**IN THE**
**SUPREME COURT OF CALIFORNIA**

**Case No.: S242034**
Court of Appeal Consolidated Case No.: D069626

**CATHERINE A. BOLING, ET AL. and CITY OF SAN DIEGO,**
*Petitioners,*

v.

**PUBLIC EMPLOYMENT RELATIONS BOARD,**
*Respondent,*

**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**
*Real Parties in Interest.*

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
Consolidated Case Nos. D069626 and D069630

# OPENING BRIEF ON THE MERITS BY ALL UNION REAL PARTIES IN INTEREST

Ann M. Smith, Esq, SBN 120733
Smith, Steiner, Vanderpool & Wax, APC
401 West A Street, Suite 320
San Diego, CA 92101
Telephone: (619) 239-7200
Email: asmith@ssvwlaw.com
Attorneys for Real Party in Interest
San Diego Municipal Employees Association

**IN THE**
**SUPREME COURT OF CALIFORNIA**

**Case No.: S242034**
Court of Appeal Consolidated Case No.: D069626

---

**CATHERINE A. BOLING, ET AL. and CITY OF SAN DIEGO,**
*Petitioners,*

v.

**PUBLIC EMPLOYMENT RELATIONS BOARD,**
*Respondent,*

**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**
*Real Parties in Interest.*

---

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
Consolidated Case Nos. D069626 and D069630

---

# OPENING BRIEF ON THE MERITS BY ALL UNION REAL PARTIES IN INTEREST

---

Ann M. Smith, Esq, SBN 120733
Smith, Steiner, Vanderpool & Wax, APC
401 West A Street, Suite 320
San Diego, CA 92101
Telephone: (619) 239-7200
Email: asmith@ssvwlaw.com
Attorneys for Real Party in Interest
San Diego Municipal Employees Association

Fern M. Steiner, Esq, SBN 118588
Smith, Steiner, Vanderpool & Wax, APC
401 West A Street, Suite 320
San Diego, CA 92101
Telephone: (619) 239-7200
Email: fsteiner@ssvwlaw.com
Attorneys for Real Party in Interest
San Diego City Firefighters Local 145, IAFF, AFL-CIO

Ellen Greenstone, Esq., SBN 66022
Rothner, Segall and Greenstone
510 South Marengo Avenue
Pasadena, CA. 91101-3115
Telephone: (626) 796-7555
Fax: 626-577-0124
Email: egreenstone@rsglabor.com
Attorneys for Real Party in Interest
AFCSME, AFL-CIO, Local 127

James J. Cunningham, Esq., SBN 128974
Law Offices of James J. Cunningham
4141 Avenida De La Plata
Oceanside, CA 92056
Telephone: (858) 565-2281
Email: jimcunninghamlaw@gmail.com
Attorneys for Real Party in Interest
Deputy City Attorneys Association of San Diego

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**State Cases** **Page(s)**

**Statutes**

**Regulations**



**Constitutions**

## ISSUES PRESENTED [1]

(1) When a final decision of the Public Employment Relations Board (PERB) is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the Meyers-Milias-Brown Act (MMBA), are PERB's interpretations of the statutes it administers and its findings of fact subject to deference under the "clearly erroneous" standard or are they subject to *de novo* review?

(2) Do the MMBA's good faith meet-and-confer obligations apply to public agencies under section 3505 or do these obligations apply only to the public agencies' governing bodies when they propose to take formal action affecting employee wages, hours, or other terms and conditions of employment under section 3504.5?

## FACTUAL AND PROCEDURAL SUMMARY

### I. The Parties

PERB was established by the Legislature in 1976 as the state's expert administrative agency to administer collective bargaining for covered governmental employees. Since 2001, PERB has been vested with exclusive initial jurisdiction to interpret and enforce the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., which applies to cities,

---

[1] This Court's Order states that the petitions for review are granted and that briefing on the issues raised in the petition for review filed by petitioners Catherine Boling, T. J. Zane and Stephen Williams is deferred pending further order of this court. (Cal. Rules Ct., rule 8.520(b)(2).)

counties and special districts. PERB determines whether charges of unfair practices are justified and, if so, what remedy is necessary to effectuate the purposes of the Act. (§3509, subd. (b); *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1077 [*Coachella*].)

The City of San Diego (City) is a charter city and a "public agency" subject to the MMBA. (§ 3501, subd. (c); AR:III:842.)[2]

The San Diego Municipal Employees Association (MEA), the Deputy City Attorneys Association of San Diego (DCAA), the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME), and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters)(collectively, Unions) is each a "recognized employee organization" (§ 3501, subdivision (b)) and an "exclusive representative" (PERB Regulation, CCR, tit. 8, §32016, subd. (B)), for an appropriate unit of City employees. Unions were the charging parties in the consolidated proceedings before PERB and real parties in interest in the Court of Appeal.

Catherine A. Boling, T. J. Zane, and Stephen B. Williams (collectively, Ballot Proponents) were the official proponents of a local initiative, referred to as the Comprehensive Pension Reform Initiative (CPRI) or Proposition B, which amended the City Charter to change certain terms and conditions of employment, including the elimination of defined benefit pensions for all new

---

[2] Citations to the 24-volume Administrative Record are abbreviated as "[volume number]:[page number]."

hires except sworn police officers. Although Ballot Proponents did not participate as parties in PERB's administrative proceedings, they filed a petition for writ of extraordinary relief (D069626), and were also named as real parties in interest in the City's petition (D069630).

## II. The Underlying Facts[3]

### A. By Charter Mandate, the City of San Diego's "Strong Mayor" Serves As City's Chief Executive Officer and Chief Labor Negotiator

City Charter article XV establishes a "Strong Mayor Form of Government," defining roles and veto power for a "Strong Mayor" elected on a City-wide basis and a 9-member City Council elected by Districts. (XIII:3337-3338; XIV:3512; XVII:4492-4502; XVIII:4707-40; XXI:5532-47.)

When sworn into office, the City's Mayor agrees to serve as the City's Chief Executive Officer, responsible for the day-to-day operations of the City functioning as a business, government, and employer. (XIII:3348-3349; City Charter § 265.) The Mayor is an elected official serving in a City-paid position as City's CEO. The City Attorney's Office (under Jan Goldsmith) published a Memorandum of Law (MOL) in January 2009 (XVIII:4719-4739)[4]

---

[3] All citations are either to the Administrative Record or, where applicable, the opinion in *Boling v. Public Employment Relations Bd.* (2017) 10 Cal.App.5th 853 [*Boling*], on which review was granted.

[4] This MOL was published to clarify the duties of Mayor and City Council in response to PERB's determination in a prior case (Case No. LA-CE-352-M) that City had violated the MMBA. (*Id.* 4719-4720.)

entitled "Impasse Procedures Under Strong Mayor Trial Form of Governance," which addresses the respective roles of the Mayor and City Council on behalf of the City as a "municipal corporation" and "single employer" under the MMBA. (XII:3191-3193; XVIII:4626-38, 4727-8.) As the City's elected chief executive officer, the Mayor gives controlling direction to the administrative service; recommends to the Council such measures and ordinances the Mayor deems necessary or expedient for the City and its residents; makes other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable; has inherent authority and responsibility for labor negotiations because it is an administrative function of local government; and retains veto power over certain Council legislative actions. It is the Mayor who must "ensure that the City's responsibilities under section 3500, subdivision (a) of the MMBA as they relate to communication with employees are met." (XVII:4493; XVIII:4721, 4727-4728.)

The Mayor also serves as City's Chief Labor Negotiator in collective bargaining with City's recognized employee organizations, including Unions. It is the Mayor's duty (1) to conduct a good faith meet and confer process under the MMBA "whenever, under the law, the obligation to meet and confer is triggered" (XIII:3349); (2) to communicate with City's employees and their Unions in a manner consistent with the MMBA; and (3) to give direction to City's Negotiating Team and determine City's bargaining objectives – what

concessions, reforms, changes in terms and conditions of employment are important to achieve. (XIII:3349-3352; XII-3191-3193; XIV:3705; XVIII:4721, 4727-4728.) The Mayor's role is not an advisory function but rather "it is the Mayor who must ensure that City's responsibilities under section 3500, subdivision (a) of the MMBA [...] are met," (XVIII:4721, 4727-4728), and it is the Mayor's "duty to negotiate with Unions in an attempt to reach agreement for the Council's consideration and possible adoption." (XVIII:4728)

### B. The Mayor's "Tentative Agreements" With Recognized Employee Organizations Are Submitted to the City Council

Subject to the terms of the City Charter and the State's Constitution, all legislative powers of the City are vested in the City Council, except those legislative powers reserved to the people by the Charter and the State Constitution. The Council adopts an annual salary ordinance establishing salaries for all City employees, subject to the Mayor's veto power. (XVII:4493 [Charter § 265], 4498-4501 [Charter §§ 280, 290]; XVIII:4636-4637, 4714.) Any tentative agreement the Mayor reaches with a recognized employee organization is submitted to the Council for determination under MMBA, Government Code section 3505.1. Because the Council has "ultimate authority to set salaries and to approve Memoranda of Understanding," (XVIII:4738-4739), the City Attorney recommends, and the Mayor follows, a bargaining protocol to foster "the core principle of the decisional law related to the

MMBA (which) is the duty to bargain in good faith." (XIII:3349-3352; XVIII:4726-4730, 4733, 4736-9.) Though not required by the Charter, the Mayor obtains Council's pre-approval for any proposed increase in wages or benefits before offered to Unions. This practice avoids an end-of-bargaining disconnect between any tentative agreement the Mayor brokers and what the Council is willing to approve. The Council is empowered to reject the Mayor's "last, best and final" offer during any impasse proceeding but the Mayor remains in control of the bargaining process. (XVII:4493 [Charter §265], 4498-4501 [§§280, 290]; XVIII:4636-4637, 4714.)

### C. City's Course of Meet-and-Confer Confirms the Mayor's and City Council's Respective Roles Under the MMBA

#### 1. Charter Amendments For the November 2006 Ballot

In 2006, Mayor Sanders met and conferred with Unions regarding two ballot proposals designed to amend the City's Charter on negotiable subjects: (1) requiring a vote of the electorate to approve future increases in pension benefits; and (2) authorizing bargaining unit work to be contracted out under a managed competition system. Meet-and-confer concluded by the deadline for the Council to put these two measures on the ballot. (XIII:3345.)

