IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

and

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

Real Parties in Interest.

Case No.: S242034

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

PUBLIC EMPLOYMENT RELATIONS BOARD'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASE LAW

FEDERAL STATUTES

CALIFORNIA STATUTES

CALIFORNIA ADMINISTRATIVE DECISIONS

REGULATIONS

OTHER AUTHORITIES

CALIFORNIA SECONDARY SOURCES

STATEMENT OF THE ISSUES

1. When a final decision of the Public Employment Relations Board (PERB or Board) is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the Meyers-Milias-Brown Act (MMBA),[1] are the Board's interpretation of the statutes it administers and its findings of fact subject to de novo review?

2. Is a public agency's duty to "meet and confer" under section 3505 of the MMBA limited only to those situations when its governing body proposes to take formal action affecting wages, hours, or other terms and conditions of employment pursuant to section 3504.5?

INTRODUCTION

This case is of great importance, not only to the Board's mission of promoting harmonious labor relations in California's public sector, but also to the relationship between the Legislature, the courts and quasi-judicial agencies such as PERB. PERB is the expert statewide agency entrusted with exclusive initial jurisdiction over the MMBA and six other public sector labor relations statutes. (§ 3509.5, subd. (b); *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077 (*Coachella*).) Since 1968, the MMBA has required local public agencies to meet and confer in good faith with their

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code, unless otherwise noted.

employees' chosen representatives over wages, hours, and other terms and conditions of employment. This duty, imposed by section 3505, is the MMBA's "centerpiece." (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.) The Court of Appeal's decision in *Boling v. Public Employment Relations Board* (April 11, 2017) 10 Cal.App.5th 853 (*Boling*), which annulled the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M, dramatically undermined: (1) the level of deference the Board receives; and (2) the scope of section 3505's duty to bargain.

Until *Boling*, the standard of review of the Board's final decisions was well settled. California courts, led by this Court, have afforded the Board's final decisions deference for over 35 years. As this Court has repeatedly acknowledged, PERB's construction of a statute within its "legislatively designated field of expertise" will not only receive deference, but will be followed unless clearly erroneous. (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*); *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 (*San Mateo*) [superseded by statute on other grounds as stated in *California School Employees Assn. v. Bonita United School Dist.* (2008) 163 Cal.App.4th 387, 401].) Importantly, PERB receives such deference even when interpreting its statutes in light of external law (i.e., legal principles outside of the Board's direct expertise). As to the Board's

factual determinations, section 3509.5, subdivision (b)—like similar provisions in the other statutes administered by PERB—expressly states that the Board's findings are *conclusive* if they are supported by substantial evidence in the record considered as a whole. The courts have consistently adhered to this statutory command when reviewing the Board's decisions.

But upon review of the final Board decision in this case, the Court of Appeal dispensed with these standards. The court gave no deference to the Board's interpretation of the MMBA, based on its reading of *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), and on the court's determination that this case "turned almost entirely upon" legal authority outside of the Board's expertise. However, *Yamaha* does not stand for the proposition that deference depends on whether the interpretation of the agency's statute is the sole or primary issue involved in a case. Moreover, this case turns on principles of statutory and common law agency, which are firmly within PERB's expertise. The court also declined to give any deference to the Board's factual findings, contrary to the express legislative mandate of section 3509.5. The court's erroneous views of the applicable standards of review must be corrected.

This Court must also correct the Court of Appeal's serious error in interpreting section 3505 of the MMBA. That section provides that "[t]he governing body of a public agency, or such boards, commissions,

administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with ... such recognized employee organizations...." (§ 3505). The Board interpreted section 3505 to mean that an "other representative" must meet and confer before deciding to change wages, hours, or other terms and conditions of employment. This interpretation comports with decades of cases finding that public employers, acting through representatives, managers, supervisors, or other agents, violated their duty to bargain, without any formal action by their respective governing bodies.

However, the Court of Appeal relied on section 3504.5—a statutory provision never raised by any of the parties—to conclude that the duty to bargain arises *only* when the agency's governing body proposes to act. The court then applied this novel interpretation of the MMBA to reject the Board's application of statutory and common law agency principles. This interpretation is contrary to existing case law, overlooks critical differences between sections 3504.5 and 3505, and undermines the MMBA's primary purposes.

Applying the proper standards of review and the correct interpretation of MMBA section 3505, the Court of Appeal's decision should be reversed, and the Board's decision should be affirmed. The

Board carefully considered the facts before it and concluded that under both statutory and common law agency principles, the City violated its duty to meet and confer in good faith through the actions of its Mayor, Jerry Sanders, and other City officials, who helped develop, draft and promote a citizens' initiative to change pension benefits for City employees. Under the City's "strong mayor" form of government, the Mayor is the City's chief executive and lead labor negotiator. Mayor Sanders admitted that he pursued his pension proposal through a citizens' initiative to avoid the City's obligations to bargain with its recognized employee organizations before proposing to amend the City Charter. He also admitted that he used his title and City resources to further his goals. The Board rejected this blatant attempt to evade the MMBA's requirements, concluding that because the Mayor was the City's agent for collective bargaining purposes, the City was required to meet and confer over the Mayor's proposal, or, at a minimum, an alternative ballot measure.

The Court of Appeal's decision upsets longstanding case law, serves to throw PERB's constituents in a state of uncertainty, and undermines harmonious labor relations in this state. It cannot stand. PERB respectfully requests that the Court of Appeal's decision be reversed and that the Board's decision be affirmed in full.

STATEMENT OF THE CASE

A. The Parties

The City is a "public agency" subject to the MMBA. (§ 3501, subd. (c).) (AR:III:842.)[2]

The San Diego Municipal Employees Association (SDMEA), the Deputy City Attorneys Association of San Diego (DCAA), the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME), and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters) (collectively, Unions) are each a "recognized employee organization" (§ 3501, subd. (b)), and an "exclusive representative" (Cal. Code Regs., tit. 8, § 32016, subd. (b)), representing an appropriate unit of City employees. (AR:III:842; V:1193; VII:1777, 1814.)

Catherine A. Boling (Boling), T.J. Zane (Zane), and Stephen B. Williams (Williams) (collectively, the Ballot Proponents) were the official proponents of an initiative to modify City employees' pension benefits, referred to as the Comprehensive Pension Reform Initiative (CPRI) or Proposition B. Although the Ballot Proponents were not parties in the PERB administrative proceedings, they petitioned for a writ of

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

extraordinary relief in the Court of Appeal, Case No. D069626, and were real parties in interest in the City's petition, Case No. D069630.[3]

B. Underlying Facts

1. Background

The City is a charter city governed by a nine-member City Council and a "Strong Mayor." (AR:XVII:4492-4497.) Under the City Charter, the Mayor is the chief executive officer, responsible for the City's day-to-day operations. (AR:XVII:4492-4493 [Charter, § 265]; XIII:3349.) The Mayor has no vote on the Council, but may recommend legislation and veto certain Council actions. (AR:XVII:4493, 4498-4501.)

The Mayor's responsibilities under the Strong Mayor system include serving as the City's lead negotiator in collective bargaining with the City's six recognized employee organizations. (AR:XIII:3349-3350.) In this role, the Mayor developed the City's negotiating strategy and initial bargaining proposals. (AR:XIII:3350-3351.) In practice, the Mayor briefed the City Council and obtained agreement on his proposals before presenting them to the Unions. (AR:XIII:3349-3352.) However, the City Council's only formal authority with respect to the meet-and-confer process was either to: (1) ratify a tentative agreement between the

[3] PERB moved to dismiss the Ballot Proponents as real parties in interest in Case No. D069630, and moved to dismiss the petition in Case No. D069626. The Court of Appeal denied the former motion and deemed the latter motion—as well as the issues raised by the Ballot Proponents' petition—moot. (*Boling, supra*, 10 Cal.App.5th 853, 867.)

Mayor and an employee organization; or (2) following a declaration of impasse in negotiations, impose the Mayor's last, best, and final offer. (AR:XVIII:4636-4637, 4714.)

Twice before this dispute arose, in 2006 and 2008, Mayor Sanders developed ballot measures affecting matters within the scope of representation; both times he negotiated with the Unions before attempting to place them on the ballot. (AR:XIII:3345; XII:3194-3197, XII:3206-3207, 3212-3213, 3217-3219.)

2. City Attorney Aguirre's 2008 Legal Opinion about "Pension Ballot Measure Questions"

During the 2008 ballot measure negotiations, then-City Attorney Michael Aguirre (Aguirre) issued a legal memorandum to the Mayor and City Council explaining the City's bargaining obligations with respect to pension-related ballot measures. (AR:XVIII:4708-4717.) In addition to the City's obligation to bargain over a measure proposed by the City Council, pursuant to *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), Aguirre advised that if the Mayor proposed a citizens' initiative affecting negotiable matters, the City would be required to negotiate with its unions, because the Mayor would "legally be considered as acting with apparent governmental authority." (AR:XVIII:4710.)

City Chief Operating Officer Jay Goldstone (Goldstone), who reports directly to the Mayor, testified that during the 2008 negotiations, Aguirre's legal opinion prompted the Mayor to present his proposal to the City Council, rather than pursue a citizens' initiative. (AR:XIV:3627.)

