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

JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS TO AMICUS BRIEF FILED BY SAN DIEGO TAXPAYERS EDUCATIONAL FOUNDATION IN SUPPORT OF CITY OF SAN DIEGO

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Introduction

Writing as an *amicus curiae* in support of the City of San Diego, the San Diego Taxpayers Educational Fund (SDTEF) fails to address the issues on which review was granted,[1] opting instead to construct a First Amendment argument which misstates the law and then applies it to a fictionalized account of this case. SDTEF's goal, like the City's, is to prevent the State from enforcing the Meyers-Milias-Brown Act (MMBA) against the City for its failure and refusal to bargain over pensions and compensation.

SDTEF's approach is to ignore PERB's findings and their legal significance under the MMBA – declaring that "this appeal presents the question whether a citizens' initiative on pension reform may be invalidated because an elected official – namely, a mayor – spoke vigorously on its behalf." (SDTEF Brief at 12.) Sticking with a fiction which contradicts the controlling findings in this case, SDTEF incorrectly characterizes PERB's decision as a determination that the City violated the MMBA "because (its) Mayor spoke up regarding an important citizens' initiative," (*Id.* at 9, 12, 17,

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[1] (1) When a final PERB decision is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the 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? and (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?

53-54), even though it was the Mayor's alleged "obligation" as an elected official to take positions on "controversial political questions." (*Id.* at 17.)

SDTEF's argument ignores Mayor Sanders' course of conduct from mid-November 2010 through early April 2011 – while he served as the City's Chief Executive Officer (CEO) and its Chief Labor Negotiator – and *before* any "citizens' initiative" was pending or a "notice of intent" to circulate a petition had been filed. During this period, Mayor Sanders' First Amendment right to "speak up" about the need for further pension reform, did not give him license to violate the MMBA by making and announcing his determination to "transform pensions" by using a citizens' initiative in order to bypass recognized employee organizations and avoid the City's state-mandated collective bargaining obligations.

SDTEF's argument also focuses exclusively on the fact that Mayor Sanders was an *elected official* – which is true – but ignores the fact that, by enacting a "strong Mayor" form of governance through the City's Charter, the people of San Diego made it the Mayor's job to serve as City's CEO and its Chief Labor Negotiator and to comply with the MMBA in the performance of his duties. SDTEF's theory that the State cannot enforce the MMBA against the City because its Mayor had an absolute and unfettered First Amendment right in the circumstances of this case to speak and act in derogation of his *executive* duties, is simply not supported in First Amendment case law.

SDTEF also fails to acknowledge and address the legal significance under the MMBA of Mayor Sanders' flat refusal to bargain in response to repeated Union demands for bargaining over the subject of pension reform – demands which were directed to him not because he was an *elected* City official but because he was the City's *executive* official in charge of the MMBA-mandated meet-and-confer process for the City.

Finally, while SDTEF is preoccupied solely with the Mayor's allegedly unfettered First Amendment rights, SDTEF never addresses PERB's conclusion that the City violated the MMBA by the *separate and independent* conduct of the City Council which, as City's governing body, is itself a statutory agent under section 3505 of the MMBA. Thus, whatever the scope of Mayor Sanders' First Amendment rights under the circumstances of this case, those rights could not and did not operate to relieve the City from accountability for the *City Council's* failure and refusal to meet and confer over pensions and compensation before voting to place the Prop B initiative on the June 2012 ballot.

By choosing to frame its argument based on a fictionalized account of the case and failing to confront the *City*'s obligations under the MMBA, SDTEF's perspective as an *amicus curiae* is of no help to this Court. Worse still, SDTEF misdirects this Court by misstating and misapplying First Amendment law to argue for a Court-sanctioned means for *government* to

engage in direct democracy for the purpose of changing terms and conditions of employment outside the good faith meet-and-confer process mandated by the MMBA. Such a result must be rejected as contrary to the text of the MMBA and decades of case law interpreting and applying it (all of which SDTEF ignores) – and because allowing government to use such an MMBA opt-out scheme would represent a resounding defeat for the legislative goals embodied in this statewide law.

Argument

I. SDTEF Ignores The Evidence And PERB's Findings Of Fact – Conclusive On Review – Regarding Mayor Sanders' *Actual* Conduct As City's Chief Executive Officer And Its Chief Labor Negotiator During The Months *Before* Any Initiative Petition Was Circulating

PERB concluded that the City violated the MMBA by implementing unilateral changes in matters within the scope of representation in a context where its chief executive officer and "strong" mayor, Jerry Sanders, used the prestige, resources, and staff of his City office to promote and pursue a pension reform initiative – in an admitted effort to avoid the City's bargaining obligations under the MMBA – *"all while denying the [U]nions an opportunity to meet and confer over his policy determination in the form of a ballot proposal."* (AR:XI:3096, emphasis added.[2])

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[2] Unless otherwise noted, all citations are to the Administrative Record. Citations to *Boling* are to the Court of Appeal's decision below.

SDTEF never analyzes these key features of PERB's decision – i.e., that the Mayor's conduct occurred when he served as City's Chief Executive Officer and its Chief Labor Negotiator and in a context where the *City* failed and refused to meet and confer over this pension reform subject matter. No fair reading of PERB's decision can lead the reader to conclude that, "in the Board's view [...] (Mayor Sanders) had an obligation to remain silent on controversial political questions," (*id.* at 18), or that PERB "effectively invalidated the citizens' initiative because an elected official, namely the Mayor, publicly supported it" or "spoke vigorously on its behalf" (*id.* at 9, 12, 17 and 54.) The record provides a startling contrast to SDTEF's mischaracterization of PERB's decision as having been based on an elected official's public support of a citizens' initiative (SDTEF Brief at 9, 12, 17-18, and 53-54.)

A. Mayor Sanders Made A Policy Decision To Achieve Further Pension Reform For The City By Initiative To Avoid Bargaining With City's Unions

Mayor Sanders used the visibility, power and prestige of his Office as Mayor, as well as his City-paid staff and City resources, in furtherance of his pension-reform-by-initiative effort for a full *five months before* leading a press conference outside City Hall to announce the filing of a "notice of intent" to circulate a citizens' initiative. SDTEF ignores but does not challenge the

substantial evidence which supports PERB's conclusive findings[3]:

✦ Mayor Sanders decided, after discussions with his City-paid 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.[4] (*Boling* at 858-859; XIII:3306-07; XIV:3527, 3531-32, 3653-54, 3667-68; XV:3835-36.)

✦ The Mayor's Office issued a press release in early November 2010 – styled as a "Mayor Jerry Sanders Fact Sheet" – 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 [...] structural deficit by the time he leaves office in 2012." (XVIII:4742-43.)

✦ This "Mayor Jerry Sanders Fact Sheet" included a "headline" under the City's seal announcing 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. (XVIII:4742.)