#### 2. A New Defined Benefit Pension Plan For New Hires

In 2008, Mayor Sanders led negotiations with Unions for a new "hybrid" defined benefit/defined contribution pension plan to de-incentivize early retirements and reduce the City's pension costs. (XIV:3628-3630;

XX:5354-56.) The Mayor opened a press conference outside City Hall to announce his tentative agreement:

> We are all assembled here today to announce **that the unions and I as the City's lead negotiator have arrived at a tentative agreement regarding pension reform.** [...] I think it's in the best interest of all parties that we arrived at this arrangement and **would urge the City Council to pass it unanimously once it's before them.** (XXI:5519 [video clip].)

The Council approved the new plan which became a term of a Council-approved Memorandum of Understanding (MOU) effective July 1, 2009, through June 30, 2011 – an MOU which also included negotiated compensation reductions, and City's agreement to meet and confer if City proposed to introduce ballot measures related to wages, hours, working conditions or employee-employer relations." (XII:3183-3185; XIV:3518-3519; XIX:4917.)

### 3. "Tentative Agreements" on Compensation Reductions, Firefighters' Pension Formula, and Retiree Health Benefits

In spring 2011, Council approved the Mayor's tentative agreement with MEA to extend its existing MOU through June 30, 2012, while continuing in effect the six percent (6%) compensation reduction begun on July 1, 2009, as well as other economic concessions. (XII:3185-3188; XIX:5023-26, 5045-46.) The Mayor also reached a tentative agreement with Firefighters for a one-year extension of its MOU through June 30, 2012, which included the concession the Mayor sought to reduce the pension formula applicable to future

firefighters from the existing "3%-at-age-50" to a less favorable "3%-at-age-55." (XIII:3473; XXI:5525-30.)

In May, the Mayor led a press conference to announce that an "historic" tentative agreement with Unions on retiree healthcare benefits would be submitted to the Council for action. (XIII:3425-3426; XIV:3522-3523; XIX:5049-52, 5054-55.) This agreement, which Council approved, achieved "record savings" – $714 million over 25 years [revised upward to a savings of $802.2 million, (XX:5275-76)], accompanied by a reduction in City's unfunded liability from $1.1 billion to $568 million. (XIX:5049-5052; 5054-55, 5063-64, 5066-5072, 5074-5104; XIV:3523.)

### D. Meanwhile, the Mayor Unilaterally Made and Implemented A Policy Decision to Seek 401(k) Pension Reform By Use of A Citizens' Initiative To Avoid Bargaining

#### 1. Joined By City's Chief Operating Officer and the City Attorney During A City Hall Press Conference, The Mayor Announced His Decision

With a new pension plan having been negotiated and adopted for those hired after July 1, 2009 – and with further concession bargaining in progress on compensation and retiree health benefits – the Mayor decided, after discussions with his staff, that he "would promote and pursue a 401(k)-style pension concept as his focus during his last two years in office," and use a citizens' initiative rather than a Council-sponsored ballot proposal.[5] (*Boling* at

[5] There was *no* citizens' initiative pending or circulating.

858-859; XIII:3306-3307; XIV:3527, 3531-3532; XV:3835-3836.) The Mayor did not believe the Council would put his 401(k) proposal on the ballot, and, in any event, going to the Council to achieve this "reform" would require negotiating with Unions and perhaps "unacceptable compromises."[6] (*Ibid.*) In a tape-recorded interview, the Mayor explained his rationale:

> "[W]hen you go out and signature gather and it costs a tremendous amount of money, it takes a tremendous amount of time and effort . . . . But you do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point . . . ."
> (10 Cal.App.5th at 859, fn. 2.)

In furtherance of his decision, the Mayor's Office issued a press release in early November 2010 declaring the Mayor's intent to "place an initiative on the ballot" to implement a "radical idea" of eliminating traditional pensions for new hires at the City "as part of his aggressive agenda [...] for eliminating the city's $73 million structural deficit by the time he leaves office in 2012." (XVIII:4742-4743.)[7] This "Mayor Jerry Sanders Fact Sheet" bore City's seal;

---

[6] The Mayor never asked the Council to consider the subject matter covered by his initiative. (XIII:3465-3466.) "Having decided that the citizens' initiative was the right way to go" to achieve 401(k)-style pension reform," he also never directed his Negotiating Team to present his proposal to Unions for bargaining. (XIII:3354, 3465; XV:3853-3854.)

[7] By February 2012 (months before Prop B was on the ballot) this $73 million structural deficit had been eliminated (in part due to concession bargaining), and, by April 2012 (before Prop B went to the voters), City projected a balanced budget for the following fiscal year, and a budget surplus for the successive five years. (XIV:3524-3525; XX:5269-5270, 5272-5273, 5278-79.)

explained that the Mayor's "administration was re-think(ing) how City provides services to the public;" and confirmed that "items requiring meet-and-confer, such as reducing the city's retiree health care liability (were) in negotiations and on track to have a deal by April." (*Ibid.*) However, the "headline" was the Mayor's plan to "push a ballot measure to eliminate traditional pensions for new hires " and to do so in furtherance of *City's* interests.[8] (XVIII:4742.)

The Mayor's staff posted this "Mayor Jerry Sanders Fact Sheet" on City's website. Standing before the City seal on the 11th floor of City Hall – joined by City's Chief Operating Officer, Councilmember Kevin Faulconer and the City Attorney – the Mayor held a "kick-off" press conference to announce his initiative. (*Boling* at 859 and fn. 3 & 4; XVIII:4742-43, 4747; XIII:3307-3309, 3312-3313, 3319-3320; XV:3914-3915, 3917; XIV:3533-3534.) Media coverage informed the public that "San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [C]ity employees." (*Boling* at 859.)

The Mayor's Office also issued a news release to announce the Mayor's decision. Councilmember Faulconer disseminated this news release by e-mail

---

[8] It is undisputed that Mayor Sanders was acting for the *City's* benefit after deciding that 401(k)-style pension reform was a "necessary and expedient" measure to eliminate City's structural budget deficit and "permanently fix" City's financial situation. (XIII:3312-3313; XV:3918-3923; XXIII:5764, 5766.)

stating that the Mayor and he "would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters." (*Ibid.*) Using JerrySanders@sandiego.gov, the Mayor's Office sent a mass e-mail to several thousand community leaders and others with the Mayor's message that he would "craft language and gather signatures for a ballot initiative to eliminate public pensions as we know them." (*Ibid*; XXIII:5747-49; XV:3907-3908, 3910-3911, 3912-3913.)

In early December 2010, Mayor Sanders' City-paid staff began promoting his pension reform initiative to the media and others. (XIII:3320-3322; XV:3922-3925, 3989-3990; XVIII:4772; XXIII:5810-12, 5923-24, 5926.) The Mayor built support with key business groups and individuals, including Ballot Proponents who became the initiative's "official proponents." (XV:3918-3921; XXIII:5806-08.) The Mayor personally promoted his pension reform initiative plan before the Chamber of Commerce's public policy committee and its full Board of Directors. (XV:3797-3800, 3925-3927; XVIII:4474, 4786; XXIII:5764, 5766.) He formed a campaign committee "San Diegans for Pension Reform" (SDPR) under FPPC rules, to "push forward with financing and fund-raising." (XIII:3378-3379, 3409-3411, 3432-3435, 3437-3440; XVIII:4782-84; XIX:4980-81, 4990-5002.) The committee's treasurer gave updates to the Mayor's Deputy Chief of Staff who kept "tabs" on the committee's activities. (XV:3816-3817.)

On January 7, 2011, the Mayor's Director of Communications sent an e-mail to Fox News: "We're eliminating employee pensions as we know them and putting in place a 401(k) plan like the private sector. My boss, San Diego Mayor Jerry Sanders, is available any time to come on The Factor to talk about what he's doing here in San Diego and the greater national problem." (XIII:3329-3331; XVIII:4788.)

### 2. The Mayor Announced His Policy Decision Directly to the City Council When Delivering His Charter-Mandated "State of the City" Address

In January 2011, the Mayor delivered his annual, Charter-mandated "State of the City" Address *directly to the City Council* to report on "the conditions and affairs of City" and to make "recommendations on such matters as he or she may deem expedient and proper." (*Boling* at 859; City Charter, Art. XV § 265(c); XVII:4494.) Vowing to "complete our financial reforms and eliminate our structural budget deficit," the Mayor described the "bold step" of creating a 401(k)-style plan for future employees to "contain pension costs and restore sanity to a situation confronting every big city:"

> "Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan [...]. We are acting in the public interest, but as private citizens." (*Boling* at 859; XIX:4832, 4836.)

Another press release confirmed the Mayor's promise that "the ballot initiative next year will build on [his] earlier pension reforms which are projected to save $400 million over the next 30 years." (*Boling* at 859; XVIII:4816.)

In the months following his "State of the City" Address – with *no* citizens' initiative filed or pending – the Mayor, aided by his staff, continued to develop, evaluate, promote and publicize his pension reform initiative while fine-tuning its terms based on the legal and financial analyses he commissioned. (*Boling* at 859-860 and fn. 6; XIII:3380-3385; XIV:3545-3549; XV:3809-3811, 3827-3828, 3937-3942, 3948-3951, 3990-3991; XIX:4983-84, 4986-88; XXIII:5782-83, 5814-30, 5928-30.)

There was an expectation that the Mayor's staff would regard his pension reform initiative as City business and within the scope of their official duties. (XIII:3321, 3330-32; XV:3807, 3957.) The Mayor's Chief of Staff viewed all the initiative-related work she and other City-paid Mayoral staff members did *before* April 2011 as "official City business." (XIII:3401-02, 3480-81; XIV:3570-76; 3653-54; 3667-68; 3676-79; XV:3812-14.)

Between January 1st and March 31st 2011, the Mayor and his key policy staff, including City's Chief Operating Officer, explored the fiscal viability of the Mayor's pension reform proposal;[9] while the Mayor's SDPR committee paid a law firm to provide legal research and advice related to it. (*Boling* at 860, fn. 7; XIII:3378-3381, 3439-3441; XIX:4980-81, 4990-5002.)

///

---

[9] City's COO testified that his fiscal analysis on the Mayor's pension reform initiative was facilitated because of his access to actuarial data from the City's defined benefit plan which was not available to "someone off the street." (XIV:3509, 3547-3554, 3565-3566.)

