Case No. S242034 No Fee (Gov. Code, § 6103)

IN THE SUPREME COURT
STATE OF CALIFORNIA

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127; AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145,

Real Parties in Interest.

After a Decision of the Court of Appeal Fourth Appellate District, Division One, Nos. D069626 and D069630
PERB Decision No. 2464-M (PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M)

PERB'S COMBINED REPLY TO ANSWERS TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASE LAW

CALIFORNIA STATUTES

RULES OF COURT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

In support of its Petition for Review (Petition), Respondent Public Employment Relations Board (PERB or Board) respectfully submits this combined Reply to the Answers filed by the City of San Diego (City) and Catherine A. Boling, T.J. Zane, and Stephen B. Williams (the Ballot Proponents).

I. INTRODUCTION

The import of this case cannot be overstated: the Court of Appeal, Fourth Appellate District in *Boling v. Public Employment Relations Board* (April 11, 2017, D069626 & D069630) 5 Cal.App.5th 853, altered the long-accepted standard of review of final adjudicatory decisions issued by the Board and severely limited a public agency's obligation to bargain in good faith under the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.)[1] to those situations when the agency's governing body proposes to act. If left to stand, this decision will have serious and detrimental impacts on public sector labor relations in the State of California.

In their respective Answers, the City and the Ballot Proponents fail to address the significant ramifications of the Court of Appeal's decision.

[1] All further statutory references are to the Government Code, unless otherwise noted.

Instead, they skirt the issues raised in PERB's Petition and argue the merits of the underlying case. Since PERB has asked this Court to resolve important questions of law and secure uniformity of decision (Cal. Rules of Court, rule 8.500(b)(1)), this Reply is limited to those few points in the Answers bearing on the specific issues raised by PERB's Petition, rather than the merits.

To the extent the Answers are responsive to the issues raised in the Petition, they are an effort to minimize or downplay the importance of this case and the conflict of authority created by the Court of Appeal's decision below. In particular, the City and the Ballot Proponents argue that this case is distinguishable from the authority cited in PERB's Petition. These arguments fail. First, they misleadingly suggest that *the Court of Appeal* drew these distinctions in its opinion. This is not the case. The Court of Appeal made sweeping conclusions on the issues raised by PERB's Petition, leading to direct conflicts with other precedent and creating significant legal uncertainty. Second, the arguments advanced by the City and the Ballot Proponents, at most, distinguish this case from some, but not all of the conflicting authority. Thus, substantial conflicts remain.

In short, the Answers fail to rebut PERB's argument that review is necessary to secure uniformity of decision and to settle important

questions of law regarding the appropriate standards of review of the Board's final decisions and a public agency's duty to bargain under the MMBA. PERB again respectfully requests that the Court grant review to address these vital issues for PERB and its constituents.

II. ARGUMENT

A. There is no dispute that the Court of Appeal refused to defer to PERB's interpretation of the MMBA.

The Board's decision below addressed fundamental questions about the circumstances in which the MMBA's duty to meet and confer arises, including when a public agency's chief executive officer and chief labor negotiator can be considered an agent of the public agency. As explained in PERB's Petition, this Court has long recognized that PERB is entitled to deference from the courts, because its "primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain." (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*).) For nearly as long, the courts have held that the Board is also entitled to deference in its treatment of questions of agency—whether treated as questions of law or questions of fact. (*Inglewood Teachers Association v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776 (*Inglewood*).)

The Ballot Proponents' claim that "[t]he issues in this case are not labor law issues the Legislature delegated to PERB to interpret" (Ballot Proponents' Answer, p. 19) cannot be taken seriously. Even the Court of Appeal did not assert that this case involved *no* labor law issues; instead it asserted that the Board's decision "turned *almost* entirely" upon other legal principles. (PERB's Petition for Review, Exhibit A., p. 43, emphasis added.) Yet even that claim was exaggerated. The Court of Appeal's novel, sua sponte interpretation of MMBA section 3504.5 is the linchpin of its decision, underlying nearly every other issue addressed, including the court's rejection of the Board's interpretation of MMBA section 3505 and agency principles. (See, e.g., Exh. A, pp. 34-35; 47, fn. 37; 51-52; 59, fn. 49; 61.) Therefore, there can be no serious dispute that the Court of Appeal refused to defer to PERB's interpretation of the MMBA.

