAACounty-08.pdf 18, 19, 22, 26

Standard & Poor’s, *RatingsDirect U.S. Public Finance: Financial Management Assessment* (June 27, 2006) available at www.commissions.leg.state.mn.us/lcftp/assessments.pdf 19

Stephen J. Gauthier, *Government Finance Officers Association, What Everyone Needs to Know About the New Fund Balance* (GFOA 2009) available at https://www.estoregfoa.org/Source/Orders/index.cfm?section=OrdersBooks&task=3&CATEGORY=ACCOUNTING&PRODUCT_TYPE=SALES&SKU=WENKNFB&DESCRIPTION=&FindSpec=new%20fund%20balance&CFOKEN=47091104&continue=1&SEARCH_TYPE=FIND&StartRow=1&PageNum=1 7, 11, 15

WM Financial Strategies, *Rates of Over - Trends in Municipal Bond Rates*, available at <http://www.munibondadvisor.com/market.htm> 27

WM Financial Strategies, *What is a Bond Rating*, available at <http://www.munibondadvisor.com/rating.htm> 27

INTEREST OF THE AMICUS CURIAE

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women, many employed by states, counties and other local government bodies. Because acceptance of the arguments advanced by Prince George's County and its Amicus would permit sweeping abrogation of contractual commitments to public employees across the country, from firefighters and police officers to nurses and teachers, the AFL-CIO has a vital interest in the outcome of this case.

All parties have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a).

ARGUMENT

Amicus AFL-CIO files this Brief to address the question whether the substantial impairment of the County's contracts with the Unions was constitutional. Specifically, the AFL-CIO addresses the two arguments advanced by the County's amicus, the International Municipal Lawyers' Association (IMLA), directed to that constitutional question.¹

¹ Although this Brief focuses on whether the County's substantial impairment of its contracts is constitutional, we would be remiss if we did not address IMLA's threshold argument – not made by the County itself – that there was no contractual

The touchstone for the argument that follows is this Court’s reminder that “[t]he authority of the states to impair contracts . . . must be constrained in some meaningful way.” *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1021 (4th Cir. 1993). And the principal constraint imposed on governments by the Contract Clause is that they are not permitted to “consider impairing the obligations of [their] own contracts on a par with other

impairment because the County Council committed “a ministerial act, not a legislative act” in enacting County Resolution-81-2008, which authorized the County furlough plan at issue in this case. *See* IMLA Brief at 9. IMLA’s “no impairment” argument rests on a false premise. The Prince George’s County Charter defines the term “resolution” to be a legislative act with the full force and effect of law: “The word ‘resolution’ shall mean a measure adopted by the Council having the force and effect of law but of a temporary or administrative character.” County Charter § 1017(c), J.A. 214; *see also* Prince George’s County Charter § 1017(d) (“The word ‘law’ shall be construed as including . . . all ordinances and *resolutions* . . . not hereby or hereafter amended or repealed”) (emphasis added); J.A. 214. Here, the record is clear that the County Council enacted its furlough plan by resolution because furloughs are “temporary” in nature and not because adoption of the plan was a “ministerial” act.

Additionally, we note that IMLA’s assertion that “there was no public hearing to accept testimony from proponents or opponents” of the furlough plan misstates the record. IMLA Brief at 9. In fact, the County Council held a perfunctory hearing on the furlough plan on September 16, 2008. J.A. 535-36. Representatives of some Unions were allowed to testify at the hearing for two minutes each. J.A. 554. The Council’s resolution approving the furlough plan was then introduced and adopted formally, in an open forum, and was signed by the Chair of the Council and the Clerk of the Council. J.A. 270-72. The Council recognized that its actions would be subject to legal challenge, as demonstrated by the resolution’s severability clause. J.A. 272. In short, IMLA’s argument that County Resolution-81-2008 was “not a legislative act” is entirely baseless.

policy alternatives’ or ‘impose a drastic impairment when an evident more moderate course would serve [their] purposes equally well,’ . . . nor act unreasonably ‘in light of the surrounding circumstances.’” *Id.* at 1020 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31 (1977)). As we show, the point of the IMLA’s presentation is to negate that “meaningful” constraint on a state’s impairment of contracts by converting the government’s impairment of its own contracts from a last resort measure into a preferred option available to, as a routine matter, virtually every governmental body.

The IMLA uses nine pages of its argument to describe various limitations on public finance during the current economic downturn generally, with little attention to the specific facts of this case. The IMLA then proceeds to make two specific arguments concerning the County’s refusal to use available, excess revenue in its reserve funds in order to avoid abrogation of its own contracts. The first argument is based on what IMLA characterizes as “best practices” concerning such funds, and the second is based on speculation about the consequences of using money from the reserve funds on the County’s highly exceptional AAA bond rating. We address and rebut these arguments in turn below.