3. City Attorney Goldsmith's 2009 Opinion about the City's Obligations under the MMBA

In January 2009, the City Attorney's Office under then-City Attorney Jan Goldsmith, issued a legal opinion regarding the City's impasse procedures. (AR:XVIII:4719-4720.) The 2009 opinion did not refute Aguirre's earlier legal advice, and acknowledged that "[i]n 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." (AR:XVIII:4730; emphasis added.)

4. The Mayor's Pension Reform Proposal

In 2010, Mayor Sanders and his staff determined that a primary goal for the remainder of his term would be fixing what he perceived as the unsustainable cost of the City's defined benefit pension system. (AR:XIII:3390-3391; XIV:3532-3533.) To this end, the Mayor proposed placing all newly-hired employees, except for police and firefighters, in a 401(k)-style defined contribution plan. (AR:XIII:3308-3309.) He stated

this change was necessary to eliminate the City's $73 million structural deficit before he left office in 2012. (AR:XIII:3308.)

After discussions with his staff, including then-Chief of Staff Kris Michell (Michell), Deputy Chief of Staff Julie Dubick (Dubick), and Goldstone, the Mayor decided to pursue his pension reform proposal as a citizens' initiative, rather than submit it to the City Council. (AR:XIV:3653-3656.)[4] One of his reasons for doing so was to avoid negotiating with the Unions over the proposal, as required by *Seal Beach*, *supra*, 36 Cal.3d 591, 602. (AR:XIII:3344.)

On November 19, 2010, the Mayor unveiled his proposal to the public. The Mayor's Communications Director, Darren Pudgil (Pudgil), reviewed and approved an announcement, titled "Mayor Will Push Ballot Measure to Eliminate Traditional Pensions for New Hires at City," which appeared on the Mayor's section of the City's website and was released to the media in the form of a "Mayor Jerry Sanders Fact Sheet" bearing the City's seal. (AR:XV:3911-3912; XVIII:4742-4743; XVIII:4745-4747.) The Mayor's staff also announced the plan in an e-mail message to

[4] Dubick testified that she worked on the proposal in her "unofficial capacity as a private citizen," but admitted that she "may have done some work in the office in exploring the viability of it as it could benefit San Diego citizens and work with our budget," as well as researching which method to use to bring the proposal to voters. (AR:XIV:3653-3654.) Dubick also stated that supporting the initiative once it was formally filed was personal business, as distinguished from "looking at it, thinking about it, studying it, determining if it would fit with the budget," which was official business. (AR:XIV:3667-3668.)

thousands of community members from the Mayor's official City e-mail address, JerrySanders@sandiego.gov. (AR:XV:3910-3912; XXIII:5747-5749.) The same day, the Mayor, accompanied by Goldsmith, Councilmember Kevin Faulconer, and Goldstone, held a press conference in the Mayor's City Hall office to announce his proposal. (AR:XIII:3312-3313.) Pudgil prepared the Mayor's talking points. (AR:XV:3913-3914.)

Over the next two months, the Mayor and his staff continued to develop and publicize his pension reform proposal. (AR:XVIII:4772; XXIII:5923-5924, 5926; XV:3923-3925; XVIII:4788.) Mayor Sanders acknowledged that he never directed his staff not to engage in these promotional activities. (AR:XIII:3321-3322.)

In January 2011, the Mayor promoted his pension reform proposal during his annual "State of the City" address to the City Council. (AR:XVIII:4816.) The City Charter describes the address as a message from the Mayor to the City Council with "a statement of the conditions and affairs of the City" and "recommendations on such matters as [the Mayor] may deem expedient and proper." (AR:XVII:4494.) In his speech, the Mayor vowed to "complete our financial reforms and eliminate our structural budget deficit, proposing what he called 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." (*Ibid.*) Later in the speech, the Mayor explained that acting as "private

citizens," "Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan." (AR:XIX:4836.) That same day, the Mayor's office issued a press release publicizing the Mayor's vow "to push forward his ballot initiative to replace pensions with a 401k-type plan for most new city hires." (AR:XVIII:4816.)

Following the speech, the Mayor continued his publicity efforts with appearances on local and national broadcast media. (AR:XV:3937, 3940-3942.) The Mayor's talking points for these appearances were all prepared by his City staff. (*Ibid.*)

Sometime in early 2011, Goldstone obtained financial analyses of the Mayor's proposal, which required arranging for a consultant to receive actuarial data from the City pension system's database. (AR:XIV:3545-3549.) Goldstone acknowledged that this information was not available to "someone off the street." (*Ibid.*)

Sanders testified that he perceived no conflict between his official duties as the City's Mayor and lead labor negotiator and his pursuit of pension reform as a private citizen. (AR:XIII:3361-3362.) Sanders conceded that when speaking about his proposal publicly, he was always identified as the Mayor. (AR:XIII:3363.)

Gerald Braun, the Mayor's City-paid speechwriter, testified that "everyone was aware that the Mayor was working on [pension reform]

and it was the subject of conversation and news broadcasts."

(AR:XII:3296.)

5. The Compromise Agreement Between Mayor Sanders and Councilmember DeMaio

Around the same time, City Councilmember Carl DeMaio (DeMaio) announced his own proposal to reform the City's finances, which, like the Mayor's, included replacing defined benefit pensions with 401(k)-style plans for newly hired employees. (AR:XVI:4157.) DeMaio's proposal differed in that it did not exempt police and firefighters, and included a "hard cap" on pensionable pay. (AR:XIII:3484.)

At a March 24, 2011 press conference, the Mayor and Councilmember Faulconer announced their intention to move forward with their pension reform proposal, which now included a cap on total City payroll. (AR:XV:3948-3949; XXIII:5828-5830.) The Mayor's City staff prepared his remarks. (AR:XV:3950.)

At a meeting in March 2011, representatives of the Lincoln Club and the San Diego Taxpayers Association (SDTA) told the Mayor that only one initiative should appear on the ballot, and that they intended to support DeMaio's plan. (AR:XIII:3480-3481; XIV:3574-3575.) This prompted negotiations over a compromise initiative. The Mayor attended some of these negotiations, as did three members of his City staff.

(AR:XIII:3401-3402; XIV:3570-3576, 3676-3679; XV:3812-3814.) Ultimately, a single proposal emerged with elements from both plans. Most notably, the resulting compromise excluded police from the 401(k)-style plan, an exclusion the Mayor insisted upon to ensure the City's ability to recruit new officers. (AR:XIX:5013-5021; XIII:3423; XIV:3595.)

SDTA hired a law firm to draft the compromise initiative. (AR:XV:3994-3995.) This firm later filed lobbying disclosure forms stating that it had received $18,000 to lobby the following City officials regarding the pension reform plan: Sanders, Faulconer, Goldsmith, Goldstone, and Dubick. (AR:XX:5257-5260.)

Goldstone and Dubick received drafts of the initiative and provided comments on the Mayor's behalf. (AR:XIV:3585-3588, 3680-3682.) The Mayor confirmed that City Attorney Goldsmith had "reviewed" the language of the measure and communicated his opinion of it. (AR:XIII:3426-3427.) Goldsmith was quoted in a news report as saying that the initiative "does provide pension relief within legal parameters." (AR:XIX:5031.)

On April 4, 2011, the Ballot Proponents filed a notice of intent to circulate petitions to place the CPRI on the ballot. (AR:XIX:5009-5021.) The next day, the Mayor announced the filing in a press conference outside City Hall. (AR:XIII:3419.) Alongside the Mayor were Goldsmith, Faulconer, DeMaio, Boling, and Zane. (AR:XIII:3394-3396.)

Although the Mayor testified that he appeared in his private capacity, and assumed the same was true for Goldsmith, there is no evidence that this fact was communicated to the press or the public at the time. (AR:XIII:3427-3428.) To the contrary, the Mayor touted his mayoral record on pension reforms, and described the CPRI as "the next step." (AR:XXI:5515.)

During the summer and fall of 2011, while signatures were being gathered for the CPRI, the Mayor's City-paid staff continued the public relations effort by arranging for interviews and appearances with print and broadcast media, providing quotes to the media, and preparing talking points for Sanders' speaking appearances. (AR:XV:3820-3821; XXIII:5843, 5845, 5837-5838, 5840-5841.) The Mayor's staff also prepared a message from the Mayor—identified three times as "Mayor Jerry Sanders"—to members of the San Diego Regional Chamber of Commerce, which solicited financial and other support for the signature-gathering effort. (AR:XIII:3468-3470; XX:5135.)

6. 2011 Contract Negotiations

Between January and May 2011, the City (led by the Mayor) and the Unions were negotiating successor memorandums of understanding, as well as limits on retiree health benefits. (AR:XII:3223-3224.) The Unions agreed to significant concessions on retiree health benefits, which the City Council approved in May 2011. (AR:XIX:5074-5079.) The

Mayor's office issued a Fact Sheet touting the "historic" agreements as saving the City $714 million over 25 years, and immediately reducing the City's $1.1 billion unfunded pension liability by $323 million. (AR:XIX:5049-5052.)

7. The Unions' Demands to Meet and Confer

In a letter dated July 15, 2011, Ann Smith (Smith), SDMEA's legal counsel, demanded that the Mayor bargain over his "much publicized 'Pension Reform' Ballot Initiative." (AR:XIX:5109-5110.) The letter stated that if the Mayor did not present his own proposal, SDMEA would assume the City's opening proposal was the contents of the CPRI. (AR:XIX:5109.)

