IN THE
SUPREME COURT OF CALIFORNIA

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

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

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127; SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO,
Real Parties in Interest.

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

REPY BRIEF ON THE MERITS BY UNION REAL PARTIES IN INTEREST

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Real Parties in Interest Unions submit this combined Reply Brief on the Merits.[1]

I. WHEN A FINAL PERB DECISION UNDER THE MMBA IS CHALLENGED IN THE COURT OF APPEAL, THE DEFERENTIAL "CLEARLY ERRONEOUS" STANDARD OF REVIEW, AND NOT *DE NOVO* REVIEW, APPLIES

A. "Clearly Erroneous" Review Is The Proper Standard Of Review For Administrative Agency Adjudication, Including PERB Final Adjudication

In *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804-805, this Court held, and reaffirmed in *County of Los Angeles v. Los Angeles County Employee Relations Comm.* (2013) 56 Cal.4th 905, 922, that PERB's experience, specialized knowledge, and primary responsibility to interpret the scope of the statutory duty to bargain is generally subject to deference unless clearly erroneous.

Here, the Court of Appeal acknowledged *Banning* in passing (*Boling v. PERB* (2017) 10 Cal.App.5th 853, 868 (*Boling*)) but concluded that, under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, *de novo* review of PERB's final decision was appropriate. *Boling* determined as a matter of law that a city has no obligation under the

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[1] Citations to the Administrative Record are abbreviated as "[volume number]-[document number]:[page number]." References to the Unions' and PERB's Opening Briefs on the Merits are abbreviated as "Unions' Op. Brief" and "PERB's Op. Brief." References to the City's and Proponents' Combined Answering Briefs on the Merits are abbreviated as "City's Ans. Brief" and Prop. Ans. Brief."

Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500, *et seq.*, to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot. (*Boling* at 872, 879.) The court consequently described the "critical question" as whether PERB erred in concluding that CPRI was not a citizens' initiative exempt from meet and confer but instead a governing body initiative "within the ambit of *Seal Beach.*" (*Id.*, referring to *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.) On this question, the court decided that PERB has no special expertise that would warrant deference and that *de novo* review therefore applies. (*Boling* at 880-81.)

Yamaha does not support a *de novo* standard here. *Yamaha* involved deference to informal agency rule-making, specifically, informal opinions of State Board of Equalization attorneys purporting to state the tax consequences of hypothetical business transactions. (*Yamaha*, 19 Cal.4th at 4-5.) This Court contrasted these interpretive rules with quasi-legislative rules as to which, within its jurisdiction, an agency has been delegated substantive lawmaking power and which courts may only narrowly review. Agency informal interpretations which do not involve exercise of legislatively delegated power are entitled to less weight, with assessment of whether deference is appropriate and, if so, its extent subject to a court's consideration of factors material to the substantive legal issue before it. (*Id.*

at 10-12.) *Yamaha* did not involve deference to administrative agency adjudication.

Despite the *Boling* court's effort to analogize PERB's adjudicative decision here to the informal agency guidance in *Yamaha*, they are not the same for standard of review purposes. Under *Yamaha*'s framework, this Court has applied the deferential "clearly erroneous" standard to agency adjudications interpreting and applying statutes the agencies administer.

> We treat such adjudications as we do other official proceedings where agencies with relevant expertise, responsibility, and familiarity interpret a statute. . . To wit: we give great weight to interpretations like these, rendered in an official adjudicatory proceeding by an administrative body with considerable expertise interpreting and implementing a particular statutory scheme.

(*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 158; *also Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 524-25 [amount of deference to administrative decisions depends on thoroughness in agency's consideration, validity of its reasoning, and consistency in applying conclusion].) Unless the agency's interpretation is clearly erroneous or unauthorized under the statute, it is entitled to great weight. (*Larkin*, 62 Cal.4th at 158; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331.)[2]

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[2] In its Answering Brief, the City endorses *Yamaha* as a "situational," "circumstantial" standard and rejects *Banning* and *Cumero v. PERB* (1991) 227 Cal.App.3d 767, as distinguishable on their facts, apparently viewing *Yamaha* as authorizing different standards of review based on differing

Accordingly, under *Yamaha*, the proper standard of review of final PERB adjudication, as for adjudication by other agencies, is and has uniformly been the "clearly erroneous" standard. (*See* PERB's Opening Brief on the Merits at pages 37-38 and note 8.)

Yamaha did not authorize the court below to switch the standard of review for final agency adjudication to *de novo* review. *Yamaha* did not hold that a court could afford agency interpretation of the statute the agency is charged to administer *no* deference. *Yamaha* did not give the court below authority to pick a different standard of review because it disagreed with PERB's interpretation of the MMBA.[3]

There is no reason for this Court to depart from longstanding authority prescribing "clearly erroneous" review of PERB and other agency

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facts, rather than based on the factors identified in *Yamaha*. (City's Ans. Brief at 19-21.) Proponents argue that the issues in this case are not labor law issues at all and that deference is a red herring advanced by PERB to continue its course of trampling on the constitutional right to initiative. (*Id.* at 38-42.) These positions assume the conclusion reached by the Court of Appeal. Neither assists this Court in addressing the proper standard of review.