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[3] PERB's findings of fact, including ultimate facts, are conclusive on review when supported by substantial evidence. (Gov. C. § 3509.5, subdivision (b).)

[4] 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:3312-13; XV:3918-23; XXIII:5764, 5766.)

✦ The Mayor's staff posted this "Mayor Jerry Sanders Fact Sheet" on City's website and the Mayor held a "kick-off" press conference on the 11th floor of City Hall to announce his initiative. Standing in front of the City seal, the Mayor was joined by City's Chief Operating Officer Jay Goldstone, Councilmember Kevin Faulconer and City Attorney Jan Goldsmith. (*Boling* at 859 and fn. 3 & 4; XVIII:4742-43, 4747; XIII:3307-09, 3312-13, 3319-20; XV:3914-15, 3917; XIV:3533-34.)

✦ The media covered the Mayor's press conference with the news 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.)

✦ Mayor Sanders used his City-paid staff to draft and issue press releases as "Mayor Sanders' Fact Sheets;" his staff posted updates to the City's website, and sent mass e-mail messages to promote the Mayor's determination that a citizens' initiative should be undertaken – and that he would undertake it – to amend the City Charter to transform pensions. (XVIII:4742-43, 4745-47, 4816; XXIII:5747-49.)

✦ Several thousand community leaders and individuals received an e-mail from JerrySanders@sandiego.gov announcing the Mayor's intent to "craft language and gather signatures for a ballot initiative to eliminate public pensions as we know them." (XXIII:5747-49; XV:3907-08, 3910-13.)

✦ With help from his City-paid staff, Mayor Sanders conducted other press conferences, in addition to the one on the 11th floor of City Hall, to promote pension reform by initiative. (XIII:3312-13; XV:3948-49; XIII:3419.)

✦ In early December 2010, Mayor Sanders' City-paid staff began promoting his pension reform initiative directly to the media and others. (XIII:3320-22; XV:3922-25, 3989-90; XVIII:4772; XXIII:5810-12, 5923-24, 5926.)

✦ The Mayor built support with key business groups and individuals, including its three "official proponents." (XV:3918-21; 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, 3925-27; 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:3378-79, 3409-11, 3432-35, 3437-40; 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:3816-17.)

✦ 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:3329-31; XVIII:4788.)

✦ 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.)

✦ Mayor Sanders issued another press release to 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 and 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:3380-85; XIV:3545-49;

XV:3809-11, 3827-28, 3937-42, 3948-51, 3990-91; XIX:4983-84, 4986-88; XXIII:5782-83, 5814-30, 5928-30.)

✦ There was an expectation that the Mayor's staff would regard the Mayor's 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 (when the Mayor announced that a "notice of intent" had been filed) 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;[5] 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:3378-81, 3439-41; XIX:4980-81, 4990-5002.)

✦ The Mayor and his staff negotiated with supporters outside the City to achieve the Mayor's policy goals for 401(k)-style pension reform through a single initiative, with transition costs associated with closing the defined benefit plan to most new hires "paid for" by imposing a 5-year pensionable pay freeze (through 2018) on existing employees. (*Boling* at 860-

[5] 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, 3547-54, 3565-66.)

861 and fn. 7-8; XIII:3376-77, 3396-3405, 3408, 3414-15, 3421-24, 3479-81, 3485-87; XIV:3568-76, 3676-80; XV:3729-30, 3811-14, 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:3423-24.)

✦ The Mayor's Chief of Staff, City's COO, and the City Attorney, all reviewed drafts of the initiative to assure it achieved the agreed-upon objectives. (*Boling* at 861 & fn. 9; XIV:3576-79, 3582-85, 3587-91, 3680-82, 3684-87, 3693-94; XV:3821-24.) Before announcing the intent to circulate, the Mayor made sure the text of the initiative was right. (XIII:3430-31, 3482, 3491; XIX:5013-21.) (See Proposition B, XVI:4073-87.)

✦ 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" (Boling, Williams and Zane) are Ballot Proponents here. (*Boling* at 861.)

✦ The Mayor led a widely-covered press conference outside City Hall the next day to announce the filing. 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 attended with another communications

staff member. (XIII:3395-99, 3415-17, 3419, 3428-32; XIX:5004, 5006-07, 5013-21.)

✦ Introduced as "Mayor Jerry Sanders," the Mayor spoke under a banner touting "Pension Reform Now." 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:3339-40, 3376-77, 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.*)

SDTEF turns a blind eye to the Mayor's actual conduct as well as his use of City resources and City-paid staff – preferring to construct a First Amendment argument on the fiction that Mayor Sanders simply fulfilled his "obligation" as an elected official to "speak up" for pension reform. (SDTEF Brief at 9, 12, 17-18, and 53-54.) Having done so, SDTEF fashions an irrelevant (and overstated) legal analysis which ultimately offers this Court no useful perspective on the issues before it.

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B. Mayor Sanders Was Elected To Serve As City's Chief Executive Officer And Its Chief Labor Negotiator Under The MMBA

SDTEF's argument that PERB's decision creates a so-called "elected-officials exception to the First Amendment," (SDTEF Brief at p. 27), also rests on a false foundation – i.e., that Mayor Sanders enjoyed absolute and unfettered First Amendment rights as an *elected official* despite his Charter-mandated duties as City's CEO and its Chief Labor Negotiator – i.e., City's "administrative official" within the meaning of MMBA section 3505.

1. The City's Charter Defined The Mayor's Executive Duties

The San Diego 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:3337-38; XIV:3512; XVII:4492-4502; XVIII:4707-40; XXI:5532-47.) When elected and 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.[6] (XIII:3348-49; City Charter § 265.)

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[6] As explained in PERB's decision, with the adoption of the strong mayor form of government, the City's Mayor "acquired the executive authority previously held by the City Manager but lost his vote on the City Council." (XI:3048.) Thus, under the previous form of government, the Mayor was a legislative official.

The City Attorney's Office (under Jan Goldsmith) published a Memorandum of Law (MOL) in January 2009 (XVIII:4719-39) 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.[7] (XII:3191-93; XVIII:4626-38, 4727-28.) This MOL confirms that, 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, 4727-28.)

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

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[7] 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. (XVIII:4719-20.)

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 by determining City's bargaining objectives – what concessions, reforms, changes in terms and conditions of employment are important to achieve. (XIII:3349-52; XII:3191-93; XIV:3705; XVIII:4721, 4727-28.)

This 2009 MOL also explains that the Mayor's role is not an advisory function. The Mayor "must ensure that City's responsibilities under section 3500, subdivision (a) of the MMBA [...] are met," (XVIII:4721, 4727-28), and has a "duty to negotiate with Unions in an attempt to reach agreement for the Council's consideration and possible adoption." (*Id.* at 4728.) Any "tentative agreements" are submitted to the City Council for determination under MMBA, Government Code section 3505.1, because, as the City's legislative body, the Council has "ultimate authority to set salaries and to approve Memoranda of Understanding." (*Id.* at 4738-39.)