The Mayor and his staff negotiated with supporters outside the City (but never with recognized employee organizations) to achieve the Mayor's policy goals for 401(k)-style pension reform through a single initiative, the CPRI. The final version melded design elements from the Mayor's plan and a plan being promoted by Councilmember DeMaio in his "Roadmap to Recovery." Newly hired police would continue in the defined benefit plan but all other newly hired employees, including firefighters, would be placed in a 401(k)-style plan; transition costs associated with closing the defined benefit plan to most new hires would be "paid for" by imposing a 5-year pensionable pay freeze (through 2018) on existing employees. (*Boling* at 860-861 and fn. 7-8; XIII:3376-3377, 3396-3405, 3408, 3414-3415, 3421-3424, 3479-3481, 3485-3487; XIV:3568-3576, 3676-3680; XV:3729-3730, 3811-3814, 3821.) The Mayor "got the pieces (he) really needed, which were a 401(k) and having police remain competitive so that *we* (i.e., the City) can hire and retain." (XIII:3423-3424.)

The Mayor's Chief of Staff, City's COO, and the City Attorney, all reviewed drafts of the initiative to assure the text achieved the agreed-upon objectives. (*Boling* at 861 and fn. 9; XIV:3576-3579, 3582-3585, 3587-3591, 3680-3682, 3684-3687, 3693-3694; XV:3821-3824.) Before announcing that his initiative was ready to circulate, the Mayor made sure the text of the initiative was right. (XIII:3430-3431, 3482, 3491; XIX:5013-21.)

On April 4, 2011 – a full five months after the Mayor had announced his policy decision to change pensions by initiative to avoid the MMBA, the City Clerk received a notice of intent to circulate a petition seeking to place the CPRI on the ballot. The three "official proponents" are Ballot Proponents here. (*Boling* at 861.) The notice was filed to coincide with a widely-covered press conference which the Mayor led outside City Hall the next day. Among others, the City Attorney, Councilmembers Faulconer and DeMaio, and two Ballot Proponents surrounded the Mayor during his press conference, (*Boling* at 862), and the Mayor's Director of Communications and another communications staff member also attended. (XIII:3395-3399, 3415-3417, 3419, 3428-3432; XIX:5004, 5006-07, 5013-21.)

Introduced as "Mayor Jerry Sanders," the Mayor spoke under a "Pension Reform Now" banner. Referring to the contents of the CPRI, he said: "We've made progress over the last few years in reforming our (pension) system. Today we're taking the next step and let me tell you it's a big one." (XIII:3339-3340, 3376-3377, 3421, 3431; XIX:5006-07, 5013-21, 5028-29 [Fox News: "Pension Reformers Unite Behind Compromise Plan"]; XXI-Ex:5515 [KUSI videoclip].) Councilmember Carl DeMaio stepped to the podium to say: "Mr. Mayor, it was your leadership that allowed us to reach the deal we have today." (*Ibid.*)

///

Following this press conference, the Mayor agreed that Ballot Proponent Zane, who was a leader in the Lincoln Club (as was Ballot Proponent Williams), should run the initiative campaign from the Lincoln Club. (*Boling* at 861, fn. 11.) The Mayor's SDPR committee contributed $89,000 to the new CPRI committee.[10] The Mayor provided interviews and quotes to the media (which his staff facilitated) to emphasize the importance of CPRI and he discussed it at his speaking appearances. (*Boling* at 862 and fn. 13.) He approved a "Message from Mayor Jerry Sanders" for circulation to members of the Regional Chamber of Commerce soliciting financial and other support for the signature-gathering effort. (*Ibid.*)

### E. Having Failed to Initiate Any Good Faith Meet-and-Confer Process Over the Mayor's 401(k) Policy Decision, the City Refused All Demands to Bargain

MEA, the largest of the City's recognized employee organizations, made a series of written requests seeking to meet-and-confer with City regarding the subject matter of the initiative, including 401(k)-style pension reform. (*Boling* at 862-863.) On July 15, 2011, MEA wrote to the Mayor:

> **The contents of your Ballot Initiative clearly fall within the scope of MEA's representation** [...]. Indeed, some of the **subject matter** [...] directly relates to matters on which MEA and the City have recently bargained and [...] reached agreements memorialized in MEA's MOU, Council Resolutions and Ordinances. [...] Please advise how you propose to proceed with this mandatory meet and confer process and when. In

[10] The Lincoln Club contributed $56,225; and "Reforming City Hall With Carl DeMaio" contributed $15,000. (XXI:5442-44.)

> preparation, and unless advised to the contrary, MEA will treat the Ballot Initiative, as presently written, as your opening proposal on the covered **subject matter.** (XIX:5109-10, emphasis added.)

MEA's four subsequent written requests urged either the Mayor or City Council or both to act on *City's behalf* to cure the failure to bargain by meeting-and-conferring over the CPRI subject matter. (XIX:5112; XX:5123-5126, 5142-5149, 5157-62.) The City Attorney's Office asserted in response that the Council was not making a "determination of policy or course of action within the meaning of the MMBA," because the Council would be required to put the CPRI on the ballot without modification if the requisite number of signatures were submitted. (*Boling* at 863; XX:5115-5117.)

Citing the City Attorney's own legal advice in the 2009 MOL acknowledging the Mayor's duty to comply with the MMBA based on his position as the City's CEO, MEA rebutted City's refusal:

> Mayor Sanders has clearly made a determination of policy *for this City* **related to mandatory subjects of bargaining** – and then promoted this determination using the power of his office as Mayor as well as its resources. [...] The conclusion is inescapable that Mayor Sanders made a deliberate decision to attempt to dodge the City's obligations under the MMBA by using the pretense that this is a "citizens' initiative" when it is, in fact, this *City's* initiative acting by and through its chief executive officer and lead labor negotiator, Mayor Sanders. (XX:5123-5126, emphasis added; *Boling* at 863.)

Noting the City Attorney's public support for the Mayor's initiative, MEA urged City Council "to seek independent legal advice related to *City's*

obligations under the MMBA in the matter of the Mayor's pension reform initiative *and* related to the duties [...] of the entire City Council in this policy-setting matter from which the Mayor had excluded them." (XX:5126, original emphasis.) In a fifth and final written demand to gain City's compliance with the MMBA, MEA wrote:

> A proper legal analysis cannot begin and end with the fact that the *City Council* is *not* proposing this ballot initiative. This fact has never been in dispute. But the City Council is *not* empowered to act as the City's Chief Labor Negotiator under the Charter's Strong Mayor Form of Governance – the Mayor is; the City Council does not initiate the MMBA-mandated meet and confer process with this City's recognized employee organizations–the Mayor does; the City Council does not direct the activities of this City's Human Resources or Labor Relations Office–the Mayor does; [...]. The City Council's ability to fulfill its proper role [...] *depends* upon the Mayor's good faith fulfillment of his Charter-mandated role as Chief Negotiator. [...][T]his letter will serve as MEA's final, heartfelt demand that the *City* comply with the MMBA [...] (XX:5157-62, original emphasis.)

Through the City Attorney, City refused all demands by MEA (as well as the other Unions) on the ground that "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot." (*Boling* at 863 and fn. 14; XX:5115-5117, 5128-5133, 5151-5155; XV:4016-4017; XV:3856; XXIII:5907-5918.)

Nearly a year after Mayor Sanders first announced his decision to change negotiable subject by initiative without bargaining, City Council adopted a CPRI-related resolution on December 5, 2011, (XVI:4067-69), and

thereafter enacted an ordinance on January 30, 2012 (XVI:4071-89), placing the CPRI on the June 5, 2012 ballot as "Proposition B." (*Boling* at 863.) 154,216 San Diego electors voted in favor and 80,126 voted against it.

## III. Procedural History

### A. PERB Proceedings Before "Stay" Ordered

In early 2012, before the June election, Unions filed unfair practice charges alleging City had violated the MMBA by refusing to bargain before placing the CPRI on the ballot. (*Boling* at 863; I:3-327; III:579-589, 609-613; IV:935-939.) PERB's Office of the General Counsel issued administrative complaints alleging City "failed and refused to meet and confer in good faith in violation of Government Code section 3505 and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(c)." (III:572-573, 835-836; V:1180-1182, 1407-1408.)

### B. Court Proceedings

Pursuant to PERB Regulations 32450-32455, MEA requested and the Board directed PERB's General Counsel to seek temporary injunctive relief enjoining City from placing CPRI/Proposition B on the ballot until City met and conferred with MEA. (II:246-249.) The Superior Court denied PERB's request. (*Boling* at 863.) City filed a cross-complaint against PERB and obtained a stay of PERB's administrative proceedings.[11] The Court of Appeal

[11] In response, Ballot Proponents sued PERB and five individually-named Board Members (SDSC Case No. 37-2012-00093347), seeking to

lifted the stay in *San Diego Municipal Employees Assn. v. Super. Ct.* (2012) 206 Cal.App.4th 1447, 1453-1455, finding that PERB, as the expert administrative agency, has exclusive initial jurisdiction over conduct that arguably violates the MMBA. (*Id.* at 1458-1460, 1465-1466; see also *Boling* at 864.) City's petition for rehearing was denied, as were its petitions to this Court for extraordinary relief and stay (S203952) and for review (S204306).[12]

### C. Administrative Hearing and ALJ's Proposed Decision

PERB assigned the administrative complaints to an administrative law judge (ALJ) who ordered the cases consolidated and presided over a four-day administrative hearing in July 2012. (VII:1911-1913; XII-XV.)

City answered Unions' unfair practice complaints by asserting that no failure or refusal to bargain had occurred in violation of section 3505 because City had not made a determination of policy or course of action related to CPRI within the meaning of section 3505. (III:842-845.)

The ALJ's 58-page Proposed Decision found that City violated the MMBA. (X:2613-2675; *Boling* at 865.) City filed exceptions. (X:2685-2724.) Ballot Proponents filed an informational brief as interested non-parties. (X:2730-2775, 2894-97; XI:2898-2927.) Unions responded. (X:2776-2782, 2817-2881; XI:2928-2957.)

---

halt PERB's administrative actions related to CPRI, as well as actual damages and attorneys' fees. (PERB's RJN in D069626 filed 9/11/16.)