[3] As is discussed in the Unions' and PERB's briefing, the *Boling* court disagreed with key PERB conclusions which were clearly warranted under PERB's grant of authority to interpret the MMBA. Integral to the court's choice of a standard of review was its *ad hoc* and unsupported interpretation of MMBA sections 3504.5 and 3505 to conclude that only a "proposal" by the "governing body" triggers the meet-and-confer obligation, that a voter initiative cannot involve such a proposal or the duty of the public agency to bargain at all, and that imposing a meet-and-confer obligation on a public agency before or in conjunction with placing a citizens' initiative on the ballot would be a meaningless act. (*Boling* at 873-79 and n.27.)

final adjudication, and the Court of Appeal provided none, nor even any standards consistent with *Yamaha*, for its one-time result-driven exception to the settled standard. To adopt the Court of Appeal's exception to the established standard for review of agency adjudication would open up state agencies' final decisions across the board to case-by-case judicial questioning of each agency's legislatively delegated expertise. The Court of Appeal erred in applying a *de novo* standard of review here.

The City argues that, in any event, PERB's decision was clearly erroneous. This issue is discussed in section III of this brief.

B. PERB's Factual Findings Are Supported By Substantial Evidence And, As Such, Are Conclusive

MMBA section 3509.5, subdivision (b) states, "[T]he findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence in the record as a whole, shall be conclusive." The court below acknowledged this standard (*Boling* at 867-68) but held it inapplicable because this case presents no material factual disputes (*id.* at 880). The court cited no authority for this evasion, and authority holds otherwise. (*See* Unions' Op. Brief at 40-41; PERB Op. Brief at 42-45.)[4]

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[4] The City simply quotes the Court of Appeal but does not otherwise discuss the conclusiveness of PERB's factual findings. (City's Ans. Brief at 20.) Proponents argue that section 3509.5 demonstrates that the MMBA was not intended to apply to initiatives because section 3509.5, subdivision (a) does not refer to initiative proponents, only to charging parties, respondents, or intervenors, and Proponents were denied intervention by PERB and not allowed to participate in the PERB proceeding. (Prop. Ans.

The Court of Appeal was not free to disregard PERB's factual findings because they were based on undisputed facts. The court used its interpretation of section 3509.5 as a device to *disregard the undisputed facts*, instead of reviewing PERB's application of the MMBA to its conclusive factual findings.

II. A PUBLIC AGENCY'S MMBA DUTY TO MEET AND CONFER IS NOT LIMITED TO AGENCY GOVERNING BODY PROPOSALS TO TAKE FORMAL ACTION AFFECTING EMPLOYEE WAGES, HOURS, OR EMPLOYMENT TERMS AND CONDITIONS

The court below *sua sponte* interpreted MMBA sections 3504.5 and 3505 to restrict the MMBA's meet and confer obligations to action by the "governing body" and then only when the governing body "proposes" legislative action. (*Boling* at 875.) This was not an issue before PERB nor raised to the Court of Appeal by any party; it was raised by the court just before oral argument. Using this interpretation, the *Boling* court allowed itself to ignore the overt involvement of the Mayor, in his official capacity, including his capacity as the bargaining representative of the City, in initiating and promoting the CPRI initiative. (*See* Unions' Op. Brief at 21-28.)[5]

Brief at 22, 40.) Proponents do not cite to the record for this factual assertion; in fact, Proponents did not move to intervene in the PERB proceeding.

[5] The court's misinterpretation of section 3505 infected its agency analysis. It reasoned: "[B]ecause we will conclude the relevant inquiry is

With no analysis of the MMBA's statutory scheme, the court below created an "opt-out" from section 3505, allowing a governing body to avoid its duty to meet and confer altogether by simply declining to make a proposal. Neither the City nor Proponents dispute that under this interpretation the statutory meet and confer obligations, enforced through the MMBA's unfair practices provisions, may no longer apply to day-to-day administration of terms and conditions of employment which are not legislative actions, including work rules, schedules, and grievances; nor to bargaining over mandatory subjects as defined in MMBA section 3504 prior to a proposal to adopt an MOU; nor to refusals to bargain in good faith short of proposed adoption by the governing body.

Significantly, in its Answering Brief, the City *does not adopt* the *Boling* court's interpretation. Rather, the City acknowledges that "it is true the Mayor may conduct negotiations with the Unions" with the Council's direction and approval but argues that he has no authority without Council direction. (City's Ans. Brief at 23, 25-26.)[6] Further, "[t]he City does not

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not whether Sanders was an agent for City (at least in some capacities), but instead whether he was the actual or ostensible agent *for the governing body* when he helped draft and campaign for the CPRI, we will examine whether PERB correctly concluded Sanders' actions can be charged to a governing body under common law principles." (*Boling* at n.34; emphasis in text.)

[6] Although the City argues that Mayor Sanders could not act as the agent of the City in pursuing legislative policy on his own because legislative policy-making is vested in the Council (City Ans. Brief at 23-27), PERB found, consistent with the City's acknowledgment in its

dispute that a recognized employee organization may itself trigger an employer's duty to bargain by a demand to meet-and-confer over a negotiable subject absent a government body proposal to take formal action" (*id.* at n.6)[7] but asserts that the Unions did not make such a demand here, because the Unions' demand was to meet and confer over the CPRI (*id.*) The City thus concedes that the key issues to be decided are matters solidly within PERB's expertise and does not adopt the Court of Appeal's strained and inexpert interpretation of section 3504.5 as legally foreclosing meet and confer.[8]

Answering Brief, that the Mayor takes bargaining direction from the Council, which must adopt any tentative agreement; makes the initial determination of policy on City bargaining positions, concessions, reforms, changes, and goals; and briefs the Council and obtains its agreement to proceed. (XI-186:2983, 3048.)