I. If The County Had Used Its Reserve Funds To Avoid Impairment Of Its Contracts, It Would Have Acted In Accordance With, And Not Contrary To, The “Best Practices” of the Government Finance Officers’ Association That Might Be Applicable To The County

A. The Underlying Empirical Facts. The District Court found that, at the time the County decided to impair its contractual commitments in order to save approximately \$20 million,² “it had approximately \$230 million in reserves.” *Fraternal Order of Police Lodge 89 v. Prince George’s County*, 645 F. Supp. 2d 492, 515 (D. Md. 2009).³ The District Court further noted that the County had conceded this fact. *Id.* According to the District Court, this \$230 million in reserves was comprised of “approximately \$133 million” in the County’s Contingency Reserve, “approximately \$53 million” in the County’s Operating Reserve, and “approximately \$44 million” in the County’s Undesignated Fund. Although use of the \$133 million (or 5% of general fund expenditures) in the Contingency Reserve was controlled by the County Charter, the District Court specifically found that “the other two funds [that is, the Operating Reserve and the

² While the furlough was intended to reduce expenditures by \$20 million, *see* 645 F. Supp. 2d at 501, only approximately \$10 million of that reduction was due to wage cuts resulting from the furlough of employees covered by contracts, *see id.* at 501 n.19.

³ In addition, the County Parks Commission had a \$60-80 million surplus fund balance and the County has already been successful in obtaining the Commission’s consent to draw on that balance twice before in 2008, for a total of \$8 million. *See*

Undesignated Fund] *do not have any restrictions attached to them.*” 645 F. Supp. 2d at 515 (emphasis added).

The District Court therefore concluded that approximately \$97 million of the County’s reserve funds – comprised of \$53 million in the Operating Reserve and \$44 million in the Undesignated Fund – were unrestricted and were intended for use to address precisely the type of fiscal shortfall the County was experiencing in 2008. *Id.*⁴

B. The IMLA Argument. The IMLA argues that Prince George’s County’s impairment of its own contracts, notwithstanding the availability of more than sufficient revenue in its reserve funds to honor those contracts, was constitutionally permissible because use of a small portion of the revenue in the reserve funds would have been inconsistent with “best practices.” The IMLA also asserts that

645 F. Supp. 2d at 499.

⁴ The District Court used the amount of \$44 million for the County’s surplus in its Undesignated Fund, citing Paper 18, Exhibit 18 for that amount. That document included the “Strategic and Fiscal Policies” section from the County’s budget for Fiscal Year 2009, but actually did not contain any dollar amount for that surplus fund. And, as the Unions’ Brief in this Court already has demonstrated, *see* Unions’ Brief at 12, 22, 35, the final, audited, and undisputed amount of surplus contained in the County’s Undesignated Fund as of June 30, 2008 was actually \$65 million. Thus, the \$97 million in surplus funds that the District Court found could be used by the County as an alternative to abrogating its collective bargaining agreements was actually more than \$118 million – that is, \$53 million in the County’s Operating Reserve and \$65 million in the County’s Undesignated Fund.

these “best practices” are described by the Government Finance Officers’ Association (GFOA), which recommends that governments maintain an undesignated fund balance equal to at least two months of general fund operating expenses or revenue. IMLA’s argument is misguided from beginning to end.

(1) At the outset, it is important to point out that IMLA’s argument is an entirely *post hoc* rationale that is wholly inconsistent with the County’s own practices. The County never cited any GFOA “best practices” recommendation, and never suggested that following such a recommendation was a rationale for its impairment. To the contrary, if the County adopted any “best practices,” they would be the practices mandated by its Charter and otherwise adopted by the County during all years relevant to this case. Thus, the County’s own, adopted “best practices” are to maintain a Charter-mandated 5% Contingency Reserve to be expended only in emergency situations; to keep an additional 2% Operating Reserve to be expended, at the County’s discretion, when it would “benefit the citizens” of the County; and to place its remaining surplus monies into an Undesignated Fund that could be used to meet “fiscal challenges.” J.A. 482-83.

(2) According to IMLA, if the County had followed the recommendations of GFOA, it would have maintained an undesignated fund balance containing two months of expenditures or, “at minimum, \$433 million.” IMLA Brief at 21. In

contrast, IMLA argues, even without drawing down its reserve funds in any way to avoid impairment of its contracts, the County's Undesignated Fund in 2008 was only \$65 million. IMLA Brief at 21. Thus, IMLA concludes, the County – by deciding to impair its own contracts rather than drawing down monies from its Undesignated Fund – “acted in a prudent and responsible manner when it decided to heed the advice of GFOA.” IMLA Brief at 21-22. But the plain facts show that the County did not heed that advice – and the County certainly did not heed that advice as it has been mischaracterized by the IMLA.

