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

SUPREME COURT
FILED
NOV - 1 2017
Jorge Navarrete Clerk
Deputy

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 REPLY BRIEF ON THE MERITS

J. FELIX DE LA TORRE, Bar No. 204282
General Counsel
WENDI L. ROSS, Bar No. 141030
Deputy General Counsel
JOSEPH W. ECKHART, Bar No. 284628
Board Counsel
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198

Attorneys for Respondent
Public Employment Relations Board

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 COMBINED REPLY BRIEF ON THE MERITS

J. FELIX DE LA TORRE, Bar No. 204282
General Counsel
WENDI L. ROSS, Bar No. 141030
Deputy General Counsel
JOSEPH W. ECKHART, Bar No. 284628
Board Counsel
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198

Attorneys for Respondent
Public Employment Relations Board

TABLE OF CONTENTS

INTRODUCTION 9

ARGUMENT 12

I. THE LEGISLATURE AND COURTS LONG AGO DETERMINED THAT DEFERENCE IS OWED TO PERB'S LEGAL INTERPRETATIONS AND FACTUAL FINDINGS. 12

A. Both Answer Briefs ignore the weight of authority and the sound policy reasons for deferring to PERB's interpretation of the statutes it enforces even if a case presents other legal issues. 12

B. The substantial evidence standard of review must be legislatively changed; it cannot be selectively ignored or altered on a case-by-case basis. 14

C. *Inglewood* properly determined the standard of review of the Board's agency determinations. 15

D. The Court of Appeal's use of the word "erroneous" does not mean it applied the "clearly erroneous" standard of review 17

E. The Board did not invite de novo review 18

II. BECAUSE THE DUTY TO MEET AND CONFER IS NOT LIMITED TO THE EMPLOYER'S GOVERNING BODY, THE BOARD PROPERLY RELIED ON STATUTORY AND COMMON LAW AGENCY PRINCIPLES TO FIND THAT THE CITY HAD A DUTY TO BARGAIN. 19

A. The Answer Briefs do not respond to PERB's arguments regarding section 3504.5 or the Board's application of agency principles. 19

B. Because the Board did not find that the Mayor engaged in a legislative act, the City's reliance on the non-delegation doctrine is misplaced. 21

C. The Answer Briefs' factual disputes regarding the possibility of bargaining over an alternative ballot measure are improper. 24

III. GIVEN THE MAYOR'S EXTENSIVE ACTIONS IN SUPPORT OF THE CPRI, IT WAS NOT A PURE CITIZENS' INITIATIVE 29

A. Even assuming the CPRI was a pure citizens' initiative, the Board's decision may be affirmed on the grounds that the City refused to bargain over an alternative ballot measure. 34

IV. THE BOARD'S DECISION DOES NOT IMPAIR THE MAYOR'S FREE SPEECH RIGHTS. 35

A. The Board's decision regulates the City's economic conduct, not the Mayor's speech. 35

B. Because Mayor Sanders' activities were undertaken in his official capacity, they were not protected speech. 38

CONCLUSION 44

TABLE OF AUTHORITIES

FEDERAL CASE LAW

Bond v. Floyd
(1966) 385 U.S. 116 39

Garcetti v. Ceballos
(2006) 547 U.S. 410 .... 38, 40

Miller v. Davis
(6th Cir., Aug. 26, 2015, No. 15-5880) 2015 WL 10692640 40

National Labor Relations Bd. v. Virginia Electric & Power Co.
(1941) 314 U.S. 469 36

Parks v. City of Horseshoe Bend
(8th Cir. 2007) 480 F.3d 837 40

Pleasant Grove City, Utah v. Summum
(2009) 555 U.S. 460 38

Wood v. Georgia
(1962) 370 U.S. 375 39

CALIFORNIA CASE LAW

American Coatings Assn. v. South Coast Air Quality Management Dist. (2012) 54 Cal.4th 446 17

Banning Teachers Assn. v. Public Employment Relations Bd.
(1988) 44 Cal.3d 799 .... 9, 12

