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 LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF CITY OF SAN DIEGO

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Introduction

Unions respond to the *amicus curiae* brief filed in support of the City of San Diego by the League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association (collectively "League") as follows:

On matters of substance,[1] League's brief is devoid of any citation to the record or to the text of PERB's actual decision. League does not address the MMBA statutory scheme at the heart of this case and certainly does not argue that the *Boling* court's new-fangled interpretation of MMBA sections 3504.5 and 3505 is correct. Nor does League explain why or how PERB's application of section 3505 to Mayor Sanders, serving as he did as City's Chief Executive Officer and its Chief Labor Negotiator, is at odds with the well-established legal principle that the duty to meet-and-confer in good faith applies to the agency's governing body *and* to those "administrative officials" who have been designated by law or by the governing body to act on the agency's behalf.

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[1] Unions note that the law firm of Renne, Sloan, Holtzman, Sakai, LLP (Renne Sloan) which signed League's brief, is the same firm which represented the *City* before PERB. Renne Sloan's attorney Timothy G. Yeung appeared with Assistant City Attorney Donald R. Worley at each day of the four-day adversarial hearing. The ALJ's Proposed Decision notes this appearance. (AR:XI:3045.) When Renne Sloan attorney Arthur A. Hartinger previously applied to the Fourth District Court of Appeal for permission to file the League of California Cities' *amicus curiae* brief in support of City, Mr. Hartinger noted in a footnote to his application that his partner Timothy G. Yeung performed "a small amount of work in the underlying matter," but did not say what work or for whom.

League lectures about the undisputed importance of initiative rights in broad terms but does not acknowledge that local initiative rights are not absolute and that this Court has previously recognized the need to reconcile initiative and referendum rights – despite their constitutional pedigree – with the important statewide goals embodied in the MMBA. Rather than address this core issue, League resorts to an *ad hominem*-style attack against PERB's allegedly "hostile" decision-making in cases where local initiatives and the MMBA intersect – but fails to say how or why PERB's reasoning was wrong on the facts or law in *any* case League cites.

League also repeats the City's (and other *amici curiae* writing in support of City) ineffective invocation of the *Wood* and *Bond* cases to argue the improbable proposition that Mayor Sanders, while serving in a Charter-mandated *executive* role, had a First Amendment right as an *elected* official to declare himself to be a "private citizen" in order to avoid the City's obligations under the MMBA, all the while using his City-paid staff and City's resources to change terms and conditions of City employment for City's budget benefit. League offers this Court no new legal analysis or perspective making this "private citizen" ruse any more credible than it has ever been on this record.

League addresses the *de novo* versus "clearly erroneous" standard of review issue with a dishonest use of Professor Asimov's 1995 law review article, followed by a call for so-called "situational" deference under *Yamaha*

when a court reviews PERB's decisions. However, this Court determined *before Yamaha* – and has confirmed since – that the correct form of "situational" deference to be applied on review of PERB's decisions is a "clearly erroneous" standard of review. This is because PERB's interpretation and application of the MMBA is based on its unique knowledge and expertise as a labor board and because the legislature has delegated to PERB the role of achieving uniform enforcement of the MMBA through an adjudicatory process in furtherance of the State's objectives.

League's approach is to paint with a broad but ultimately colorless brush. While it is clear that League is opposed to PERB's enforcement of the MMBA against the City in this case, League offers no analysis of the facts or law which supports this opposition on any principled basis.

Argument

I. The League's *Ad Hominem*-Style Attack On PERB's Decision-Making Is No Substitute For Thoughtful Legal Analysis Which League Fails To Offer

League opens with an *ad hominem*-style attack against PERB as having been "consistently hostile to local ballot measures." (League at p. 9) League uses the term "hostile" to infer that PERB has an irrational opposition to local ballot measures in the Meyers-Milias-Brown Act (MMBA) context, but offers no analysis explaining if, how or why PERB's interpretation or application of the MMBA in any of the cited cases was either wrong based on PERB's

conclusive findings of fact or failed to follow existing judicial precedent. (See Gov. C. §§ 3509, subd. (b) and 3509.5, subd. (b).) Since League took no time to present this Court with any such analysis, League's unsupported "attack" on PERB's decisions should be entirely disregarded.[2]

Moreover, League's assignment of an "irrational hostility" label to *any* decision-maker who upholds the statewide objectives embodied in the MMBA when threatened by local exercises in direct democracy (i.e., initiatives and referenda), would logically include this Court.[3] In *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach* (1984) 36 Cal.3d 591, this Court rejected the notion that a City Council's constitutional right to propose charter amendments under article XI, section 3(b) was absolute – finding instead that

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[2] League cites three decisions by PERB's Administrative Law Judges which have no precedential value unless adopted by the Board, (Cal. Code Regs., tit. 8, § 32215), and only one has been. (*City & County of San Francisco* (2017) PERB Decision No. 2540-M [Board interpreted and applied MMBA section 3507 to determine whether a binding interest arbitration process was a "reasonable" process for dispute resolution].)