[12] Ballot Proponents' sought review in the same matter. (S203478)

### D. Board Decision

PERB's 61-page Decision adopted the ALJ's findings of fact (with two exceptions) because they were supported by the record. (XI:2978-3126; *Boling* at 865-867.) PERB affirmed the ALJ's conclusion that City had violated the MMBA by failing and refusing to meet and confer. (*Boling* at 866, fn. 17 and 20.) However, PERB acknowledged that only *courts* have the power to invalidate voter-approved initiatives and thus modified the proposed remedy. (*Id.* at 866-867; XI:3023-3025; *cf.* X:2670-2671.) Leaving the CPRI/Prop B charter amendment in effect (until and unless a court invalidates it), PERB imposed traditional restorative and compensatory remedies against *City* for its violation of the MMBA, with a "make-whole" remedy limited to those employees represented by Unions. (XI:3018-3020.)

### E. Pre-Opinion Proceedings in the Court of Appeal

City and Ballot Proponents filed separate Petitions for Writ of Extraordinary Relief (Gov. C. § 3509.5), seeking nullification of PERB's Decision. City argued that PERB's order was illegal and unenforceable because the MMBA's meet-and-confer process was preempted: first, by the Mayor's First Amendment right, like any other citizen, to engage in direct democracy by initiative; second, by the citizens' constitutional right to initiative which is absolute; and, third, by the provisions of Government Code sections 3203 and 3209 which authorized the Mayor's conduct. City also

argued that PERB erred when using inapplicable agency theories to impose a meet-and-confer obligation on City. PERB and Unions answered three *amicus* briefs filed in support of City's Petition which focused exclusively on the Mayor's right to exercise his First Amendment rights unburdened by any obligation for City to comply with the MMBA.

Ballot Proponents argued that a citizens' initiative is protected by the Constitution as political speech, cannot be modified by a governing body before being placed on the ballot, and cannot be restricted in any manner by the MMBA. They argued that PERB has no jurisdiction over a citizens' initiative and thus PERB's hearing process violated their rights of association.

Days before oral argument, *Boling* issued a "focus" letter for argument which raised new issues not argued by either Petitioner and never briefed during more than 5 years of litigation: does MMBA section 3504.5 define (and limit) a public agency's duty to bargain rather than section 3505, and should a *de novo* standard of review apply to PERB's construction of the MMBA?

### F. Court of Appeal Opinion

*Boling* issued an order consolidating City's and Ballot Proponents' Petitions for decision and then filed its Opinion annulling PERB's decision and remanding the matter to PERB with directions to dismiss Unions' unfair practice complaints. (*Boling*, *supra*, 10 Cal.App.5th at 895.) *Boling* also denied PERB's motion to dismiss Ballot Proponents as real parties in interest

on City's petition. (*Id.* at 867.) In light of its conclusion that PERB's decision must be annulled, *Boling* found PERB's motion to dismiss Ballot Proponents' separate petition moot and did not address it or the additional arguments raised therein. (*Ibid.*)

### G. Petitions for Rehearing Denied

Unions and PERB filed timely petitions for rehearing on the ground, *inter alia*, that they were denied the opportunity to brief dispositive issues. *Boling* summarily denied both petitions.

## ARGUMENT

### I. In Furtherance of Statewide Objectives, The MMBA Is Intended to Foster Communication, Dispute Resolution and *Agreement* Between Public Agencies and Recognized Employee Organizations

In 1961, California became "one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment." (*Glendale City Employees Ass'n v. City of Glendale* (1975)15 Cal.3d 328, 332 [*Glendale*].) In 1968, the Legislature enacted the MMBA as a statute of broad application governing the labor relations of nearly all cities, counties, and special districts. (Gov. C. §3501.) Its purpose is to promote full communication between public employers and employees, improve personnel management and employer-employee relations, and thereby foster "the strong policy favoring peaceful resolution of employment disputes." (Gov. C. § 3500,

subd. (a); *Glendale, supra,* at 335-336; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 22.) The goal of the MMBA is to foster *agreement.* (*Glendale* at 336.) "Though the (meet-and-confer) process is not binding, it requires that the parties seriously 'attempt to resolve differences and reach a common ground.'" (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 61-62.)

### A. PERB's Role As An Expert, Quasi-Judicial Administrative Agency Is To Enforce the MMBA On A Uniform, Statewide Basis Consistent With Its Legislative Objectives

Before 2001, no administrative agency was entrusted with the role of interpreting and enforcing the MMBA on a uniform statewide basis. Instead, state courts interpreted and applied it on a case-by-case basis. By amendment to the MMBA in 2000, PERB's jurisdiction was expanded to include the authority to resolve MMBA disputes (except those involving peace officers). Enforcement actions filed in a multitude of state courts and reviewed by various Appellate Districts, came to an end.

PERB's role is to bring "expertise and uniformity to the delicate task of stabilizing labor relations." (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d 1, 12.) This Court has long held that PERB's expertise as a quasi-judicial agency, and the need for uniformity in labor relations, entitle PERB's final decisions to great deference. (*San Mateo City School Dist. v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 856.)

"PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'" (*Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, 804 [*Banning*]; *Int'l Ass'n of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259 [applying clearly erroneous standard of review].) This Court reaffirmed the vitality of the *Banning* "clearly erroneous" standard of review in *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922 [*County of Los Angeles*][courts defer to PERB's construction of labor law provisions within its jurisdiction unless clearly erroneous].

### B. The Centerpiece of the MMBA Is A Public Agency's Duty To Bargain In Good Faith Established By Section 3505

Courts have "consistently held that the Legislature intended the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employees and employers." (*Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal. 4th 525, 539 [*Woodside*].) It establishes the right of public employees to "form, join, and participate in the activities of employee organizations . . . for the purpose of representation in all matters of employer-employee relations," as well as the right of their recognized employee organizations "to represent their members in their employment relations with public agencies." (Gov. C. §§ 3502-3503.) The scope of that

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." (§ 3504.)

It establishes a duty to meet-and-confer in good faith regarding those matters (§ 3505) – a duty expressly applicable to *public agencies.* (§§ 3501 and 3505).[13] In cases spanning nearly four decades, this Court has recognized section 3505 as the centerpiece of the MMBA. (*Glendale*, *supra*, at 336; *Los Angeles County Civil Service Comm.*, *supra*, 23 Cal.3d at 61-61; *People ex rel. Seal Beach POA v. City of Seal Beach* (1984) 36 Cal.3d 591, 596-597 [*Seal Beach*]; *Woodside, supra,* 7 Cal.4th at 536-537; *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 780 [*Trinity County*]; *Claremont POA v. City of Claremont* (2006) 39 Cal.4th 623, 630 [*Claremont*]; *County of Los Angeles*, *supra,* 56 Cal.4th at 922.) Before *Boling*, the Fourth District itself recently described this section 3505 duty:

> The (MMB)Act imposes a duty on a public agency to "meet and confer in good faith" with recognized unions, "regarding wages, hours, and other terms and conditions of employment . . . prior to arriving at a determination of policy or course of action." (§ 3505.) The duty to bargain applies to a decision "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls." (*International Assn. of Fire Fighters, Local 188, AFL-CIO v.*

---

[13] The City Attorney's 2009 MOL confirmed that "the City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. *See* Charter § 1. The City is the public agency covered by the MMBA." (XVIII:4730.)

> *PERB* (2011) 51 Cal.4th 259, 272.) [...] Thus, the duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU [...]. (*San Diego Housing Commission v. PERB* (2016) 246 Cal.App.4th 1, 8-9.)

## II. By An Unprecedented Rejection of PERB's Role As the State's Expert Labor Relations Agency, *Boling* Applied *De Novo* Review to Annul PERB's Decision Based On A New Construction of the MMBA Unmoored From Five Decades of Judicial and Administrative Precedent

### A. Deference to PERB's Agency Determinations Is Fundamental to the MMBA

While *Boling* acknowledged that the agency issues in this case present potential questions of fact on which it would typically owe PERB deference, *Boling* concluded that PERB has "no specialized expertise," and "no comparative expertise in the common law that would warrant deference" because the material facts related to the existence of a principal-agent relationship are undisputed.[14] (*Boling* at 881, fn. 34; 887, fn. 41.)

However, MMBA section 3509.5, subdivision (b), expressly states: "[T]he findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence in the record considered as a whole, shall be conclusive." A question of fact is presented even where the facts are undisputed but give rise to conflicting inferences. (*Lantz v. Workers'*

---

[14] *Boling*'s view also conflicts with this Court's long-established principle that PERB may construe its statutes in light of "external law" when necessary to resolve unfair practice allegations and to avoid conflicts with those other laws, and, having done so, the same level of deference applies. (*Cumero v. PERB* (1989) 49 Cal.3d 575 at 583, 586-7.)

*Compensation Appeals Bd.* (2014) 226 Cal.App.4th 298, 316-317), and a reviewing court is not permitted to draw its own inferences from the evidence submitted to PERB. (*Regents of the University of California v. PERB* (1986) 41 Cal.3d 601, 617.) Courts may not re-weigh evidence presented to PERB. (*Inglewood, supra*, at 781.) This standard applies to PERB's factual findings related to agency, and it applies when PERB's decision is based on undisputed facts. (*Inglewood, supra*, 227 Cal.App.3d at 781; *Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191, 196.)

*Boling*'s contrary conclusion has important implications for appellate review. Under the substantial evidence test established by section 3509.5, the complaining party bears the burden of presenting all the material evidence on a particular disputed point, not just the evidence that supports its own view of the facts. (*Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 187, fn. 4; *Telish v. California State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1497.) This is consistent with a petitioner's overall burden in a petition for writ of extraordinary relief. (*See Butte View Farms v. ALRB* (1979) 95 Cal.App.3d 961, 966, fn. 1.)

By holding that the substantial evidence test may be discarded and a petitioner relieved of its burden under section 3509.5 whenever a reviewing court prefers to draw contrary inferences from undisputed evidence, *Boling* fundamentally changed the judicial review process established by the

Legislature in section 3509.5 – a process intended to be deferential to PERB to achieve uniform statewide interpretation and application of the state's labor relations statutes. (*Banning, supra*, 44 Cal.3d 799, 804.)

### B. *Boling*'s *Sua Sponte* New Construction of the MMBA Is Contrary to Its Text, This Court's Precedent Interpreting It, and the MMBA's Legislative Goals

Insisting on *de novo* review of PERB's interpretation of the MMBA in defiance of this Court's *Banning* "clearly erroneous" review standard, *Boling*'s *sua sponte* new interpretation of the MMBA radically limits (and confuses) the circumstances in which a public agency owes a duty to meet and confer.