As a threshold matter, IMLA's assertion that the County impaired its contracts to protect a \$65 million Undesignated Fund that already was “dramatically below the formulaic best practice” of \$433 million in an unrestricted fund balance is based on a misleading alteration of GFOA terminology. GFOA defines “unrestricted fund balance” to include “the total of committed fund balance, assigned fund balance, and unassigned fund balance.” Stephen J. Gauthier, *Government Finance Officers Association, What Everyone Needs to Know About the New Fund Balance* 37 n.25 (GFOA 2009) [hereinafter cited as Gauthier, *New Fund Balance*].⁵ In addition, GFOA recommends that contingency

⁵ Stephen J. Gauthier is the Director of the GFOA's Technical Services Center. This document is available at <https://www.estoregfoa.org/Source/Orders/index.cfm?section=OrdersBooks&task=>

reserve funds be considered part of the “unrestricted fund balance” for its “best practices” analysis. *See* GFOA, *Best Practice: Appropriate Level of Unrestricted Fund Balance*, at 1 n.3 (2009) [hereinafter cited as GFOA, *Best Practice*] (“Sometimes restricted fund balance includes resources available to finance items that typically would require the use of unrestricted fund balance (e.g. a contingency reserve). In that case, such amounts should be included as part of unrestricted fund balance for purposes of analysis.”).⁶

IMLA ignores the various components of the “unrestricted fund balance” defined by GFOA, and instead falsely equates GFOA’s “unrestricted fund balance” with the County’s Undesignated Fund. *See* IMLA Brief at 21. This is misleading in the extreme, because it excludes other funds held in reserve by the County. Following the GFOA definition, the County’s “unrestricted fund balance” properly includes the entirety of the \$153 million in “unreserved” funds that the County had as of June 30, 2008, J.A. 471, as well as the County’s \$133 million Contingency Reserve, which is “included as part of unrestricted fund balance for purposes of

3&CATEGORY=ACCOUNTING&PRODUCT_TYPE=SALES&SKU=WENKN
 FB&DESCRIPTION=&FindSpec=new%20fund%20balance&CFTOKEN=470911
 04&continue=1&SEARCH_TYPE=FIND&StartRow=1&PageNum=1.

⁶ This document is available at http://www.gfoa.org/downloads/AppropriateLevelUnrestrictedFundBalanceGeneralFund_BestPractice.pdf.

analysis.” See GFOA, *Best Practice*, *supra*, at 1 n.3. In addition, for reasons explained more fully in the margin, other substantial reserve funds maintained by the County outside of its general fund, also might be included in a proper calculation of the GFOA-defined “unrestricted fund balance.”⁷

Thus, according to the actual terms of the GFOA best practice (rather than the misleading version presented by IMLA), the County as of June 30, 2008 had more than \$286 million – and perhaps substantially more, depending on whether its outside reserve funds are included, *see supra* n.7 – in what properly might be characterized as its “unrestricted fund balance.” The County therefore was far closer to IMLA’s “formulaic best practice” balance than the IMLA brief admits. IMLA Brief at 21.

(3) Any difference between the County’s fund balances and what IMLA asserts would have constituted “best practices” also ignores the fact that the “best practices” standard proposed by the IMLA does not – and should not – apply to

⁷ In particular, the GFOA best practice provides that “financial resources available in other funds should also be considered in assessing the adequacy of unrestricted fund balance [] in the general fund.” *Id.* at 1. This suggests that reserve funds maintained by the County outside of its general fund – including its Internal Service Funds, its Special Revenue Funds, and its Enterprise Funds – also should be considered in any “best practices” analysis. J.A. 483. See Prince George’s County Fiscal Year 2010 Operating Budget, Budget Overview, at 9 (listing more than \$280 million in these three funds during 2008), *available at*

Prince George's County. Indeed, that is exactly what the County itself concluded, and that conclusion was fully consistent with the actual recommendations of the GFOA. As we explained above and further describe below, the County adopted a different standard for measuring the adequacy of its reserve funds, one more appropriate to its size and other particular circumstances, and the County would have remained in compliance with that standard even if it had not impaired its contracts.

More specifically, both the GFOA – on which IMLA relies – and other authorities on public finance actually recommend reserve fund levels that would have been maintained by Prince George's County even if it had honored the contractual commitments that it impaired in this case.

The GFOA recommendation cited by the IMLA makes this abundantly clear:

In practice, a level of unrestricted fund balance significantly lower than the recommended minimum may be appropriate for states and America's largest governments (e.g., cities, counties, and school districts) because they often are in a better position to predict contingencies (for the same reason that an insurance company can more readily predict the number of accidents for a pool of 500,000 drivers than for a pool of fifty), and because their revenues and expenditures often are more diversified and thus potentially less subject to volatility.

http://www.princegeorgescountymd.gov/Government/AgencyIndex/OMB/Proposed_Budget_FY2010/Approvedpdfs/budget_overview.pdf

GFOA, *Best Practice*, *supra*, at 2 n.5. In fact, the GFOA has further explained that “[a] minimum of as little as 5 percent [of operating revenue or operating expenditures] . . . may be appropriate for larger governments.” Gauthier, *New Fund Balance*, *supra*, at 25.⁸ As the 62nd largest county in the United States, with a population of over 800,000, Prince George’s County clearly fits into the category of “larger governments.” See “100 Largest Counties,” Population Division, U.S. Census Bureau, *available* at <http://www.census.gov/popest/counties/tables/CO-EST2007-07.csv>.