[3] California's Attorney General has likewise enforced the important rights guaranteed by the MMBA by granting the Bakersfield Police Officers' Association and the San Jose Police Officers' Association leave to sue *in quo warranto* where they asserted that the City of Bakersfield and the City of San Jose, respectively, had placed initiatives on the ballot to change terms and conditions of employment without first engaging in a good faith meet-and-confer process under the MMBA. (Opinion 11-702 (2012) 95 Ops. Cal. Atty. Gen. 31; Opinion No. 12-605 (2013) 96 Ops. Cal. Atty. Gen. 1.) In both cases, the police unions, like the police union in *People ex rel. Seal Beach Police Officers Ass'n, supra*, were not subject to PERB's exclusive initial jurisdiction to hear and decide a bad faith bargaining unfair practice charge. (See Gov. C. § 3511.)

this constitutional right must yield to the important statewide objectives of the MMBA. Accordingly, this 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, 600-01.) Then in *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765, this Court held 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" when used to challenge a Memorandum of Understanding reached after a good faith meet-and-confer process under the MMBA. (*Id.* at 784.)

While League recites basic legal principles related to California's initiative and referendum rights as tools of direct democracy, (League at p. 11), League does not confront the prior landmark cases of this Court constraining these rights in furtherance of the State's goals embodied in the MMBA. Thus, League has contributed nothing to the legal discourse on the fundamental question before this Court: How will the State's legitimate goal of fostering statewide public sector labor peace through communication, good faith meet-and-confer and, if possible, agreements between public sector employers and hundreds of thousands of public employees, be achieved if *government* itself is permitted to use the tools of direct democracy to change negotiable subjects outside the MMBA?

PERB has provided the answer and League offers no basis in fact or law to overturn PERB's decision.

II. League's Vague But Unspecified Concern About The Free Speech Rights Of Elected Officials Cannot Logically Arise From What PERB Actually Decided Based On The Unique Facts Of This Case

In their briefing on the merits and in answer to the *amicus curiae* brief of San Diego Taxpayers Educational Foundation, Unions have already rebutted the notion that, on this record, any First Amendment rights available to Mayor Sanders while serving as City's *executive* official, excused the City from its obligations under the MMBA. Unions will not repeat themselves here except to address League's vague "concern" that PERB's decision, "if permitted to stand, would "likely impinge" on and "effectively chill the right of *elected* officials to communicate and offer their opinions about legislation and other issues affecting their respective communities." (League at p. 12, emphasis added.) Although League does not say how or why such "likely" impingement or "chilling" effect would occur, such an idle prediction is frivolous when viewed against PERB's narrowly-drawn decision applying mainstream MMBA precedent to a set of facts which stands in sharp contrast to League's fictionalized version that City's Mayor acted "privately" in his "political support" for the underlying initiative. (*Ibid.*)

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A. PERB's Decision That City Violated The MMBA In This Case Is Driven By Mayor Sanders' Role As An *Executive* Not An *Elected* Official

League's assertions about a broad impact on *elected* officials ignores the fact that this case turns on Mayor Sanders' specific *executive* duties and his use of City-paid staff and resources.[4] And these duties were not assigned to him willy-nilly by PERB; these duties were entrusted to him by City's Charter. His obligation to perform these duties in compliance with the MMBA distinguished him from every other elected official in the City – and, for that matter, other elected officials around the State who are not designated either by law or by their public agencies' governing bodies to be the agency's "administrative official or other representative" for purposes of compliance with the MMBA section 3505.