Goldsmith responded on behalf of the City in an August 16, 2011 letter, copied to the Mayor and the City Councilmembers, denying that the City was obligated to negotiate with SDMEA. (AR:XX:5115-5117.)

On September 9, 2011, Smith responded by letter, asserting that the Mayor had made a "determination of policy *for this City* related to mandatory subjects of bargaining" and sponsored "this 'pension reform' initiative in furtherance of the City's interest[s] as he defines them." (AR:XX:5123-5126, emphasis in original.) Copies of Smith's letter were sent to the City Councilmembers. (AR:XX:5126.)

Smith and Goldsmith exchanged additional correspondence on the issue. (AR:XX:5128-5130, 5142-5144, 5151-5155, 5157-5162.) In one

letter, Goldsmith disagreed with the conclusion in Aguirre's 2008 legal memorandum that the Mayor would be acting with the apparent authority of the City if he proposed a citizens' initiative. (AR:XX:5152-5155.)

The City also rejected similar demands to bargain by DCAA, the Firefighters, and AFSCME. (AR:XV:4016-4017; XXIII:5908, 5910, 5913, 5915.)

8. Passage of Proposition B

On September 30, 2011, the signed petitions in support of the CPRI were submitted to the City Clerk. (AR:XVI:4065.)

On December 5, 2011, after the signatures were deemed sufficient to qualify the CPRI for the ballot, the City Council adopted a resolution to place the initiative on the June 2012 ballot. (AR:XX:5178-5180.) On January 30, 2012, the City Council adopted a resolution directing the preparation of the title, summary, and analyses of the CPRI for the voter pamphlet. (AR:XX:5184-5185.)

The CPRI appeared on the June 2012 ballot as "Proposition B." The published argument in favor of the initiative was signed by, among others, "Mayor Jerry Sanders" and City Councilmembers Faulconer and DeMaio. (AR:XX:5193.) The voters subsequently approved Proposition B. (AR:XVI:4094-4096.) The Mayor was the keynote speaker at the election night celebration, and he lauded Proposition B as the latest in a

series of fiscal reforms he had helped achieve, including the ballot measures in 2006 and the pension reforms in 2008. (AR:XXI:5521.)[5]

C. PROCEDURAL HISTORY

1. Initiation of PERB Proceedings

In early 2012, before the election, each Union filed an unfair practice charge alleging that the City had violated the MMBA by refusing to bargain before placing the CPRI on the ballot. (AR:I:3-237; III:579-589, 609-613; IV:935-939.) PERB's General Counsel issued an administrative complaint in each case alleging that "chief labor negotiator San Diego City Mayor Jerry Sanders" was the City's "agent," who had "co-authored, developed, sponsored, promoted, funded, and implemented a pension reform initiative, referred to as the 'Comprehensive Pension Reform Initiative for San Diego,'" and that the City had violated section 3505 by refusing demands to meet and confer before placing the CPRI on the ballot for the June 2012 election. (AR:III:572-573, 835-836; V:1180-1182, 1407-1408.)

2. Superior Court Proceedings

After filing its unfair practice charge, SDMEA requested that PERB seek to enjoin the City from placing the CPRI on the ballot until it

[5] Meanwhile, the City had already announced, in February 2012, that its $73 million structural deficit had been eliminated. (AR:XIV:3524-3525; XX:5269-5270.) By April 2012, the City was projecting a balanced budget for the following fiscal year, and a budget surplus for the successive five years. (AR:XIV:3525; XX:5272-5273.)

had met and conferred with SDMEA. (AR:II:246-249.) The Board granted this request (AR:XVII:4484), but its application for temporary injunctive relief was denied (see *San Diego Mun. Employees Assn. v. Super. Ct.* (2012) 206 Cal.App.4th 1447, 1453-1455 (*SDMEA*)). Meanwhile, the City filed a cross-complaint against PERB and obtained a stay of PERB's administrative proceedings. (*Ibid.*) The Court of Appeal ultimately lifted the stay, and the City's subsequent petitions for rehearing by the Court of Appeal and for review by this Court were denied. (*Id.* at p. 1466, rehg. den. July 3, 2012, review den. Aug. 29, 2012.)

3. Administrative Hearing and ALJ Decision

The PERB cases were assigned to an administrative law judge (ALJ) and consolidated for hearing. (AR:VII:1911-1913.) Following a four-day hearing (AR:XII-XV) and submission of post-hearing briefs, the ALJ issued a proposed decision finding the City in violation of the MMBA. (AR:X:2613-2675.) The ALJ determined that the Mayor—in his capacity as the City's chief executive officer and lead labor negotiator—had decided to alter City employees' terms and conditions of employment, without negotiating this decision with the Unions. (AR:X:2650-2652.) The ALJ concluded that the Mayor was acting as the City's agent when he announced the decision to pursue the pension reform initiative that became Proposition B, and that the City Council ratified both Sanders' decision and his refusal to meet and confer with the Unions. (AR:X:2648-

2661.) The ALJ rejected the City's defense that Proposition B was a "private" citizens' initiative exempt from the MMBA's meet-and-confer requirements. (AR:X:2661-2667.) Consequently, the ALJ ordered the City to rescind the provisions of Proposition B and restore the status quo ante. (AR:X:2670-2671.)

4. Final Board Decision

The City appealed the ALJ's decision to the Board itself and filed a supporting brief. (AR:X:2685-2724.) The Ballot Proponents also filed two briefs in support of the City's exceptions. (AR:X:2736-2760; XI:2900-2927.)

The Board issued a final decision affirming the ALJ's decision, but modifying the order. (AR:XI:2979-3103.) The Board agreed that the City was liable for the Mayor's conduct as its agent, and that such liability did not conflict with the initiative right. (AR:XI:3034-3035.) Regarding the tension between the MMBA and the initiative process, the Board explained that:

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

(AR:XI:3038-3039.) The Board also rejected the contention that the City had no authority to meet and confer because it was obligated to place the CPRI on the ballot without alteration. (AR:XI:3034 & fn. 23.) Echoing the ALJ, the Board noted that the City had previously placed alternative measures on the ballot, and that the Unions' request for bargaining reasonably contemplated such alternatives. (*Ibid.*)

Despite affirming the ALJ's conclusion that the City violated the MMBA, the Board did not order the City to rescind Proposition B. The Board concluded that the authority to do so lies exclusively in the courts, and it therefore crafted a make whole remedy that did not include rescission of Proposition B. (AR:XI:3023-3025.)[6]

5. Proceedings in the Court of Appeal

Invoking section 3509.5, subdivision (b), the City and the Ballot Proponents filed separate petitions for writ of extraordinary relief challenging the Board's decision.

On March 8, 2017, after the case was fully briefed and just nine days before oral argument, the Court of Appeal issued a letter directing the parties, among other things, to be prepared to discuss the application of

[6] Specifically, the Board ordered the City to make affected employees whole by paying the difference in value between the defined benefit plan and the 401(k)-style plan enacted by Proposition B. (AR:XI:3023-3024.) The Board also ordered the City to pay the Unions' attorneys' fees if they chose to pursue a court action to rescind Proposition B. (AR:XI:3024-3025.)

section 3504.5 to the facts of this case and the standard of review of the Board's final decision under *Yamaha*, *supra*, 19 Cal.4th 1. This letter marked the first time either section 3504.5 or *Yamaha* had been cited in this case.

On April 11, 2017, the Court of Appeal issued its opinion annulling the Board's decision. The court applied de novo review, because it claimed PERB was not interpreting any statutes within its administrative expertise. (*Boling*, *supra*, 10 Cal.App.5th 853, 880-881.) The court also determined that the Board's factual findings regarding the existence of an agency relationship were entitled to no deference under section 3509.5's substantial evidence standard, because, it asserted, the facts were "undisputed." (*Id.* at p. 881, fn. 34.) And despite claiming that PERB's decision did not turn on an interpretation of any statute within its expertise, the court expressly considered and rejected the Board's view that section 3505 requires a public agency's "other representatives" to meet and confer in good faith. (*Id.* at p. 882, fn. 37.) As suggested in its earlier letter, the court relied on section 3504.5, concluding that this section specifies "*when* meet-and-confer obligations are triggered," while section 3505 only "describes *how* that process should be accomplished, including *who* ... shall participate on behalf of the governing body." (*Ibid.*, emphasis in original.)

The court summarily denied PERB's and the Unions' petitions for rehearing, and its opinion became final on May 11, 2017.

This Court granted PERB's and the Unions' petitions for review on July 26, 2017.[7]

ARGUMENT

I. THE COURT OF APPEAL'S APPLICATION OF A DE NOVO STANDARD OF REVIEW CONFLICTS WITH EXISTING PRECEDENT AND EXPRESS STATUTORY LANGUAGE.