1. The clearly erroneous standard of review has been applied to the Board's interpretation of its own statutes regardless of what—or how many—other legal issues are presented in a case.

The City argues that this case is distinguishable from *Banning*, *supra*, 44 Cal.3d 799, because the interpretation of the applicable collective bargaining statute, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) was the only issue in that case. (City's Answer,

p. 13.) The Court of Appeal, however, did not rely on this distinction. But even if it had, it still would have created a split of authority.

Notably, this Court has applied the "clearly erroneous" standard of review to PERB's interpretation of section 3505, even though the case also involved issues outside of PERB's jurisdiction, such as the constitutional right to privacy. (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922.) This Court has also noted that while the Board may not determine that one of its statutes is unconstitutional, it may construe those statutes "in light of constitutional standards" (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583), in which case that construction is reviewed under the "clearly erroneous" standard (*id.* at pp. 586-587). Likewise, the Sixth Appellate District recently applied the "clearly erroneous" standard in a case that—like this one—included election law and constitutional issues, in addition to issues of MMBA interpretation. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1287-1288.)

Thus, the Court of Appeal created a plain conflict of authority when it concluded that the "clearly erroneous" standard of review does not apply if a case presents other legal issues aside from the interpretation of the MMBA.

2. The Court of Appeal did not distinguish this case from *Inglewood*.

As explained in PERB's Petition, *Inglewood*, *supra*, 227 Cal.App.3d 767, held that the Board's "interpretation of agency principles is subject to the clearly erroneous standard of review" (*id.* at p. 776), while its factual findings on agency—like all of the Board's findings of fact—are conclusive if supported by substantial evidence (*id.* at p. 781). The Ballot Proponents argue that this case is unlike *Inglewood*: "This is not a case where PERB has determined whether a school principal is acting as an agent of a district while on duty on school grounds by applying 'agency' principles, under NLRB case law." (Ballot Proponents' Answer, pp. 21-22.)

The Court of Appeal did not distinguish *Inglewood* on these narrow factual grounds. Instead, it concluded that agency was a question of law in this case because it was based on undisputed material facts (Exh. A, p. 44, fn. 34), and that it was among those areas of law outside of the Board's expertise (*id.* at p. 43). Thus, the Court of Appeal created two direct conflicts: first, with *Inglewood*'s holding that agency, as a question of law, is within the Board's administrative expertise; and second, with appellate authority holding that PERB's factual findings are owed deference under the substantial evidence standard, *regardless* of whether

the facts are in dispute. (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196.)[2]

3. The Court of Appeal's use of the word "erroneous" does not mean that it deferred to PERB's interpretation of the MMBA.

Despite arguing at length that the Court of Appeal was correct to review the Board's interpretation of the MMBA de novo, both the City and the Ballot Proponents *also* argue that the Court of Appeal did, in fact, review the Board's decision under the "clearly erroneous" standard. (City's Answer, pp. 15-16; Ballot Proponents' Answer, p. 18.) The basis for this argument is not that the Court of Appeal *said* it was considering the Board's decision under both standards of review. It did not. (Exh. A., pp. 43-44.) Rather, the City and the Ballot Proponents simply assert that when the Court of Appeal described the Board's conclusions as "erroneous," it was actually applying the "clearly erroneous" standard of

[2] The Ballot Proponents also briefly refer to the Court of Appeal's reliance on *Los Angeles Unified School District. v. Public Employment Relations Board* (1986) 191 Cal.App.3d 551 (*Los Angeles USD*). (Ballot Proponents' Answer, pp. 20-21.) The Court of Appeal cited this case for the supposed proposition that courts have "declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles." (Exh. A, p. 26, fn. 21.)

To dispel any notion that there was conflicting authority on this point before the Court of Appeal weighed in, *Los Angeles USD* did *not* "decline[] to accord any deference" to PERB. It correctly acknowledged that it was required to defer to PERB's interpretation of the EERA unless that interpretation was "clearly erroneous." (*Los Angeles USD*, *supra*, at p. 556.)

review. (See, e.g., City's Answer, pp. 15-16 ["[W]hether a legal conclusion is classified as 'erroneous' or 'clearly erroneous' is a distinction without a difference"].)