Nor should PERB's assessment of the limits on the Mayor's First Amendment rights – when construed in the context of the MMBA and his *executive* duties – have come as a surprise to City or League as a student of the MMBA. Mere months before Mayor Sanders conducted his November 2010 press conference inside City Hall to announce his pension-reform-by-initiative determination as a means to bypass Unions, the City was put on notice that the

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[4] Individuals do not have a First Amendment right to use government-controlled means of communication. Where the government "is speaking on its own behalf" rather than "providing a forum for private speech," free speech principles do not apply. (*Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 470.)

alleged "free speech" rights of an elected City official would not permit the City to violate the MMBA. In *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, PERB cited its three-decades-old decision in *Rio Hondo Community College District* (1980) PERB Decision No. 128, when explaining its rejection of the City's defense in an unfair practice complaint against its elected City Attorney:

> [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. (*Office of the City Attorney* at 8-9.)

PERB's determination that Mayor Sanders' conduct is imputed to the City because he served as its statutory agent under MMBA section 3505, is not only supported by substantial evidence, it is the only rational finding dictated by that evidence. *Nothing* in this conclusion impairs the "right of public officials to express their political and policy opinions about all pending legislation, whether supported by labor or not." (League at p. 13.) Thus, this "right" can be reaffirmed as League urges while this Court nevertheless upholds PERB's decision to ensure the MMBA's continued vitality.

B. PERB's Agency Determination Is Consistent With What City's Own Municipal Lawyers Predicted

League accuses PERB of offering interpretations outside its MMBA expertise over "how San Diego's government is structured under its charter, and whether common law agency principles apply in a charter city." (League at p. 9.) League offers no specifics.

Yet, ironically, PERB's agency determination in this case is fully consistent with what two elected City Attorneys had previously told the Mayor and City Council it would be. By Memorandum in **2008** entitled "Pension Ballot Measure Questions," (XVIII:4708-17),[5] the City Attorney expressly advised Mayor Sanders and the City Council 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.) Then, by Memorandum of Law issued in January 2009, the same City Attorney – who later stood with Mayor Sanders to announce his pension-reform-by-initiative plan in November 2010 – had cautioned that the City's compliance with the MMBA would be determined based on the actions of all its agents despite the shared duties assigned to Mayor and City Council under the Charter:

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

> [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.)

This is precisely what PERB's decision does when evaluating the consequences *to the City* of the Mayor's actions taken on its behalf while serving as City's "administrative official" under section 3505 of the MMBA. According to the League, *nothing* Mayor Sanders did or said as the City's highest-ranking executive officer and Chief Labor Negotiator could ever constitute an unfair labor practice under the MMBA. But this view stands in direct conflict with the City Charter and the MMBA.

C. City Was Not The Victim Of Mayoral "Misconduct" But Fully Embraced The MMBA Opt-Out Scheme At Issue In This Case

League suggests that Mayor Sanders may have engaged in "misconduct" by misusing public resources for which the City must not "suffer the consequences." (League at p. 13.) City has never argued, nor is there anything in the record, to support this view of the City as "victim" in this case. The Mayor believed he had a right to do what he did as a private citizen – without triggering *any* duty by the City to comply with the MMBA. He was told by the City Attorney that he had this right and, indeed, the City Attorney "stood" with the Mayor during his first press conference inside City Hall to

announce his determination and his plan; the Mayor named the City Attorney as a participant in his pension-reform-by-initiative plan when describing it during his State of the City Address; and the City Attorney stood with the Mayor again during his press conference outside City Hall to announce the filing of a "notice of intent" as the Mayor's next "big step" to reform City's pension system. (XIII:3339-40, 3376-77, 3421, 3431; XIX:5006-07, 5013-21, 5028-29 [Fox News: "Pension Reformers Unite Behind Compromise Plan"]; XXI:Ex. 159:5515 [KUSI videoclip].)

Before he led this press conference, the Mayor's Chief of Staff, City's Chief Operating Officer, and the City Attorney, had all reviewed drafts of the initiative to assure it achieved the Mayor's objectives. (*Boling* at 861 & fn. 9; XIV:3576-79, 3582-85, 3587-91, 3680-82, 3684-87, 3693-94; XV:3821-24.) And this press conference came after *months* devoted to this initiative effort – treated as "official business" by the Mayor's City-paid staff.[6]

Moreover, 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 use of pubic funds to develop and draft a proposed

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[6] See AR:XIII:3321, 3330-32, 3401-02, 3480-81; XIV:3570-76, 3653-54, 3667-68, 3676-79; XV:3807, 3812-14, 3957.

initiative does not violate campaign financing law because it is not partisan campaign activity seeking to persuade voters. (*League of Women Voters v. Countywide Criminal Justice Coord. Comm.* (1988) 203 Cal.App.3d 529, 550.)