Bodinson Mfg. Co. v. California Employment Com.
(1941) 17 Cal.2d 321 18

Butte View Farms v. Agricultural Labor Relations Bd.
(1979) 95 Cal.App.3d 961 29

California Cannabis Coalition v. City of Upland
(2017) 3 Cal.5th 924 .... 31, 33

California School Employees Assn. v. Bonita United School Dist.
(2008) 163 Cal.App.4th 387 12

Carian v. Agricultural Labor Relations Bd. (1984) 36 Cal.3d 654 .... 20, 37

City of Palo Alto v. Public Employment Relations Bd. (2016) 5 Cal.App.5th 1271 13

Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd. (2005) 35 Cal.4th 1072 16

County of Los Angeles v. Los Angeles County Employee Relations Com. (2013) 56 Cal.4th 905 13

Cumero v. Public Employment Relations Bd. (1989) 49 Cal.3d 575 .... 10, 12

DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal.4th 864 38

Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal.App.3d 767 .... 9, 14, 15, 17

Jeffrey v. Super. Ct. (2002) 102 Cal.App.4th 1 .... 27, 34

Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334 23

Kugler v. Yocum (1968) 69 Cal.2d 371 23

Lantz v. Workers' Compensation Appeals Bd. (2014) 226 Cal.App.4th 298 15

Larkin v. Workers' Compensation Appeals Bd. (2015) 62 Cal.4th 152 18

League of Women Voters v. Countywide Criminal Justice Coordination Committee (1988) 203 Cal.App.3d 529 .... 42, 43

Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055 40

Los Angeles Unified School Dist. v. Public Employment Relations Bd. (1986) 191 Cal.App.3d 551 15

Marathon Entertainment, Inc. v. Blasi
(2008) 42 Cal.4th 974 18

McFarland v. Pico
(1857) 8 Cal. 626 18

Moreno Valley Unified School Dist. v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191 15

Morrow v. Los Angeles Unified School Dist.
(2007) 149 Cal.App.4th 1424 41

People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach (1984) 36 Cal.3d 591 .... 22, 24, 32

Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8 (2012) 55 Cal.4th 1083 36

Regents of the Univ. of Cal. v. Public Employment Relations Bd.
(1986) 41 Cal.3d 601 .... 14, 25

San Mateo City School Dist. v. Public Employment Relations Bd.
(1983) 33 Cal.3d 850 12

Schaffer v. City and County of San Francisco
(2008) 168 Cal.App.4th 992 41

South Bay Union School Dist. v. Public Employment Relations Bd.
(1991) 228 Cal.App.3d 502 35

Stanson v. Mott
(1976) 17 Cal.3d 206 38

State Bldg. & Cons. Trades Council of Cal., AFL–CIO v. City of Vista (2012) 54 Cal.4th 547 24

Voters for Responsible Retirement v. Bd. of Supervisors
(1994) 8 Cal.4th 765 31

Yamaha Corporation of America v. State Bd. of Equalization
(1998) 19 Cal.4th 1 .... 9, 13

CONSTITUTION

U.S. Const., 1st Amend. 35

CALIFORNIA CONSTITUTION

Cal. Const., Art. XI, § 3, subd. (c) 30

Cal. Const., Art. XIII C, § 2, subd. (b) 31

CALIFORNIA STATUTES

Elec. Code, § 1405 33

Elec. Code, § 9212 33

Elec. Code, § 9214 33

Elec. Code, § 9255 .... 27, 33

Elec. Code, § 18620 33

Gov. Code, § 3203 .... 35, 36, 44

Gov. Code, § 3207 38

Gov. Code, § 3209 .... 35, 36, 38, 44

Gov. Code, § 3500 45

Gov. Code, § 3500 et seq. 9

Gov. Code, § 3504.5 .... 10, 19, 22

Gov. Code, § 3505 .... *passim*

Gov. Code, § 3509.5 15

Gov. Code, § 3509.5, subd. (b) 14, 27

CALIFORNIA ADMINISTRATIVE DECISIONS

Bellflower Unified School Dist.
(2014) PERB Decision No. 2385 27

City of San Diego (Office of the City Attorney)
(2010) PERB Decision No. 2103-M 43

County of Riverside
(2010) PERB Decision No. 2119-M 44

Healdsburg Union High School Dist./San Mateo City School Dist. (1984) PERB Decision No. 375 27