Indeed, the 5% recommendation of the GFOA is similar to the recommendation of virtually all credible authorities on public finance. The National Conference of State Legislatures’ Fiscal Affairs and Oversight Committee “suggests that the combination of general fund surpluses and budget stabilization

⁸ Gauthier cites the same reasons advanced in the GFOA recommendation for larger governments maintaining relatively smaller funds:

First, larger governments normally find it easier to predict contingencies than do smaller ones (for the same reasons that an insurance company can more readily predict the number of car accidents for a pool of 500,000 drivers than for a pool of fifty). Second, operating revenues and operating expenditures of larger governments often are more diversified and less volatile than those of their smaller counterparts.

Gauthier, *New Fund Balance*, *supra*, at 25.

funds should equal at least 5 percent of total state expenditures.” Daniel G. Thatcher, *State Budget Stabilization Funds*, available at <http://www.ncsl.org/?TabId=12630>. Indeed, twenty-one states actually *cap* their reserve funds at 5%. Gary C. Corina & Ray D. Nelson, “Rainy Day Funds and Value at Risk,” *State Tax News*, Aug. 25, 2003, p. 564 [hereinafter cited as Corina & Nelson, “Rainy Day Funds”], available at <http://www.state.tn.us/comptroller/bf/pdf/RainyDayFundReport5-7-07.pdf>. The 5% recommendation is also used by municipal bond rating agencies. *See id.*; Thatcher, *State Budget Stabilization Funds*, *supra*. The World Bank has made the same 5% recommendation to emerging and transitional countries. Corina & Nelson, “Rainy Day Funds,” *supra*, at 564.

The fact that the 5% recommendation is the recommendation most commonly honored by larger governmental units is further reflected in the fact that, as of early 2008, reserve fund balances held by states totaled 4.6% of states’ annual expenditures. Elizabeth C. McNichol, Center on Budget and Policy Priorities, *Is it Raining Yet?: Yes, And It’s Time for Many States to Use Their Rainy Day Fund* 3 (2008) [hereinafter cited as McNichol, *Is it Raining Yet*], available at <http://www.cbpp.org/files/2-21-08sfp2.pdf>.

In fact, as noted above, the 5% recommendation is the recommendation that Prince George's County itself chose to follow based on its own particular fiscal circumstances prior to the current economic downturn. The very GFOA document cited by the IMLA recommends that "governments establish a formal policy on the level of unrestricted fund balance that should be maintained in the general fund." GFOA, *Best Practice, supra*, at 1. The GFOA further recommends that the level of the unrestricted fund balance be set "based upon a government's own specific circumstances." *Id.* at 2. Prince George's County followed these recommendations. Section 806 of the County Charter requires the County to maintain the equivalent of 5% of its budget in a "General Fund Contingency Reserve." *See* 645 F. Supp. 2d at 500 n.14.

Importantly, the County would have acted in full compliance with the 5% mandate included in its Charter even if it had not chosen to impair its contracts. Five percent of expenditures for Fiscal Year 2009 was a little more than \$130 million. And at that time, the County's Contingency Reserve fund balance contained the required 5% or \$133 million, its Operating Reserve contained \$53 million, and its Unrestricted Fund surplus was \$65 million. *See* 643 F. Supp. 2d at 515. Budget Director Seeman informed the Unions in June 2008 that the County would have more than 7% of its budget in reserved funds, including the required

5% in the Contingency Reserve and the 2% Operating Reserve, even absent any reductions in contractually mandated personnel costs. *See id.* at 500; J.A. 552.

The County thus has admitted that the furlough was not necessary in order to maintain its reserve funds at the required 5% and 2% levels – the levels the County itself, consistent with the GFOA’s recommendation for governments of its size, considered to be consistent with “best practices.”

(4) It also should be evident that using reserve funds during an economic downturn is fully consistent with “best practices,” even if it causes the funds to fall below a recommended level (which, as we just demonstrated, would *not* have been the case here). The very purpose of maintaining reserve funds is to permit public entities to use those funds when revenue unexpectedly falls. Simply stated, reserve funds are funds put away during periods of high revenue intake for use during periods of low revenue intake. Thus, the ordinary and prudent use of such reserve funds would cause them to increase during the former periods and decrease during the latter. The IMLA’s argument to the contrary takes a static view, suggesting that reserve funds should be maintained at a constant level regardless of circumstances. The IMLA’s position on reserve fund levels is not supported by the authorities it cites, or by any other authorities on public finance.