Thus, what happened in this case was not the product of Mayoral misconduct; nor was City the victim of any rogue actor. What happened in this case was according to *City's plan* – a plan designed to change pensions by initiative to avoid the obligations of meet-and-confer under the MMBA. For this reason, the City – through its two statutory agents, the Mayor and City Council – remained adamant in its failure and refusal to meet and confer over this pension reform subject matter: (1) when the City's duty first arose in November 2010; (2) during the months thereafter when *no initiative was pending*; (3) *before* any initiative had qualified for the ballot; (4) despite Unions' repeated written requests directed to the Mayor, City Council and City Attorney; and (5) even *after* Unions had filed unfair practice charges against the City based, in part, on a detailed account of the Mayor's conduct. Notably, Unions sent seven letters beginning in early July 2011, repeatedly and consistently asserting the belief that, because he served as City's Chief Executive Officer and Chief Labor Negotiator, Mayor Sanders was acting as City's agent in pursuing 401(k)-style pension reform, and urging the Mayor, City Attorney, and City Council not to go forward with their unlawful actions. (XIX:5109-10, 5112; XX:5123-26, 5142-44, 5157-62.)

With full knowledge of the Mayor's highly-publicized activities and his stated intentions – explained directly to the City Council during the State of the City Address in early January 2011 – the City Council sat idly on the sidelines waiting to take the benefits of this bypass scheme *for the City*.

Thus, far from seeing itself as the victim of the Mayor's alleged misconduct, as League suggests, the City has asserted the alleged righteousness of what the Mayor did, as well as the alleged lawfulness of its own failure and refusal to bargain, throughout this case. The City's defense of this case is indeed reminiscent of the iconic moment in *A Few Good Men*: "you're damn right (the City) ordered the code red."

Accordingly, there is *nothing* in PERB's decision which serves to restrain or chill the "right of elected officials to communicate and offer their opinions about legislation and other issues affecting their respective communities," as League predicts. Nor is there anything "unworkable and ambiguous" about what this decision means and how elected officials should comply with it *if* they serve as their public agency's chief executive officer and chief labor negotiator under the MMBA. PERB's decision, if upheld, clearly and unambiguously forecloses "administrative officials or other representatives" of local public agency governing bodies (as defined by MMBA section 3505) from using their *governmental* positions and power – as Mayor Sanders did in this case – to exploit the initiative process as a means

to change terms and conditions of employment for the benefit of the public entity they serve while failing and refusing to engage in a good faith meet-and-confer process with recognized employee organizations.

III. League's Call For "Situational Deference" Under *Yamaha* Means A "Clearly Erroneous" Standard Of Review For PERB's Adjudicatory Decisions Because Of Its Expertise As A Labor Board

One of the two issues before this Court for review is this: 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?

Despite the City's acknowledgment as Petitioner before the Fourth Appellate District that a "clearly erroneous" standard of review applied to review of PERB's decision under MMBA section 3509.5, subdivision (b), (City's Opening Brief to *Boling* Court of Appeal, p. 20), the *Boling* court declared that, under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), *de novo* review of PERB's final decision was appropriate. (*Boling* at 870.) This result was at odds with decades of case law, led by this Court, establishing a "clearly erroneous" standard of review. It was also at odds with the Fourth District Court of Appeal's own application of a "clearly erroneous" standard of review when upholding PERB's decision less than a year earlier in *San Diego Housing Commission v. PERB* (*SEIU Local*

221) (2016) 246 Cal.App.4th 1, 12. In *San Diego Housing Commission*, the court stated that PERB's interpretation of the MMBA falls squarely within PERB's legislatively designated field of expertise, and since PERB's primary responsibility is to determine the scope of the statutory duty to bargain and to resolve charges of unfair refusal to bargain, a reviewing court owes PERB's legal determinations deference and its "interpretation will generally be followed unless it is clearly erroneous." (*Ibid.*)

According to the *Boling* court, PERB's decision allegedly turned on questions of law outside PERB's area of expertise and did not involve its interpretation and application of the MMBA itself. Unions have addressed the *Boling* court's fundamental error in this regard in their Opening and Reply Briefs on the Merits – noting that *Boling's* rejection of PERB's conclusion that the City violated the MMBA turned entirely on the *Boling* court's decision to substitute its own (unexplained) interpretation of MMBA sections 3504.5 and 3505 for PERB's interpretation. The correct interpretation and application of these two sections of the MMBA is at the heart of the matter before this Court.