With the City Council's ultimate authority in mind, the Mayor obtains Council's pre-approval for any proposed increase in wages or benefits before offering such an increase to Unions.[8] Though not required by the Charter

[8] Needless to say, if the Mayor succeeds in reaching a tentative agreement with recognized employee organizations over *concessions* in wages or benefits, any concern over a disconnect between the Mayor and City Council at the end of the bargaining process is removed.

itself, this practice avoids an end-of-bargaining disconnect between any tentative agreement the Mayor brokers and what the Council is willing to approve. The City Attorney recommended, and the Mayor follows, this pre-approval protocol in order to foster "the core principle of the decisional law related to the MMBA [which] is the duty to bargain in good faith." (XIII:3349-52; XVIII:4726-30, 4733, 4736-39.)

Accordingly, Mayor Sanders was not one among the City's several legislators. He was the sole elected executive who took an oath to serve in a City-paid position as the City's CEO and its Chief Labor Negotiator – with an acknowledged obligation to act on the City's behalf to comply with the MMBA.

2. The City Council Repeatedly Acknowledged The Mayor's Role As Chief Labor Negotiator

The evidence is indisputable (and SDTEF does not dispute it) that, in his capacity as City's authorized Chief Labor Negotiator – i.e., acting on behalf of the governing body as City's "administrative official or other representative" under MMBA section 3505 – Mayor Sanders repeatedly led successful MMBA-mandated "meet and confer" efforts with City's recognized employee organizations and, in each instance, brought tentative agreements to the City Council for legislative approval.

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a. Mayor Led Meet-And-Confer Over Charter Amendments For 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 under MMBA section 3504: (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. When the meet-and-confer process had successfully concluded, the City Council voted to put these two measures on the ballot. (XIII:3345.)

b. Mayor Led Meet-And-Confer Over New Hybrid Defined Benefit/Defined Contribution 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:3628-30; XX:5354-56.) The Mayor announced his tentative agreement on pension reform at a press conference outside City Hall:

> [T]**he 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 hybrid pension plan for those hired on or after July 1, 2009, and it became a term of a Council-approved Memorandum of Understanding (MOU) effective July 1, 2009, through June 30, 2011, together

with negotiated compensation reductions for all existing employees. This MOU included the City's agreement (based on the concessions being made) to meet and confer over any proposed ballot measures related to wages, hours, working conditions or employee-employer relations."[9] (XII:3183-85; XIV:3518-19; XIX:4917.)

c. Mayor Led Meet-And-Confer To Procure Compensation Reductions, Change To Firefighters' Pension Formula, And Reform Of 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:3185-88; XIX:5023-26, 5045-46.)

The Mayor also reached a tentative agreement with San Diego City Firefighters Local 145 for a one-year extension of their MOU through June 30, 2012, which included Firefighters' key concession 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.)

Then in May 2011, the Mayor led a press conference to announce that an "historic" tentative agreement with Unions on retiree healthcare benefits

[9] While this express contractual commitment was in effect, the City denied it had any obligation to meet and confer with Unions in response to Mayor Sanders' *further* pension reform goals announced in November 2010. (See Section I above at pp. 14-20.) According to the City, no duty to meet and confer was triggered because the Mayor was acting as a private citizen when pursuing further pension reform by ballot measure.

would be submitted to the Council for action. (XIII:3425-26; XIV:3522-23; 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:5049-52; 5054-55, 5063-64, 5066-72, 5074-5104; XIV:3523.)

C. PERB's Agency Findings Are Unassailable On This Record And Consistent With What The City Attorney Foreshadowed In 2008

Based on the substantial evidence related to Mayor Sanders' *executive* duties under the City Charter and his past course of conduct in furtherance of those duties, PERB concluded that Mayor Sanders spoke and acted in his official capacity as City's statutory agent under MMBA section 3505 when failing to meet-and-confer in good faith before making and announcing his unilateral decision to change pensions by initiative. PERB applied well-established statutory and common law theories of agency to conclude that Mayor Sanders' actions were imputed to the City. (XI-Ex:186:2994.)

PERB's conclusion was, in fact, *exactly* as the City Attorney advised the City it would be in 2008 when Mayor Sanders' first entertained the idea of leading an initiative to change pensions.[10] Precisely because Mayor Sanders

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[10] When the City Attorney published this legal advice, the Mayor returned to the bargaining table where he and recognized employee organizations reached the tentative agreement on a new hybrid pension plan described above in Section II, subsection B-2, at p. 25.

had been entrusted with these Charter-mandated, MMBA-related job duties, and because the City Council had repeatedly acknowledged Mayor Sanders' authority to "negotiate on behalf of the City," the City Attorney expressly advised Mayor Sanders and the City Council by Memorandum in **2008** that if Mayor Sanders led a pension initiative as a "private citizen," the City's obligations to meet and confer under section 3505 would be triggered because the Mayor's sponsorship "would legally be considered as (his) acting with apparent governmental authority." (XVIII:4710, 4716 and fn. 9.)

Months later, without revoking or contradicting this 2008 advice, City Attorney Goldsmith issued a Memorandum to Mayor Sanders and the City Council in January 2009 – cautioning that the City's compliance with the MMBA would be determined based on the actions of all its agents:

> [T]he City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. *See* Charter §1. The City itself is the public agency covered by the MMBA. In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City." (XVIII:4730, emphasis added.)

PERB's findings, including its determination that an agency relationship existed between Mayor Sanders and the City as to the conduct at issue, are not only consistent with the legal views expressed in these 2008 and 2009 MOLs, they are supported by substantial evidence and thus conclusive. (Gov. C. § 3509.5, subd. (b); *Garlock Sealing Technologies, LLC v. NAK*

Sealing Technologies Corp. (2007) 148 Cal.App.4th 937, 965, as modified on denial of rehearing (April 17, 2007).)

Having ignored the evidence, SDTEF constructs its First Amendment argument based on a fictionalized account of this case which contradicts PERB's conclusive findings.