The City's assertion that the Mayor cannot make opening offers at the bargaining table without City Council pre-approval (City's Op. Brief at 25-26) is factually incorrect. The citation to the record is to testimony that this is a *practice* based on the City Attorney's Memorandum of Law (MOL) dated January 2009, not a requirement. There is no such limitation in the Charter. As discussed in the Union's Opening Brief at pages 16-19, the Mayor must "ensure that the City's responsibilities under . . . the MMBA as they relate to communication with employees are met." (XVII:4493, XVIII:4721, 4727-28.) In any event, MMBA section 3505 places responsibility on the public agency as a whole.

[7] This acknowledgment *alone* undermines the Court of Appeal's conclusion that the duty to bargain is not triggered unless and until the *governing body* makes a *proposal.*

[8] Proponents view this MMBA issue on review as simply irrelevant, asserting, "The reality is that neither section applies to a voter's initiatives because the governing body of the public agency has no discretion to bargain as to the initiative's terms." (Prop. Ans. Brief at 27-28.)

PERB's Opening Brief contains a comprehensive discussion of section 3505, and, to the extent it has been invoked, section 3504.5, which is grounded in MMBA history, statutory interpretation, decades of cases in which the courts and PERB have held public agencies in violation of section 3505 based on conduct involving no formal action by the governing body, coherency with other public sector labor relations statutes, and promotion of the MMBA's purposes. (PERB's Op. Brief at 45-58.) The ALJ found that the City Charter "establishes a 'shared duty' between the Mayor and Council for discharging the City's duties under the MMBA." (XI-186:3080.) Section 3504.5 has never been held to be a limitation on section 3505. The Unions agree with the City's description of meet and confer as a continuing process, initiated by either the City or Unions, conducted by the Mayor and informed by the direction and approval of the Council. The City's acknowledgment that meet and confer may start and occur independent of an initiating governing body formal proposal gives the Court ample basis to reject the Court of Appeal's *ad hoc* statutory interpretation.

III. PERB'S DETERMINATION THAT THE CITY, THROUGH THE MAYOR, FAILED TO MEET AND CONFER CONCERNING CPRI IN VIOLATION OF THE MMBA WAS NOT "CLEARLY ERRONEOUS"

A. PERB's Agency Determinations Were Within Its Authority

PERB's determination that the Mayor acted as the City's agent under the MMBA in placing the City's imprimatur on changing pensions through a voter initiative, while at the same time refusing to meet and confer with Real Party Unions, is exactly the type of determination entrusted to PERB's expertise. (*Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767, 775-77.)

In its Answering Brief, the City omits discussion of PERB's finding that the Mayor was a statutory agent for collective bargaining as a "designated" or "other" representative under MMBA section 3505.

The City argues that the Mayor did not have actual authority from the Council nor apparent authority, based on the City's effort to fit the Mayor's collective bargaining duties into the Court of Appeal's cramped reading of section 3504.5 limiting meet and confer to formal (which the City reads as "legislative") proposals by the Council itself.

PERB adopted pages of ALJ findings on the involvement of the Mayor, his staff, and Council President Pro Tem Faulconer starting in November 2010 in pursuing pension reform to "permanently fix" the City's

structural budget problem by crafting and leading an initiative designed to amend the Charter to replace the City's negotiated defined benefit plan with a defined contribution plan for non-safety new hires and to use this process to bypass MMBA bargaining with City unions. Pursuit of the initiative involved City resources and staff, the Mayor's State of the City address, official City publicity, meetings with civic groups, and strategizing. (XI-186:3057-70.) Based on the Mayor's testimony, PERB found that the Mayor believed he could simultaneously engage in private political campaigning while also functioning as Mayor because elected officials "don't have private time per se." (XI-186:20.)

PERB recounted the undisputed facts of the Mayor's authority and the Council's knowledge and acquiescence in the Mayor's refusal to meet and confer over the initiative. (XI:186:2982-2985). PERB upheld the ALJ's finding that the Mayor acted "in his capacity as the City's chief executive officer and labor relations spokesperson," "that he made a firm decision to alter terms and conditions of employment of employees represented by the Unions," that he was "acting as the City's agent" when he pursued the initiative, and that no serious effort was made "to segregate the official duties of the Mayor and his staff from their ostensibly private activities in support of the pension reform initiative." PERB further upheld the ALJ's finding that the "City Council, by its action and inaction, ratified

both Sanders' decision and his refusal to meet and confer with the Unions." (XI:186:2986-90).[9]

In a lengthy analysis, PERB discussed the ALJ's findings of statutory agency, actual authority, apparent authority and ratification, as well as why, under PERB precedent, the high-ranking Mayor's ostensible "private" conduct was attributable to the City.[10] Because PERB applied agency principles within its informed expertise under the MMBA, *Boling*'s view that PERB applied "common law principles of agency over which it has no specialized expertise warranting deference" (*Boling* at 782) is a gross mischaracterization of PERB's decision.

Banning itself warned against judicial appropriation of PERB's expertise and the failure to give PERB's case-by-case role proper deference. (*Banning*, 44 Cal.3d at 805). PERB's agency findings here are entitled to

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[9] The City's claim the Council could not have ratified the Mayor's conduct because it was obligated as a matter of law to put the initiative on the ballot (City's Ans. Brief at 26-31) and the *Boling* court's conclusion that there is no evidence that CPRI was ever "approved" by the City's governing body Council (*Boling* at 858), do not negate the essential agency finding, supported by substantial evidence, that the governing body ratified the refusal to meet and confer with the Unions despite the Unions' multiple requests to bargain to the Mayor and Council.