League, however, does not address the text of either section 3504.5 or 3505 or the interplay between them in light of the statute as a whole. League does not argue that PERB's interpretation of these sections was wrong or that *Boling*'s interpretation is right. Instead, League argues that the "clearly erroneous" standard of review when applied to PERB's decisions "does not

square with this Court's holding in *Yamaha*." (League at p. 14.) League asserts that this Court only haphazardly applied a "clearly erroneous" standard of review in *Banning Teachers Ass'n v. PERB* (1988) 44 Cal.3d 799 (*Banning*), "with no real analysis as to its meaning or practical application," and that this "clearly erroneous" standard has been mindlessly applied by this Court and other courts ever since. Thus, League calls on this Court to "re-set the standard of review and confirm that the degree of deference accorded PERB's interpretations is "situational." (League at p. 10.) Although League appears to believe that if a "situational deference" standard as described in *Yamaha* is applied, it will defeat PERB's interpretation and application of the MMBA to the facts of this case, League misunderstands. When League describes the *Yamaha* standard of review as the court's exercise of its "independent judgment, giving deference to the determination of the (agency) appropriate to the circumstances of the agency action," (League at pp. 15-16), League is *not* invoking a *de novo* standard of review. Rather, when it comes to PERB's interpretation and application of the MMBA, League is calling for application of the established "clearly erroneous" standard of review.

A. The "Clearly Erroneous" Standard of Review For PERB's Decisions Is Consistent With *Yamaha*'s Notion of "Situational Deference"

Yamaha did not involve the review of a decision by a presumptively expert administrative agency in an adjudicatory context. However, *Yamaha*'s

notion of "situational deference" is, in fact, a "clearly erroneous" standard of review when such an agency decision is under review.

Beginning with its decision in *San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 856 [superseded by statute on other grounds as stated in *California School Employees Ass'n. v. Bonita United School Dist.* (2008) 163 Cal.App.4th 387, 401], this Court has applied a clearly erroneous standard of review to PERB's decisions based on a recognition of its expertise as a labor board – citing the prior application of this clearly erroneous standard to the Agricultural Labor Relations Board's (ALRB) decisions in *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 859 and in *J. R. Norton Co. v. Agricultural Labor Relations Board* (ALRB) (1979) 26 Cal.3d 1, 29 (*Norton*). This Court explained the reason for this degree of deference in *Banning, supra*, 44 Cal.3d at 804 – again citing its earlier 1979 decision in *Norton:*

> 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.' (Citation omitted.) We follow PERB's interpretation unless it is clearly erroneous. (*Banning* at 804.)

Moreover, years after deciding *Yamaha*, this Court continued to apply a "clearly erroneous" standard of review when PERB's or a similar labor board's decision is under review and has done so in a deliberate not mindless fashion as League suggests. (See *International Ass'n of Firefighters, Local*

188, AFL-CIO v. PERB (2011) 51 Cal.4th 259; *County of Los Angeles v. Los Angeles County Employee Relations Comm.* (2013) 56 Cal.4th 905.) Even after granting review in *Boling*, this Court emphatically reaffirmed the deference owed to the decisions of PERB's sister labor board, the ALRB. "[T]he Board, as the agency charged with the ALRA's administration, 'is entitled to deference when interpreting policy in its field of expertise.'" (*Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1155, quoting *Norton, supra.*) "The Legislature 'intended that the ALRB serve as "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.'" (*Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1168, quoting *Tex-Cal Land Management, Inc. v. ALRB* (1979) 24 Cal.3d 335, 346.) "Where the Board relies on its 'specialized knowledge' and 'expertise,' its decision 'is vested with a presumption of validity.'" (*Ibid.*, quoting *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1292.)

Thus, this Court thoughtfully declared *before Yamaha* – and has thoughtfully confirmed since – that the "appropriate deference" or "weight" to be given PERB's interpretation of the laws the Legislature has entrusted to it to enforce on a uniform statewide basis, is the "clearly erroneous" standard. In short, this "clearly erroneous" standard of review *is* the "situational

deference" which League is calling for – i.e., courts "giv(ing) deference to the determination of the (agency) appropriate to the circumstances of the agency action." (League at pp. 15-16.)