Needless to say, neither Answer cites any authority for the proposition that "erroneous" and "clearly erroneous" mean the same thing. This argument assumes that this Court has not meant what it said when it repeatedly affirmed the "clearly erroneous" standard—not just in the cases involving PERB (cited at page 33, footnote 5 of the Petition)—but also in those cases involving other administrative agencies. (See, e.g., *Larkin v. W.C.A.B.* (2015) 62 Cal.4th 152, 158; *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 988.)

In fact, this Court has used the phrase "clearly erroneous" in various contexts virtually since its inception. (See, e.g., *McFarland v. Pico* (1857) 8 Cal. 626, 631 ["We would not disregard a decision of this Court, deliberately made, unless satisfied that it was clearly erroneous"].) The concept made its way into this Court's jurisprudence regarding the weight to be given an executive branch interpretation of a statute nearly a century ago. (*Riley v. Thompson* (1924) 193 Cal. 773, 778 ["'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be

overturned'"].) And the specific term entered the Court's case law concerning review of administrative agency interpretations when this Court stated: "It is likewise true that the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Bodinson Mfg. Co. v. California Employment Com.* (1941) 17 Cal.2d 321, 325.)

As a result, the claim that the Court of Appeal below actually applied the "clearly erroneous" standard of review is meritless.

4. PERB has consistently maintained that the Board's interpretation of the MMBA is entitled to deference.

The City claims that the Board "invited" de novo review when, in the course of its administrative decision, it determined that certain issues were beyond its own jurisdiction but ultimately not implicated by the facts of the case. (City's Answer, p. 15.) To the extent the City suggests that the Board has agreed that de novo was the proper standard of review of the Board's interpretation of the MMBA, that suggestion is unfounded.

In the portion of the Board's decision cited by the City, the Board acknowledged that its own authority is limited to interpreting and enforcing the MMBA. (AR:XI:3006.) The Board noted, however, that it "is not automatically divested of these powers and duties simply because matters of external law, including constitutional questions, are implicated in a labor dispute." (AR:XI:3006-3007.) Consistent with this view,

PERB's briefing to the Court of Appeal recognized that the Board's interpretation of external law was not subject to deference. (See PERB's Respondent's Brief, p. 46.)[3] But, to be perfectly clear, the Board has never deviated from its position that the interpretation of the MMBA is subject to the clearly erroneous standard of review. (*Id.* at pp. 44-45.) Because nothing cited by the City even suggests otherwise, the claim that the Board "invited" de novo review is false.

B. The Court of Appeal's sweeping conclusion that section 3504.5 limits the duty to meet and confer is not confined to the context of local initiatives or legislative acts.

Both the City and the Ballot Proponents argue that this case is distinguishable from those cited in PERB's Petition in which a public agency was found to have violated its duty to meet and confer without any formal action by its governing body. (See PERB's Petition, p. 42, fn. 5.) As a threshold matter, these arguments do *not* address the conflict between the Court of Appeal's opinion below and *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118 and *Los Angeles County Employees Association,*

[3] No party argued before the Court of Appeal that PERB's conclusions regarding agency were not entitled to deference because they were based on undisputed fact and were matters of external law; the Court of Appeal reached these issues sua sponte. (Exh. A, pp. 43-44.) However, PERB pointed out in its Petition for Rehearing that even if agency is viewed as a question of law, the Board is still entitled to deference under the "clearly erroneous" standard. (PERB's Petition for Rehearing, pp. 7, 11-12.)

Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, 5. These cases held that a recognized employee organization can itself trigger the duty to meet and confer, by demanding to bargain over a negotiable subject. Thus, neither the City nor the Ballot Proponents claim that the Court of Appeal's decision below was consistent with those cases.