II. SDTEF Misapplies The First Amendment In An Effort To Defeat The State's Interest In Enforcing The MMBA To Foster Labor Peace Through Collective Bargaining

A. SDTEF Joins The City In Opposing Enforcement Of The MMBA Against The City On The Basis Of Mayor Sanders' Allegedly Unfettered First Amendment Rights

SDTEF supports the City's goal to prevent enforcement of the MMBA against it – as the public agency governed by the MMBA – based on the allegedly unfettered First Amendment rights of its Mayor. For its part, the City asserts that, while serving as City's CEO and Chief Labor Negotiator, Mayor Sanders retained a "fundamental First Amendment right to petition [his] government for redress and to express [his] views on 'matters of public concern'" by bringing an initiative on subject matter covered by the MMBA as a private citizen.[11] (City's Answer at 41 and 46-49, citing *Pickering v. Bd.*

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[11] There is no evidence in this case that Mayor Sanders undertook *any* activities in furtherance of his pension reform initiative efforts as "Jerry Sanders, resident of San Diego." He did not conduct meetings at his home or call press conferences in his driveway; he did not use a private e-mail account or call the media or other interested supporters from his home. He used his "Mayoral Office" in City Hall and the City-paid staff provided to him *because he was Mayor*, to implement his policy determination that further pension reform was needed to relieve pressure on the City's budget.

of Ed. of Tp. High School Dist. 205 (1968) 391 U.S. 563, 574.) Although the City acknowledges PERB's conclusion that Mayor Sanders used City facilities and personnel to support a pension reform initiative – and even concedes that this use could give rise to "potential criminal or, more likely, ethical violations,"[12] the City notes that "(Mayor) Sanders and his staff *attempted* to adhere to local and state law policy on political activity." (City's Answer at 51, fn. 51, emphasis added.) The City nevertheless insists that the Mayor's political activities "have specific sanction in law" and "do not violate the MMBA," (*id.* at 49). Furthermore, the City asserts that, once the Mayor announced his *intent* to take action "as a private citizen" to implement pension reform by citizens' initiative – while continuing to use his title, his Office, the City's resources and the City-paid personnel available to him as Mayor – the City itself was relieved of its duties under the MMBA.[13] (*Id.* at 48-49, 52.) According to the City's view of the facts and law, despite his role as City's CEO and Chief Labor Negotiator and his use of City resources and City-paid staff, Mayor Sanders' "rights" as a *private citizen* operate to make the State's attempted enforcement of the MMBA against the City unconstitutional.

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[12] State law does not protect political activity by government officials and employees undertaken during working hours and using public resources. (See Government Code §§ 3207, 3209; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213, 223-224, 227.)

[13] The City denies, however, that this approach gives it "a privilege to violate the MMBA." (City's Answer Brief at 48-49.)

SDTEF goes even further – arguing that, while serving as City's "highest elected official," Mayor Sanders' speech was fully protected by the First Amendment "regardless of the capacity in which he shared his views – whether as citizen or 'as Mayor.'" (SDTEF Brief at 18-19 and 28.) According to SDTEF, Mayor Sanders had an absolute, unfettered First Amendment right as an elected official to speak and to do as he did in this case – as well as to use the City's resources and the City-paid staff made available to him in his position as Mayor to do it – without triggering any obligations for the City to comply with the MMBA. In SDTEF's view, not only is the State's attempt to enforce the MMBA against the City an unconstitutional restriction on the Mayor's rights as an elected official, PERB is thereby "punishing" the Mayor for his "constitutional virtue" as an elected official. Citing *Wood v. Georgia* (1962) 370 U.S. 375 (*Wood*) and *Bond v. Floyd* (1966) 385 U.S. 116 (*Bond*), SDTEF argues that Mayor Sanders had an "obligation to take positions on controversial political questions so that [his] constituents can be fully informed" and "better able to assess [his] qualifications for office."[14] (SDTEF Brief at 16-19, 23-28.) On the basis of these cases, SDTEF argues that the Court of Appeal's opinion annulling PERB's decision should be affirmed

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[14] While SDTEF, like the City, does not dispute that state law permissibly prohibits or restricts political activity by government officials and employees undertaken during working hours and by the use of public resources, SDTEF ignores the evidence (now conclusive on review) establishing the Mayor's unprotected speech and conduct.

because "no governmental interest can justify" the restriction on the Mayor's speech which results from PERB's enforcement of the MMBA in this case. (SDTEF Brief at 20.)

B. The First Amendment Rights of Executive Officials Like Mayor Sanders Are Subject To Restraint

The cases SDTEF cites when asserting the allegedly unfettered First Amendment rights of elected officials do not consider how those rights are restrained or limited when the elected official has *executive* duties. In *Wood*, the U. S. Supreme Court held that an elected sheriff had a First Amendment right to make public statements on a matter pending before a grand jury because his statements did not interfere with the performance of his duties as sheriff or with the duties he had, if any, in connection with the grand jury matter. (*Wood* at 394.) In *Bond*, the court held that a duly-elected legislator to the Georgia House of Representatives could not lawfully be excluded in retaliation for his anti-Vietnam War speech.

While SDTEF argues that the First Amendment prohibits the government from silencing elected officials on matters of public concern, SDTEF ignores the facts here establishing Mayor Sanders' role as City's CEO and Chief Labor Negotiator. (XVII:4492-93; XIII:3349.) In fact, Mayor Sanders' decision to bypass recognized employee organizations to achieve 401(k)pension reform by initiative was not made in his capacity as an *elected* official (or private citizen) but in his capacity as the City's *executive* official

responsible for the meet-and-confer process; and his power to refuse the employee organizations' repeated demands for bargaining over his 401(k)-style pension reform agenda could likewise only be exercised in his capacity as a statutory agent under section 3505 of the MMBA (not as one of several elected legislative officials or as a private citizen).

As such, SDTEF cites *no authority* for the proposition that, in his role as CEO and City's Chief Labor Negotiator, Mayor Sanders had an unfettered First Amendment right to speak and do as he did in this case without consequences *for the City* under the MMBA.

Moreover, the First Amendment does not provide an elected *executive* official like Mayor Sanders with a lawful excuse to abandon or waive the performance of his official duties or to act contrary to those duties. Executive officials are charged with upholding and enforcing the law, regardless of whether it is consistent with their own views. (See generally *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082.) They are not privileged to simply evade or ignore the law, (*ibid*), much less by invoking the First Amendment.

C. Mayor Sanders' First Amendment Rights Are Constrained Under *Garcetti* Because His Speech Occurred In The Performance Of His Official Duties As City's CEO And Chief Negotiator

Mayor Sanders' First Amendment rights as an *elected* official were not made absolute and unfettered by the *Wood* and *Bond* cases as SDTEF

contends. Public employees "generally have no First Amendment protection for speech made as part of their official duties" because they are not speaking as citizens. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [*Garcetti*].)

In *Garcetti*, the court concluded that when public employees make statements on matters of public concern pursuant to their official duties, they are not speaking as citizens for First Amendment purposes because this speech owes its existence to the public employee's professional responsibilities, and thus, restrictions on this speech do "not infringe any liberties the employee might have enjoyed as a private citizen." (*Garcetti* at 421-22.)