The *Boling* court's use of a *de novo* standard not only upsets 35 years of consistent precedent – established by sound reasoning – but it also weakens the Legislative goal of having the MMBA and other labor relations statutes interpreted and enforced on a uniform statewide basis by an expert administrative agency.

B. City's Defenses Based On External Law Do Not Alter the "Clearly Erroneous" Standard of Review

League suggests that PERB engaged in some unspecified interpretation and application of "municipal, Constitutional and election laws, as well as common law principles," (League at p. 15), such that a "clearly erroneous" standard of review should not be applied to its decision. But League does not explain what laws external to the MMBA PERB interpreted and, if PERB did so, how its interpretation affected the outcome in this case – and, if it did, why PERB's interpretation is wrong on the facts or in the context of the MMBA. To the contrary, the record demonstrates that no interpretation of external law was needed in this case for PERB to conclude that the MMBA was violated and that a remedy against the City is essential in order to effectuate the purpose

of the Act.[7] The City Charter unambiguously established the Mayor's duties as Chief Executive Officer and Chief Labor Negotiator under the MMBA; an undisputed course of conduct demonstrated how the Mayor and City Council shared their duties to comply with the MMBA in light of the Mayor's Charter-mandated role; and prior opinions of the City's own municipal attorneys foreshadowed PERB's conclusions.

Thus, as shown in Unions' and PERB's Opening and Reply Briefs on the merits, PERB's decision falls squarely within the parameters of its expertise in administering the MMBA and is fully consistent with judicial precedent under the MMBA based on substantial evidence. Neither PERB nor Unions have asserted that PERB's interpretation of external law outside its area of MMBA expertise is entitled to a "clearly erroneous" standard of review; the point is otherwise – PERB's decision does not turn on the interpretation and application of any law outside its agency expertise.

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[7] Contrary to the careless rhetoric of League, other *amicus curiae,* the Ballot Proponents and the City, PERB did not "strike down" this ballot initiative. (See League at p. 9.) PERB concluded that the authority to invalidate it rests exclusively with the courts and thus PERB crafted a make whole remedy consistent with MMBA precedent in unilateral change cases – a remedy necessary to effectuate the purposes of the Act – while leaving the initiative itself intact. (XI:3023-25.) PERB's make-whole remedy covers only those employees represented by the four Unions in this case and not all employees otherwise impacted by this initiative. (*Id.* at 3023-24.) PERB also ordered the City to pay Unions' attorneys' fees if they chose to pursue a court action to rescind Proposition B as it applies to those represented employees. (*Id.* at 3024-25.)

Moreover, the fact that other laws may be raised or implicated by a litigant's defense of an unfair practice charge, does not alter the "clearly erroneous" standard of review applied to PERB's interpretation and application of the MMBA itself. This Court has previously established in *Cumero v. PERB* (1989) 49 Cal.3d 575 at 583, 586-587, that when PERB construes a labor relations act "in light of constitutional standards," the same level of deference applies as with any other PERB determination. Thus, the fact that a litigant throws other laws into the mix, as the City did here, as an excuse for its non-compliance with the MMBA, does *not* mean that a reviewing court should or must deny PERB the appropriate deferential review of its interpretation of the MMBA. (See *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922; *City of Palo Alto v. PERB* (2016) 5 Cal.App.5th 1271, 1287-88 [applying the "clearly erroneous" standard in a case that dealt with election law and constitutional issues in addition to issues of MMBA interpretation].) If it were otherwise, the litigants themselves in an unfair practice case would be empowered to alter the standard of review merely by interposing defenses based on external law, however frivolous.

C. League's Citation To Evidence Not In The Record Should Be Disregarded

Having otherwise ignored the entire contents of the voluminous record in this case throughout its *amicus curiae* brief, League cites to "a colloquy" it

claims took place during oral argument in the *Boling* case as allegedly "shedding light on the problem with the 'clearly erroneous' standard." (League at p. 13.) League purportedly quotes two questions/comments attributed to the "Court" as part of this colloquy with PERB's counsel but does not quote the answer given. The identity of the "Court" – i.e., panel member – is not disclosed. The quoted material is allegedly taken from pages 37-39 of a Reporter's Transcript which is neither a part of the record nor did League file it with a request for judicial notice. (Cal. Rules of Court, rule 8.520(g).) This part of League's brief should be disregarded as improper.

D. League Misdirects This Court When Citing Professor Asimov's 1995 Law Review Article

League misrepresents and thus misdirects this Court regarding the 1995 work product of UCLA Law Professor Michael Asimov.