Each of the statutes administered by PERB, including the MMBA, provides for judicial review of a final Board decision by petition for writ of extraordinary relief. (See, e.g., § 3509.5; § 3520, subd. (b); § 3542, subd. (b); § 3564, subd. (b).) Courts have long held that the expertise of quasi-judicial labor agencies such as PERB, and the need for uniformity in labor relations, entitle PERB's final decisions to deference. (*Banning*, *supra*, 44 Cal.3d 799, 804; *San Mateo*, *supra*, 33 Cal.3d 850, 856.) As this Court explained in *Banning*, "PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'" (*Banning*, *supra*, at p. 804.) Thus, "[t]he relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine

[7] The Court also granted, but deferred briefing on, the Ballot Proponents' petition for review of the denial of their request for attorneys' fees.

the scope of the statutory duty to bargain and to resolve charges of unfair refusal to bargain, is generally one of deference." (*Ibid.*)

Accordingly, the deferential standards of review of a final Board decision after an adjudicatory hearing are well settled: (1) the courts follow the Board's interpretations of the statutes within its jurisdiction unless clearly erroneous (*Banning*, *supra*, 44 Cal.3d 799, 804); and (2) the Board's factual findings are conclusive if supported by substantial evidence in the record as a whole (§ 3509.5, subd. (b)). The Court of Appeal erred by dispensing with these standards in favor of de novo review.

A. Until the Court of Appeal's decision below, the courts had uniformly applied the clearly erroneous standard of review to the Board's interpretation of its statutes even when other legal issues are presented.

Although it is ultimately the reviewing court's duty to construe the meaning of the statute at issue (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587 (*Cumero*)), one of the Legislature's purposes in entrusting PERB with exclusive jurisdiction over California's public sector labor relations statutes was to bring "expertise and uniformity to the delicate task of stabilizing labor relations" (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d 1, 12). As a result of PERB's expertise, numerous courts have affirmed that PERB's interpretation of the statutes it is charged with administering—including the MMBA—will be

followed unless it is clearly erroneous.[8] As this Court has noted, when the Legislature "employs open-ended statutory language that an agency is authorized to apply or 'when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make'" the reviewing court should find that "the Legislature has delegated the task of interpreting or elaborating on a statute to an administrative agency." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.)

1. The courts defer to the Board's interpretation of the MMBA regardless of whether a case presents other legal issues.

The Court of Appeal concluded that this matter "turned almost entirely upon" legal authority *outside* of the Board's expertise (*Boling*, *supra*, 10 Cal.App.5th at p. 880), including constitutional provisions, election law and common law principles. However, this is not a valid

[8] *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922; *Banning*, *supra*, 44 Cal.3d 799, 804; *San Mateo*, *supra*, 33 Cal.3d 850, 856; *San Lorenzo Educ. Assn. v. Wilson* (1982) 32 Cal.3d 841, 850; *Orange County Water Dist. v. Public Employment Relations Bd.* (2017) 8 Cal.App.5th 52, 60-61; *City of Palo Alto v. Public Employment Relations Bd.* (2017) 5 Cal.App.5th 1271 , 1287-1288 (*Palo Alto*); *San Diego Housing Com. v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, 12; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776 (*Inglewood*).

basis for a court to decline to defer to the Board's interpretation of the MMBA.[9]

The courts have consistently recognized that PERB may construe its statutes, including the MMBA, in light of "external law" when necessary to resolve unfair practice allegations and to avoid conflicts with those other laws. (*Cumero*, *supra*, 49 Cal.3d 575, 583, 586-587; *SDMEA*, *supra*, 206 Cal.App.4th 1447, 1458; *Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 51-53; see also *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 494 ["[T]he agency will often be interpreting a statute within its administrative jurisdiction [and] may possess special familiarity with satellite legal and regulatory issues"].) This principle was most recently recognized in *Palo Alto*, *supra*, 5 Cal.App.5th 1271, 1288:

> Noting the deference afforded to PERB over matters within its expertise, the City argues PERB should not be given deference over its interpretation of the election law or constitutional law issues raised by this case. However, it is "settled precedent that PERB may construe employee relations laws considering constitutional precedent" [citations], and PERB's construction of statutes such as sections 3505 and 3507 fall squarely within its expertise.

[9] Moreover, as demonstrated in section III.A.1, *post*, this case in fact turned on the Board's interpretation of section 3505 and of agency principles, both of which are within its expertise.

(See also *Public Employment Relations Bd. v. Super. Ct.* (1993) 13 Cal.App.4th 1816, 1828 [constitutionally-based affirmative defense does *not* deprive PERB of jurisdiction to proceed with a hearing and issue a final decision on all issues in the case].)

Dispensing with deference to the Board's interpretation of the MMBA, as the Court of Appeal did here, merely because a case includes other legal issues, undermines the "expertise and uniformity" PERB brings "to the delicate task of stabilizing labor relations." (*San Diego Teachers Assn. v. Super. Ct.*, *supra*, 24 Cal.3d 1, 12.) Thus, the Court of Appeal's flat rejection of PERB's interpretation of the MMBA simply because other statutory or constitutional principles were implicated was improper.

2. *Yamaha* does not support the Court of Appeal's conclusion.

Contrary to the Court of Appeal's view, *Yamaha*, *supra*, 19 Cal.4th 1, does not stand for the proposition that if a case turns on legal issues outside of an administrative agency's designated expertise, the agency's interpretation can simply be disregarded. (*Boling*, *supra*, 10 Cal.App.5th 853, 869-870.) In *Yamaha*, this Court determined that the Court of Appeal erred in giving conclusive weight to statutory interpretations contained in "annotations" drafted by attorneys for the State Board of Equalization. (*Yamaha*, *supra*, at pp. 4-5.) This Court determined that the annotations were not binding on the courts, but that their weight—like

that of all interpretations of a statute by an expert agency—depends on the circumstances in which they were produced. (*Id.* at p. 8.) It did *not* determine that the weight of the agency's interpretation depends on whether it is the sole or primary issue involved in the case.

In fact, the circumstances in which the Board arrived at its interpretation of the MMBA in this case weigh strongly in favor of deference to the Board. Shortly after *Yamaha*, this Court recognized the persuasiveness of statutory interpretations contained in precedential agency decisions that are the result of adversarial adjudicatory processes. (*Hoechst Celanese Corporation v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 524-525.) This is precisely the type of process that led to the Board's decision in this case. It is also the type of process underlying the Board's interpretations that the courts have deferred to both before and after *Yamaha*. (See cases cited in footnote 8, *ante*; see also *Yamaha*, *supra*, 19 Cal.4th 1, 16 (conc. opn. of Mosk, J.) [explaining that the majority did "not purport to change the well-established ... body of law pertaining to judicial review of administrative rulings, but merely to attempt to clarify that law"].)

Thus, the Court of Appeal's reliance on *Yamaha* was entirely misplaced, and the Court of Appeal erred by failing to defer to the Board's interpretation of the MMBA.

B. The substantial evidence standard applies to review of the Board's factual findings even if the facts are undisputed.

The Legislature mandated judicial deference to the Board's factual findings by providing that "[t]he 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." (§ 3509.5, subd. (b).) By this clear statutory directive, the Legislature ensured that courts could not reweigh the evidence presented to PERB. (*Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1123; *Inglewood, supra*, 227 Cal.App.3d 767, 781.) As this Court clarified over 30 years ago,

> If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so.... [A] reviewing court may not substitute its judgment for that of the Board.

(*Regents of the University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617.)

Here, the Court of Appeal rejected the statutorily-mandated standard of review, because the case "did not turn upon resolution of material factual disputes...." (*Boling, supra*, 10 Cal.App.5th 853, 880.) However, the statutory mandate cannot so easily be disregarded.

1. Where the substantial evidence standard is mandated by statute, the reviewing court is not free to disregard it.

As this Court has recognized, "the Legislature [is] free ... to specify... that certain administrative determinations need to be subjected only to substantial evidence review rather than independent judgment review." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805,822, 824, fn. 17, citing *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 340-341 (*Tex-Cal*).) In *Tex-Cal*, this Court considered Labor Code section 1160.8, which mandates a substantial evidence standard of review for the Agricultural Labor Relations Board's (ALRB) factual findings. (*Tex-Cal*, *supra*, at pp. 340-341.) The petitioner argued that an independent standard of review should apply in that case, despite the language of section 1160.8, because the case involved a fundamental vested right. (*Id.* at p. 342.) This Court rejected that argument, stating that the substantial evidence standard of review applies regardless of whether a fundamental vested right is involved. (*Id.* at p. 346; accord *Kensington University v. Council for Private Postsecondary etc. Education* (1997) 54 Cal.App.4th 27, 40-41.)

Thus, given the express mandate of section 3509.5, the Court of Appeal was not free to simply disregard the substantial evidence standard.

2. Even where the facts are undisputed, the substantial evidence standard prevents the reviewing court from taking its own view of the facts or relying on facts not relied on by the petitioner.

Contrary to the Court of Appeal's view that the substantial evidence standard is inapplicable when the facts are undisputed (*Boling*, *supra*, 10 Cal.App.5th 853, 880), this standard has been applied when there are undisputed facts (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196) and when conflicting inferences may be drawn from undisputed facts (*Lantz v. Workers' Compensation Appeals Bd.* (2014) 226 Cal.App.4th 298, 316-317).