SDTEF acknowledges the rationale of *Garcetti* that a citizen who enters government service must "by necessity accept certain limitations on their freedom with regard to what they may say and do within the scope of their employment," and that, for this reason, "public employees enjoy no First Amendment protection for speech "pursuant to their official duties." (SDTEF Brief at 39.) However, SDTEF argues that *Garcetti* categorically does not apply to this case because Mayor Sanders was an "elected official rather than an ordinary non-elected public employee," and, on this basis, *Wood* and *Bond* "squarely foreclose" any result applying *Garcetti* to eliminate or diminish his First Amendment rights. (SDTEF Brief at pp. 29-30.) Of course, the record is irrefutable – but SDTEF ignores it – that Mayor Sanders was not just an *elected official* but an *executive* official with duties entrusted to him by San

Diego's residents under the City Charter – duties that included compliance with the MMBA on behalf of the City.

Moreover, SDTEF's argument that the *Wood* and *Bond* cases must be understood to "squarely foreclose" application of *Garcetti* to any *elected* official, is also not well-taken. In *Werkheiser v. Pocono Twp.* (3rd Cir. 2015) 780 F.3d 172, the court concluded that plaintiff *elected official* was unable to overcome a qualified immunity defense because his speech occurring as late as 2012 was arguably not protected by the First Amendment based on *Garcetti.* In fact, the *Werkheiser* court considered and rejected the argument which SDTEF makes here – i.e., that before 2012, the First Amendment rights of elected officials (as opposed to public employees) had been clearly established by *Bond v. Floyd* (1966) 385 U.S. 116, 136-7. Accordingly, *Garcetti v. Ceballos* (2006) 547 U. S. 410, was the law when Mayor Sanders was doing the "speaking" at issue in this case in 2010 and 2011, and thus he had no First Amendment right to speak and act in a manner which violated the MMBA while performing his official duties as the City's *elected* CEO and its Chief Labor Negotiator.

Furthermore, the Ninth Circuit has also considered First Amendment claims on at least three occasions since *Garcetti* – concluding that statements are made in the speaker's capacity *as citizen* if the speech was not the product of "perform[ing] the tasks [the employee] was paid to perform" (*Freitag v.*

Ayers (9th Cir. 2006) 468 F.3d 528, 544, quoting *Garcetti*, 547 U. S. at 422), or if the speaker had no official duty, policy-making responsibility or authority to make the questioned statements. (*Marable v. Nitchman* (9th Cir. 2007) 511 F.3d 924, 932-33.) Then in *Posey v. Lake Pend Oreille School District No. 84* (9th Cir. 2008) 546 F.3d 1121, 1123, 1127, 1129, the Ninth Circuit held that the inquiry into whether a public employee's speech is protected by the First Amendment presents a mixed question of fact and law with the *trier of fact* determining whether the speaker spoke as a public employee pursuant to official duties or as a private citizen contributing to the civic discourse.

Thus, under *Garcetti* and *Posey,* PERB's determination as the trier of fact, based on substantial evidence, that Mayor Sanders spoke and acted in his official capacity and *not* as a private citizen, is conclusive. Indeed, PERB's conclusion is inescapable based on the relevant "Mayor Jerry Sanders Fact Sheets" issued in 2010-2011 whereby, "speaking" as City's CEO, Mayor Sanders announced his intent to eliminate the City's $73 million budget deficit by "rethinking how the City provides services to the public," "restructuring city government," "eliminating free trash collection" to certain homes and businesses, "exploring potential revenue streams," "identifying non-critical processes that can be eliminated," using competitive bidding strategies and managed competition, reducing the City's retiree health care liability through "meet and confer," and, as touted in the headline, "placing an initiative on the

ballot" to replace defined benefit pensions for new hires with a 401(K)-style, defined contribution plan. (XVIII:4742-43, Ex. 25.)

D. SDTEF Exaggerates The Scope Of First Amendment Protection Even When It Is Available To Elected Officials

The First Amendment rights of *elected* officials are not absolute and unfettered in any event. In *Werkheiser, supra*, 780 F.3d 172, the court observed that any First Amendment protection for an elected official's speech likely prevents only those forms of retaliation which interfere with the official's ability to adequately perform his or her *elected* duties, citing *Blair v. Bethel Sch. Dist.* (9th Cir. 2010) 608 F.3d 540, 542, 545 [First Amendment did not protect a school board member from removal as Vice President of the Board based on his "contrarian advocacy" when speaking out against the Superintendent]; *Phelan v. Laramie County Cmty. Coll. Bd.* (10th Cir. 2000) 235 F.3d 1243, 1245-46, 1248 [First Amendment was not violated when a community college board censured one of its elected trustees for violating an ethics policy by placing a newspaper ad encouraging the public to vote against a pending measure]; and *Zilich v. Longo* (6th Cir. 1994) 34 F.3d 359, 361 [no viable First Amendment retaliation claim against sitting Council members who passed a resolution that outgoing council member, who had been a thorn in their side, had never been qualified to hold office.]

None of the federal cases which SDTEF has cited are inconsistent with the Board's decision and none are in conflict with the settled proposition that

an elected official has no First Amendment right to engage in political activity using public resources. The First Amendment does not protect Mayor Sanders' speech at issue in this case and certainly provides no basis to excuse or justify the City's violation of the MMBA.

Accordingly, SDTEF's approach is as untenable as the City's "private citizen" approach. Both seek a Court-sanctioned means for *government* to engage in direct democracy to change terms and conditions of employment while avoiding the obligations of the MMBA. Such a result would be contrary to the text of the statute and would defeat the legislative goals embodied in this statewide law. As shown below, the First Amendment to the United States Constitution neither dictates nor condones such an impairment of the State's right to regulate local public entities in furtherance of its statewide objectives to foster communication on matters within the scope of representation, agreements through good faith collective bargaining where achievable, and ultimately labor peace.

III. The State Has A Right – Without Offending The First Amendment – To Regulate The City's Labor Relations Conduct In Furtherance of Statewide Objectives

The First Amendment does not prevent the government from regulating conduct in furtherance of important state interests even when there is an incidental effect on speech. Although the nature, scope and purpose of government's regulatory action – here the MMBA – is critical to any First

Amendment analysis, SDTEF ignores the state law itself while nevertheless asserting that the First Amendment absolutely prevents the state from enforcing it against the City.

A. The State Has An Important Interest In Promoting Public Sector Labor Peace Through Collective Bargaining

The California Legislature exercised its legislative authority on behalf of the sovereign state to enact MMBA in 1968 as a statute of broad application governing the labor relations of nearly all cities, counties, and special districts. (Gov. C. § 3501.) The legislative goal is to promote full communication between public employers and employees, improve personnel management and employer-employee relations, and thereby foster "the strong policy in California favoring peaceful resolution of employment disputes." (Gov. C. § 3500, subd. (a); *Glendale City Employees' Ass'n v. City of Glendale* (1975) 15 Cal.3d 328, 335-336; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622.) "The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes.' (Citation.)" (*County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 925.)