First, in support of its argument against this Court's long-standing invocation of a "clearly erroneous" standard when reviewing adjudicatory decisions of the State's labor boards, League cites "confusion over the use of the clearly erroneous standard" which Professor Asimov allegedly assigned to "Washington judges" who "could not figure out how clearly erroneous differed from substantial evidence." (League at p. 15, citing 42 UCLA L. Rev. 1157, 1190.) But Professor Asimov was writing about judicial review of *fact findings* – i.e., the "clearly erroneous test" used by federal appellate courts to review the findings of lower court judges in cases without juries. Professor

Asimov makes his point about Washington judges' confusion to support his general view in 1995 that it would be a mistake for California administrative law to replace its substantial evidence test with a clearly erroneous test when a court reviews agency fact findings.

Here, however, the California legislature has established a bright line rule applicable to review of PERB's decisions – i.e., the findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. (Gov. C. § 3509.5, subd. (b).)

Second, League is not giving this Court an honest context for the quote it presents from Professor Asimov's law review article purporting to state "the mainstream California rule" as one of "independent judgment" rule when a court reviews an agency's interpretations of law. (League at p. 14.) Professor Asimov states that this "rule" is subject to several caveats, including the requirement for courts to accord deference or "great weight" to an agency's interpretation when it is a specialist with expertise in administering a particular statute and the legal text is "entwined with issues of fact, policy and discretion." In support of this caveat to the "rule," Professor Asimov cites, among other cases, this Court's decision in *Highland Ranch v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 848, 859. (42 UCLA L. Rev. 1157, 1194-1195 and fn. 136.)

Professor Asimov also describes the line of California cases calling for a court to affirm an agency's interpretation of a statute it is charged with enforcing if the agency's interpretation is not "clearly erroneous," citing many decisions of this Court including *Banning, supra*, 44 Cal.3d at 804-05. (42 UCLA L. Rev. at 1201 and fn. 156-157.) Asimov interprets this Court's use of the "clearly erroneous" language to mean the same thing as "weak deference," quoting this Court in *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 45:

> We have generally accorded respect to administrative interpretations of a law and, *unless clearly erroneous*, have deemed them *significant factors* in ascertaining statutory meaning and purpose. (42 UCLA L. Rev. at 1201, fn. 157, emphasis in original.)

On the basis of this analysis, Professor Asimov makes his case against the "no deference" rule announced in *Boling*. In his view, a rule calling for appropriate deference is sensible; it promotes accurate decisionmaking because an agency's qualification to interpret text is often superior to a court's, especially where the materials are technical and engage an agency's expertise; and the agency may be more competent to reach an interpretation that reflects legislative intent, furthers the statutory policy, and facilitates enforcement and administration – and, he notes, this is especially true when the agency has maintained the interpretation consistently and has given it careful and thorough consideration. Deference also promotes uniformity and tends to discourage

litigants from seeking judicial review of agency decisions containing legal interpretations. (42 UCLA L. Rev. at 1203-1205.)

IV. League's Call For Unions To Be Satisfied With "Effects" Bargaining Belies A Fundamental Disregard Of Section 3505 As The "Centerpiece" Of The MMBA

This unfair practice case is and has always been focused on the City's unlawful conduct in failing and refusing to bargain over the subject matter of pension reform. City's conduct in violation of the MMBA was accomplished by the actions and inaction of its two statutory agents under section 3505 – its Mayor, as City's "administrative official" designated both by law and by the City Council, and by the City Council itself as City's governing body. Both statutory agents failed and refused to bargain over subject matter which is undeniably within the scope of representation under MMBA section 3504 – i.e., replacing defined benefit pensions with a 401(k)-style plan. Section 3505 established the City's duty to meet-and-confer in good faith over this subject matter by conducting in-person meetings, freely exchanging information, opinions and proposals, and continuing these good faith efforts for a reasonable period of time in an effort to each an agreement *before* the City determined its policy on further pension reform or any course of action to implement it.

League concedes that "if the City Council of the City of San Diego proposed to change pension benefits, it would be required to negotiate with

affected labor unions before the City could adopt legislation making those changes," but that "there can be no duty to meet and confer over the content of a citizen's initiative." (League at p. 17.) However, Unions never demanded bargaining over the contents of the (Proposition B) citizens' initiative itself. As PERB observed, [b]y not seeking to bargaining over Proposition B per se, the [U]nions avoid the question left open in *Seal Beach* . . ." (XI:3091.)