[10] PERB based its findings on undisputed facts, and, for each legal type of agency, PERB reviewed and applied its own precedent, California (including Agricultural Labor Relations Act) precedent, and National Labor Relations Act precedent. (XI:186:2990-3005). The *Boling* court's notion that, where facts are undisputed, they require no specialized expertise in application of the law (*Boling* at n.34) is illogical and unsupported by case law.

deference under *Banning*.

B. PERB's Determination That The City's Duty To Meet And Confer Arose Before And Independent Of CPRI Was Within PERB's Expertise

PERB held that the City's duty to meet and confer arose when the Mayor "announced his intention to seek implementation of a new policy regarding pensions" at his November 2010 press conference, his State of the City speech, and at an April 2011 press conference, and in emphasizing that this new policy was "a critical objective of his administration and the focus of his remaining years in office." PERB relied on settled authority that a unilateral change without bargaining occurs when an employer demonstrates a clear intent to change matters affecting employment terms and conditions and takes concrete steps to effectuate the change, even if the action falls short of implementation. (XI-186:3076.) Moreover, *before* a change may be made, the public agency must first provide the exclusive representative reasonable notice and an opportunity to bargain. (*PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899; *City of Sacramento* (2013) PERB Dec. No. 2351-M, sl.op. at 28.) The City nowhere disputes these labor law principles. Thus, PERB found, as a matter of its expert authority, that the City's duty to meet and confer arose when the Mayor first took steps to make pension changes, by whatever means, before there was an initiative and before the Unions demanded to

bargain. "[G]iven the peculiar circumstances of this case and our agreement with the ALJ that, irrespective of the citizens' right to enact Proposition B, the Mayor's *prior* announcement of a policy change affected the negotiable matters within the scope of MMBA's meet-and-confer requirements." (XI:186:3011.)

The City and Proponents profess confusion about when meet and confer could have taken place and assert that there is no time for bargaining in the context of voter initiatives. Yet, even after the Mayor announced his plan for a voter initiative in November 2010, in December 2010 the San Diego County Taxpayers Association (SCDCTA) sent a letter to the Mayor stating that its Board had adopted Pension Reform Principles for any reform proposal "that is adopted by either the City Council or voters," including a 401(k) plan for new hires. The letter repeated SDCTA's support for "[a]doption of these Principles, *through the legally required negotiating process* or a vote of the people." (XXIII-200:5769: emphasis supplied.) The City cites this letter (City's Ans. Brief at 11) but ignores that, at a time when the City was legally obligated to give notice and an opportunity to meet and confer, there was ample room for bargaining, and SDCTA was fully open to the City engaging in this process.

The City also claims that it did not have flexibility concerning the election at which CPRI would be presented to the voters despite *Jeffrey v.*

Superior Court (2002) 102 Cal.App. 4th 1, 9 [Election Code specifies only *minimum* time limits, 88 days, for placing an initiative on the ballot] and hence no ability to delay the initiative until November 2012, because the initiative was set to become effective by its terms July 1, 2012. This is the first time in this case the City has made this argument, and it is spurious.[11]

The Mayor announced his firm decision to make pension changes in November 2010, triggering the City's obligation to give notice and an opportunity to meet and confer. Proponents submitted their notice of intention to circulate petitions to place CPRI on the ballot in April 2011 and submitted signatures in September 2011. The initiative qualified in November 2011, and the Council passed a resolution of intention to place it on the June 5, 2012 ballot. The only timing constraint imposed by the

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[11] Both City and Proponents argue for the first time here that the stated effective dates within CPRI *required* its placement on the June 2012 ballot under the Elections Code and *Jeffrey*. (City's Ans. Brief at 33, citing XIX-196:5015; Prop. Ans. Brief at 24-25, citing XVI-193:4076.) However, CPRI, on its face, was to have *no effect* on existing Memoranda of Understanding (MOUs) with City Unions which became effective July 1, 2012. The text of CPRI states that, under (the proposed) new Charter section 70.2: "From the effective date of this Section until June 30, 2018, in the City's initial bargaining position in negotiations on any Memoranda of Understanding with recognized employee organizations or bargaining groups, the City shall propose terms that are consistent with the following requirements and shall work to achieve the following outcomes . . ." (XIX-196:5025.) The text cited by Proponents states: "By January 1, 2013 and to the extent allowed by law, including the legal effect of existing Memorandums (sic) of Understanding as of the effective date of this section, . . ." (XVI-193:4076.) With CPRI expressly applicable to future bargaining, City's and Proponents' argument is misleading and factually contradicted by the evidence.

Election Code was the requirement that *at least 88 days* elapse between the Council's action placing the measure on the ballot and the election. Between early November 2010, when the City's obligation to give the unions notice and the opportunity for good faith meet and confer arose, and November 2011, when CPRI qualified for the ballot, the City had more than enough time and opportunity for good faith bargaining. If, as SDCTA's December 2010 letter recognized, the City had engaged in the "legally required negotiating process" and that process had succeeded, no notice of intent to circulate a citizens' initiative may have ever come to fruition. Moreover, even after the initiative petition began circulating in April 2011 and after the Unions demanded bargaining in July 2011, ample time remained for meet and confer on a competing, compromise, or subsequent initiative;[12] on contractual terms in exchange for loss to employees in the event of pension changes if the initiative should pass; or for recruitment and retention incentives to make up for the workforce consequences of citizens imposing targeted employment terms on the City through an initiative.