The substantial evidence test has important consequences for appellate review. Under this test, the complaining party bears the burden of presenting all evidence on a factual issue, not just the evidence supporting its own position. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 187, fn. 4; *Telish v. California State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1497.) Thus, if the Court of Appeal's decision is left to stand, a court may simply declare the facts undisputed, relieve the petitioner of its burden, rely on evidence not cited by the petitioner, and draw contrary inferences based on the evidence. Because this approach would, in addition to contravening section 3509, subdivision (b), subvert the Legislature's

purpose in vesting PERB with quasi-judicial powers to decide cases involving violations of the State's public sector labor statutes, the Court of Appeal's decision should be reversed.

II. THE BOARD CORRECTLY HELD THAT THE MMBA IMPOSES A DUTY TO BARGAIN ON A PUBLIC AGENCY'S "OTHER REPRESENTATIVES," NOT JUST ITS GOVERNING BODY.

Relying on section 3505, the Board concluded that the Mayor was a statutory agent, i.e., an "other representative" of the City. The Court of Appeal gave no deference to this conclusion, and went on to hold that it was foreclosed by section 3504.5, a provision that had not been cited in any of the parties' briefs to the Court of Appeal or the Board. Aside from its error in refusing to defer to the Board, the court's reliance on section 3504.5 was misplaced, and the Board's interpretation is supported by the MMBA's language, purpose, and decades of precedent.

A. The Board's conclusion that a public agency's "other representatives" are required to meet and confer in good faith is consistent with the plain language of section 3505.

When construing a statute, this Court begins with the statutory language, "the most reliable indicator of [the Legislature's] intent." (*People v. Castillolopez* (2016) 63 Cal.4th 322, 329.) Here, section 3505 consists of two paragraphs. The first provides:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly

> designated by law or by such governing body, shall *meet and confer in good faith* regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

(§ 3505, 1st par., emphasis added.) The second paragraph then defines the key phrase from the first:

> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

(§ 3505, 2d par.)

Based on the plain language of this section, the Board rejected the City's argument that the MMBA only requires the governing body to meet and confer:

> Section 3505's command is not limited to the governing body. Although the governing body

> is legally responsible for enacting legislation on terms and conditions of employment (e.g., most often by adopting a tentative agreement) the duty defined by section 3505 is also imposed on "other representatives as may be properly designated by law or by such governing body." The Mayor is unquestionably such an "other representative."

(AR:XI:3078-3079.)

The Court of Appeal had ample grounds for upholding this conclusion. It is consistent with the statutory language. The City and the Ballot Proponents failed to cite any authority (including section 3504.5) supporting a countervailing interpretation either during the administrative process or before the appellate court. (*Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 668, fn. 6; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743.) And the court was required to defer to the Board's interpretation of the MMBA. (*County of Los Angeles v. Los Angeles County Employee Relations Com.*, *supra*, 56 Cal.4th 905, 922.) Instead, the Court of Appeal turned to section 3504.5, which is inapposite.

1. Differences in the language of sections 3504.5 and 3505 suggest that the two sections impose different duties.

Because the relevant parts of sections 3504.5 and 3505 were enacted contemporaneously (Stats. 1968, ch. 1390, §§ 5-6),[10] the Legislature's use

[10] Section 3504.5 was amended in 2002 with only minor changes to the language relevant here. (Stats. 2002, ch. 1041, § 1.)

of different terms in the two sections compels the inference that different meanings were intended (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343).

Section 3504.5, subdivision (a) provides:

> Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to *meet* with the governing body or the boards and commissions.

(Emphasis added.) Several significant differences between this section and section 3505 are readily apparent. First, the two sections describe the employer's duties in starkly different terms. Section 3504.5 discusses a duty to "meet," while section 3505, imposes a duty to "meet and confer in good faith," and then specifically defines that phrase in its second paragraph.

Second, section 3505 refers to a broader range of actions. While section 3504.5 applies to a proposed "ordinance, rule, resolution, or regulation," the duty under section 3505 applies "prior to arriving at *a determination of policy or course of action*" (emphasis added).

Third, the two sections specify different conditions precedent. Section 3504.5 applies when an "ordinance, rule, resolution or regulation" on specified topics is "proposed to be adopted by the governing body." Section 3505's duty applies more broadly: "upon request by either party."

These significant textual differences lead to the conclusion that section 3504.5 was *not* intended to limit the meet-and-confer requirement to only the governing body, but rather that the two sections define separate, though sometimes overlapping, duties: (1) a governing body's duty to "meet" before taking formal legislative action, under section 3504.5; and (2) an employer's duty to "meet and confer in good faith" before implementing a policy change, under section 3505. This conclusion finds support in then-Professor Grodin's influential treatise on the MMBA, in which he explained section 3504.5 as follows:

> Meeting with the city council or a board of supervisors was an established form of communication between employee organizations, particularly independent associations, and local public agencies in prebargaining days. Possibly, the legislature wished to preserve that form of communication as to some matters on which meeting and conferring had taken place.

(Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1999) 50 Hastings L.J. 717, 752-753, footnote omitted [originally published (1972) 23 Hastings L.J. 719].)[11]

2. The Court of Appeal's interpretation renders parts of section 3505 surplusage.

The courts avoid interpretations that render statutory language surplusage. (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630.) Here, the Court of Appeal concluded that "[t]he governing body ... or other representatives as may be properly designated by law or by such governing body'" (§ 3505, 1st par.) refers to "*who* ... shall participate on behalf of the governing body" (*Boling, supra*, 10 Cal.App.5th 853, 882, fn. 37, emphasis in original). But this makes the following language of section 3505's second paragraph superfluous: "a public agency, *or such representatives as it may designate* ...." (§ 3505, 2d par, emphasis added.) There was no reason for the Legislature to explain twice that a governing body may designate representatives to participate in the meet-and-confer process.

The Board's interpretation, however, avoids this problem. Under that interpretation, this language means that any of the entities or

[11] As explained elsewhere by Professor Grodin, the MMBA's predecessor statute, the Brown Act, required public agencies to "meet and confer," but the MMBA added the requirement of doing so "in good faith," and endeavoring to reach a binding agreement. (*Id.* at pp. 728-730.)

individuals who are required to meet and confer—i.e., the governing body, boards, commissions, administrative officers, or other representatives—may designate a representative to meet and confer "personally" on their behalf.[12]

B. The Board's interpretation is consistent with precedent interpreting the MMBA.

The Court of Appeal cited no case law in support of its interpretation of sections 3504.5 and 3505, and there is none. Rather, in the nearly 50 years since the MMBA was enacted, both the courts and PERB have found numerous public agencies in violation of section 3505 as a result of conduct involving no formal action by the governing body.[13] The courts have also

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[12] This interpretation accords with the City's practice. The Mayor as chief labor negotiator does not personally sit at the bargaining table; instead, the City hires a consultant to serve as its chief spokesperson in negotiations. (AR:XIII:3350.)

[13] See, for instance, *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521, 540 [police chief imposed reorganization plan]; *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 540 [fire chief imposed drug-testing requirement]; *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1011 [police chief changed practice relating to officer reports regarding use of force]; *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 265 [county administrator issued work rule]; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 504 [police chief changed employee work schedules]; *City of Davis* (2016) PERB Decision No. 2494-M, p. 46 [assistant police chief and administrative fire chief implemented performance improvement plan procedures]; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 56 [county public defender changed policy regarding employee representation in investigatory meetings]; *County of Riverside* (2012) PERB Decision No. 2233-M, pp. 13-14 [county

held that a recognized employee organization can trigger the duty to bargain, by demanding to do so regarding a negotiable subject. (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 5.) Both types of cases are outside the narrow ambit of section 3504.5, because they do not involve proposals by the governing body.

Although these cases do not consider section 3504.5 or the proposition that only a governing body's actions trigger a duty to meet and confer, they are significant nevertheless. While the Court of Appeal's interpretation of section 3504.5 would appear to dispose of these cases in favor of the employer, there is no reported case in which an employer has even advanced this interpretation. (Cf. *Cole v. City of Oakland Residential Rent Arbitration Bd.* (1992) 3 Cal.App.4th 693, 697-698 [an administrative

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hospital management restricted union's access to employees]; *Omnitrans* (2010) PERB Decision No. 2143-M, pp. 8-10 [general manager and director of operations changed grievance policy]; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7-8 [city attorney attempted to deal directly with employees instead of their exclusive representative]; *Omnitrans* (2009) PERB Decision No. 2030-M, p. 29 [managers changed policy governing union access by having union representatives arrested for trespassing]; *City of Riverside* (2009) PERB Decision No. 2027-M, p. 14 [city division changed promotion policy]; see also *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 27, 33-38 [violation of the duty to bargain when police chief announced firm decision to lay off employees, not when city council later approved budget eliminating positions].)

agency's contemporaneous construction of a statute, combined with reliance and acquiescence by those affected, is entitled to great weight].)

While some cases have attempted to reconcile sections 3504.5 and 3505, none support the Court of Appeal's conclusion. For example, this Court has described both sections 3504.5 and 3505 as applying not just to governing boards, but generally to "employers" or "public agencies," although this issue was not dispositive. (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657.) Some lower courts have recognized that the two sections concern different duties. For example:

> Government Code section 3504.5 requires a public agency's *governing body* to "give reasonable written notice...." In addition, *a public agency* is required to meet and confer in good faith .... (Gov. Code, § 3505.)

(*Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1289-1290, emphasis added.) Other courts have described section 3504.5 as requiring notice of "legislative" actions. (See, e.g., *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 822-823; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 966.)

