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

REPLY IN SUPPORT OF PETITION FOR REVIEW BY UNION REAL PARTIES IN INTEREST

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INTRODUCTION

In their Petitions for Review, the Public Employment Relations Board ("PERB"), Respondent below, and Real Parties in Interest San Diego Municipal Employees Association; Deputy City Attorneys Association; American Federation of State, County and Municipal Employees, AFL-CIO, Local 127; and San Diego City Firefighters Local 145, IAFF, AFL-CIO ("Real Party Unions") demonstrate why and how the issues decided by the Court of Appeal below, some not raised by any party, individually and together, upend settled law under the Meyers-Milias-Brown Act ("MMBA"), California Gov't. Code section 3500 *et seq.*, and provide public entities with a road map for circumventing the centerpiece of the MMBA – the obligation to meet and confer in good faith in MMBA section 3505. The consequential issues necessitating review are:

1) the Court of Appeal's abandonment of the well-established deferential "clearly erroneous" standard of review of PERB adjudicative decisions under *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, in favor of application of a *de novo* standard of review under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1;

2) the Court of Appeal's redefinition of the MMBA's meet and confer provisions to:

a) abrogate the authority of PERB as the expert agency to

interpret and apply the MMBA, specifically the MMBA's provisions regarding public authorities' agents for purposes of collective bargaining and the interrelationship of MMBA sections 3504.5 and 3505 regulating the meet and confer process; and

b) excuse a public entity from application of the MMBA and any obligation under the MMBA to meet and confer with employee organizations affected by voter-sponsored initiatives over subjects within the MMBA's scope of representation.

In their Combined Answers, Petitioners in the court below, the City of San Diego ("City") and ballot initiative proponents Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents") urge this Court to adopt the erroneous conclusions of the Opinion below, largely without disputing the consequences of the Court of Appeal's errors.[1]

Review by this Court is necessary to secure uniformity of decisions under the State's eight public sector labor relations laws and local labor relations ordinances and for the city, county, and special district public agencies and hundreds of thousands of public employees they employ; and to settle important questions of law regarding the standard of review of final PERB decisions and a public agency's obligation to meet and confer under the MMBA.

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[1] A copy of the Opinion ("Op.") is attached as Appendix A to Real Party Unions' Petition for Review.

I. Review Is Necessary To Preserve Uniformity Of Application Of The Deferential "Clearly Erroneous" Standard Of Review Of PERB Decisions

The City and Proponents premise their defense of the Court of Appeal's abandonment of the long-established deferential standard in *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, for review of PERB decisions by contending, like the Court of Appeal, that PERB applied law outside of its expertise. (Op. pp. 26, 43-44; City's Combined Answer ("City's Comb. Ans.") p. 13; Proponents' Combined Answer ("Proponents' Comb. Ans.") p. 19). Based on this inaccurate premise, the court below interposed *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, as a means of substituting its judgment for PERB's expertise in applying the MMBA to the circumstances of the Comprehensive Pension Reform Initiative ("CPRI")/Proposition B Charter amendment initiative. Indeed, the City asserts that PERB "invited de novo review" by acknowledging difficult questions about the applicability of the MMBA to a citizen's initiative, while concluding, however, that those difficulties are not implicated by the facts of this case. (City's Comb. Ans. p. 15, from PERB Decision, Administrative Record, XI:186:3006).[2] Proponents assert that *Yamaha* should provide the applicable standard of

[2] All evidentiary and administrative citations are to the Administrative Record, by volume (*e.g.*, XI), tab, and page.

review so as not "to separate PERB from the applicable standard of review that applies to other state administrative agencies." (Proponents' Comb. Ans. p. 22). Neither of these contentions is reason to abandon the *Banning* standard.

This Court should grant review because PERB's determination that the City's conduct in intentionally circumventing MMBA bargaining obligations through its extensive patronage of the CPRI initiative violated the MMBA's good faith meet and confer requirements constituted the exercise of PERB's expertise in applying the MMBA.

PERB's determination that the City's Mayor acted as the City's statutory agent under the MMBA in placing the City's imprimatur on the CPRI initiative and at the same time refusing to meet and confer with Real Party Unions is exactly the type of determination entrusted to PERB's expertise and not to *de novo* court review. *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767, 775-77 (holding definition of agency used by PERB to decide case, a more restrained test than under National Labor Relations Act, was not clearly erroneous).