By seeking to strengthen *communication* between public employers and employees, the MMBA fosters labor peace. To effect its goals, the MMBA obligates employers to meet and confer in good faith with employee representatives about matters that fall within the "scope of representation."

(*Claremont Police Officers Assoc. v. City of Claremont* (2006) 39 Cal.4th 623, 630; Gov. C. §§ 3504 and 3505.) Accordingly, 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*].)

B. A Public Employer's Duty To Meet And Confer In Good Faith Over Subjects Within The Scope Of Representation Is The Centerpiece Of The MMBA

In cases spanning nearly four decades, this Court has recognized section 3505 – establishing the duty of public agencies to meet-and-confer in good faith regarding matters within the scope of representation as defined in section 3504 – as the centerpiece of the MMBA.[15] (*Glendale*, *supra*, at 336; *Los Angeles County Civil Service Comm.* (1978) 23 Cal.3d 55, 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,

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[15] SDTEF cites MMBA section 3505 multiple times by number only, with no recital, in whole or in part, of the text of this section or how it fits into the statutory scheme itself. SDTEF's only purpose in citing section 3505 is to condemn PERB's application of it to Mayor Sanders but with no analysis about the City's duties under section 3505 as the public entity governed by the MMBA. Nor does SDTEF cite a single court case or administrative decision interpreting and applying the MMBA during its 50-year history – not even the opinions of this Court.

630 [*Claremont*]; *County of Los Angeles, supra,* 56 Cal.4th at 922; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083.)

The obligation to meet and confer in good faith belongs not only to the public agency's governing body but also to "its administrative officials and other representatives as may be properly designated by law or by such governing body," (Gov. C. § 3505), i.e., the Mayor – just as City Attorney Goldsmith confirmed in his 2009 Memorandum of Law. (XVIII:4730.)

Nothing in the First Amendment or in any other state or federal law excused the Mayor's compliance the official duties assigned to him under MMBA section 3505 by virtue of the Charter-mandated role he accepted as City's CEO and Chief Labor Negotiator.

C. PERB's Decision Is Directed Against the City's Economic Conduct When Implementing Unilateral Changes In Pensions And Compensation In Violation Of The MMBA's Core Duties

The Board held that the City violated the MMBA through the actions taken by the Mayor within the scope of his duties as the City's Chief Executive Officer and Chief Labor Negotiator – i.e., as an agent of the City – *combined with* the actions of the City in refusing to bargain with the Unions. (XI:3096.) PERB's decision and remedy are directed at the City because the City is the public agency responsible for any failure to comply with the MMBA. (Gov. C. § 3506.5, subd. (c) [prohibiting "[a] public agency" from refusing or failing

"to meet and negotiate in good faith with a recognized employee organization"]; Cal. Code Regs., tit. 8, §§ 32602-32604 [specifying unfair practices by public agencies and by employee organizations but not by individuals].)

Moreover, the Board's decision directly regulates the City's economic conduct, not the Mayor's speech. The City was the only respondent in the proceedings before PERB and, on finding that the City had engaged in an unfair labor practice, PERB ordered the City, not the Mayor, to provide a remedy. The City itself "acknowledges that its officials are not entirely immunized by the First Amendment from potential violations of the MMBA and that freedom of expression may be permissibly limited in the labor relations context when it "impinges on (employees') representational rights." (City's Answer at p. 45.) Yet, it would be hard to envision a case where the "impingement on representational rights" could be any greater than what occurred here when the City failed and refused to meet and confer with recognized employee organizations over "transformational" changes to the core compensation and pension bargain affecting City employees.[16] The

[16] The ballot summary asks: "Should the Charter be amended to: direct City negotiators to seek limits on a City employee's compensation used to calculate pension benefits (from its effective date until June 30, 2018); eliminate defined benefit pensions for all new City Officials and employees, except police officers, substituting a defined contribution 401(k)-type plan; require substantially equal pension contributions from the City and employees; and eliminate, if permissible, a vote of employees or retirees to change their benefits?" (XVI:4088.)

theory under which the Board found a violation in this case, a unilateral change to terms and conditions of employment, is a particularly harmful form of refusal to bargain because it denies represented employees and their recognized employee organizations the rights they are guaranteed under the MMBA, and has an inherently destabilizing and detrimental effect on the bargaining relationship. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 23.)

Because what the Board found unlawful was the City's refusal to bargain with the Unions, and not the Mayor's speech, the Board's decision regulates the City directly and the Mayor only indirectly. As a result, this case bears no relation to those in which interference with First Amendment rights has been found by the courts. To the contrary, any incidental restriction on the Mayor's speech owing to the Board's regulation of the City's economic conduct is not the type that even triggers a First Amendment analysis. (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 707.) Thus, to uphold PERB's decision in this case, this Court need not decide the scope or nature of the Mayor's First Amendment rights to speak in his official capacity. Whatever rights he enjoyed as an *elected* official, the right to act on behalf of the City while serving as its CEO and Chief Labor Negotiator to opt-out of the MMBA at his/its whim was assuredly not among them.

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IV. In View Of His Executive Duties, Any Incidental Impact On Mayor Sanders' Speech Rights As An Elected Official Does Not Offend The First Amendment In Any Event

SDTEF declares that PERB's enforcement of section 3505 against the City represents an unconstitutional "content- and viewpoint-based prior restraint" of Mayor Sanders' speech about pension reform when he had an obligation to speak on this "controversial political question" as an *elected official.*[17] (SDTEF Brief at 19-20, 27, 47-53). As such, SDTEF argues that PERB's decision cannot withstand the strict scrutiny it must receive because "no governmental interest can justify" the unconstitutional restriction of the Mayor's speech. (*Id.* at 19-20.)