Governments (like private parties) maintain reserve funds in order to have the financial flexibility to meet their financial commitments despite an unexpected drop in revenue (or increase in expenditures). In other words, governments maintain reserve funds precisely to be used in situations such as that faced by Prince George's County in this case. The expectation is that the fund will then be replenished as the economy recovers. Strict adherence to the IMLA's construction of the GFOA's recommendation concerning maintenance of a minimum reserve would defeat the very purpose of such a reserve. In fact, neither the GFOA nor other authorities support the IMLA's position.

In the 2009 report written by Stephen J. Gauthier to explain GFOA's standards, the GFOA clearly states that "[o]bviously, *minimum* here means the amount to be maintained *prior* to the contingency occurring. To set a hard and fast minimum applicable in all circumstances would mean that the resources could never be used, which would defeat the entire purpose of accumulating a 'cushion' against contingencies." Gauthier, *New Fund Balance, supra*, at 37 n.26 (emphasis added). Gauthier continues, "During a significant economic downturn, strict adherence to the fund balance policy may be impractical. Accordingly, a government may wish to consider tailoring the language of its fund balance policy to allow an appropriate degree of flexibility in such circumstances." *Id.* n.28.

The Center on Budget and Policy Priorities similarly explains that reserve funds serve as governments' "*first line of defense* against the budget pressures caused by declining revenues and rising need for public services during a downturn." McNichol, *Is it Raining Yet, supra*, at 1 (emphasis added). Such funds "are meant for use during a cyclical economic downturn." *Id.* at 4. A report on *The 12 Habits of Highly Successful Finance Officers* put out by the credit rating agency Fitch concurs that reserves "may be used to address unanticipated revenue shortfalls or unforeseen expenditures" and that "[t]his provides a *first defense* against deficit spending and helps maintain liquidity." FitchRatings, *The 12 Habits of Highly Successful Finance Officers: Management's and Disclosure's Impact on Municipal Credit Ratings 3*, available at <http://www.nafoa.org/pdf/12Habits.pdf>. The National Council of State Legislatures also confirms this obvious point – that such funds "exist to provide stability to state budgets experiencing economic fluctuations. 'Revenue shortfall' or 'budget deficit' still remain the most common conditions for tapping budget stabilization funds." Thatcher, *State Budget Stabilization Funds, supra*. Experts explain that the reason reserve funds should be drawn on first during an economic downturn is to avoid quick and unwise decisions such as the decision to impair its own contracts that was made by Prince George's County in this case. "The availability of [reserve fund] resources allows

a state to respond to situations in a timely fashion and avoid unwise and shortsighted decisions.” Corina & Nelson, “Rainy Day Funds,” *supra*, at 564.

Indeed, the County concedes these points. As described by the County itself, the purpose of its Operating Reserve is to “ensure a reasonable degree of stability in its programs over the long run,” and the fund contained in the Operating Reserve “can be used to offset the impact of budget emergencies.” 645 F. Supp. 2d at 515. Similarly, as described by the County itself in a note in its budget, the County’s Undesignated Fund may be used to “address fiscal challenges.” J.A. 483. The County further explains that its Undesignated Fund is “used to mitigate the impact of the declining housing market and the accompanied dramatic slowdown of the revenue growth within the County.” 645 F. Supp. 2d at 515. In fact, the County’s Budget Director acknowledged that “as a general matter of policy,” the County has designated a portion of its Undesignated Fund (approximately \$27 million) for the following year “either to balance the budget or pay for specific one-time expenditures.” *Id.* at 516 (quoting Seeman Depo. at 63, J.A. at 375).

Thus, it is fully consistent with “best practices” – as described by the GFOA as well as other experts, and as adopted by the County itself – to draw on reserve funds at the start of an economic downturn in order to meet public obligations,

even if such an appropriate use of funds results in reserve funds that fall below generally recommended levels (which would *not* have been the case here).

(5) The IMLA argument also suffers from the flaw that it exaggerates the strictness of what are, as IMLA concedes, merely “recommendations” concerning reserve funds. IMLA Brief at 20. The GFOA recommendation cited by the IMLA is not, in fact, the hard and fast rule suggested by IMLA.⁹ The GFOA makes clear that “[t]he adequacy of unrestricted fund balance in the general fund should be assessed based upon a government’s own specific circumstances.” GFOA, *Best Practice*, *supra*, at 2. In fact, as IMLA acknowledges, the GFOA specifically indicates “that states and the largest local governments could consider reducing the levels of fund balance below the two month recommendation because each was better positioned to withstand regularly anticipated economic upheaval.” IMLA Brief at 21-22 n.5.