PERB recounted the undisputed facts of the Mayor's authority and the Mayor's, Council members', and Council's involvement in the CPRI/Proposition B Charter amendment, including the Council's knowledge and acquiescence in the Mayor's refusal to meet and confer over

the initiative. (XI:186:2982-2985). PERB upheld the ALJ's finding that the Mayor acted "in his capacity as the City's chief executive officer and labor relations spokesperson," "that he made a firm decision to alter terms and conditions of employment of employees represented by the Unions," and that he was "acting as the City's agent" when he pursued the initiative. PERB further upheld the ALJ's finding that the "City Council, by its action and inaction, ratified both Sanders' decision and his refusal to meet and confer with the Unions." (XI:186:2986).[3]

In a lengthy analysis, PERB discussed the City's exceptions to the ALJ's findings of statutory agency,[4] actual authority, apparent authority and ratification, as well as why, under PERB precedent, the high-ranking Mayor's ostensible "private" conduct was attributable to the City.[5] Because

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[3] The Court of Appeal's conclusion that there is no evidence that CPRI was ever "approved" by the City's governing body Council (Op. p. 6), does not negate the essential agency finding, supported by substantial evidence, that the governing body ratified the refusal to meet and confer with the Unions despite the Unions' multiple requests to bargain to the Mayor and Council.

[4] PERB found, based on undisputed facts, that no serious effort was made "to segregate the official duties of the Mayor and his staff from their ostensibly private activities in support of the pension reform initiative," so that the Mayor, the City's designated labor representative under MMBA section 3505, acted as the City's statutory agent in using his office to support the ballot initiative. (XI:186:2989-2990.).

[5] PERB based its findings on undisputed facts, and, for each legal type of agency, PERB reviewed and applied its own precedent, California (including Agricultural Labor Relations Act) precedent, and/or National Labor Relations Act precedent. (XI:186:2990-3005). The Court of

PERB applied agency principles within its informed expertise under the MMBA, the Court of Appeal's view that PERB applied "common law principles of agency over which it has no specialized expertise warranting deference" (Op. p. 43-44) is a gross mischaracterization of PERB's decision.

The City and Proponents argue that, in any event, PERB's agency findings were "clearly erroneous." Both repeat and rely on the Court of Appeal's conclusion that PERB's fundamental premise – which the court described as the concept that under agency principles the Mayor's conduct "converted" the CPRI initiative to a City Council-sponsored measure as to which bargaining was required – is legally erroneous. (Op. pp. 65-66; City's Comb. Ans. pp. 15-16; Proponents' Comb. Ans. pp. 16-18). This characterization subverts PERB's reasoning. PERB's focus was not the initiative but, rather, the Mayor's conduct which gave rise to the MMBA obligation related to the subject matter of the initiative, pension reform. ("[G]iven the peculiar circumstances of this case and our agreement with the ALJ that, irrespective of the citizens' right to enact Proposition B, the Mayor's *prior* announcement of a policy change affected the negotiable matters within the scope of MMBA's meet-and-confer requirements."

Appeal's notion that, where facts are undisputed, they require no specialized expertise in application of the law (Op. n.34) is illogical and unsupported by case law involving review of agency adjudication.

(XI:186:3011)).

Banning itself warned against the Court of Appeal's appropriation of PERB's expertise and its categorical dismissal of PERB's authority here in the context of an initiative prompted and supported by the City's own bargaining representative, holding that the court there failed to give PERB's case-by-case role proper deference and condemning the court's "per se rule, adopted to spare the reviewing court the task of examining claims on a case-by-case basis." (44 Cal.3d at 805).

Review is necessary to ensure that PERB's adjudicated, reasoned, expert findings – especially, of agency – continue to receive the deference under *Banning* to which they are entitled.

II. Review Is Necessary To Uphold PERB's Application Of The MMBA To The City's Conduct Related To The Voter Initiative Here Under *Seal Beach* And *Voters*.

The Court should grant review to reinforce its holdings in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, and *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, that the rights of initiative and referendum must be reconciled with the statewide concerns embodied in the MMBA.

In *Seal Beach*, this Court held that a charter city could not use its constitutional power to propose charter amendments to circumvent meet

and confer obligations under the MMBA, concluding that the MMBA requirements and charter amendment powers are compatible. (36 Cal.3d at 597-601). The Court did not reach the circumstance of a voter-proposed charter amendment measure, noting, "Needless to say, this case does not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at n.8).

Then, in *Voters*, the Court held that the MMBA restricted the voters' right of referendum to challenge an ordinance adopting a memorandum of understanding ("MOU") between a county and its employee organizations. "[T]he Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to exclusively delegate negotiating authority to the boards of supervisors, and therefore the power to curtail the local right of referendum." (8 Cal.4th at 783-84). Contrary to the Court of Appeal's conclusion here that *Voters* involved only the limited issue of whether statutory provisions governing county referenda, *i.e.*, that ordinances adopting MOUs take effect immediately, precluding referenda (*see* Op. pp. 37-39), this Court's decision in *Voters* rested on its broader consideration of "how a referendum might fit into the collective bargaining regime contemplated by the MMBA." (8 Cal.4th at 781). The broader analysis recognized the interrelationship between the negotiating and the decision-making roles of

public agencies and their governing bodies in fulfilling the MMBA's statutory bargaining obligations – precisely the interrelationship of public agency roles jettisoned by the court below.