A. League Does Not Address City's Duty To Engage In Good Faith Meet-and-Confer *Before* The Mayor's Determination To Change Pensions By Initiative Was Unilaterally Implemented

League treats this citizens' initiative – which qualified for the ballot in November 2011 – as having displaced the City's duty to engage in good faith bargaining over the subject matter of pension reform for the entire period spanning from November 2010 when Mayor Sanders announced his pension-reform-by-initiative determination during his City Hall press conference through the vote in June 2012. Thus, League's view of the "intersection between the MMBA and any exercise of local initiative rights" is that the mere presence of a citizens' initiative anywhere on the landscape is sufficient to preempt the MMBA and displace the State's interest in a viable statewide public sector collective bargaining law. This result is untenable under the actual text of the MMBA and decades of case law interpreting and applying it, including by this Court.

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As PERB concluded, when the Mayor announced his pension reform intentions in November 2010 and during the months that followed – before and after a notice of intent to circulate a petition was filed, while it was circulating, and even after it 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 citizens' initiative itself, assuming it came to fruition despite the Mayor's collective bargaining activities in compliance with the MMBA. 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].) The *Boling* Ballot Proponents themselves

covered the eventuality of such a competing measure by including Section 9, "Conflicting Ballot Measures" in the text of Proposition B:

> [I]n 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.)

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.)

B. League's Arguments About "Effects" Bargaining And Union-Sponsored Initiatives Ignore The MMBA

League urges this Court to allow the City's failure and flat refusal to meet-and-confer unremedied because Unions theoretically could have put their own initiative on the ballot and, in any event, had a right (albeit an empty one) to bargain over effects *after* the core compensation bargain for represented employees had been permanently and unilaterally changed. (League at 18-21.) League's argument disregards the "substantive duties" imposed and the "substantive, enforceable rights" conferred under the MMBA, (*Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, 539) – including the public employer's duty under section 3505 (what this Court has repeatedly called the "centerpiece" of the MMBA) to meet-and-confer in good faith *before* arriving at a determination of policy or course of action as to subject matter within the scope of representation.

League's argument also disregards the reality that an employer's unilateral change in terms and conditions of employment, as occurred here, 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.)

Conclusion

League's defense of the City's unfair practice conduct in this case is ultimately at odds with both the State's legitimate objectives and the proven successes of the good faith meet-and-confer process when respected by public employers and recognized employee organizations throughout the State. Such a defense on this record is at odds with the League's declared "commitment to the principle of bargaining in good faith," which it acknowledged in its *amicus curiae* brief before the Court of Appeal. (League at p. 8.)

Indeed, under Mayor Sanders' leadership, the City of San Diego itself had implemented pension reform, eliminated its structural budget deficit, and reduced its retiree health benefit unfunded liability by hundreds of millions of dollars *through collective bargaining.* It was the commitment of City's recognized employee organizations and the willingness of represented employees to make the necessary sacrifices – in the context of the City's

compliance with the MMBA – which produced these results. The City's failure and refusal to bargain over *further* pension reform after procuring these bargained-for concessions – and its blatant use of an initiative led by its CEO and Chief Labor Negotiator to do so – must be rejected by an effective remedy imposed to preserve the MMBA's critical role in promoting public sector labor peace through communication and collective bargaining.

League's call for this Court to reject PERB's decision is not supported by any thoughtful legal analysis applied to the actual record, nor any analysis of the MMBA statutory scheme or the decades of court and administrative precedent enforcing it to foster the Legislature's objective of promoting public sector labor peace through communication and good faith collective bargaining. Annulling PERB's decision in favor of the *Boling* interpretation of the MMBA would create new uncertainty for public agencies and recognized employee organizations, cause needless disruption for hundreds of thousands of public employees whose work lives are governed by it, and spawn more litigation.

League's negative perspective on PERB's decision does not broaden this Court's understanding of the legal issues it confronts. While the general

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opinions it proffers may be suitable for a political forum, they have no useful place in a court of law.

Dated: January 29, 2018

SMITH, STEINER, VANDERPOOL & WAX, APC

By: _____
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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 7,339 words.

Dated: January 29, 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 29, 2018, I served the within document described as:

JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS TO AMICUS BRIEF FILED BY LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION 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 29, 2018, at San Diego, California.

ELIZABETH DIAZ