Both the City and Proponents make much of their claims that the Unions requested to meet and confer over CPRI itself and did not request to meet and confer over a competing ballot measure. These arguments

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[12] The City did precisely this when the Council acted on the City's behalf to place a competing initiative on the same ballot as a local citizens' initiative aimed at amending the Charter on a tax-related issue. *See Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374.

implicitly admit – and the City expressly notes (City Ans. Brief at n.6) – that a union request to bargain over the subject matter covered by CPRI, though not its terms, would have required the City to bargain. PERB found that SDMEA's letter demanded to meet and confer over the initiative and "objected to the Mayor's failure to offer negotiations" on the matters contained in the proposed measure. (XI-186:3070.) PERB further found that SDMEA's subsequent letter recited that the Mayor had made a policy determination for the City related to mandatory subjects of bargaining and had sponsored the initiative in furtherance of the City's interest as defined by him. (XI-186:3071.) These findings, as well as the letters themselves (Unions' Op. Brief at 29-30), are conclusive and support PERB's conclusion that the Unions' demands to bargain did not seek to change the language of the CPRI but sought bargaining more broadly.[13] This conclusion is well within PERB's authority to interpret the MMBA's scope

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[13] It was not the wording of the Unions' demands that caused the City's refusal to bargain here. The undisputed facts are that in November 2010 the Mayor decided to pursue further pension reform using a citizens' initiative *in order to avoid meet and confer obligations*. He did not believe the Council would put his proposal on the ballot, and he would have to negotiate with the Unions and possibly make "unacceptable compromises." The Mayor explained that "you get the ballot initiative on what you actually want," which is "what we did," and "you don't know what's going to go on." (*Boling* at 858-59.) By the time of the Unions' demand, the City's unlawful failure to give notice and an opportunity to bargain had already occurred and rendered unnecessary the need for the Unions to request bargaining. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M, sl.op. 22 [where employer has made change without notice and opportunity to bargain, union need not plead or prove that it demanded bargaining].)

of meet and confer (section 3505) and definition of subjects within the scope of representation (section 3504) and is entitled to deference.

Finally, Proponents describe the MMBA as "bewildering" (Prop. Ans. Brief at 20) and imagine that collective bargaining is carried on only for delay (*id.* at 44 ["'Good faith' bargaining drags on"]) and would be "futile in the context of voter initiatives" (*id.* at 26). Truly working themselves up, Proponents imagine that, during bargaining while a ballot measure is circulating, the governing body and unions would have some control over the ballot measure and that negotiating would constitute offering a thing of value in return for amending or withdrawing an initiative – a criminal violation of the Election Code. (*Id.* at 45.)[14] They assert that, "if the City had accepted SDMEA's request to bargain over CPRI, while circulating, it would put the City in a tenuous legal position." (*Id.* at 46.) Proponents have "misunderstood" the Unions' position all along. The Unions did not seek, nor have interest in, meeting and conferring either *with* the Proponents or with the City over the *terms* of Proponents' ballot measure. The Unions sought their own statutory rights to bargain with the City over pension benefit changes and other significant compensation issues covered by the Mayor's proposed initiative.

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[14] One might ask, then, what was the Proponents' acceptance of Mayor Sanders' and Councilmembers' support and City resources in aid of their initiative, if not a thing of value?

IV. LOCAL VOTER INITIATIVES REGARDING WAGES, HOURS, AND TERMS AND CONDITIONS OF EMPLOYMENT WITHIN THE SCOPE OF REPRESENTATION DO NOT PREEMPT THE MMBA

A. CPRI Did Not Preclude The City From Fulfilling Its MMBA Meet And Confer Obligations

The Court of Appeal, City, and Proponents all assume the conclusion they wish to reach: that local citizens' initiatives regarding matters within the scope of representation of MMBA section 3505 practically and legally leave no room for, *i.e.*, preempt, any obligation whatsoever under the MMBA to meet and confer at any time on any subject related to such initiatives. Although the issues for review here are properly more broadly stated – and are, indeed, broader and more serious MMBA questions – than their narrow relationship to local citizens' initiatives, local initiatives are virtually the sole focus of the City's and Proponents' Answering Briefs. The *Boling* court staked its decision on this legal premise. Indeed, the Court admitted that, *if* the MMBA prescribes a bargaining obligation related to local voter initiatives, PERB's decision must stand. (*Boling* at n.24.)[15]

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[15] "[I]f we were to conclude the same meet-and-confer obligations are compelled [for a voter initiative], *regardless* of whether persons associated with city government are involved in drafting and/or campaigning for a citizen-sponsored initiative, we would have to affirm PERB's principal determination that City violated the MMBA by refusing unions' demands to meet and confer before placing the CPRI on the ballot, and all of PERB's subsidiary conclusions regarding Sanders's actual or ostensible agency relationship to City (even if legally erroneous) would become superfluous." (*Boling* n.24; emphasis in text.)

In *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511 (*COST*), this Court held that, in matters of statewide concern, the state may preempt the entire field excluding all local control, or it may choose to grant some measure of local control, including placing procedural restrictions on the exercise of local authority. "The state's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body." (*Id.* at 511-12.) "It is indisputable that the procedures set forth in the MMBA are a matter of statewide concern, and are preemptive of contradictory local labor-management procedures." (*Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 781 (*Trinity County*).)

In *Seal Beach*, this Court held that a city's constitutional right to propose charter amendments is not absolute (36 Cal.3d at 598); that "[t]he meet and confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices" as a matter of general law of "statewide concern" which prevails over local enactments of a chartered city (*id.* at 599-600); and that no actual conflict exists between a city's authority to propose charter amendments and

MMBA Section 3505 (*id.* at 601).[16] The Court in *Seal Beach* expressly did not reach the circumstance of a voter-proposed charter amendment measure. (*Id.* at n.8.)[17]

In *Trinity County*, this Court held that the MMBA restricts local voters' right to overturn by referendum an ordinance adopting a collectively bargained MOU between a county and its employee organizations. The Court held: "[T]he Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to exclusively delegate negotiating authority to the boards of supervisors, and therefore the power to curtail the local right of referendum." (8 Cal.4th at 783-84.)