Moreover, other experts on public finance, including the very bond rating agency that IMLA argues would have reacted adversely to the County’s departure from the allegedly recommended minimum reserve level, expressly eschew the suggestion that there is a generally applicable “ideal” or “best” reserve level.

⁹ And to the extent the GFOA recommendations can be strictly construed, IMLA itself criticizes them as “formulaic.” IMLA Brief at 21.

Standard & Poor's states, "we do not advocate an ideal reserve level." Standard & Poor's, *RatingsDirect, Sector Review: Exclusive 'AAA' County Club Opens Door to Six New Members* 3, Jan. 24, 2008, available at http://www.co.washington.mn.us/client_files/documents/fsd/FSD-AAACounty-08.pdf. Fitch agrees: "The appropriate size of such a reserve depends on the potential variability of the entity's revenues and expenses, as well as its working cash needs to handle seasonality of revenues or expenditures." FitchReports, *Highly Successful Finance Officers, supra*, at 3. A report prepared by the University of Tennessee's Center for Business and Economic Research for the State of Tennessee confirms, "S&P takes the position that there is no single recommended fund balance level for all governments and that the appropriate level depends on cash flow patterns, revenue concentration, and other unique operating risks or lack of risks." Center for Business and Economic Research, University of Tennessee, *Rainy Day Funds: Analysis and Recommendations for Tennessee* at 3 (May 2007) [hereinafter cited as University of Tennessee, *Rainy Day Funds*], available at <http://taxpolicycenter.org/UploadedPDF/1000606.pdf>. Rather than the rigid minimum suggested by IMLA, what Standard & Poor's has expressly indicated is "likely to affect credit quality" is whether the public entity has "established a formalized operating reserve policy" and whether "[m]anagement

has historically adhered to it.” Standard & Poor’s, *RatingsDirect U.S. Public Finance: Financial Management Assessment 2, 5* (June 27, 2006), available at www.commissions.leg.state.mn.us/lcpfp/assessments.pdf. As we demonstrated above, Prince George’s County has established such a policy and would have continued to adhere to that policy even if it had not chosen to impair its own contracts.

(6) The IMLA “best practices” argument also is completely unsupported, for IMLA presents no evidence suggesting that most states and localities follow the “best practices” described by GFOA; indeed, IMLA presents no evidence to suggest that any particular state or locality follows the recommendation of GFOA as construed by the IMLA. The only evidence in the record concerning actual practices followed by any state or local government is that concerning Prince George’s County itself, which, as described above, demonstrates that the County has never adopted, and has never sought to comply with, the standard advanced by IMLA, either before or after the impairment of its contracts that is challenged in this case. While IMLA argues that the best practice is to maintain a reserve equal to two months of operating expenses or revenue (or almost 17%), as of 2007 only one state (Alaska) met that standard, only three states had reserve funds in excess of 6% of their budgets, and only five states had reserve funds in excess of 5%.

University of Tennessee, *Rainy Day Funds*, *supra*, at 14-15. Finally, the GFOA states that the aim of its “best practices” is *not* “to codify current accepted practice,” but to “promote . . . change.” GFOA, *Best Practices and Advisory Announcement*, available at http://www.gfoa.org/index.php?option=com_content&task=view&id=1175. It would be inappropriate for this Court to embrace a standard that would permit all or most public entities to impair their own contracts based on alleged “best practices” that are, in fact, not followed by most governments.

In sum, it would have been fully consistent with “best practices,” both as adopted by the County itself and as explained by the GFOA and other public finance experts, for the County to have used a small portion of its reserve funds in order to meet the financial commitments contained in its collective bargaining agreements during Fiscal Year 2009. And even if the reality were otherwise, IMLA cites no case law, and we are aware of none, remotely supporting its argument that governmental adherence to “best practices” regarding the maintenance of reserve funds provides a justification under the Contract Clause for the government’s impairment of its own contracts. In these challenging economic times, it may become increasingly difficult for governmental bodies to adhere to “best practices” in the maintenance of reserve funds. Allowing non-constitutional

standards, such as the “best practices” cited by the IMLA, to justify the impairment of contracts would permit governmental bodies to impair their own contractual obligations as a routine matter rather than as a last resort.