Importantly, none of these cases held or even suggested that the duty to meet and confer in good faith *only* applies when section 3504.5 imposes

a duty to give reasonable notice and an opportunity to meet with the governing body. Thus, no authority supports the Court of Appeal's constricted interpretation of sections 3504.5 and 3505.

C. The Board's interpretation avoids making the MMBA an anomaly among California's public sector labor relations statutes.

This Court has emphasized that by vesting PERB with jurisdiction over the MMBA, the Legislature intended "a coherent and harmonious system of public employment relations laws." (*Coachella*, *supra*, 35 Cal.4th 1072, 1090.) An interpretation that would render the MMBA an anomaly among California's public sector bargaining laws should therefore be avoided when possible. (*Ibid.*)

None of the other statutes administered by the Board contain any language suggesting that the duty to bargain is limited to the employer's governing body. Each contains substantially similar language requiring the employer or its designated representatives to meet and confer. (§ 3543.3; § 3570; §§ 3516.5, 3517; § 71634.2, subd. (a); § 71818; Pub. Util. Code, § 99563.4.) In light of these provisions, it is unsurprising that the Board has found employers liable for the failure to bargain in good faith under these statutes without any action by the governing body. (See, e.g., *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 27;

San Diego Unified School District (1980) PERB Decision No. 137, p. 19 (*San Diego USD*).)[14]

Thus, if the MMBA were interpreted so narrowly that the meet-and-confer requirement only applied to proposals of the governing body, it would be an outlier among California's public sector labor relations statutes.

D. The Board's interpretation promotes—while the Court of Appeal's interpretation defeats—the MMBA's purposes.

A statute must be interpreted "with a view to promoting rather than defeating [its] general purpose." (*Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1291.) This Court "will not adopt '[a] narrow or restricted meaning' of statutory language 'if it would result in an evasion of the evident purpose of [a statute], when a permissible, but broader, meaning would prevent the evasion and carry out that purpose." (*Ibid.*, alterations in original.)

[14] The Court of Appeal incorrectly asserted that *San Diego USD*, which involved actions by a minority of the school district's governing body, only found a violation of section 3543.5, subdivision (a) (which prohibits imposing or threatening to impose reprisals on employees because of their exercise of rights under the Educational Employment Relations Act (§ 3540 et seq. [EERA]), *not* a violation of the duty to bargain. (*Boling*, *supra*, 10 Cal.App.5th 853, 885, fn. 40.) In fact, that case also found an independent violation of section 3543.5, subdivision (c), which prohibits an employer from refusing to meet and negotiate in good faith. (*San Diego USD*, *supra*, at p. 19.)

Foremost among the MMBA's purposes is to "promote 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 employers and public employee organizations." (§ 3500, subd. (a).)

The Court of Appeal's novel interpretation of sections 3504.5 and 3505 presents several conflicts with this purpose. First, it dramatically narrows the types of disputes that are subject to resolution through the meet-and-confer process. Any policy changes that can be accomplished without legislative action by the agency's governing body would be excluded. But as the cases cited in footnote 13, *ante*, demonstrate, those changes are neither less likely to lead to disputes, nor necessarily less important, than changes made by the governing body.

In addition, the Court of Appeal's interpretation creates an unexplained dichotomy between violations of the duty to bargain and violations of the MMBA's prohibitions on interference and discrimination. The Court of Appeal acknowledged that actions unapproved by the governing body may constitute violations of the MMBA's section 3506 prohibitions against interference or discrimination,[15] but not violations of

[15] Section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

section 3505's duty to meet and confer. (*Boling, supra*, 10 Cal.App.5th 853, 885-886.) In addition to ignoring that bargaining violations are routinely found without action by the governing body (§ II.B., *ante*), this distinction has no basis in the purposes of the MMBA. A failure to bargain is not categorically less important than interference with employee rights. If anything, it is more important. As noted, this Court has described section 3505 is the MMBA's "centerpiece." (*Voters for Responsible Retirement v. Bd. of Supervisors, supra*, 8 Cal.4th 765, 780.) Unilateral changes—the classic form of a refusal to bargain, in which the employer changes employment terms without negotiating—have a "destabilizing and disorienting impact on employer-employee affairs." (*San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-15.) "An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place." (*Id.* at p. 15.) Such actions "undermine the principle of exclusive representation because they derogate the union's ability to act effectively on behalf of unit members." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 23.) As a result, a distinction between the duty to bargain and the prohibition against interference and discrimination in this regard conflicts with the MMBA's purposes.

On the other hand, the Board's broader interpretation of section 3505 is consistent with the MMBA's overall purposes. That interpretation

ensures that the meet and confer process is available to resolve disputes and promote communications between employers and employees, regardless of whether the decision maker is the governing body or an "other representative." (§ 3505.) Indeed, the purposes of the MMBA are to improve communications and relations between employers and employees—not just between governing bodies and employees. And because the employer retains the option of insisting on its position and refusing to agree, the meet-and-confer requirement does not dictate any substantive outcome. (See *Building Material & Construction Teamsters' Union v. Farrell*, *supra*, 41 Cal.3d 651, 665.) But it does prevent the employer from asserting unilateral control over terms and conditions of employment based on nothing more than the identity of its decision maker.

Thus, section 3504.5 does not limit the duty to bargain under section 3505. The Board's interpretation of section 3505 to apply to an agency's "other representatives" was not clearly erroneous and should be upheld.

III. WHEN CONSIDERED UNDER THE CORRECT STANDARD OF REVIEW AND WITH THE CORRECT INTERPRETATION OF SECTION 3505, THE BOARD'S DECISION MUST BE AFFIRMED.

A. The Board was entitled to deference because its decision either rested on interpretation of the MMBA or on findings of ultimate fact.

1. Whether the MMBA's duty to bargain applies to the City's agents is a question of MMBA interpretation.

The Court of Appeal's conclusion that the Board was owed no deference because its decision "turned almost entirely upon" legal principles outside of the Board's expertise (*Boling*, *supra*, 10 Cal.App.5th 853, 880) was incorrect. This case turns on two issues that are squarely within the Board's expertise: the interpretation of MMBA section 3505 and how agency principles apply to the MMBA.

The Court of Appeal's erroneous conclusion that section 3504.5 limits the duty to meet and confer under section 3505 (see § II, *ante*) was the linchpin of its opinion, underlying nearly every other issue addressed by the court (see, e.g., *Boling*, *supra*, 10 Cal.App.5th 853, 875, 882, fn. 37, 885, 890, fn. 49, 891). This was a pure question of statutory interpretation, however, within the Board's expertise. As a result, the court was required to defer to the Board's conclusion that MMBA section 3505 requires a public agency's "other representatives"—not just its governing body—to meet and confer, unless that interpretation was clearly erroneous.

Moreover, the question of how agency principles apply to the MMBA is also within the Board's particular expertise. *Inglewood, supra*, 227 Cal.App.3d 767, makes clear that determining when an employer is liable for the conduct of its agents is central to PERB's role in interpreting a collective bargaining statute.[16] *Inglewood* held that PERB's "interpretation of agency principles is subject to the clearly erroneous standard of review" (*id.* at p. 776), and squarely within the Board's purview (*id.* at p. 778).

Inglewood considered whether the Board erred by deciding not to apply to EERA the same agency principles that apply under the National Labor Relations Act (29 U.S.C. § 151 et seq. [NLRA]) and the Agricultural Labor Relations Act (Lab. Code, § 1141 et seq. [ALRA]) (*Inglewood, supra*, 227 Cal.App.3d 767, 778.) The court noted that EERA differs from the NLRA and ALRA in that it does not mandate the application of a particular standard of agency. (*Ibid.*) This difference, the court concluded, "supports PERB's conclusion that the Legislature meant for PERB to decide what appropriate standard of agency should be applied in the context of the EERA." (*Ibid.*)

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

The Court of Appeal in this case likewise determined that the MMBA does not mandate the application of NLRA or ALRA agency principles. (*Boling*, *supra*, 10 Cal.App.5th 890, fn. 49.) Yet it did not apply *Inglewood*'s holding that this meant the Legislature had empowered *PERB* to make that determination in the first instance. Nor did the Court of Appeal explain why it declined to do so.

Inglewood was correct in holding that the application of agency principles is within PERB's expertise and should receive deference from the courts. (*Inglewood*, *supra*, 227 Cal.App.3d 767, 778.) When a statute is "open-ended, or entwined with issues of fact, policy, and discretion," the courts will defer to the relevant administrative agency's expertise. (*American Coatings Assn. v. South Coast Air Quality Management Dist.*, *supra*, 54 Cal.4th 446, 461.) EERA (like the MMBA) is open-ended on the question of agency. (*Inglewood*, *supra*, at p. 778.) Agency principles are also closely entwined with issues of fact, as whether an agency relationship is established in a particular case is considered an ultimate fact. (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965.) Agency principles are also entwined with issues of labor relations policy, because employers and employee organizations often act through their agents. (See, e.g., *Santa Ana Unified School Dist.* (2013) PERB Decision No. 2332, p. 9; *National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, pp. 14-

15.) Thus, questions of agency—*who* must comply with the MMBA—go to the heart of the meaning of the statute.