San Diego Unified School Dist. (1980) PERB Decision No. 137 23

Santee Elementary School Dist. (2006) PERB Decision No. 1822 26

OTHER AUTHORITIES

Assembly Bill No. 83 (2017-2018 Reg. Sess.) 16

RULES OF COURT

Cal. Rules of Court, rule 8.500(c)(1) 25, 28

INTRODUCTION

Largely avoiding the points raised in the Public Employment Relations Board's (PERB or Board) Opening Brief, the Answer Briefs of the City of San Diego (City) and Catherine A. Boling, T.J. Zane, and Stephen B. Williams (Ballot Proponents) alternate between reiterating the Court of Appeal's erroneous conclusions and offering new and different grounds for overturning the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M. Neither of the Answer Briefs demonstrate that the Court of Appeal applied the right standard of review, properly interpreted section 3505 of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq. [MMBA]), or otherwise correctly rejected the Board's decision.[1]

Both the City and the Ballot Proponents support the Court of Appeal's application of a de novo standard of review. Citing *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), the court concluded that since the Board's decision rested on issues "outside" PERB's expertise, it could disregard *Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804 (*Banning*) [the courts defer to PERB's interpretation unless "clearly erroneous"], *Inglewood Teachers Association v. Public Employment*

[1] All further statutory references are to the Government Code, unless otherwise noted.

Relations Board (1991) 227 Cal.App.3d 767, 776 (*Inglewood*) [agency principles are within the Board's expertise] and *Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575, 583 (*Cumero*) [PERB may interpret its statutes in light of external law]. But *Yamaha* does not support the Court of Appeal's conclusion, and the City and the Ballot Proponents' efforts to distinguish *Banning*, *Inglewood,* and *Cumero* do not jusftify a different standard of review. Therefore, it is clear that the Court of Appeal erred in applying de novo review.

Tellingly, neither Answer Brief attempts to defend the Court of Appeal's reliance on section 3504.5 to limit the MMBA's duty to meet and confer to the employer's governing body. Although they argue that PERB erred in finding an agency relationship between the Mayor and the City, these arguments misconstrue the Board's decision, raise new issues not presented to the Court of Appeal, and ultimately fail on their merits.

The Answer Briefs also proclaim the importance of the citizen's initiative process and the constitutional rights of elected leaders. PERB has no dispute with either proposition, and in fact the Board's decision leaves *intact* the entirety of the ballot measure in this case referred to as Proposition B.

The Board's decision, concluding that the Mayor was the City's agent under both statutory and common law principles, was not clearly erroneous and was based on substantial evidence in the record as a whole.

The City and the Ballot Proponents do not refute that the City's "Strong" Mayor, Jerry Sanders: was the City's chief executive and lead labor negotiator pursuant to the City Charter; admitted he wanted to use the initiative process to avoid the City's obligations to bargain with the Unions[2] over employee pension benefits; used his City-paid staff to help draft and promote his proposal; used his City office, the City seal, his State of the City address, and City resources to support and campaign for his pension proposal; and signed the ballot statement supporting the initiative as "Mayor Jerry Sanders." Based on these facts and other facts in the record, the Board found an agency relationship between the City and the Mayor, and concluded the City was required to meet and confer with the Unions regarding the Mayor's pension proposal or an alternative proposal before placing the measure on the ballot. Because this conclusion is based on the correct interpretation of the MMBA and serves to effectuate the purposes of the statute, it should be affirmed.

[2] "Unions" refers to real parties in interest San Diego Municipal Employees Association (SDMEA), Deputy City Attorneys Association of San Diego, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters).

ARGUMENT

I. THE LEGISLATURE AND COURTS LONG AGO DETERMINED THAT DEFERENCE IS OWED TO PERB'S LEGAL INTERPRETATIONS AND FACTUAL FINDINGS.

A. Both Answer Briefs ignore the weight of authority and the sound policy reasons for deferring to PERB's interpretation of the statutes it enforces even if a case presents other legal issues.