Here, neither the Court of Appeal, the City, nor Proponents consider whether and how, within the mandates of this Court in *Seal Beach* and *Voters*, voter-proposed initiatives can be reconciled with the statewide concerns of the MMBA in the circumstances of this case. The court below and Proponents simply conclude that initiatives and the MMBA present an either-or conflict and that the initiative process prevails to the total exclusion of the MMBA[6] – results rejected by this Court's reasoning in both *Seal Beach* and *Voters*. The City does not address *Seal Beach* or *Voters* at all in its Answer.

The Court should grant review to ensure uniformity of decision in this case as an extension of the holdings in *Seal Beach* and *Voters* that local

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[61] *See* Op. p. 6 ("we must then decide whether PERB properly concluded City nevertheless violated its meet-and-confer obligations because CPRI was *not* a citizen-sponsored initiative outside of *Seal Beach*'s holding, but was instead a 'City'-sponsored ballot proposal within the ambit of *Seal Beach*" (emphasis in text)), p. 40 (because of "clear distinction" between voter-sponsored, ministerial, and city-council-generated initiatives, a city has no obligation under the MMBA to meet and confer, because such an initiative does not involve a proposal "by the governing body" "nor could produce an agreement regarding such an initiative that the public agency is authorized to make"); Proponents' Comb. Ans. p. 8 ("the Meyers-Milias-Brown Act (MMBA) . . . is not applicable to citizen-circulated initiative measures") and pp. 15-16 ("the constraints of the MMBA have no control" over the exercise by citizens of constitutional initiative rights").

public employment-related charter amendment proposals, referenda, and initiatives must be reconciled with the MMBA.

This case presents undisputed factual evidence of conduct by the City's designated labor negotiator blurring the territory between a voter-proposed initiative and a City-proposed measure. As a result, this case does not present precisely the initiative question left open by this Court in *Seal Beach*, and Real Party Unions submit that the cursory rejection of the MMBA by the court below necessitates this Court's review to uphold PERB's careful placement of this case within the reasoning of *Seal Beach* and *Voters*.

Acknowledging that its "authority is not unlimited" but that the courts have historically recognized that local legislation may not conflict with statutes such as the MMBA intended to regulate public employee labor relations (XI:186:3007, 3009), PERB stepped carefully. After a lengthy discussion of *Seal Beach*, *Voters*, and *Tuolumne Jobs & Small Bus. Alliance v. Superior Court* (2014) 59 Cal.4th 1029, urged by the City, PERB concluded, "In the absence of controlling appellate authority directing PERB that the meet-and-confer process is constitutionally infirm or preempted by the citizens' initiative process, we must uphold our duty to administer the MMBA . . . [W]e may resolve the issues only to the extent our statutes are implicated." (XI:186:3017). Agreeing that the facts of this

case do not present the issue of MMBA preemption of all voter-proposed initiatives (XI:186:3013), PERB identified the premise of its holding as the same as the policy underlying *Seal Beach* and *Voters* – that "the City cannot exploit the tension between the MMBA and the initiative process to evade its meet-and-confer obligations." (XI:186:3038).

Then, acknowledging that only courts have the power to invalidate voter-approved initiatives, PERB modified the relief recommended in the ALJ's Proposed Decision to order traditional MMBA make-whole compensatory remedies, while leaving the CPRI/Proposition B Charter amendment in effect. (XI:186:3017-3028). PERB concluded that the CPRI initiative and its placement on a ballot did not preclude the City from separately fulfilling its meet and confer obligations, either practically or legally. (XI:186:3034-3035, 3038-3039).[7]

Review is necessary to ensure that the statewide concerns embodied in the MMBA be reconciled with the rights of initiative.

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[7] The court below and the City ignored, and Proponents dismiss (Proponents' Comb. Ans. pp. 26-28), arguments that meet and confer could productively occur before, during, and after the initiative process on subjects within the scope of representation related to the subject matter of Proposition B. Proponents do not explain why requiring the City to meet and confer "amounts to an attempt to create unconstitutional election barriers in California," or would have this Court "override the 'jealously guarded' right to direct democracy," and have the MMBA "trump[] the citizen's right to propose ballot box legislation under the Election Code, City Charter and the California Constitution" (Proponents' Comb. Ans. p. 23).