*Boling* argued that legal principles involving PERB's "special expertise" were only tangential to a resolution of this unfair practice case. According to *Boling*, the duty to meet-and-confer in good faith is not owed by the public agency or employer under section 3505; the duty is owed only by the entity's *governing body* and, even then, only in the very limited circumstances described in section 3504.5, subdivision (a). *Boling* asserted:

> Section 3504.5, subdivision (a) describes *when* meet-and-confer obligations are triggered (i.e., when there is an "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"), and section 3505 describes *how* that process should be accomplished, including *who* (i.e. the "governing body . . . or other representatives as may be properly designated by law or by such governing body") shall participate on behalf of the governing body. The designation in section 3505 of who shall *conduct* the meet-and-confer process does not expand who *owes* the meet-and-confer obligations imposed by section 3504.5. (*Boling* at 882, fn. 37, emphasis in original.)

*Boling* is the first court in 49 years to find that section 3504.5 restricts the duty to meet and confer under section 3505.[15] There is no prior published court or PERB decision in which a public agency has even suggested that section 3504.5 limits the duty to meet and confer in any way. (*Cf. Cole v. City of Oakland Resid'l Rent Arbitration Bd.* (1992) 3 Cal.App.4th 693, 697-698 [administrative agency's contemporaneous construction of a statute, combined with reliance and acquiescence by those affected, is entitled to great weight].

For decades, this Court has read sections 3504.5 and 3505 *together* – and with section 3500 – to describe the purposes of the MMBA.

> The MMBA has two stated purposes: (1) to promote full communication between public employers and employees, and (2) to improve personnel management and employer-employee relations. (§ 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the "scope of representation." (§§ 3504.5, 3505, emphasis added.)

*Claremont, supra*, 39 Cal.4th at 630, quoting *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657. As this Court held in *Glendale, supra*, 15 Cal.3d at 336, and *Trinity County, supra,* 8 Cal.4th at 782, the effectiveness of collective bargaining under the MMBA depends on a statutory scheme whereby the governing body that approves labor agreements is the same entity required to conduct or supervise the

---

[15] The relevant text of section 3504.5 has been part of the MMBA since its original enactment in 1968. (Stats. 1968, ch. 1390, p. 2728.)

bargaining. When reading the statutory provisions together and as part of a whole, "[a]n employer cannot change matters within the scope of representation without first providing the exclusive representative notice and opportunity to negotiate." (*PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899; *see also City of Sacramento* (2013) PERB Dec. No. 2351-M, sl.op. at 28 [reasonable advance notice and an opportunity to bargain must be given before a change is made].) *Boling*'s new construction flouts this established principle by absolving a *public agency's* governing body of its statutory responsibility to conduct or supervise bargaining by its designated representative, here the Mayor.

Contrary to *Boling*'s reading of sections 3504.5 and 3505, it is commonplace in cases before PERB which involve a public employer's failure or refusal to bargain, for the actor whose conduct is at issue to be an individual manager, supervisor, administrator, or director – not the governing body itself. This is borne out by a multitude of cases decided by the courts,[16] and by PERB

---

[16] See, e.g., *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1011 [police chief; unilateral change]; *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 489 [management; unilateral change]; *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 265 [county administrator; rule issued]; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 504 [police chief; unilateral change].

since it assumed exclusive initial jurisdiction over the MMBA in 2001,[17] in which public agencies have been found in violation of section 3505's duty to meet-and-confer without any formal action by the governing body.

Moreover, a plain reading of the text of sections 3504.5 and 3505 contradicts *Boling*'s construction that *only* section 3504.5 identifies "who" has a duty to meet-and-confer and "when." Section 3505 mandates, in detail, the "who, what, when and how" related to the agency's meet-and-confer duty.

Section 3505's express terms make no limiting reference back to those governing board actions itemized in section 3504.5, subdivision (a), when establishing a public agency's duty to meet and confer.[18] Section 3505 assigns the duty to the agency's "governing body or such administrative officers or

---

[17] See, e.g., *City of Davis* (2016) PERB Decision No. 2494-M, p. 46 [assistant police chief and administrative fire chief; unilateral change]; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 56 [county public defender; unilateral change]; *City of Livermore* (2014) PERB Decision No, 2396-M, p. 20 [city police department; unilateral change]; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7-8 [city attorney; direct dealing in violation of section 3505]; *City of Riverside* (2009) PERB Decision No. 2027-M, p. 14 [city division; unilateral change].

[18] This erroneous construction also belies *Boling*'s fundamental misunderstanding of how City government works. City Council does not *initiate* any "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation." The Mayor brings proposed legislative actions to the Council for adoption after a section 3505 good faith meet-and-confer process has already occurred. "Tentative agreements" related to Memoranda of Understanding, (II, C, 1-3, *supra*, pp. 19-21), if approved, are adopted by *resolution* and/or by *ordinance* depending on the subject matter.

other representatives as may be properly designated by law or by such governing body," and, in its second paragraph, to the "public agency, or such representatives as it may designate." The duty must be fulfilled "*prior to* arriving at a determination of policy or course of action," related to "wages, hours, and other terms and conditions of employment," or "matters within the scope of representation," and also must be fulfilled "promptly *upon request by either party*" – with "adequate time" allowed for the "resolution of impasses where specific procedures" exist. The duty requires that a "public agency" or its designated representatives (1) meet "personally;" (2) "continue for a reasonable period of time" to "exchange freely information, opinions, and proposals;" (3) "consider fully such presentations as are made by the employee organization on behalf of its members;" (4) endeavor to reach agreement; and, (5) where applicable, do so prior to the public agency's adoption of its final budget for the ensuing year.

Notably, *Boling*'s *sua sponte* rejection of "(PERB's) reading of the statutory scheme" was done without any analysis explaining why PERB's statutory construction is wrong – whether by reference to the actual text of the relevant provisions, the statutory scheme as a whole, any pertinent legislative history, or any prior court or administrative decisions. (*Cf. San Diego Housing Com. v. PERB* (2016) 246 Cal.App. 4th 1, 8, review denied [settled canons of statutory construction explained].) *Boling* fails to explain how its new

construction rather than PERB's is faithful to the actual text of *both* sections 3504.5 and 3505, or how this drastic restriction in a public agency's meet-and-confer duty will advance rather than defeat the legislative intentions and objectives set forth in MMBA section 3500.

Nevertheless, *Boling*'s *ad hoc* announcement that section 3504.5, not section 3505, defines *who* has a duty to meet and confer and *when*, represents a seismic shift in MMBA jurisprudence disrupting decades of established bargaining practices – defined by section 3505 – in every public agency across California. By exempting the actions of a public agency's properly designated *administrative officers or other representatives* from the meet-and-confer duties established by section 3505, *Boling* makes an MMBA opt-out scheme available to every city, county and special district.[19] This un-circumscribed new freedom to act outside the MMBA will impact the quality of public employees' daily work lives – for example, schedules, shift times, and work rules – as well as matters at the very core of the compensation and employment bargain as occurred in this case.

### C. *Boling* Imperils the MMBA and PERB's Role In Enforcing It

It is undisputed that City's Mayor, who serves as its Chief Executive Officer and Chief Labor Negotiator, made a decision for City to circumvent

---

[19] Published court decisions are binding precedent for all parties covered by the MMBA. (PERB Reg. 32320 and 32215.)

the MMBA's mandatory good faith meet-and-confer process and accomplish 401(k)-style pension reform by going to the voters instead. Rather than bring a proposed ballot measure to the City Council as he had done previously on matters within the scope of representation, (II, C-1, *supra,* at p. 19), he used his Office, his staff, and City resources to by-pass Unions and take legislative action by means of a citizens' initiative.[20]

PERB applied the plain text of the MMBA, aided by a consistent body of MMBA jurisprudence established over the past five decades, to reject the City's approach as destructive of the fundamental statewide goals embodied in the MMBA.[21] There is no more critical determination for this state's expert labor relations agency than to decide whether a public agency has violated the MMBA by its failure and refusal to meet and confer in good faith over subject matter within the scope of representation.

///

---

[20] The initiative process is a method of enacting legislation. (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769; *Chula Vista Citizens for Jobs & Fair Competition v. Norris* (2015) 782 F.3d 520, 530) There is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is the first step in an act of law-making and it is not core political speech. (*Angle v. Miller* (9th Cir. 2012) 673 F.3d 1122, 1132, citing *Meyer v. Grant* (1988) 486 U. S. 414, 424-25).

[21] Following *NLRB v. Katz* (1962) 369 U.S. 736, California courts have adopted the private-sector view that unilateral action affecting mandatory subjects of bargaining constitutes a *per se* violation of the MMBA. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 824; *Internat'l Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 967-968.)

*Boling* is the first appellate district to reject and replace the deferential "clearly erroneous" standard of review established by this Court in *Banning,* with the *de novo* standard of review announced in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 [*Yamaha*]. (10 Cal.App.5th at 868-870.) *Boling* defended *de novo* review on the unsupported theory that PERB's legal determination that City violated the MMBA by its failure and refusal to bargain over 401(k)-style pension reform "did not turn upon [PERB's] application of legal principles based on any special expertise with the legal and regulatory milieu surrounding the disputed legal principles." (*Id.* at 880-886.) Not so.

Insisting on *de novo* review, *Boling* rejected PERB's determination at the very heart of the MMBA. Striking out on its own to re-interpret the Act, *Boling* announced a radically different interpretation of the MMBA – one directed at preserving the City's scofflaw misuse of the local initiative power. *Boling*'s rejection of PERB's role, together with its rogue statutory construction narrowing the scope of every covered public agency's duty to engage in good faith meet-and-confer – a duty central to the MMBA's purpose – sanctions an MMBA opt-out which imperils the MMBA itself.

Confronted by the stark choice presented, this Court must determine whether the MMBA – and PERB – will have a future worthy of the state's purpose to foster labor peace through good faith collective bargaining.