II. The County Would Not Have Lost Its AAA Bond Rating If It Had Used A Small Portion Of Its Reserve Funds To Avoid The Impairment And, Even If It Would Have, Maintaining A Bond Rating Not Previously Enjoyed By The County and Not Enjoyed by 99% of Counties Cannot Justify Impairment

Like its argument about “best practices” relating to reserve levels, the IMLA’s argument concerning the County’s need to preserve its AAA bond rating is based on pure speculation, and has no foundation in the facts of this case or the facts of public finance more generally.¹⁰

A. First, the IMLA provides no evidence to suggest that a modest reduction in the County’s reserve funds would have led to a downgrade of the County’s bond rating. In fact, the evidence suggests exactly the opposite. In November of last year, Standard & Poor’s reaffirmed the County’s AAA rating, *after considering the draw down of reserves that would be required to pay the District Court’s \$11 million judgment in this case. See Standard & Poor’s, RatingsDirect, Prince George’s County, Maryland: General Obligation (Nov. 25,*

¹⁰ It bears noting that IMLA’s argument concerning the AAA bond rating undermines its argument concerning “best practices” because Prince George’s

2009), *available at*

<http://www.standardandpoors.com/general/generalsearch/en/us/?npSortBy=Relevance&search=%27Prince%20Georges%20County%27&pageNav=Yes&navType=NP&pStart=0&pSortBy=relevance&start=10&range=10>. The rating agency reported, “For fiscal 2009, management is projecting another drawdown of roughly \$35 million due to declining revenues. . . . [P]art of the \$35 million includes an \$11 million liability for the repayment of furlough pay deductions due to a recent court decision.” *Id.* at 3. In other words, after considering the fact that the County would have to pay the wages it would have paid had it not impaired the contracts, Standard & Poor’s reaffirmed the AAA bond rating. There could be no stronger evidence that the impairment was not necessary to maintain the County’s AAA bond rating.¹¹

In general, Standard & Poor’s itself has made clear that “use of reserves is not a credit weakness in and of itself. These reserves are accumulated in order to be spent during times of budgetary imbalance and extraordinary economic events.”

County was given the AAA bond rating at a time when its fund reserves were, as we demonstrated above, well below the “best practices” advocated by IMLA.

¹¹ The IMLA ends its Brief with a citation to a November 19, 2009, report that Fitch had rated the County’s general obligation bonds AA+, *see* IMLA Brief at 25 n.7, but that is exactly the same rating Fitch gave the County in 2008, *see* 645 F. Supp. 2d at 498 n.7.

Robin Prunty, Alexander M. Fraser, Steven J. Murphy, *Commentary: The State of the States*, Standard & Poor's, October 18, 2001, quoted in University of Tennessee, *Rainy Day Funds, supra*, at 4. The report from the University of Tennessee, cited earlier, agrees: "Spending down reserves should not hurt a state's bond rating." University of Tennessee, *Rainy Day Funds, supra*, at 4.

The reasons that honoring the contracts would not have led to a downgrade of the County's bond rating are made clear by a review of the Standard & Poor's reports on the County from June 2008 and November 2009. The two reports make clear that the AAA rating was based on a large number of factors reflecting the *long-term* fiscal health of the County, and did not rest on the size of the County's reserve funds.

Recent experience in similar counties in the region as well as more generally also does not bear out the IMLA's unfounded argument. For example, Montgomery County, Maryland received AAA ratings from Fitch, Moody's and Standard & Poor's in the fall of 2009 despite its 2010 budget including a one-year revision to that county's reserve policy, lowering the required reserve to 5 percent of total resources, from 6 percent. *See* Clabaugh, "Montgomery County bonds get Fitch's AAA," *Washington Business Journal*, Oct. 30, 2009. Experience among the states during the prior recession in 2001 reinforces the point. *See* University of

Tennessee, *Rainy Day Funds*, *supra*, at 4 (noting that seven of the ten states with AAA bond ratings used one-third or more of their reserve funds in 2002).

In short, the available evidence demonstrates that the fully appropriate use of a small portion of the reserve funds to avoid the impairment would not have resulted in the County's loss of its AAA rating from Standard & Poor's.

B. Nor is the IMLA's argument concerning the importance of maintaining an AAA rating based on any evidence about actual governmental experience inside or outside Prince George's County. While IMLA tries to suggest that it was essential to the fiscal health of the County to maintain the AAA rating from Standard & Poor's, in fact such a rating is extremely rare among public entities. Indeed, as the District Court found, Prince George's County itself did not have an AAA rating until June 2008, when "for the 'first time in County history,'" according to the County's own press release, it was awarded the highest rating by Standard & Poor's, 645 F. Supp. 2d at 498, and the County always has operated with the second-highest rating from the two other major bond rating agencies, Fitch and Moody's. J.A. 607.

As of December of last year, approximately 20 of the nation's 3,100 counties (0.6 percent) received AAA bond ratings from all three bond rating agencies. Raymond, "Salt Lake County gets AAA bond rating," *Desert News*,

Dec. 8, 2009, *available at*

<http://www.desertnews.com/article/print/705350101/Salt-Lake-County-gets-AAA-bond-rating.html>. As of January 2008, only 48 counties (1.5 percent) received AAA ratings from Standard and Poor's. *See* Standard & Poor's, *Exclusive 'AAA' County Club Opens Door to Six New Members*, *supra*, at 2. Standard & Poor's reported at that time that less than 1 percent of counties' general obligation debt is rated AAA. *Id.* Thus, over 99% of counties and the vast majority of state and other local governments¹² issue bonds, service their debt, and balance their budgets without a AAA rating from all three credit rating agencies. The IMLA presents no evidence that Prince George's County could not have done the same even in the highly unlikely event that complying with its contractual commitments had led to a slight downgrade of its bond rating.