The City and the Ballot Proponents argue that the Court of Appeal correctly applied a de novo standard of review, because this case presents issues supposedly outside of PERB's expertise, and is not a typical unfair practice case. (City Ans., pp. 19-22; BP Ans., pp. 33-39.) But neither disputes that this Court has repeatedly affirmed, for over 35 years, that PERB's expertise warrants deference under the clearly erroneous standard of review. (*Banning, supra*, 44 Cal.3d 799, 804; *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].)

PERB acknowledges it is not entitled to deference when interpreting external laws, such as constitutional provisions. (*Cumero, supra*, 49 Cal.3d 575, 583.) Until the Court of Appeal below, however, the courts have never held that the presence of other legal issues reduces the deference owed to PERB's interpretation of its own statutes. Rather,

they have uniformly deferred to PERB's interpretation *even if* other issues were implicated. (*Id.* at pp. 586-587; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922.) For instance, in *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1287-1288, the court applied the "clearly erroneous" standard in a case that—like this one—included election law and constitutional issues, in addition to issues of MMBA interpretation.

The City would distinguish the cases applying the "clearly erroneous" standard of review, because this case involves a "confluence" or "convergence" of "numerous" issues outside PERB's expertise. (City Ans., pp. 19, 21.) But the City fails to explain why this should mean PERB's interpretation *of the MMBA* receives no deference.

The City and the Ballot Proponents also repeat the Court of Appeal's error in relying on *Yamaha*, *supra*, 19 Cal.4th 1. However, they do not cite anything in *Yamaha* or its progeny supporting the proposition that the standard of review of an agency's legal interpretation changes if a case also involves other legal issues.

Thus, the City and Ballot Proponents offer no basis for upholding the Court of Appeal's rejection of the "clearly erroneous" standard of review.

B. The substantial evidence standard of review must be legislatively changed; it cannot be selectively ignored or altered on a case-by-case basis.

The Answer Briefs claim that PERB's factual determinations are not entitled to deference under the substantial evidence standard of review if they are undisputed. (City Ans., p. 20; Ballot Proponents [BP] Ans., pp. 36, 40-41.) They are wrong.

By statute, PERB's factual determinations are conclusive if supported by substantial evidence. (§ 3509.5, subd. (b).) Under this standard, "[i]f there is a plausible basis for the Board's factual decisions, [the court is] not concerned that contrary findings may seem ... 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 (*Regents*); *Inglewood, supra*, 227 Cal.App.3d 767, 776-779, 781.) Notably, neither Answer brief contests PERB's argument that "the Legislature [is] free ... to specify... that certain administrative determinations need to be subjected only to substantial evidence review rather than independent judgment review." (PERB Opening Brief (OB), p. 43.)

Both Answer Briefs also fail to acknowledge that the substantial evidence standard applies when the facts are undisputed (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142

Cal.App.3d 191, 196),[3] and when conflicting inferences may be drawn from undisputed facts (*Lantz v. Workers' Compensation Appeals Bd.* (2014) 226 Cal.App.4th 298, 316-317). Notably, while the underlying facts of this case are not in dispute, both Answer Briefs raise new arguments about the inferences to be drawn from those facts. (See § II.C., *post.*)

Thus, given the express mandate of section 3509.5, the City and the Ballot Petitioners' arguments as to the standard of review of PERB's factual determinations are without merit.

C. *Inglewood* properly determined the standard of review of the Board's agency determinations.

The Answer Briefs argue that PERB's agency determinations are not entitled to deference. (City Ans., pp. 23-31; BP Ans., pp. 37-38.) These arguments, which attempt to distinguish this case from *Inglewood, supra*, 227 Cal.App.3d 767, are unavailing.

As explained in PERB's Opening Brief, *Inglewood, supra*, 227 Cal.App.3d 767, held that the Board's "interpretation of agency principles is subject to the clearly erroneous standard of review" (*id.* at p. 776),

[3] Both the City and Ballot Proponents briefly refer to the Court of Appeal's reliance on *Los Angeles Unified School District v. Public Employment Relations Board* (1986) 191 Cal.App.3d 551. (City Ans., pp. 20-21, fn. 4; BP Ans., p. 35.) Neither Answer Brief disputes PERB's explanation why reliance on that case is misplaced. (See PERB OB, pp. 63-64.)

while its factual findings on agency—like all of the Board's findings of fact—are conclusive if supported by substantial evidence (*id.* at p. 781).