In *Trinity County*, the Court considered "how a referendum might fit into the collective bargaining regime contemplated by the MMBA." (8 Cal.

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[16] The *Seal Beach* decision nevertheless cited "an unbroken series of public employee cases" holding that general law of statewide importance prevails over charter cities' powers in the event of an actual conflict between state law and charter city authority. (36 Cal.3d at 600 and cases cited therein.)

[17] The City discusses *Seal Beach* but argues that its holding was driven by the compatibility between the city's constitutional right to propose initiatives and its duties under the MMBA (City's Ans. Brief at 37), minimizing the significant discussion by the Court of the "unbroken series of public employee cases" upholding general law of statewide concern over charter cities' enactments in the event of an actual conflict. Proponents do not discuss *Seal Beach*, other than to say that the *Boling* court answered the question left open in footnote 8 correctly. (Prop. Ans. Brief at 8.) They do not mention nor cite *Trinity County* at all.

4th at 781) This Court observed that the relationship between local referendum power and the MMBA's purposes to promote communication and resolve disputes raised the question posed in *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975)15 Cal.3d 328, 336: why negotiate if either party can disregard the outcome by ultimately going to the voters? (8 Cal.4th at 782.) The answer in *Glendale*, restated in *Trinity County*, is the essential interconnectedness of the governing body and its designated labor relations representatives in carrying out the bargaining process.

> [T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1 – i.e., the governing body – is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges.

(*Id.*) The Court reasoned that interjecting the power of referendum would "in effect be sanctioning a kind of bad faith bargaining process" divorced from the responsibility to negotiate an agreement which would undermine the effectiveness of the collective bargaining process. (*Id.* at 782-83.)

The Court's reasoning in *Seal Beach* and *Trinity County* (relying on *Glendale*) that the meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices" (*Seal Beach,* 36 Cal.3d at 599) applies equally to city council-sponsored initiatives, local voter referenda, and, here, local voter initiatives. There is no basis in the MMBA to view a local voter initiative as

preemptive of this important statewide statutory purpose.

The *Boling* court did not consider or apply *Seal Beach* and *Trinity County* in terms of their common holdings on the relationship between the MMBA's centerpiece meet-and-confer requirements and local initiative and referendum powers. Instead, the court separately analyzed *Seal Beach* as if it were a CEQA case and treated the MMBA's meet-and-confer requirements as mere ministerial acts applicable only to the governing body and not to the public agency. (*Boling* at 873-75 and n.29) *Boling* then confined the meaning of *Trinity County* to its particular statutory context involving counties and insisted that, in any other context, the MMBA must explicitly bar local initiatives (*id.* at 878).

The *Boling* court made no effort even to consider harmonizing the MMBA requirements and the initiative process – shirking Justice Kaus's caution in *Seal Beach* that "few legal rights are so 'absolute and untrammeled' that they can never be subjected to peaceful coexistence with other rules." (36 Cal.3d at 598.) The *Boling* court's opposite answer – that a city has *no* MMBA obligations before placing a local voter initiative covering the MMBA's subject matter on the ballot (*Boling* at 879) – is simply contrary to the reasoning of *Seal Beach* and *Trinity County*. Like the court below, neither the City[18] nor Proponents[19] consider harmonizing

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[18] The City rejects any coexistence of the MMBA with the rights of local initiative. The City also argues that the CPRI itself did not affect a

application of the MMBA with a voter initiative.

Observing that there was no dispute that pensions are a subject for meet and confer under the MMBA, PERB treated the City's claim that the City Council had a ministerial duty to put CPRI on the ballot as a defense and found that it did not preempt all bargaining. (XI-186:3035-36.)

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matter of statewide concern because it sought to change pensions for *future* new hires. (City's Ans. Brief at 40.) First, this is a new argument never raised before PERB or to the Court of Appeal, and it contradicts the City's concession that the Mayor's proposal contained matters within the scope of representation. (*See* XI-186:3077.) Second, it is based on an incorrect legal premise that negotiable subjects affecting *future* hires are not within the scope of the MMBA's obligation for good faith meet and confer. (*City of Santa Rosa* (2011) WL 7007183, sl.op. at *8, 36 PERC para. 94 [there is "no distinction between the negotiability of a proposal that fell within the scope of representation as to occupied positions (current employees) and vacant positions (future employees)."]) Finally, it is a profoundly incorrect factual assertion that CPRI only affected *future* new hires. The expensive transition costs associated with closing the defined benefit pension plan to new non-police hires was to be paid for by a virtual freeze on *existing* employees' wages for a five-year period beginning on the effective date of the CPRI and continuing through June 30, 2018. This is the *very provision* the City and Proponents cited as the basis for their argument (albeit specious) that the CPRI contemplated a July 1, 2012 effective date. (*See* XVI-193:4076 and XIX-196:5015.)

[19] Proponents' arguments betray their lack of understanding of collective bargaining law. They acknowledge that the MMBA is of "statewide concern" but assert that the MMBA and voter initiatives cannot be harmonized because PERB jurisdiction would necessarily depend on the viewpoint of the speaker, only coming into play for citizens' measures opposed by labor. (Prop. Ans. Brief at 42-43.) Proponents are wrong that the governing body would have no opportunity to bargain related to a union-sponsored measure concerning their public employee members' wages, hours, and terms and conditions. Meet and confer is a "mutual obligation" under MMBA section 3505. If the public agency employer requests bargaining over a subject within the scope of representation, unions too are obligated to bargain.