A. The MMBA Is Directed At Certain Subjects Within The Scope Of Representation But It Is Content-Neutral

The MMBA is justified by the state's interest in "promot[ing] full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employees and public

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[17] A "strict scrutiny" standard of review applies when the government enacts a law or regulation to prohibit or restrict speech based on its content. (See, e.g., *Burson v. Freeman* (1992) 504 U. S. 191 [Tennessee state law upheld under strict scrutiny standard because, despite its content-based restriction on political speech, the prohibition against election campaigning within 100 feet of a polling place furthered the government's compelling interest in ballot secrecy]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 869 [shopping mall's rule prohibiting all speech advocating a boycott was content-based and could not withstand strict scrutiny].)

employee organizations." (Gov. C. § 3500, subd. (a).) The fact that the MMBA is directed at certain *subjects* – i.e., wages, hours, and other terms and conditions of employment (Gov. C. §§ 3504, 3505) – does not mean the MMBA is a content-based restriction on *speech*. To the contrary, the MMBA is content-neutral. As this Court noted in *Ralphs Grocery, supra*, 55 Cal.4th 1083, 1102, "literal or absolute content neutrality" is not required for a statute or regulation to be considered content-neutral. The regulation must only "be justified by legitimate concerns that are unrelated to any disagreement with the message conveyed by the speech." (*Ibid.*) Thus, state laws giving employees and labor unions special rights to engage in speech related to labor disputes are content neutral because they are justified by, among other things, "the state's interest in promoting collective bargaining to resolve labor disputes," rather than any disagreement with the message conveyed by forms of speech not protected by the statutes. (*Ibid.*)

B. PERB's Decision Is Directed At The City's Failure And Refusal To Bargain Not The Mayor's Speech

PERB's conclusion that the City violated the MMBA regulatory scheme is not based on any disagreement with the Mayor's speech calling for further pension reform in general or "speaking up" in favor of Proposition B in particular. It is well settled in California law that the MMBA's meet-and-confer process does not impose or dictate substantive terms and conditions of

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employment. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 289.) Thus, the MMBA neither favors nor opposes pension reform.

What the MMBA does prohibit is conduct that constitutes a failure or refusal to meet and confer in good faith. (Gov. C. § 3506.5, subd. (c).) The Board's decision did not interpret the MMBA to target "particular views taken by speakers on a subject" (*Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819, 829), as SDTEF suggests, but rather the decision addresses (and remedies) conduct that is highly detrimental to the process of collective bargaining – the failure and flat refusal to bargain. Because the Board's decision applying the MMBA is justified without reference to the content of the Mayor's speech, it is content-neutral. (*Ralphs Grocery, supra*, 55 Cal.4th 1083, 1102.)

Furthermore, PERB's decision holds the City accountable under the MMBA for the Mayor's actions (and the City Council's inaction) long after the last "speech" by the Mayor in favor of Proposition B. The decision, by definition, does not constitute a "prior restraint" because it did not *forbid* the Mayor's speech in advance of its occurrence. (See *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886.) A "prior restraint" has an immediate and irreversible sanction by "freezing" speech before publication as opposed to imposing a criminal or civil penalty after it takes place. (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559.)

Finally, the Board's decision is narrowly tailored to advance the state's interest in promoting labor peace through collective bargaining, with no less restrictive means available. PERB's decision is *not* directed at suppressing or restricting Mayor Sanders' speech communicating existing facts related to the City's budget, pension-related costs and funding levels, or stating his opinion that further pension reform was needed. Nor did PERB hold that the Mayor was barred from *publicly sharing his views on pension reform* or from *publicly supporting a citizens' initiative regarding pension reform,* until he went through the meet-and-confer process with the Unions, (SDTEF Brief at pp. 49 and 50-51, emphasis added), and "unless and until the City Council permits him to do so." (*Id.* at 53, emphasis added.)

Instead, PERB held that the Mayor's conduct in promoting and pursuing a citizens' initiative to change employee pensions and compensation without bargaining – while using the prestige of his Mayoral Office along with City resources and staff to do so – is imputed to the City, such that *the City* was required to meet and confer with Unions under the MMBA. That holding does not require the Mayor to have kept his personal views on a proposed citizens' initiative to himself absent the approval of the City Council. The Board's focus was not the public nature of the Mayor's support but rather his authority to act on behalf of the City with respect to collective bargaining and his use of City resources – websites, e-mail, press releases, the State of the

City Address, and the Mayor's City-paid staff – to promote and pursue the initiative. (See XI:2989.) Restricting the ability of a public agency's chief executive officer to use the resources of his office to support a change to terms and conditions of employment outside the collective bargaining process is necessary to achieve the state's compelling interest in promoting labor peace through the collective bargaining process. As the Board explained, the Mayor's conduct in this case "undermine[s] the [MMBA's] principle of bilateral negotiations by exploiting the 'problematic nature of the relationship between the MMBA and the local [initiative-referendum] power." (XI:2993-94, quoting *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 782.)

To the extent PERB's decision has any regulatory impact on the Mayor's speech, it is only an indirect one and it arises only because the Mayor's speech took place in the performance of his duties as City's highest-ranking *executive official.* While Mayor Sanders remained free to offer the public his views and opinions about the need for pension reform, he was never free to abandon his Charter-mandated responsibilities as City's CEO and Chief Labor Negotiator. Nor can the City exploit the Mayor's decision to do so by failing and refusing to give recognized employee organizations their guaranteed right to be heard at the bargaining table under section 3505.

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C. Speech To Promote Conduct In Violation Of The MMBA's Core Duties Is Not Protected By The First Amendment

The notion that the First Amendment prevents the State from enforcing the MMBA against the City based on the course of conduct by its Chief Executive Officer and Chief Labor Negotiator – as proven in this case – is unsupported in case law. This Court recognizes that enforcement of the MMBA to regulate conduct may properly burden speech rights without offending the First Amendment, (*Cumero v. PERB* (1989) 49 Cal.3d 575), and that "[s]tatutory law [...] may single out labor related speech for particular protection or regulation, in the context of a statutory system of economic regulation of labor relations, without violating the federal Constitution." (*Ralphs Grocery Co. v. United Food and Commercial Workers Union, Local 8* (2012) 55 Cal.4th 1083, 1103 [*Ralphs Grocery*].)

Decades ago, in an unfair labor practice proceeding, the United States Supreme Court rejected the argument that the First Amendment protected an employer's speech in violation of the National Labor Relations Act, holding that "[t]he sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." (*National Labor Relations Bd. v. Virginia Electric & Power Co.* (1941) 314 U.S. 469, 477.) In keeping with this well-established precedent, PERB recognizes a public employer's right to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate; however, speech

which violates the Act is sanctioned for the protection of employees not to punish employers. (*Id.*, citing *Antelope Valley Community College Dist.* (1979) PERB Decision No. 97.)

In *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S, PERB made clear that:

> employer speech that goes beyond mere expression of opinion or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections.

Then the City itself was reminded of this limitation *before* Mayor Sanders began his course of conduct in November 2010 when PERB issued a decision *against the City* based on the speech of its *elected* City Attorney Michael J. Aguirre. (*San Diego Firefighters, Local 145, I.A.F.F. v. City of San Diego [Office of the City Attorney]* (March 26, 2010) PERB Decision No. 2103-M.) Citing *Rio Hondo Community College District* (1980) PERB Decision No. 128, PERB concluded:

> [E]mployer speech that goes beyond mere expression of opinion or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections. (*State of California [Department of Transportation]* (1996) PERB Decision No. 1176-S.) Furthermore, the Board in *Rio Hondo* specifically held that protection is afforded to employer speech "provided the communication is not used as a means of violating the Act." (*Id.*) Thus, the Board specifically exempts from protection speech that is used as a means to commit an unfair labor practice, such as bypassing the exclusive representative. (*City of San Diego [Office of the City Attorney]* at 8-9.)