C. The IMLA's argument also overstates the financial impact of a slight downgrade in the County's bond rating. Using a chart that shows the difference between an AA-rated bond and an A-rated bond, IMLA argues that the County

¹² Standard & Poor's reports that only 86 of around 19,000 municipalities (0.4 percent) had AAA bond ratings in 2008. *See* Standard & Poor's, *Global Credit Portal: RatingsDirect, Sector Review: The Ranks of 'AAA' Municipalities Swell Despite Hard Times 2* (Nov. 3, 2009), *available at* http://www2.standardandpoors.com/spf/pdf/fixedincome/ranks_of.pdf; Census Bureau, "Census Bureau Reports Number of Local Governments Nears 88,000", *available at* <http://www.census.gov/Press->

would face “dramatic” fiscal consequences if it lost its AAA bond rating. *See* IMLA Brief at 23-24. A cursory inspection of this chart shows that IMLA has once again made a misleading argument.

First, at the time of impairment in September 2008, the very website relied on by IMLA confirms that there were fewer than 30 basis points separating an AA-rated bond from an A-rated bond. WM Financial Strategies, *Rates of Over – Trends in Municipal Bond Rates*, fig. 5, available at <http://www.munibondadvisor.com/market.htm> (last accessed Jan. 27, 2010). A difference of 30 basis points on a bond of \$100 million (like that issued by the County in June 2008) would amount to increased interest payments of only \$300,000 a year.

Second, and more significantly, the chart used by IMLA is not comparable to a downgrade from an AAA bond rating to an AA+ bond rating (and thus completely irrelevant in this case) because in the Standard & Poor’s ratings system there are *three* full rating gradations between A and AA. *See* WM Financial Strategies, *What is a Bond Rating*, available at <http://www.munibondadvisor.com/rating.htm> (last accessed Jan. 27, 2010) (noting that Standard & Poor’s has ratings of A+ and AA- between A and AA). By

[Release/www/releases/archives/governments/000410.html](http://www.releases/archives/governments/000410.html).

contrast, there is only *one* rating gradation between AA+ and AAA. *See id.* Thus, IMLA's argument that the County could have faced a difference of 75 basis points if it had been downgraded from an AAA rating to a AA+ rating is not supported by the chart and other information cited by the IMLA.

Finally, the County's Budget Director testified that the loss of the County's AAA bond rating would have cost the County approximately \$1 million a year. This statement is contradicted by IMLA's own exaggerated claims, and even if assumed to be true, the amount of \$1 million represented less than 0.04% of the County's annual budget of more than \$2.6 billion, and therefore was not likely to have serious budget consequences. J.A. 420. Neither the County nor IMLA cite any case where a court has held that a governmental entity may impair its own contracts to preserve a AAA bond rating, which is enjoyed by fewer than 1 percent of all counties. J.A. 557. Indeed, acceptance of IMLA's argument that impairment is justified by the need to maintain a AAA bond rating would permit almost 100% of the public entities in the country to impair their contractual obligations.

CONCLUSION

For the above-stated reasons, as well as those stated in the Appellee Unions' Brief, the judgment of the District Court should be affirmed.

Respectfully submitted,

s/ James B. Coppess

LYNN RHINEHART

JAMES B. COPPESS

American Federation of Labor &

Congress of Industrial Organizations

815 Sixteenth Street, NW

Washington, DC 20006

(202) 637-5053

Counsel for Amicus Curiae AFL-CIO

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B). The Brief is in Times New Roman 14-point typeface. With the exception of those portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 6,469 words.

s/ James B. Coppess
James B. Coppess

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically, and served on all parties or their counsel of record through the CM/ECF system if they are registered users, or if they are not, that paper copies were served on counsel and unrepresented parties at the following addresses by third-party commercial carrier for delivery within three calendar days, this 29th day of January, 2010:

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648

Bruce R. Lerner
Andrew D. Roth
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Suite 1000
Washington, DC 20005

Rajesh A. Kumar
Special Counsel
Prince George's County
Office of Law - Room 5121
County Administration Building
Upper Marlboro, Maryland 20772

Darragh L. Inman
Joel A. Smith
Kahn, Smith & Collins, PA
201 N. Charles St., 10th Floor
Baltimore, MD 21201

Charles Wellington Thompson, Jr.
International Municipal Lawyers Association
7910 Woodmont Ave. Suite 1440
Bethesda, MD 20814

s/ James B. Coppess
James B. Coppess