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

B. The MMBA's Preemptive Force Is Embodied In Its Statewide Importance And Need Not Be Express

This Court has previously rejected the argument made by the City and Proponents that the MMBA must expressly extend its coverage to local voter initiatives or otherwise state as an intended purpose that its meet and confer requirements constrain the local electorate's initiative power. Citing *COST*, this Court reiterated in *Trinity County* that the Legislature need not state its preemptive choices with respect to initiative and referendum expressly. Its power to restrict local initiatives and referenda may be implicit or may also derive "from its power to enact general laws of statewide importance that override local legislation." (*Trinity County*, 8 Cal.4th at 779.) The Court recognized that the MMBA's "statutory scheme in an area of statewide concern" implicitly justified restricting the right of

local referendum. (*Id.* at 779-80.)[20]

Proponents nevertheless argue that the Court's recent decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, requires that evidence of intent to restrict local initiative power must be unambiguous and may not be implied and that the MMBA, other statutes, case law, and/or PERB's regulations must affirmatively extend MMBA or PERB's jurisdiction to voter initiatives or must expressly extend procedural rights to ballot proponents. (Prop. Ans. Brief at 26-28.) *Upland* did not overrule the standard in *COST* and *Trinity County* that the power to restrict local initiatives and referenda may be implicit in a statutory scheme of statewide concern without express legislative restriction. In *Upland*, this Court interpreted two state constitutional provisions, both involving voter participation: Article II, sections 8 and 11, containing the initiative power, and Article XIIIC, limiting the ability of local governments to impose, extend, or increase any general tax without a vote of the electorate at a regularly scheduled general election for members of the governing body.

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[20] *COST* held, on "the question whether a statutory reference to action by a local legislative body indicates a legislative intent to preclude action on the same subject by the electorate," that "an intent to exclude ballot measure is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair." (45 Cal.3d at 501.) (*See also DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776 [factor is "whether the subject at issue was a *matter of 'statewide concern'* or a 'municipal affair,' *with the former indicating* a greater probability of intent to bar initiative and referendum" (emphasis added)].)

Upland did not involve, and neither the majority nor concurring and dissenting opinions cited or discussed any cases involving, the intersection of local voter initiatives and statutes governing matters of statewide concern. The Court did not cite *Seal Beach*, *Trinity County*, or decisions reviewing agency adjudication under laws of statewide concern, and the interpretive rules about inferring a limitation on the right of initiative and referendum in matters of statewide importance in *COST* and *Trinity County* remain unaffected by *Upland.*

C. Meet And Confer Under The MMBA Is Not Merely Procedural

Relying mostly on cases involving CEQA and land use, the court below, City, and Proponents assert that meet and confer under the MMBA is merely procedural, preliminary to adoption of proposals impacting negotiable subjects. However, PERB permissibly determined within its expertise that CEQA review and the MMBA's meet-and-confer requirements are "qualitatively different." (XI-186:3016.) Meet and confer is more than mechanical. MMBA section 3505 provides that meet and confer in good faith means to meet in person promptly upon request by either party and continuing for a reasonable time; freely to exchange information and proposals; to consider fully presentations made by the employee organization prior to arriving at a determination of policy or course of action; to endeavor to reach agreement on matters within the

scope of information; and to include adequate time for resolution of impasses where such procedures exist. The MMBA is a matter of statewide concern precisely because these requirements substantively fulfill its purposes of communication between public employees and employers and resolution of their disputes. *Boling*'s treatment of these requirements as perfunctory undermines the very foundations of public employee collective bargaining.

V. PERB'S DECISION DOES NOT INFRINGE FIRST AMENDMENT RIGHTS

Boling properly gave the City's and Proponents' First Amendment claims no consideration.[21] The City urges that Mayor Sanders' actions are protected under the First Amendment. Whatever First Amendment rights the Mayor may have had, he was the City official responsible along with the Council under the City Charter and the MMBA for labor negotiations, and he had no First Amendment right to violate the MMBA by refusing to bargain. (*Antelope Valley Community College Dist.* (1979) PERB Dec. No. 97, citing *NLRB v. Virginia Electric & Power Co.* (1941) 314 U.S. 469 [NLRA does not enjoin free speech; statutory sanction is not for punishment of employer but for protection of employees].)

The City claims the Mayor had a right as a City official to draft an

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[21] Proponents do not advance a First Amendment argument here, instead urging that their right of initiative is absolute under the Constitution, a concept already rejected in *Seal Beach* and *Trinity County*.

initiative and to seek private citizens to carry it forward, citing *League of Women Voters v. Countywide Criminal. Justice Coordination Comm.* (1988) 203 Cal. App.3d 529, 555-56. (City Ans. Brief at 46-47.) Nothing in *League of Women Voters* suggests that the Mayor might do so by conduct that violates the MMBA.

The City posits that the Mayor had a choice in changing a policy that is subject to mandatory meet and confer under the MMBA: He could "take a pension reform proposal to the City Council seeking authority to propose an opening bargaining position" or he could make a "political judgment" not to go to the Council because he judged it lacking sufficient will to bargain to impasse and impose an alternative pension plan (both of which he could *only* do by virtue of his designation as the representative of the governing body responsible for discharging the City's obligations under the MMBA), and so could pursue a citizens' initiative. (City Ans. Brief at 49.) Thus, the City argues that, because some constitutional and statutory provisions authorize public employees to speak under some circumstances, the Mayor therefore had a *choice* under the First Amendment to violate the MMBA's duty to meet and confer or not.