Consistent with these precedents, PERB concluded here that the City violated its duties under section 3505 when its statutory agents – i.e., both the Mayor in his recognized role as authorized Chief Labor Negotiator and the City Council in its role as governing body – failed and refused to meet-and-confer in good faith over the subject matter being addressed by the Mayor's initiative efforts at any time from November 2010 (when the Mayor held his "kick-off" press conference) until January 2012 (when the Council voted to put the initiative on the June 2012 ballot). As PERB noted, for the Mayor, serving in the role as City's Chief Negotiator, to use the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by the Unions on these same subjects raises questions about what incentive the Unions have to agree to anything." (XI:3038-39; see Section I, B-2 at pp. 24-27, above.) As a result, the necessity of the Board's indirect but minimal "restriction" on the Mayor's speech in order to further the state's important (even compelling) interest is beyond dispute.

V. The City Violated The MMBA Based On The City Council's Failure And Refusal To Bargain Over The Pension Reform Subject Matter

Whatever the legitimate contours of the Mayor's First Amendment rights, whether as a private citizen or as an elected official, under no circumstances can those rights be interpreted and applied to give the *City* amnesty for violating the MMBA as both the City and SDTEF propose.

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Because of the Mayor's and City Council's shared duties under section 3505 of the MMBA – duties carefully defined by City Attorney Goldsmith's 2009 Memorandum of Law (XVII:4492-94) – the City Council was not free to condone or ratify the Mayor's failure and refusal to bargain by its own silence and inaction. Thus, regardless of who sponsored or supported the 401(k)-style pension reform initiative the Mayor first announced during his City Hall press conference in November 2010, the City's duty to bargain over this subject matter arose – and continued – *before* any notice of intent had been filed, *while* a petition was circulating, *before* the proposed initiative had qualified for the ballot, and *before* the City Council voted to put it on the June 2012 ballot.[18] The City Council knew as early as January 2011 what the Mayor intended to do – why and how – because he told them during his State of the City Address.

Moreover, nothing prevented the City, through its governing body as statutory agent under MMBA section 3505, from negotiating an alternative or competing measure. (XI:3034 & fn. 23.) It is well-settled 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 City itself established legal precedent on this point in *Howard Jarvis Taxpayers Assn. v.*

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[18] SDTEF acknowledges that the City Council's *vote* to do so is not speech under the First Amendment. (SDTEF's Brief at 44.)

City of San Diego (2004) 120 Cal.App.4th 374. And the *Boling* Ballot Proponents covered the eventuality of such a competing measure by including Section 9, "Conflicting Ballot Measures" in the text of Proposition B:

> in the event that this measure and another measure or measures relating to the establishment of compensation and benefit levels of City officers and employees, or both, appear on the same city-wide election ballot. (XVI:4087.)

Furthermore, there is no dispute that there was time and opportunity for a good faith meet and confer process because the City Council was not required to present Proposition B to the voters when it did. (*Jeffrey v. Super. Ct.* (2002) 102 Cal.App.4th 1, 4 [observing that Elections Code section 9255, which governs the placement of charter initiatives on the ballot, "enumerates minimum time limits, but no maximum time limits."].)

The City's ability to comply with the MMBA depended upon the actions of its statutory agents. Neither the Mayor nor the City Council took affirmative steps to initiate a good faith meet-and-confer process on the negotiable pension reform subject matter as required by sections 3504 and 3505. When presented with repeated Union demands for bargaining, they flatly refused. What PERB found unlawful was the City's failure and refusal to bargain with the Unions and not the Mayor's speech.

Yet neither the City nor SDTEF explain how either the negotiation of an alternative measure or a delay in submitting Proposition B to the voters, pending those negotiations, would have restricted Mayor Sanders' First

Amendment rights – whether as private citizen or as Mayor – assuming he had certain First Amendment rights under the circumstances of this case.

Conclusion

SDTEF's arguments about the general importance and protected nature of speech by elected officials on matters of public concern, is nothing more than a generic but, alas, irrelevant treatise which is of no help to this Court in deciding the matter.

In essence, by different routes, both the City and SDTEF argue for this Court's endorsement of an MMBA "opt-out" scheme. The City posits that *nothing* Mayor Sanders did or said with regard to 401(k)-style pension reform was done or said in his role *as Mayor*, and thus the *City's* duty as a public entity employer to meet and confer was never triggered – whether before or after a "notice of intent to circulate" Prop B was filed or it had qualified for the ballot. On the other hand, SDTEF posits that, beginning in November 2010, *everything* Mayor Sanders did or said *as Mayor* in furtherance of implementing 401(k)-style pension reform to improve the City's budget – including his failure and refusal to meet and confer under the MMBA – was protected by the First Amendment such that PERB's Decision enforcing the MMBA against the City is unconstitutional and cannot stand.

Either approach, if accepted, would undermine the state's strong policy favoring peaceful resolution of public sector employment disputes by the

salutary requirement for a good faith meet and confer process with recognized employee organizations on matters within the scope of representation.

Here, as PERB concluded, the conduct of the City's statutorily-defined agents – its Mayor and its City Council – constituted an unlawful by-pass of City's recognized employee organizations leading to a unilateral change in terms and conditions of employment and a *per se* violation of the MMBA. Left unremedied, the *City* (and other public entities empowered to emulate this new model) would "opt into" the MMBA when it chooses to seek concessions *at the bargaining table*, as the City did here when securing agreement on a new pension plan, but then "opt out" of the MMBA, with impunity, to procure or impose additional pension concessions at the ballot box *without bargaining.*

The result the City seeks, and *amicus curiae* SDTEF supports, conflicts with long-established precedents interpreting and applying the MMBA on a uniform statewide basis and, if condoned by our courts, will undermine the efficacy of a law which has fostered public sector labor peace for nearly five decades. The City's conduct must be firmly renounced to assure that the State's public sector bargaining law retains its vitality and that the right of

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direct democracy by local initiative does not become a tool of *government* itself to thwart or avoid the statewide objectives embodied in that law.

Dated: January 26, 2018

SMITH, STEINER, VANDERPOOL & WAX, APC

By: Ann M. Smith

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)

I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, 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 11,322 words.

Dated: January 26, 2018

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 January 26, 2018, I served the within document described as:

JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS TO AMICUS BRIEF FILED BY SAN DIEGO TAXPAYERS EDUCATIONAL FOUNDATION IN SUPPORT OF CITY OF SAN DIEGO

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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 January 26, 2018, at San Diego, California.

ELIZABETH DIAZ