### D. Statutory Agency: *Boling* Erred In Rejecting PERB's Determination That City's Mayor Is Its Statutory Agent Under MMBA Section 3505

#### 1. PERB Applied Section 3505's Express Terms to Find That City's Mayor Is A Statutory Agent With A Duty to Meet-and-Confer

The MMBA governs a *public agency* based on the conduct of its agents. Section 3505 defines those agents to include the agency's governing body *and* those "administrative officers or other representatives" properly designated "by law" or "by the governing body." PERB concluded that City's Mayor is its statutory agent within the meaning of MMBA section 3505 because the Mayor is an "administrative officer" or "other representative" properly designated as City's agent "by law" (based on the Mayor's Charter-mandated duties and responsibilities) and "by the governing body" (based on the Council's agreement during all past bargaining that the Mayor serves as the City's Chief Labor Negotiator). (X:2649-2650; XI:2982-2986, 2988-3001.)

Thus, in his capacity as a statutory agent, the Mayor's unfair practice conduct became the *City's* unfair practice conduct when he made, announced and implemented a policy decision on City's behalf to alter terms and conditions of employment for represented employees using the legislative means of initiative to bypass their Unions and avoid the obligation to meet and confer in good faith. (X:2650-2652; XI:2982-2986, 2988-3001.) As PERB noted, City has never disputed the factual finding that the Mayor *acted on*

*behalf of City* when pursuing an initiative to reduce pension costs. (XI:2989-2990, 2994.)

On this factual and legal foundation, PERB rejected City's defense that CPRI was a purely "private" endeavor exempt from the MMBA's meet-and-confer requirements. (X:2661-2667; XI:2982-2986, 2988-3001.) "The MMBA's meet-and-confer provisions must be construed to require City to provide notice and opportunity to bargain over the Mayor's pension reform initiative before accepting the benefits of a unilaterally-imposed new policy." (XI:2993-4.) PERB's agency determinations in this case were exactly as City Attorney Goldsmith explained them in his published 2009 MOL before this controversy erupted: "[N]otwithstanding any distinctions in the Charter's roles for the Council, the Mayor, the Civil Service Commission, and other City officials or representatives, [...] PERB will consider the actions of all officials and representatives acting on behalf of the City in determining whether or not the City has committed an unfair labor practice in violation of the MMBA." (XVIII:4721, 4727-28, 4730, emphasis added.)

### 2. *Boling* Rejected the Provisions of Section 3505 Establishing That Public Agencies Bargain Through Statutorily-Designated Agents

On the basis of its new construction of sections 3504.5 and 3505, *Boling* rejected PERB's determination that the Mayor's conduct is relevant when ascertaining whether City complied with its section 3505 duty in

connection with the Mayor's unilateral policy determination announced and implemented by initiative. *Boling* concluded that, notwithstanding the Mayor's acknowledged Charter-imposed duties and responsibilities as City's Chief Executive Officer and his role as the City's Chief Labor Negotiator (*Boling* at 882, fn. 36), City's Mayor is *not* a *statutory* agent for *City* under the MMBA because being an "administrative officer or other representative designated by law or by the governing body" under section 3505 is legally irrelevant to the question of *who* has a duty to bargain. In fact, *Boling* wrote the Mayor entirely out of the unfair practice narrative as having no "legal relevance on the central issue raised in this proceeding." (*Boling* at 865, fn. 16)[22]

Accordingly, *Boling* declared that PERB erred in concluding that City violated the Act when the Mayor implemented a policy decision to eliminate defined benefit pensions for City's budget benefit and to do so by initiative to bypass Unions and avoid meet-and-confer because no policy determination the Mayor made as City's CEO and Chief Labor Negotiator to change employment terms and conditions within the scope of representation triggered City's duty to meet-and-confer. (XI:3078-3079; *Boling* at 881, fn. 34, 882-883, 886.)

---

[22] *Boling* initially dismissed the course of conduct at issue in this unfair practice case as the "participation by a few government officials and employees in drafting and campaigning for a citizen-sponsored initiative," (*id.* at 880), and later characterized this conduct as "the Mayor's advocacy for a citizen-sponsored initiative affecting employee benefits" – which was neither "inherently wrongful," nor proscribed by the MMBA merely because the Mayor "occupies public office." (*Id.* at 891& fn. 50.) (*Cf.* II-D, *supra*, at pp. 21-29.)

However, consistent with the text and purpose of the MMBA and all prior judicial and administrative interpretations of it, PERB properly concluded that section 3505's command is not limited to the governing body. Although the governing body is legally responsible for enacting legislation on terms and conditions of employment (e.g., most often by adopting a tentative agreement), the duty defined by section 3505 is also imposed on "other representatives as may be properly designated by law or by such governing body." City's Mayor is unquestionably such an "other representative." Section 3505 cannot be read as confining itself to policy determinations or intended courses of action only of the governing body. PERB has construed all of the statutes under its jurisdiction [] as requiring negotiations on proposals to change negotiable subjects whether accomplished through legislative action by the governing body. (XI:3078-3079.)

### E. Common Law Agency: *Boling* Erred In Rejecting PERB's Common Law Agency Findings Within the Scope of Its Expertise

More than 25 years ago, *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767, 781 [*Inglewood*], held that common law agency principles *are* within the Board's expertise, that the substantial evidence test applies to PERB's factual determinations regarding the existence of an agency relationship, and that the Board's findings concerning an agency relationship are owed deference. The *Inglewood* court described PERB's determination of

agency issues as central to its role in interpreting a collective bargaining statute – in that case, the Educational Employment Relations Act (Gov. C. § 3540 et seq. [EERA].)[23] The *Inglewood* court held that PERB's application of agency principles – including those that might be considered "common law" theories – is a matter squarely within the Board's purview, and subject to the clearly erroneous standard of review. (*Id.* at 776, 778.)

### 1. PERB Applied Common Law Agency Principles Consistent With Precedent and the Statutory Scheme

In addition to its determination that City violated the MMBA based on the conduct of its Mayor as a statutory agent under section 3505, PERB applied common law agency principles while noting that labor boards routinely apply such principles in unfair practices cases and do so with reference to the broad, remedial purposes of the statutes they administer. (*Regents of the University of California*, (2005) PERB Decision No. 1771-H at p. 3, n. 2.)

Here, PERB concluded that the Mayor had actual and apparent authority to pursue this pension reform measure as City's agent. An agent is deemed to represent the principal for all purposes within the scope of his actual authority, and those liabilities which accrue to the agent from his transactions similarly accrue to the principal. (Civil C. § 2330; *Workman v.*

---

[23] Although *Inglewood* arose under EERA rather than the MMBA, this Court has noted that the purpose of the Legislature's decision to entrust PERB with administration of the MMBA was to create a "coherent and harmonious system of public employment relations laws." (*Coachella, supra,* 35 Cal.4th 1072, 1090.)

*City of San Diego* (1968) 267 Cal.App.2d 36, 38.) Where an agent's discretion is broad (as is City's Strong Mayor's), so, too, is the principal's liability for the wrongful conduct of its agent unless these wrongful acts are unrelated to the purpose of the agency. (*Superior Farming Co. v. ALRB* (1984) 151 Cal.App.3d 110, 117; *Johnson v. Monson* (1920) 183 Cal.149, 150-151; *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 312.)(XI:2991.)

PERB concluded that City's Mayor acted with actual authority with regard to CPRI since he acted within the scope of his authority as lead labor negotiator and that application of common law agency principles is consistent with the text of section 3505 making City accountable as principal for the unfair practice conduct of its Mayor as a *statutory* agent. (XI:2993, 2996-2997)

Moreover, apparent authority is such as "a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. (Civil C. § 2317; *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 573 ["proof of authority, either actual or ostensible, [...] may be established by circumstantial evidence"].) The record is filled with media reports and public appearances by the Mayor, Councilmembers and City staff discussing CPRI as the Mayor's initiative. An employer's high-ranking officials, particularly those whose duties include labor relations or collective bargaining, are presumed to speak and act on behalf of the employer such that

///

their words and conduct may be imputed to the employer in unfair practice cases. (XI:2997-3001; see also *Vista Verde Farms, supra,* 29 Cal.3d at 312.)

PERB's application of agency principles to find that City violated the MMBA based on the Mayor's unilateral policy determination and action when using his Office to change pensions by "private" initiative, is consistent with the published legal advice the Mayor and City Council received from the City Attorney in a 2008 MOL on the subject of "Pension Ballot Measure Questions." (XVIII:4708-4717.) In relevant part, this MOL explains that City's meet-and-confer obligation would be triggered if the Mayor invokes his constitutional right as a citizen to "initiate or sponsor a voter petition drive to place a ballot measure to amend City Charter provisions related to retirement pensions:"

> [S]uch sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions [...] City would have the same meet and confer obligations with its unions as [if he were proposing a ballot measure on behalf of City].[24] (*Id.* at 4710, 4716 & fn. 9.)

PERB concluded that this 2008 MOL accurately describes City's duty to bargain in this case based on the Mayor's conduct. (XI:3037.) PERB rejected the notion that City could only be liable for its Mayor's conduct under

---

[24] In response to this 2008 MOL, Mayor Sanders abandoned the citizens' initiative approach and returned to the bargaining table where he negotiated a new "hybrid" defined benefit/defined contribution pension plan with Unions to achieve his policy objectives. (II, C-2, *supra,* p. 19.)

the MMBA if the City Council had *expressly* authorized him to pursue a pension reform ballot measure. Allowing City to escape liability based on this "defense" would frustrate the MMBA's purpose of promoting harmonious labor relations (§ 3500, subd. (a)) through meet-and-confer. (§ 3505). In fact, as the state's expert in enforcing the MMBA on a uniform, statewide basis, PERB relied on this Court's precedent to explain that such a prerequisite for "express authorization" would undermine the principle of bilateral negotiations by exploiting the "problematic nature of the relationship between the MMBA and the local [initiative-referendum] power," citing *Trinity County*, *supra*, 8 Cal.4th at 782.

### 2. Invoking the General Expertise of Courts In Applying the Common Law, *Boling* Erroneously Re-construed the MMBA to Reject PERB's Common Law Agency Findings

*Boling* acknowledged the substantial evidence related to the Mayor's Charter-mandated role, (*Boling* at 886, 889), but rejected PERB's application of common law agency principles in reliance on *Boling's* own new construction of the MMBA. *Boling* concluded that common law "actual or apparent" agency principles have no applicability here because: first, the "principal" for purposes of any duty to meet-and-confer is the *City Council* not City (*id.* at 881, fn. 34); second, the City Council cannot "be charged with the unapproved conduct of its agents" because compliance with section 3504.5 is not triggered by "some action proposed by a putative agent of the governing

body," *i.e.*, the City's Mayor (*id.* at 890, fn. 49); and, third, City Council's silence and inaction in response to the Mayor's publicly-announced intention to change City employee pensions by initiative did not support a finding of apparent agency because the Mayor said he was taking action as a "private citizen" and not "as representative for the City Council." (*Id.* at 889, fn. 47.)