III. Review Is Necessary To Correct The Court Of Appeal's Misinterpretation of MMBA sections 3504.5 and 3505

This Court should grant review of the Court of Appeal's *sua sponte* interpretation of MMBA section 3505, which confines the MMBA's meet and confer obligations to action only by the "governing body" and then only when the governing body "proposes" legislative action.[8] As both PERB and Real Party Unions demonstrate in their Petitions for Review, the Court of Appeal's outlier interpretation of section 3505, particularly together with section 3504.5, undermines virtually all of MMBA jurisprudence. PERB's Petition, pp. 39-45; Real Party Unions' Petition, pp. 18-30.

In their Answers to the Petitions, neither the City nor Proponents view the Court of Appeal's unprecedented reading of section 3505 as anything consequential. However, the MMBA statutory scheme requires the public employer's integrated compliance – through its designated representatives *and* governing body. The MMBA imposes on public agencies, through their representatives, the obligation to meet and confer in good faith upon request and for reasonable periods of time concerning

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[8] The Court's misinterpretation of section 3505 also infected its agency analysis. Op. p. 44, n.34 ("because we will conclude the relevant inquiry is *not* whether Sanders was an agent for City (at least in some capacities), but instead whether he was the actual or ostensible agent *for the governing body* when he helped draft and campaign for the CPRI, we will examine whether PERB correctly concluded Sanders' actions can be charged to a governing body under common law principles." (emphasis in text)).

subjects within the scope of representation throughout their relationship. Cal. Gov't. Code section 3505; *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537. Section 3504.5, added later and appearing sequentially before section 3505, is by its terms a notice provision, not a curtailment of the meet and confer obligation.

This Court has recognized that collective bargaining under the MMBA will not work if the public agency employer and its own designated collective bargaining representatives do not function together. The Court has cautioned against the very bifurcation of decision-making by public bodies and negotiating by their designated representatives which the court below approved.

> Stated differently, the effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1–i.e., the governing body–is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined. This kind of bifurcation of authority between negotiators and decisionmakers would not be considered lawful were it to occur in the realm of private sector labor relations.

Voters for Responsible Retirement v. Bd. of Supervisors (1994) 8 Cal.4th

765, 782-83 (citation under National Labor Relations Act omitted). Breakdown of the collective bargaining process resulting from separation of authority between public agency negotiators and decision-makers, as the court below prescribed in its interpretation of MMBA sections 3504.5 and 3505, occurs not only in the context of referenda (as this Court recognized in *Voters*, quoted above) and initiatives, but in all aspects of the meet and confer process – in which negotiation of adopted and enforceable collective bargaining agreements is the goal.

The Court of Appeal's effective creation of an MMBA section 3505 "opt out" enabling a public agency to circumvent MMBA meet and confer obligations by avoiding its governing body is independent of the initiative issues raised in this case. As the Petitions for Review recount, the Opinion below offers no analysis of the MMBA's statutory scheme and its purposes nor of case law to justify its interpretation that undermines the very point and process of meeting and conferring. Similarly, neither the City nor Proponents dispute that, as a consequence, the statutory meet and confer obligations, enforced through the MMBA's unfair practices provisions, under the Court of Appeal's construct, may no longer apply to day-to-day administration of terms and conditions of employment such as work rules, schedules, and grievances; to MOU bargaining prior to any proposed adoption of an MOU; nor to refusals to bargain in good faith on subjects

within the statutory scope of representation or short of the point of proposed adoption by the governing body. The City does not deal with the drastic re-write of the MMBA at all. Rather, the City advances the astonishing additional proposition that an interpretation of section 3505 which would require the Mayor to meet and confer with the City's unions interferes with his First Amendment rights of petition and expression and his California statutory rights to engage in political activity. (City's Comb. Ans. pp. 20-22).[9] Neither the court below, the City, nor Proponents appear to have considered the ramifications of the court's limited reading of MMBA section 3504.5 and 3505.

Review is, therefore, necessary to prevent the MMBA from being weakened by the Court of Appeal's unmoored interpretation of section 3505.

CONCLUSION

For the reasons set forth in the Real Party Unions' Petition for Review and in this Reply, the Real Party Unions respectfully submit that

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[9] PERB dealt with a version of this argument in its Decision. (XI:186:3007-3008).

review by this Court of the Court of Appeal's decision below is necessary.

Dated: June 15, 2017

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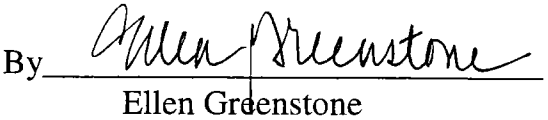
By 
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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)

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 X7), contains 3,476 words.

Dated: June 15, 2017

ELLEN GREENSTONE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On June 15, 2017, I served the **REPLY IN SUPPORT OF PETITION FOR REVIEW BY UNION REAL PARTIES IN INTEREST** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **(By Mail)**
I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice I place all envelopes to be mailed in a location in my office specifically designated for mail. The mail then would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[X] **(State Court)**
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on June 15, 2017.

JERRY COHEN

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