The City answers its own argument: "[A]cknowledg[ing] that its officials are not entirely immunized by the First Amendment from potential violations of the MMBA," the City asserts that PERB cases that limit free

expression deal with expression directed to employees which constitute threats or impinge on their representational rights. (City Ans. Brief at 45.) That is exactly what PERB determined here. The Mayor's unilateral "determination of a policy to change terms and conditions of employment" over which the MMBA required the City to bargain with the representatives of its employees interfered with their representational rights. (XI-186:3094-5.)

Finally, the City argues that the MMBA duty to meet and confer is a prior restraint on the Mayor's speech under the First Amendment and infringes public activity rights under California Government Code section 3203 and 3209. (City Ans. Brief at 49-51.) The requirement that the Mayor communicate across the bargaining table on behalf of the City in his official capacity does not restrain any private speech or political activity rights he may have.

VI. PERB'S REMEDY IS TAILORED TO EFFECTUATE THE MMBA

An administrative agency's remedial orders under MMBA section 3509 will not be disturbed by a reviewing court "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Elec. & Power Co. v. NLRB* (1943) 319 U. S. 533, 540; *Santa Monica Community College Dist. v. PERB* (1980) 112 Cal.App.3d 684; *J. R. Norton Co. v. Agricultural*

Labor Relations Bd. (1987) 192 Cal.App.3d 874.

The City does not comment on PERB's remedy in its Answering Brief. PERB's remedy was carefully tailored to its remedial authority under the MMBA and extensively justified in case law, including cases in which a PERB remedy affects rights of non-parties. (XI-186:3018-3028.) PERB's remedial powers under Government Code section 3541.5, subdivision (c), include the power to order the City, as the "offending party," to cease and desist from its unilateral change unfair practice *or to take affirmative action* to undo the effects of this unilateral change. The requirement to take affirmative action, if necessary, includes requiring an offending public employer to enact or to amend an ordinance to effectuate the remedy. (*San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557-558.)

When an employer unilaterally changes negotiable subjects without bargaining, the standard remedy is to order the employer to rescind the new or changed policy, to bargain with the exclusive representative upon request, and to make affected employees whole for any losses incurred as a result of the unlawful conduct. (*Cal. State Employees' Assn. v. PERB* (1996) 51 Cal.App.4th 923, 946.) Rights conferred on public employees by the MMBA are not adequately safeguarded by requiring an employer to meet and confer *after* a unilateral change *without* undoing the unilateral

change; in such situations, the employer would be allowed to take advantage of a strengthened negotiating position it unlawfully obtained. (*See San Francisco Community College District* (1979) PERB Dec. No. 105, sl.op. at 17; *Redwoods Community College District* (1997) PERB Dec. No. 1242, sl.op. at 24.)[22]

PERB plainly acknowledged that its remedial power as an administrative agency – as distinct from this Court's power – does not extend to the invalidation of a municipal election. (XI-186:3020-3023.) Concluding that only courts have the power to invalidate voter-approved initiatives, PERB modified the relief recommended in the ALJ's Proposed Decision to order traditional MMBA make-whole compensatory remedies, while leaving the CPRI/Proposition B Charter amendment in effect. (XI:186:3017-3028). PERB concluded that the CPRI initiative and its placement on a ballot did not preclude the City from separately fulfilling its meet and confer obligations, either practically or legally. (XI:186:3034-3035, 3038-3039.) PERB did *not* invalidate Proposition B but left it to the

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[22] The City assured the Superior Court in 2012 when opposing PERB's injunctive relief requests to delay the vote on Proposition B and then to delay its implementation, that PERB had the remedial power "to place employees back in the position they were in prior to the unfair labor practice – ordering those employees to be provided the City's defined benefit retirement plan subject, of course, to judicial review." (XXI-158:5513:1-5.)

Unions to seek relief in the courts to overturn it.[23] PERB's remedy was a carefully crafted exercise of its expertise within the authority granted to it by the MMBA.

CONCLUSION

For the reasons set forth in the Real Party Unions' Opening Brief and in this Reply, the Unions respectfully urge this Court to reverse the decision below and to enforce PERB's decision.

Dated: October 30, 2017

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[23] Rather than requiring a second legal proceeding for the Unions to receive a full remedy, this Court could order the relief needed to effectuate the remedial purposes of the MMBA, by declaring that, based on the MMBA violation proved in this case and PERB's application of established MMBA remedial measures, Proposition B be invalidated as having been placed on the ballot by the City in violation of its meet and confer obligations under the MMBA. (*Howard Jarvis Taxpayers' Assn.*, 120 Cal.App.4th at 395, and cases cited in PERB's decision at XI-186:3022-33.)

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

I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect X7), contains 8,356 words.

Dated: October 30, 2017

ELLEN GREENSTONE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On October 30, 2017, I served the foregoing document described as **REPLY BRIEF ON THE MERITS BY UNION REAL PARTIES IN INTEREST** on the interested parties in this action by the method indicated:

SEE ATTACHED SERVICE LIST

[X] **(By UPS Next Day Air)**
I enclosed said document in an envelope provided by UPS, with delivery fees paid for, and addressed as shown in the attached Service List. I caused the envelope to be placed for collection and overnight delivery in a regularly utilized drop box of UPS, or delivered to an authorized courier or driver authorized by the UPS to receive documents.

[X] **(By Electronic Service)**
I electronically served said document by e-mailing from my e-mail address, vcohen@rsglabor.com, to the electronic service addresses in the attached Service List.

[X] **(State Court)**
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on October 30, 2017 at Pasadena, California.

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