On this basis, *Boling* concluded the Mayor is also not *City's* common law agent in labor-related matters.[25] *Boling* noted that, even if the City Council *were* charged as "principal" for the Mayor's conduct, the Council's (and thus *City's*) liability would depend on that conduct being wrongful *ab initio* – which *Boling* had already determined it was not – because the Mayor's "individual advocacy for a citizen-sponsored initiative effecting employee benefits" was neither inherently wrongful nor proscribed by the MMBA merely he "occupies public office." (*Id.* at 891 and fn. 50.) Distinguishing the result in *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, *Boling* contrasted the Mayor's "permissible" activities with those of an agent whose "inherently wrongful and injurious acts [...] would unquestionably constitute an unfair labor practice if engaged in directly by the employer." (*Boling* at 891.)

///

---

[25] *Boling* agreed that the Mayor believed his actions promoted City's best financial interests but found this fact irrelevant when it is section 3504.5 which defines *who* has a duty to meet-and-confer. *Boling* notes there is no evidence the Mayor believed he was promoting CPRI *on behalf of the City Council* and no evidence the Council induced him to believe his actions in promoting CPRI were on its behalf. (*Boling* at 887, fn. 42.)

Thus, *Boling*'s erroneous construction of sections 3504.5 and 3505 to exclude the Mayor from the unfair practice narrative taints every feature of *Boling*'s analysis and blinds it to this Court's key point in *Vista Verde* emphasizing that an employer's liability does not turn on strict or technical agency doctrines but rather must be determined from the viewpoint of the affected employees – with the touchstone being whether the employees "would have just cause to believe that [the actor was] acting for and on behalf of management," or "whether the employer has gained an improper benefit from the misconduct." (29 Cal.3d at 319-320.)

### F. Ratification: Having Exempted the Mayor From Any Meet-and-Confer Duty, *Boling* Erred In Concluding the City Council Had No Duty to Act

#### 1. *City* Violated the MMBA By the City Council's Unfair Practice Conduct As A Statutory Agent Under Section 3505

City's governing body, its City Council, is also a statutory agent under section 3505 with a duty to comply with the MMBA's good faith meet-and-confer mandate before "arriving at a determination of policy or course of action" related to subject matter within the scope of representation. Acts that are not expressly authorized but are within the scope of an agent's authority are subject to subsequent ratification. (XI:3002, citing *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942.)

The Council's independent duty to comply with the MMBA on behalf of *City* arose when the Mayor delivered his "State of the City" Address during

a formal meeting of the *City Council* in January 2011, announcing his decision to change subject matter within the MMBA's scope of representation by initiative. As PERB noted:

> The unions' interest in bargaining with the Mayor without implicating the rights of the citizen proponents is not difficult to ascertain. [Unions] could have hoped for a compromise proposal with the Mayor, possibly through intervention of the City Council. Even assuming [CPRI] would have succeeded on its own, a compromise solution of any derivation would have resulted in the presentation of a competing initiative measure possibly giving the electorate a more moderate option for addressing pension costs. (XI:3034-3035, 3091, fn. 19.)

In addition, MEA's letter to the Mayor dated July 15, 2011, sought bargaining over the *pension reform subject matter* covered by the Mayor's initiative effort – subject matter which was clearly within the scope of representation and also covered by existing MOUs. (XIX:5109-10.)

Yet, with knowledge of the Mayor's conduct, the City Council failed to disavow or cure it. Despite Unions' persistent requests for bargaining, neither the Mayor nor the City Council – as statutory agents for the *City* – took any action to cure the *City's* failure and refusal to bargain *over this subject matter* even though the obligations set forth in section 3505 are expressly

///

///

///

*bilateral* and may be invoked "upon request by either party."[26] (XX:5123-26, 5142-49, 5157-62.)

Thus, having had a duty to act to comply with section 3505, the Council's failure to engage in a good faith meet-and-confer process with Unions on the *subject of 401(k) pension reform* – either on the Council's own initiative *or* in response to Unions' written requests – at any time during the period after the Mayor's public announcement in early January 2011 and *before* any notice of intent to circulate an initiative petition had been filed in early April – or, for that matter, during the many months *before* the Mayoral-led citizens' initiative had qualified for the ballot in November 2011 – constituted the *City Council's* unfair practice in violation of section 3505. (X:2648-2661; XI:2982-2986, 2988-3001.)

On this basis, PERB concluded that the City Council was prohibited from putting CPRI on the ballot *before negotiating* with Unions over the mandatory subject matter of 401(k) pension reform. (XI:3042.)

///

///

///

---

[26] A recognized employee organization may itself trigger an employer's duty to bargain by a demand to meet-and-confer over a negotiable subject. (*Dublin Prof'l Fire Fighters, Local 1885 v. Valley Comm. Svs. Dist.* (1975) 45 Cal.App.3d 116, 118 [assignment of overtime work]; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 5 [caseloads of eligibility workers].)

### 2. Based On Its Conclusion That City's Mayor Had No Duty to Meet-and-Confer Under Section 3505, *Boling* Concluded That Its City Council Likewise Had No Duty

*Boling* acknowledged that "it is well established as a principle of labor law that where a party ratifies the conduct of another, the party adopting such conduct also accepts responsibility for any unfair practices implicated by that conduct," such that "ratification may impose liability for the acts of employees or representatives, even when the principal is not at fault and takes no active part in those acts," and, further, that ratification may be express or implied from an employer's failure to "investigate or respond to allegations of wrongdoing." (*Boling* at 892.) However, *Boling* concluded that the City Council had no independent duty to act as a statutory agent because CPRI was not *its* proposal within the meaning of section 3504.5 and also had no duty to "disavow or repudiate" the Mayor's conduct because there was nothing wrongful about it. In fact, *Boling* is "convinced that (Mayor) Sanders was entitled to support CPRI (either as an individual or through capitalizing on his office's bully pulpit) because he was not supporting the proposal as the "governing body," which is the only entity constrained by the meet-and-confer obligations under the MMBA." (*Id.* at 893.)

Finally, *Boling* rejected the notion that common law ratification could be premised on the City Council's placing the CPRI on the ballot or, thereafter, accepting for City the financial benefits accruing from its passage because the

City Council could not have declined to do either. According to *Boling*, "ratification has no application when the principal is unable to decline the benefits of an agent's unauthorized acts," (*id.* at 894), such that the Mayor's opt-out scheme worked exactly as intended and PERB is powerless to provide represented employees and their Unions with any remedy.

*Boling*'s result-oriented reasoning led illogically to its exempting the Mayor from his clear statutory duties and to its restricting the Council's participation in labor relations to the point of impracticality. Even *Boling*'s *de novo* rationale does not support this twisted result.

### G. City's Duty to Meet-and-Confer Over Mandatory Subjects Did Not Implicate Local Initiative Rights

#### 1. City Had A Duty To Engage In Good Faith Meet-and-Confer Which May Have Led To A City Council-Sponsored Alternative to CPRI or A Competing Ballot Measure

As PERB concluded, as soon as the Mayor announced his intentions in November 2010 and, thereafter, even when a notice to circulate was filed in April and the petition circulating – and even after CPRI had qualified for the ballot – nothing prevented City and Unions from negotiating over a ballot measure on the same subject matter, whether as an alternative to any citizens' initiative or as a competing measure. (XI:3034 & fn. 23.) Such a process would not have required altering the CPRI itself. The City Attorney's 2008 MOL, in fact, explained exactly how such a Council-initiated ballot measure would be bargained in compliance with the MMBA. (XVIII:4709, 4712-15.)

Moreover, it is well-settled, and City never disputed, that conflicting ballot measures may be presented at the same election, with the measure receiving the highest vote total prevailing. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188.) In fact, the San Diego City Council put a competing ballot measure before voters in response to a duly-qualified citizen's initiative when deemed appropriate in defense of the City's budget. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 [*both* measures approved but invalidated on cross-motions for declaratory relief].) PERB expressly rejected the contention that City had no authority to meet and confer with Unions simply because it was obligated to place CPRI on the ballot without alteration. (XI:3034 and fn. 23.)

### 2. *Boling* Again Relied On A New Construction of Section 3504.5 to Reframe the Unfair Practice Conduct At Issue, Reject PERB's Determinations Regarding the City Council's Role, and Further Eviscerate the MMBA

*Boling* ignored PERB's conclusion that the City Council had both a duty to meet and confer over the CPRI *subject matter* and the time and opportunity to do so before putting CPRI on the ballot. While *Boling* agreed that, when a CPRI-related resolution came before the City Council on December 5, 2011 (XX:5178-5180) – months before the June 2012 primary election and nearly a year before the November 2012 general election -- the Council "arguably" had some flexibility and discretion to delay the initiative vote (citing *Jeffrey v. Super. Ct.* (2002) 1002 Cal.App.4th 1, 4), *Boling* found

this point legally insignificant to accommodate bargaining under the MMBA on the basis that the City Council had no right to *modify* the CPRI. (*Boling* at 872-873 and fn. 25.) Thus, by re-framing the unfair practice conduct at issue as a demand to bargain *over CPRI* in order to change its terms, *Boling* declared that any imposition of a meet-and-confer obligation on the governing body would require an "idle" or "meaningless" act. (*Boling* at 872-873, fn. 25; 875, fn. 27.) *Boling* concludes that, even when a citizen-sponsored initiative addresses matters within the "scope of representation," the governing body of a public agency has *no duty* to meet-and-confer because:

> the meet-and-confer requirements of the MMBA by its express terms constrain only *proposals* by the "*governing body*" (§§ 3504.5, subd. (a) [...]; 3505 [...]. Because a citizen-sponsored initiative does not involve a proposal by the "governing body," we are convinced there are no analogous meet-and-confer requirements for citizen-sponsored initiatives. (*Boling* at 875, original emphasis.)

According to *Boling*, the agency's governing body is legally entitled to fail and refuse to bargain over subject matter within the scope of representation under section 3504. Rather than harmonize the rights at issue as PERB did, in keeping with this Court's precedents, *Boling* erroneously concluded that the mere existence of a citizens' initiative seeking to legislate changes in terms and conditions serves to displace the MMBA.