The Ballot Proponents claim this case is distinguishable from *Inglewood* because the purported agent in *Inglewood* was a school principal. (BP Ans., p. 38.) Missing from this argument is any reason *why* different standards of review should apply to PERB's agency determinations involving school principals, on the one hand, and city mayors, on the other.[4] Different standards of review for different statutes would be at odds with the Legislature's purpose in entrusting PERB with jurisdiction over the MMBA and seven other public sector labor relations statutes. (See *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090.)[5] Had the Legislature intended different standards of review for mayors and school principals, it could have simply declined to transfer exclusive initial jurisdiction over the MMBA to PERB in 2001. This would have allowed courts to continue to decide agency issues de novo.

---

[4] Circularly, the Ballot Proponents argue that PERB's lack of expertise in making agency determinations is "evidenced by the inaccuracy of [its] conclusions." (BP Ans., p. 37.)

[5] Since PERB's Opening Brief, the Legislature has passed and the Governor has signed Assembly Bill No. 83 (2017-2018 Reg. Sess.), creating a new statute under PERB's jurisdiction, the Judicial Council Employer-Employee Relations Act.

The City's attempt to distinguish this case from *Inglewood*, *supra*, 227 Cal.App.3d 767, claims that this matter involves undisputed material facts, unlike *Inglewood*. (City Ans., pp. 20-21, fn. 4.) Even if this were true, and agency becomes a pure question of law, the City ignores *Inglewood*'s holding regarding questions of law related to agency. As noted, those questions are *also* subject to deference—under the "clearly erroneous" standard of review. (*Inglewood*, *supra*, 227 Cal.App.3d 767, 776.)

As PERB argued in its Opening Brief, *Inglewood* was correct on this point because, on the issue of agency, California's public sector labor relations statutes are "open-ended [and] entwined with issues of fact, policy, and discretion." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.) Neither Answer Brief responds to this argument.

Therefore, the Court of Appeal's conclusion that PERB's interpretation of agency principles is not subject to deference must be reversed.

D. The Court of Appeal's use of the word "erroneous" does not mean it applied the "clearly erroneous" standard of review

Despite defending the Court of Appeal's rejection of the "clearly erroneous" standard of review, both Answer Briefs also argue that the Court of Appeal in fact applied it. (City Ans., p. 22; BP Ans., p. 41.) The

basis for this argument is the categorical declaration that "erroneous" and "clearly erroneous" mean the same thing. (*Ibid.*)

Needless to say, neither Answer Brief cites any authority for such a proposition. This argument assumes that this Court has not meant what it said when it repeatedly affirmed the "clearly erroneous" standard—not just in the numerous cases involving PERB (PERB OB, pp. 37-38)—but also in cases involving other administrative agencies. (See, e.g., *Larkin v. Workers' Compensation Appeals Bd.* (2015) 62 Cal.4th 152, 158; *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 988.)[6] Consequently, the claim that the Court of Appeal applied the "clearly erroneous" standard of review is without merit.

E. The Board did not invite de novo review.

The City claims that the Board "invited" de novo review when, in the course of its decision, it determined that certain issues were beyond its own jurisdiction but ultimately not implicated by the facts of the case. (City Ans., p. 22.) In the cited part of the Board's decision, the Board acknowledged that its own authority is limited to interpreting and enforcing the MMBA. (AR:XI:3006.) Such an acknowledgment in no way suggested that the Board believed its interpretation *of the MMBA*

---

[6] This Court has used the specific phrase "clearly erroneous" in various contexts virtually since its inception (see, e.g., *McFarland v. Pico* (1857) 8 Cal. 626, 631), and introduced it to the administrative law context in *Bodinson Manufacturing Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325.

should be subject to de novo review. The City's claim to the contrary is meritless.

II. BECAUSE THE DUTY TO MEET AND CONFER IS NOT LIMITED TO THE EMPLOYER'S GOVERNING BODY, THE BOARD PROPERLY RELIED ON STATUTORY AND COMMON LAW AGENCY PRINCIPLES TO FIND THAT THE CITY HAD A DUTY TO BARGAIN.