Moreover, it makes little sense to carve out agency from the numerous other issues on which the Board receives deference. As matters of statutory interpretation, the Board must interpret provisions on the scope of representation (§ 3504), the rights of employees (§ 3502) and employee organizations (§ 3503), and the proscription against interference and discrimination (§ 3506), among others. The Board is clearly entitled to deference when it interprets these provisions. The Board is also entitled to deference on its findings of fact (§ 3509.5, subd. (b)), and its selection of the appropriate remedy for statutory violations (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1014-1015).

Like *Inglewood*, other courts have recognized that some questions are so intertwined with matters of PERB's jurisdiction that PERB must receive deference. For instance, in *California State Employees' Association v. Public Employment Relations Board* (1996) 51 Cal.App.4th 923, 940, the court applied the "clearly erroneous" standard of review to PERB's interpretation of a collective bargaining agreement. Technically, this is a matter of contract law (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 15), and the Board does not have jurisdiction to resolve pure contract disputes (see, e.g., §§ 3505.8, 3541.5, subd. (b), 3514.5,

subd. (b)). But the interpretation of collective bargaining agreements is essential to PERB's jurisdiction, as it bears on such matters as whether the employer has unilaterally changed a term of the agreement without negotiating (e.g., *Bellflower Unified School Dist.* (2015) PERB Decision No. 2455, p. 4-5), whether a party has contractually waived its right to bargain over a particular subject (e.g., *Berkeley Unified School Dist.* (2004) PERB Decision No. 1729, pp. 3-4), or whether a union has contractually waived employees' statutory rights (e.g., *City & County of San Francisco* (2017) PERB Decision No. 2536-M, pp. 31-35). Declining to give PERB deference on these essential questions makes little sense.

In support of its contrary conclusion, the Court of Appeal cited *Los Angeles Unified School District v. Public Employment Relations Board* (1986) 191 Cal.App.3d 551 (*Los Angeles USD*) for the proposition that courts have "declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles." (*Boling, supra*, 10 Cal.App.5th 853, 870, fn. 21.) The court's reliance on this case was misplaced on two counts. First, it did not involve common law principles, but instead a pure question of *statutory* interpretation: whether two chapters of the same international union are the "same employee organization" within the meaning of EERA. (§ 3545, subd. (b)(2).) Second, far from "declin[ing] to accord any deference" to PERB, the court correctly acknowledged that it was *required to defer* to PERB's

interpretation of this statutory provision unless it was "clearly erroneous." (*Los Angeles USD*, *supra*, at p. 556.)

Thus, *Inglewood* was correct in holding that the Board is entitled to deference in its determination of how agency principles apply in the absence of a statutory mandate. The Court of Appeal's holding to the contrary should be reversed.

2. Whether an agency relationship is established is a question of ultimate fact.

Alternatively, if agency is not a question of law, it is a question of ultimate fact (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.*, *supra*, 148 Cal.App.4th 937, 965), on which the Court of Appeal was required to defer to PERB (§ 3509.5, subd. (b); *Inglewood*, *supra*, 227 Cal.App.3d 767, 781).

B. Because the actions of "other representatives" under section 3505 trigger a duty to meet and confer, the Board properly concluded that the Mayor was a statutory agent of the City.

As explained in section II, *ante*, a public agency's "other representatives" are required to meet and confer with recognized employee organizations "prior to arriving at a determination of policy or course of action." (§ 3505.) The Board's finding that the Mayor was an "other representative" of the City (AR:XI:3079) is supported by substantial evidence in the record.

Under the City Charter *both* the Mayor *and* the City Council are responsible for discharging the City's duties under the MMBA. (AR:XVII:4492-4494.) As the City's lead labor negotiator and chief executive officer, the Mayor has a singular ability to influence the City's labor relations. (AR:XVII:4492-4494.) This is well demonstrated by his previous efforts in developing and negotiating ballot measures with the Unions (AR:XIII:3345; XII:3194-3197, XII:3206-3207, 3212-3213, 3217-3219), as well as by his power to control the City's last, best, and final offer to the Unions (AR:XVIII:4636-4637 [council policy stating that City Council may only ratify a tentative agreement reached by the Mayor or vote on whether to impose the Mayor's last, best, and final offer]).

In addition, the City Charter gives the Mayor the authority to recommend "measures and ordinances" that he finds "necessary and expedient" (AR:XVII:4493), and requires the Mayor to address the City Council with "a statement of the conditions and affairs of the City" and "recommendations on such matters as he or she may deem expedient and proper" (AR:XVII:4494). Here, the Mayor made his policy recommendation—instituting a 401(k)-type pension for new employees—during his State of the City speech. (AR:XVIII:4816, 4832, 4494.) Although the Mayor claimed that he was pursuing his proposal as a private citizen, he was not acting as a private citizen when making his State of the City speech; that is not a forum available to private citizens. Nor was the

Mayor acting as a private citizen when using City resources and his City-paid staff to develop and publicize his pension reform efforts.

To hold that the Mayor was not an "other representative" of the City in these circumstances would conflict with the MMBA's purposes. The Mayor and his City-paid staff made a policy decision that pension reform would be one of the primary goals of his administration, and then made a further policy decision to avoid bargaining with the Unions by pursuing that goal through a citizens' initiative. (AR:XIV:3653-3656.) Simultaneously, the Mayor was negotiating with the Unions and obtaining significant concessions in employee benefits. (AR:XIX:5074-5079.) Allowing the Mayor complete discretion to decide whether to negotiate a ballot measure proposal with the Unions or avoid negotiations and pursue a citizens' initiative undermines the principle of bilateral negotiations by exploiting the "problematic nature of the relationship between the MMBA and the local [initiative-referendum] power." (*Voters for Responsible Retirement*, *supra*, 8 Cal.4th 765, 782.)

Therefore, the Board properly concluded that the Mayor was a statutory agent—an "other representative"—of the City, within the meaning of section 3505.

C. The Board's application of common law agency theories also supports its conclusion.

The Board's determination that the Mayor was an agent of the City was also based on principles of actual authority, apparent authority, and ratification. Substantial evidence in the record as a whole supports these conclusions as well.

1. The Mayor acted with the actual authority of the City.

An actual agent is one employed by the principal. (Civ. Code, § 2299.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) An agent is deemed to represent the principal for all purposes within the scope of his actual authority, and therefore all of the rights and liabilities that accrue to the agent from his transactions similarly accrue to the principal. (Civ. Code, § 2330; *Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38.)

The Court of Appeal focused on a lack of evidence that the Mayor "believed he was acting or had the authority to act on behalf of the City Council when he took these actions," i.e., developed and promoted the CPRI (*Boling, supra*, 10 Cal.App.5th 853, 887, emphasis omitted), but this was the wrong inquiry. The determining factor, as the Board found, was that the Mayor "was acting within the scope of his authority, including the degree of discretion conferred on the Mayor by the City Charter to further

the City's interests." (AR:XI:2991; *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, 312 (*Vista Verde Farms*); *Fields v. Sanders* (1947) 29 Cal.2d 834, 839.) As noted, the City Charter gives the Mayor authority to recommend legislation to the City Council as he deems "necessary or expedient," and makes the Mayor the lead labor negotiator on behalf of the City. (AR:XVII:4492-4494.) Mayor Sanders appeared publicly on at least three occasions—including at the State of City speech—touting his pension reform proposal in an effort to "permanently fix" *the City's* financial situation. (AR:XIII:3312-3313; XV:3918-3923; XXIII:5764, 5766.) Despite his stray comments that he was acting as a private citizen, there is little doubt that he was speaking about "the conditions and affairs of the City" and making policy recommendations *for the City*. (AR:XXIII:5837-5838, 5840-5841.) As the record amply demonstrates, the Mayor was assisted in these objectives by his City-paid staff, and obtained approval for them from then-City Attorney Goldsmith.

Thus, the Board reasonably concluded that the Mayor believed he had discretion, in his capacity as Mayor, to decide whether to pursue pension reform for the City through the MMBA's meet-and-confer process or through a citizen's initiative. The Court of Appeal was not free to reject this factual finding. (*Regents of the University of California v. Public Employment Relations Bd., supra*, 41 Cal.3d 601, 617.) Because the City Council allowed the Mayor to believe that there was no conflict between

"his duties as the City's chief executive officer and spokesperson in collective bargaining and his rights as a private citizen," the Board correctly determined that the Mayor was the City's actual agent. (AR:XI:2992-2993; Civ. Code, § 2307; *Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 677; *Compton Unified School Dist.* (2003) PERB Decision No. 1518, p. 5 (*Compton*).)

2. The Mayor acted with the apparent authority of the City.

The Board also concluded that the Mayor was an apparent agent of the City. (AR:XI:2995.) Apparent authority is such as "a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) Although the Court of Appeal determined that the Board was not relying on any manifestations by the City Council that it had authorized the Mayor's conduct, it acknowledged cases under the ALRA "imposing liability on an employer for an act by an agent that constituted an unfair labor practice, even when such act was not expressly authorized by the employer, as long as such act was within the scope of the agent's duties." (*Boling, supra*, 10 Cal.App.5th 853, 890, citing *Vista Verde, supra*, 29 Cal.3d 307 & *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100.) But the Court of Appeal incorrectly concluded that this principle could not be applied under the MMBA. (*Ibid.*)

The Court of Appeal criticized the Board for failing to "demonstrate[] there are sufficient parallels between the relevant provisions of the MMBA and the ALRA to permit cases decided under the latter scheme to provide guidance under the distinct scheme of the MMBA." (*Boling, supra,* 10 Cal.App.5th 853, 891.) In this regard, the court ignored that when PERB is interpreting a statute within its exclusive initial jurisdiction that does not mandate a particular standard of agency, the determination of what standard applies is for PERB to resolve in the first instance. (*Inglewood, supra,* 227 Cal.App.3d 767, 778.) Thus, the Board was permitted to decide that this standard should apply in this case.