///

///

## III. By Rejecting PERB's Decision Harmonizing the Tainted Exercise of Local Initiative Rights With Rights Guaranteed by the MMBA, *Boling* Has Sanctioned Government's Use of Citizens' Initiative To Avoid Meet-and-Confer

The determination of "the extent to which local regulation of employment matters as prescribed by [a City's] charter might be superseded by matters of statewide concern is a matter properly decided, in the first instance, by PERB." (*Int'l. Fed. of Prof. and Tech. Engin. v. Bunch* (1995) 40 Cal.App.4th 670, 676, review denied.)

This Court has twice looked at the intersection between *local* ballot measures and the MMBA and in both cases found that *constitutional* rights of initiative (exercised by a governing body) and of referendum (exercised by the electorate) must necessarily yield to the MMBA. (*Seal Beach, supra* 36 Cal. 3d 591, and *Trinity County, supra*, 8 Cal. 4th 765.)

Before this Court decided *Seal Beach* in 1984, *San Francisco Firefighters v. Bd. of Supervisors* (1979) 96 Cal.App.3d 538, was the "state of the law" related to Article XI, § 3(b) rights – holding that a charter city's constitutional right to propose charter amendments in the public interest is "absolute" and "untrammeled" and "shall not be the product of bargaining and compromise between the public entity's representatives and others." (*Id.* at 548.) This court overruled *San Francisco Firefighters* because the constitutional right to propose charter amendments is *not* absolute. "[I]t is a truism that few legal rights are so absolute and untrammeled that they can

never be subjected to peaceful coexistence with other rules." (*Seal Beach* at 598 [internal quotations omitted].) "Fair labor practices, uniform throughout the state" are a matter of statewide concern. (*Id.* at 600.) The "meet-and-confer requirement [of the MMBA] is an essential component for regulating the city's employment practices." (*Id.* at 601.) Concluding that a governing body's article XI, § 3(b) constitutional rights must yield to the important statewide objectives of the MMBA, the *Seal Beach* court ordered the vote on three charter amendments set aside and the *status quo ante* restored until the good faith meet-and-confer requirements of the MMBA could be satisfied. (*Id.* at 594-95.)

A decade after *Seal Beach*, this Court held in *Trinity County* that "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to curtail the local right of referendum." (8 Cal. 4th at 784.)

Here, confronted with an avalanche of evidence establishing unfair practice conduct by City when using a citizens' initiative as the means to by-pass Unions and avoid the MMBA's central good faith meet-and-confer mandate, PERB held City to account with a remedy to effectuate the purposes of the Act in this unilateral change case in a manner fully consistent with this Court's *Seal Beach* and *Trinity County* precedents. The law is clear that initiative rights are important but *not* absolute. (*Widders v. Furchtenicht*

(2008) 167 Cal.App.4th 769, 786 [courts must guard the initiative power with "both sword and shield" to protect against interference with its proper exercise and to strike down efforts to exploit the power for an improper purpose].)

PERB rejected City's defense that this Court's *Seal Beach* precedent is not implicated based on the tactics it used – i.e., a flagrant course of unfair practice conduct by its Mayor claiming to be a "private citizen" while serving in the capacity of statutory agent, combined with the blameworthy inaction of its City Council. PERB concluded that, where local control implicates matters of statewide concern, it must be harmonized with the general laws of the state (*Seal Beach*) and, where a genuine conflict exists, local rights are preempted by the general laws affecting statewide concerns (*Trinity County*). (XI:3008-17.) A charter city cannot expand its power to affect statewide matters simply by acting through its electorate rather than through traditional legislative means. (XI:3012.)

There is simply *no* authority for the proposition urged by City, and adopted by *Boling,* that the MMBA is superseded by City's use of the local initiative process in a way which allows it, as a covered public agency, to circumvent the MMBA's meet-and-confer obligation as it did here. (XI:3008.)

Moreover, PERB concluded that it need not answer the question left open by this Court in *Seal Beach, supra*, 36 Cal. 3d 591, 599, fn. 8 – whether the meet-and-confer requirement was intended to apply to charter amendments

proposed by initiative – because this case does not ultimately involve a face-off between the MMBA's meet-and-confer requirements and the constitutional right of local initiative. PERB found that *City's* use of the local initiative power – by both the actions and inaction of its Mayor and City Council as a means to by-pass the obligations of the MMBA – was both an abuse of that initiative power and inimical to the MMBA's goal of fostering communication, dispute resolution and *agreements* between public employers and their employees. On these specific findings, PERB determined that the exercise of local initiative rights in *this case* must yield because proper enforcement of the MMBA requires it. Otherwise, *City*, as the offending public employer, would be allowed to benefit from its unfair practice conduct without consequences. (XI:3023-3025, 3034-3035; *Boling* at 866-867.) PERB explained that:

> for the City's elected officials, and particularly the Mayor as the chief labor relations official, to use the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by Unions on these same subjects raises questions about what incentive Unions have to agree to anything. (*Id.* at 3038-3039.)

*Boling* acknowledged that the core tenets of this Court's decision in *Seal Beach* were that (1) the MMBA was clearly intended to apply to regulate actions by the governing bodies of charter cities and (2) the MMBA mandates that those governing bodies satisfy the procedural requirements (the meet-and-confer process) before unilaterally imposing any changes on matters within the scope of representation. (*Boling* at 874.) However, again, by application of its

erroneous new construction of the MMBA, *Boling* concluded that "a city has no obligation under the MMBA to meet and confer" because a duly-qualified citizen-sponsored initiative does not involve a proposal by a 'governing body' nor could meet-and-confer produce an agreement that the public agency is authorized to make." (*Id.* at 879.)

On the same misguided basis, *Boling* declared that the question this Court left unanswered in footnote 8 of *Seal Beach* must be answered *before* any analysis of the unfair practice conduct at issue in this case. *Boling*'s framing of that question underscores the mischief throughout its analysis and the reason for its erroneous conclusions in this case:

> [R]egardless of whether persons associated with city government are involved in drafting and/or campaigning for a citizen-sponsored initiative," do the MMBA's meet-and-confer requirements apply "with equal force before the governing body of a charter city may comply with its statutory obligation to place on the ballot a duly qualified citizens' initiative proposing the same type of charter amendment?" (*Boling* at 872, fn. 24.)

*Boling*'s "regardless" premise led it to sidestep the very heart of this dispute – and the reason for PERB's Decision – which is *the conduct of City's Mayor*.

*Boling* approached this case as one where initiative rights are absolute and when exercised, regardless of government's bold, direct and undisputed involvement to avoid the MMBA and by-pass recognized employee organizations, must wholly displace the MMBA. *Boling* has thus offered a full-throated endorsement for a public agency's use of "citizens' initiatives"

to eviscerate the statewide rights guaranteed by the MMBA while legislating unilateral changes in terms and conditions of public employment.

## CONCLUSION

Only a reversal of *Boling* and dismissal of City's petition for writ of extraordinary relief will ensure the continued vitality of the MMBA consistent with its legislative objectives, and prevent a spate of new litigation to test the uncertainties created when making *de novo* review of every PERB Decision available around the state. Without a reversal, rights long-ago guaranteed to *all* public employees and their recognized employee organizations will be defeated by the exercise of local initiative rights in *one city*, and the State's interest in fostering labor peace will be undermined.

By enforcement of PERB's Decision and the remedy it prescribes within the scope of its authority to effectuate the purposes of the MMBA, this Court will further the principles it carefully crafted in *Seal Beach* and in *Trinity County* to assure that constitutional rights of local initiative and referendum are harmonized with the statewide goals embodied in the MMBA.

///

///

///

///

Dated: 8-22-17 SMITH, STEINER, VANDERPOOL & WAX

BY: Ann M. Smith
ANN M. SMITH
Attorneys for Real Party in Interest
San Diego Municipal Employees
Association

Dated: 8/22/17 ROTHNER, SEGALL AND GREENSTONE

BY: Ellen Greenstone
ELLEN GREENSTONE
Attorneys for Real Party in Interest
AFCSME, AFL-CIO, Local 127

**CERTIFICATE OF COMPLIANCE PURSUANT TO**

**CALIFORNIA RULES OF COURT, RULE 8.520(c )(1) and (3)**

In accordance with Rule 8.520(c)(1), I certify that the text of this brief, after excluding the words permitted by Rule 8.520(c)(3), but including all footnotes, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect 11), contains 13,812 words.

Dated: 8-22-17

Ann M. Smith
ANN M. SMITH

## PROOF OF SERVICE

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

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

CASE NAME: Boling, et al.; City of San Diego v. Public Employment Relations Board

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West A Street, Suite 320, San Diego, California.

On August 23, 2017, I served the within document described as:

**OPENING BRIEF ON THE MERITS BY ALL UNION REAL PARTIES IN INTEREST**

on the parties listed below via the method indicated:

| Party | |
|---|---|
| Kenneth H. Lounsbery, Esq.<br>James P. Lough, Esq.<br>Yana L. Ridge, Esq.<br>Alena Shamos, Esq.<br>Lounsbery Ferguson Altona & Peak<br>960 Canterbury Place, Suite 300<br>Escondido, California 92025<br>Telephone: 760-743-1201; Fax: 760-743-9926<br>Email: khl@lfap.com; jpl@lfap.com; aso@lfap.com<br>(Attorneys for Petitioner Catherine A. Boling, T.J. Zane, and Stephen B. Williams) | First Class Mail & Email |

///

///

Mara W. Elliott, City Attorney
George Schaefer, Assistant City Attorney
M. Travis Phelps, Deputy City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101
Telephone: 619-533-5800; Fax: 619-533-5856
Email: wchung@sandiego.gov; mphelps@sandiego.gov
(Attorneys for Petitioner City of San Diego)

First Class Mail
& Email

Jose Felix De La Torre, Esq.
Wendi Lynn Ross, Esq.
Joseph W. Eckhart, Esq.
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
Telephone: 916-322-8231; Fax: 916-327-7960
Email: PERBLitigation@perb.ca.gov;
fdelatorre@perb.ca.gov
(Attorneys for Respondent Public
Employment Relations Board)

First Class Mail
& Email

BY UNITED STATES FIRST CLASS 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 San Diego, California.

///

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 23, 2017, at San Diego, California.

ELIZABETH DIAZ