A. The Answer Briefs do not respond to PERB's arguments regarding section 3504.5 or the Board's application of agency principles.

As PERB argued in its Opening Brief, the Court of Appeal erred by relying on section 3504.5 to conclude that only a public agency's governing body must meet and confer under section 3505. (PERB OB, pp. 45-58.) Neither Answer Brief makes any attempt to defend the Court of Appeal's reliance on section 3504.5.

PERB also argued that the Court of Appeal erred by rejecting the Board's reliance on statutory and common law agency principles. (PERB OB, pp. 64-73.) In response to these arguments, the City largely—and erroneously—relies on the non-delegation doctrine. (See § II.B, *post.*) Neither Answer Brief, however, responds directly to PERB's arguments that: (1) the Mayor was a statutory agent of the City because of his unique power over the negotiations process (PERB OB, pp. 64-66); (2) with respect to actual authority, the relevant inquiry was whether 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'" (PERB OB, pp. 67-68, quoting AR:XI:2991); (3) the Board could find the City liable on grounds of apparent authority without express manifestations that the City Council authorized the Mayor's conduct (*id.* at pp. 69-71); and (4) the City Council ratified the Mayor's actions because it had discretion to do something other than place the CPRI on the ballot without negotiating—specifically, negotiate over an alternative ballot measure (*id.* at pp. 72-73).[7]

In a footnote, the City latches onto two points the Court of Appeal made regarding the Board's apparent authority finding: (1) that the Board did not find that the Unions relied to their detriment on their belief in the Mayor's apparent authority; and (2) that apparent authority cannot be applied against the government if doing so would undermine important public policies. (City Ans., pp. 29-30, fn. 7; see *Boling v. Public Employment Relations Board* (April 11, 2017) 10 Cal.App.5th 853, 888, fns. 44 & 45.) Neither of these arguments can properly serve as grounds for overturning the Board's decision, because they were raised sua sponte by the Court of Appeal. The City never made them to the Board. (See *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 668, fn. 6 (*Carian*).)

[7] The argument that the Unions did not request to meet and confer over a competing initiative is addressed in section II.C, *post*.

Moreover, both arguments are meritless. The Unions relied on the Mayor's apparent authority as the City's chief negotiator, by simultaneously negotiating with the Mayor and agreeing to significant concessions on retiree health benefits (AR:XII:3223-3224; XIX:5074-5079), while expecting the opportunity to negotiate over his pension reform proposal (AR:XIX:5109-5110). In addition, applying the principles of apparent authority promotes the important public policies underlying the MMBA, by preventing the City from benefiting from the Mayor's failure to negotiate with the Unions.

B. Because the Board did not find that the Mayor engaged in a legislative act, the City's reliance on the non-delegation doctrine is misplaced.

In response to PERB's arguments based on statutory and common law agency principles, the City relies on the City Charter's reservation of legislative authority to the City Council, and argues that it would violate the non-delegation doctrine to hold the City accountable for the Mayor's actions in violation of section 3505. (City Ans., pp. 23-25.) This argument misconstrues the nature of the Mayor's actions and misapplies the non-delegation doctrine.

The Board did not find the Mayor to have engaged in legislative actions. There is no dispute that the City Council may place its own proposed charter amendment on the ballot by majority vote. Here, however, the Board did not find that the Mayor was responsible for

actually placing the CPRI on the ballot. In the proposed decision, which was adopted by the Board, the administrative law judge (ALJ) explained, "The policy decision relevant to the MMBA is one to change negotiable subjects, not whether to seek placement of a policy to that effect on the ballot." (AR:XI:3079.) The ALJ also observed that when a city council places a charter amendment on the ballot (and is obligated to bargain according to *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*)), "the city council is not legislating per se, but offering a proposal to be adopted by legislative action on the part of the electorate." (*Ibid.*) Thus, the Mayor's policy decision to propose pension reform was not a legislative act. The non-delegation doctrine does not apply.