Moreover, the present case cannot be distinguished from the other cases cited by PERB on the grounds that those cases did not involve purportedly non-delegable legislative conduct (City's Answer, p. 19), or citizens' initiatives, which are not subject to the governing body's direct control (Ballot Proponents' Answer, p. 24-25). These minor distinctions ignore the sweeping nature of the Court of Appeal's conclusion that section 3504.5 specifies "*when* meet-and-confer obligations are triggered," while section 3505 only "describes *how* that process should be accomplished, including *who* ... shall participate on behalf of the governing body." (Exh. A, p. 47, fn. 37, emphasis in original.) As the Court of Appeal further pronounced:

> [C]ompliance with the meet-and-confer mandate of section 3504.5 [ ]is triggered only when there is some action "proposed to be adopted by the governing body" (§ 3504.5, subd. (a)) rather than some action proposed by a putative agent of the governing body.

(*Id.* at p. 59, fn. 49.) Further, the Court of Appeal rejected (without directly addressing) the Board's conclusion that there could be a duty to

bargain over a competing or alternative ballot measure, which *would be* under the control of the governing body. (AR:XI:3034 & fn. 23.)

Any doubt on this point is removed by the Court of Appeal's distinction between unfair practice allegations involving interference with employee rights under the MMBA and those involving the refusal or failure to meet and confer. (Exh A., pp. 50-51.) According to the Court of Appeal, common law agency principles may apply to find liability for "unapproved" conduct by a manager, supervisor or other putative agent of the public employer, where that conduct interferes with employee rights, but not when it might constitute a failure to bargain. (*Ibid.*) Thus, by foreclosing any reliance on agency principles to find a duty to meet and confer, the Court of Appeal's conclusion leaves no opening to establish a duty to bargain based on a delegation of the governing body's authority, or the fact that the governing body retains "control."

In addition, as PERB acknowledged in its Petition, the interpretation of section 3504.5 was not at issue in the cases cited by PERB. Because the Court of Appeal's far-reaching conclusion stands as the only direct authority on this point, it creates substantial uncertainty regarding the duty to bargain in all future cases regarding this issue. The *possibility* that a future appellate court might distinguish the Court of Appeal's opinion on the grounds advanced by the City or the Ballot

Proponents offers no guidance to the thousands of public agencies and employee organizations whose ongoing bargaining relationships are governed by the MMBA. Therefore, even if the distinctions raised by the City and the Ballot Proponents were valid, this would not reduce the need for this Court to definitively resolve the issue.

III. CONCLUSION

If allowed to stand, the Court of Appeal's opinion will have a profound destabilizing effect on public sector labor relations in California. Therefore, PERB respectfully asks the Court to grant review.

Dated: June 16, 2017

Respectfully submitted,

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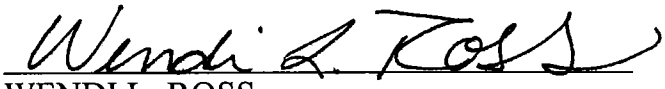
COUNSEL'S CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT 8.504(d)(1)

Counsel of Record hereby certifies that pursuant to rule 8.504(d)(1) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman-type font and contains, including footnotes, 2,878 words, which is less than the maximum—4,200 words—permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 16, 2017



WENDI L. ROSS
Declarant
PUBLIC EMPLOYMENT RELATIONS BOARD

PROOF OF SERVICE
C.C.P. 1013a

COURT NAME: In the Supreme Court for the State of California

CASE NUMBER: Supreme Court: S242034
Appellate Court: D069626 and D069630

PERB DECISION NO.: 2464-M, PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M

CASE NAME: *City of San Diego v. Public Employment Relations Board; San Diego Municipal Employees Association; Deputy City Attorneys Association; American Federation of State, County and Municipal Employees, AFL-CIO, Local 127; San Diego City Firefighters, Local 145, IAFF, AFL-CIO; Catherine A. Boling; T.J. Zane; and Stephen B. Williams*

I declare that I am a resident of or employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within entitled cause. I am an employee of the Public Employment Relations Board, 1031 18th Street, Sacramento, California 95811.

On June 16, 2017, I served the Public Employment Relations Board's **Combined Reply to Answers to Petition for Review** regarding the above-referenced case on the parties listed below.

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[X] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. The envelope or package was placed in the mail at Sacramento, California.

[X] **(BY ELECTRONIC SERVICE (E-MAIL))** I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) to the electronic service address(es) listed above on the date indicated. I did not receive within a reasonable period of time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this declaration was executed on June 16, 2017, at Sacramento, California.

S. Taylor
(Type or print name)

S Taylor
(Signature)