Under long-standing PERB precedent, conduct by a supervisor during working time is generally attributable to the employer for unfair practice liability. (*Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed decision, pp. 40-42.) An employer's high-ranking officials, particularly those whose duties include employee or labor relations or collective bargaining matters, are generally presumed to speak and act on behalf of the employer such that their words and conduct may be imputed to the employer in unfair practice cases. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, pp. 40-41; *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed decision at p. 45.) Because the Mayor publicly campaigned for the initiative in his official

capacity and "on working time," and used City-paid staff and resources to support the initiative, PERB appropriately concluded that his firm decision to change City policy on negotiable matters was attributable to the City.

The Court of Appeal also rejected the Board's apparent authority finding on the ground that Mayor Sanders's actions were not "inherently wrongful." (*Boling*, *supra*, 10 Cal.App.5th 853, 891.) But the appropriate question is not whether those actions were "inherently wrongful," but whether they would "constitute an unfair labor practice ... if engaged in directly by the employer." (*Vista Verde*, *supra*, 29 Cal.3d 307, 317.) There is no question that the Mayor's conduct in this case—making a policy determination to present a ballot measure to the electorate without bargaining with the Unions—would have been an unfair practice if engaged in by the City itself. (*Seal Beach*, *supra*, 36 Cal.3d 591, 602; *County of Santa Clara* (2010) PERB Decision No. 2114-M, p. 9.)

Therefore, as cautioned by then-City Attorney Aguirre in 2008 (AR:XVIII:4710), the Board properly found the City liable for the Mayor's conduct.

3. The City Council ratified the Mayor's conduct.

An agency relationship may be created by the adoption or ratification of the acts of another. (Civ. Code, §§ 2307, 2310.) The Board has noted the "well established [principle] of labor law that where a party ratifies the conduct of another, that party adopting the conduct accepts

responsibility for any unfair practice implicated by the conduct." (*Compton*, *supra*, PERB Decision No. 1518, p. 5.) Ratification occurs when an employer has knowledge of its agent's conduct and fails to disavow it. (*Chula Vista Elementary School Dist.* (2004) PERB Decision No. 1647, pp. 8-12; see also Civ. Code, § 2310.)

The Court of Appeal rejected the Board's conclusion that the City Council ratified the Mayor's conduct on two grounds, both of them erroneous. First, the court held that the Council was not required to repudiate or disavow this conduct "because [the Mayor] was not supporting the proposal as the 'governing body,' which is the only entity constrained by the meet-and-confer obligations under the MMBA." (*Boling*, *supra*, 10 Cal.App.5th 853, 893.) As demonstrated in section II, *ante*, this is incorrect; section 3505's meet-and-confer obligation also constrains the City's "other representatives."

Second, the court determined that the City Council's acceptance of the significant financial benefits of the Mayor's conduct did not support ratification because the Council did not have discretion to decline to place the CPRI on the ballot. (*Boling*, *supra*, 10 Cal.App.5th 853, 894.) But this conclusion ignored the Board's determination that the City could have negotiated over an *alternative* or *competing* ballot measure without violating any ministerial duty to place the CPRI on the ballot. (AR:XI:3034 & fn. 23; 3091, fn. 19.) It is well settled that conflicting

ballot measures may be presented at the same election. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188.) Because nothing prevented the City from negotiating over an alternative ballot measure, it is not the case that the City Council's only course of action was to place the CPRI on the ballot and ignore the Unions' repeated demands to bargain.[17]

Thus, the Board correctly concluded that the City ratified the Mayor's conduct.

D. Even if this Court were to disagree that the Mayor was the City's agent, the Board would not be foreclosed from concluding that the City was required to meet and confer over an alternative measure after the Unions demanded to bargain.

The Court of Appeal acknowledged the principle that it must affirm the Board's decision if it was correct "on any theory applicable to this case," even if the Board's particular theory was incorrect. (*Boling, supra*, 10 Cal.App.5th 853, 872, fn. 24.) This rule has been applied on review of the Board's decisions. (*South Bay Union School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 509.) Here, the

[17] The Court of Appeal also concluded that the City Council's rejection of the Unions' bargaining demands was "lawful" because there is no obligation to bargain over a citizens' initiative, referring back to its conclusion that *Seal Beach, supra*, 36 Cal.3d 591 does not apply to citizens' initiatives. (*Boling, supra*, 10 Cal.App.5th 853, 892, fn. 51.) However, as the Board observed, "[b]y not seeking to bargain over Proposition B per se, the [U]nions avoid the question left open in *Seal Beach*...." (AR:XI:3091.)

Board's decision may be upheld, even if no agency relationship is found, on the grounds that the City refused to bargain over an alternative measure.

As explained in section III.C.3, *ante*, the Board correctly held that the City could have negotiated with the Unions over an alternative ballot measure without violating any ministerial duty to place the CPRI on the ballot. (AR:XI:3034 & fn. 23; 3091, fn. 19.) The Court of Appeal ignored this issue, possibly because of its erroneous view that a duty to bargain only arises when the governing body proposes to act. (See § II, *ante*.) But as explained above, an employer must meet and confer upon request by the exclusive representative. (See *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.*, *supra*, 45 Cal.App.3d 116, 118; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles*, *supra*, 33 Cal.App.3d 1, 5.)

Although the City and the Ballot Proponents have generally suggested that there was insufficient time to negotiate, nothing required the City to place the CPRI on the June 2012 ballot. (See *Jeffrey v. Super. Ct.* (2002) 102 Cal.App.4th 1, 4 [Elections Code section 9255, governing initiatives to amend a city charter "enumerates minimum time limits, but

no maximum time limits" for ballot placement].)[18] Moreover, the Board found that the parties had a history of negotiating on an expedited basis when necessary (AR:XI:3051-3053), and the record reflects that the first demand to bargain came well before the City placed the CPRI on the ballot (AR:XIX:5109-5110 [July 15, 2011 demand to bargain]; AR:XX:5184-5185 [January 30, 2012 resolution placing CPRI on June 2012 ballot]). Thus, the Board's decision may be upheld because the City failed or refused to bargain over a competing measure.

Alternatively, if the Court does not believe the Board's decision is sufficiently clear on this point, it should remand for further proceedings before the Board:

> It is a guiding principle of administrative law ... that an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.

(*J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 39, internal quotation marks omitted; see also *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 307-308.)

[18] The Court of Appeal even acknowledged that the City Council at least "arguably" had flexibility regarding the timing of the election under the Elections Code. (*Boling*, *supra*, 10 Cal.App.5th 853, 873, fn. 25.)

Because a lack of an agency relationship would not foreclose the Board from finding that the City was required to negotiate with the Unions over alternative ballot measures upon request, the Board should be permitted to clarify, if necessary, whether a violation of the MMBA may be found on this ground, and, if so, the appropriate remedy necessary to effectuate the purposes of the statute. (§ 3509, subd. (b).)

CONCLUSION

The Court of Appeal summarily dispensed with any deference owed to a final Board decision, as well as the proper standards of review, in favor of an inapplicable standard based on *Yamaha*, *supra*, 19 Cal.4th 1. This was contrary to controlling precedent as to PERB's statutory interpretation, and to the MMBA's express mandates as to PERB's factual findings. Further, the Court of Appeal transmogrified the scope of the duty to meet and confer under section 3505, by relying on an interpretation of a statutory provision (section 3504.5) that was never briefed before the Board, and that has no basis in the statutory text, purpose, or case law.

PERB's Decision in this matter—that the City unilaterally changed the pension benefits of City employees without first meeting and conferring with the Unions—should be affirmed because PERB's interpretation of the MMBA was not clearly erroneous and its factual findings were supported by substantial evidence. Because the City has

failed to meet *its burden* to show clear error or a lack of substantial evidence in PERB's decision, PERB respectfully urges the Court to overturn the Court of Appeal's decision and affirm the Board's decision in *City of San Diego, supra*, PERB Decision No. 2464-M.

Dated: September 7, 2017 Respectfully submitted,

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COUNSEL'S CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.520(c)

Counsel of Record hereby certifies that pursuant to Rule 8.520(c) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman type font including footnotes and contains 13,920 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief

Dated: September 7, 2017

WENDI L. ROSS
Declarant
PUBLIC EMPLOYMENT
RELATIONS BOARD

PROOF OF SERVICE
C.C.P. 1013a

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

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

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

CASE NAME: *CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS v. PUBLIC EMPLOYMENT RELATIONS BOARD; CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127; AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145*

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

On September 7, 2017, I served the Public Employment Relations Board's **Opening Brief on the Merits** regarding the above-referenced case on the parties listed below.

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

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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this declaration was executed on September 7, 2017, at Sacramento, California.

S. Taylor
(Type or print name)

S Taylor
(Signature)