Section 3505 did, however, apply to the Mayor's actions. The City suggests that it only applies to legislative actions. (City Ans., p. 25.) But had this been the Legislature's intent, it would have provided that the duty to bargain arises under the same circumstances as the duty to "meet" under section 3504.5: "any ordinance, rule, resolution, or regulation proposed to be adopted by the governing body"—legislative actions. Instead, the Legislature used more expansive language in section 3505: "prior to arriving at a determination of policy or course of action." This difference demonstrates that section 3505 is not confined to legislative

acts. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.)

The Board's application of the duty to bargain to the Mayor's non-legislative action in this case is consistent with longstanding PERB precedent. In *San Diego Unified School District* (1980) PERB Decision No. 137, the Board considered whether the employer violated its duty to bargain when two of the five members of its governing board took action that contravened established policy, without negotiating with the union. While PERB recognized that the governing board could take official action only by majority vote, it nevertheless held that the issue was whether the actions of the two members "may be viewed … as acts of the employer in the eyes of the employees." (*Id.* at p. 10.) Finding that standard met, the Board concluded that the employer committed an unfair practice by failing to bargain over the change in policy. (*Id.* at p. 19.)

In any event, even if the non-delegation doctrine applied, the City cannot use it to defeat the mandates of section 3505. As the City notes, the doctrine bars a local legislative body from delegating its authority without providing sufficient guiding standards. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375.) The doctrine's purpose is to ensure "that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to

assure the proper implementation of its policy decisions." (*Id.* at pp. 376-377.)

Here, however, the City is using the non-delegation doctrine not to ensure that the City Council resolves "truly fundamental issues," but to frustrate the purposes of the MMBA. Application of the non-delegation doctrine to immunize the City contravenes the clear policy embodied in section 3505, which requires a public agency's governing body *and* its "other representatives" to meet and confer "prior to arriving at a determination of policy or course of action." The Courts have consistently recognized that the MMBA regulates a matter of statewide concern and supersedes contrary provisions of a local charter. (*State Bldg. & Cons. Trades Council of Cal., AFL–CIO v. City of Vista* (2012) 54 Cal.4th 547, 564, citing *City of Seal Beach, supra*, 36 Cal.3d 591.) As a result, the City cannot evade liability for the Mayor's actions by relying on a conflict with Charter provisions concerning the delegation of legislative authority.

C. The Answer Briefs' factual disputes regarding the possibility of bargaining over an alternative ballot measure are improper.

In its Opening Brief, PERB pointed out the Board's factual finding that the Unions' demands to bargain contemplated bargaining over an alternative or competing ballot measure (PERB OB, pp. 33, 74-75), as well as the Court of Appeal's acknowledgment that the City had

flexibility under the Elections Code regarding the timing of the election at which the CPRI would be presented to voters (*id.* at p. 75, fn. 18, citing *Boling*, *supra*, 10 Cal.App.5th 853, 873, fn. 25). The City and the Ballot Proponents dispute these points for the first time in this Court. (City Ans., pp. 31, 33; BP Ans., pp. 14, 24-25.) Both disputes are untimely and ultimately meritless.

Regarding the Unions' several demands to bargain, the Board expressly found that they "also contemplated the possibility of bargaining over an alternative or competing measure on the subject." (AR:XI:3035.) The City acknowledged this finding in the Court of Appeal, but did not challenge it. (City's Opening Br., Case No. D069630, p. 67.) The Ballot Proponents did not address it at all. Thus, the Court should decline to consider this untimely challenge to the Board's factual finding. (Cal. Rules of Ct., rule 8.500(c)(1).)

Even if the Court were to consider this challenge, it fails on the merits. The substantial evidence standard of review means there must be a "plausible basis," for the Board's finding; this Court does not reweigh the evidence. (*Regents*, *supra*, 41 Cal.3d 601, 617.) There is a plausible basis for the Board's finding here, because the City and the Ballot Proponents have cited nothing in the Unions' demands to bargain in which suggested that the City could alter the CPRI or decline to place it on the ballot. For instance, the Firefighters' demand to bargain stated:

> The purpose of this letter is to request that the City meet and confer with Local 145 on the Comprehensive Pension Reform Initiative, as required under the Meyers, Milias, Brown Act.
>
> As you know, the City Council recently voted to place the "CPR" initiative on the June 2012, ballot. Therefore, Local 145 *requests that the City meet and confer on matters falling within the scope of wages, hours and working conditions as required under the MMBA.*

(AR:XXIII:5908, emphasis added.) SDMEA's second demand to bargain did not dispute the City Attorney's assertions that the City Council could not alter the CPRI or decline to place it on the ballot. (AR:XX:5123.) Instead, it noted that its demand to bargain was not addressed to the City Council, but to "Mayor Sanders who serves as the City's chief executive officer with the authority to give controlling direction to the administrative service of the City and to make recommendations to the City Council concerning the affairs of the City." (*Ibid.*) Plainly, the Mayor could have recommended that the Council place a measure on the ballot after negotiations with the Unions, as he had done previously.

"A valid request to negotiate will be found if it adequately indicates a desire to negotiate on a subject within scope." (*Santee Elementary School Dist.* (2006) PERB Decision No. 1822, p. 5.) The Board has never held that a bargaining demand must specify the ultimate action proposed to be taken—i.e., the adoption of a memorandum of understanding, a ballot measure, or some other action. On the other hand, the Board has

long held that the parties must use the meet-and-confer process itself to clarify ambiguous bargaining proposals. (*Bellflower Unified School Dist.* (2014) PERB Decision No. 2385, p. 7; *Healdsburg Union High School Dist./San Mateo City School Dist.* (1984) PERB Decision No. 375, p. 9.) Due to the City's outright refusal to bargain and failure to seek clarification of the Unions' demands, the Unions' failure to expressly ask to bargain over a competing ballot measure is not fatal to the Board's finding that such a measure was contemplated. This is particularly true in light of the parties' history of negotiating over ballot measures. Because the Board's reasonable assessment of the Unions' bargaining demands is supported by substantial evidence, it is conclusive. (§ 3509.5, subd. (b).)

Regarding the timing of the election, the Court of Appeal observed that "[t]he governing body arguably has some flexibility as to at which election the initiative is presented to the voters." (*Boling*, *supra*, 10 Cal.App.5th 853, 873, fn. 25, citing *Jeffrey v. Super. Ct.* (2002) 102 Cal.App.4th 1, 4-10 (*Jeffrey*).) *Jeffrey* observed that Elections Code section 9255 imposes no maximum time limit as to when a city council must submit an initiative to amend a city charter to the voters, meaning the only apparent constraint is the effective date of the amendment itself. (*Id.* at p. 4.)

Contrary to the Court of Appeal's observation in this case, the Answer Briefs now assert that the effective date of the CPRI was July 1,

2012, therefore preventing the City Council from placing it on a later election ballot. (City Ans., p. 33; BP Ans., pp 24-25.) The Court should decline to address these arguments, raised for the first time in the Answer Briefs. (See Cal. Rules of Ct., rule 8.500(c)(1).)

This argument also fails on its merits. The CPRI expressly provided in section 6 ("EFFECTIVE DATE"): "This Charter amendment shall become effective in the manner allowed by law." (AR:XVI:4086.) No effective date was specified. The City and the Ballot Proponents rely on a single parenthetical reference to July 1, 2012 in the title of one of the new charter sections, but the text of that section refers only to "the effective date of this Section"—again without specifying a date. (AR:XVI:4076.)

Nevertheless, even if the City Council was required to place the CPRI on the June 2012 ballot, the Answer Briefs do not dispute that the first bargaining demands came well before the City Council placed the CPRI on the ballot, and the City and the Unions had a history of expedited bargaining over ballot measures. (PERB OB, p. 75.) Because the City outright refused to bargain, it cannot be determined that there was insufficient time for negotiations over an alternative measure to take place.

Also without merit is the City's argument—raised only in a footnote—that its failure to bargain over an alternative ballot measure

cannot justify the remedy imposed by the Board. (City Ans., p. 33, fn. 8.) The Board's remedies are reviewable for abuse of discretion and "will not be disturbed by the courts 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 purposes of the act." (*Butte View Farms v. Agricultural Labor Relations Bd.* (1979) 95 Cal.App.3d 961, 967.) The City's suggested alternative—ordering the City to meet and confer over an alternative measure without making employees whole—would force the Unions to bargain at a disadvantage and provide the City with no incentive to fulfill its bargaining obligations in the future.

III. GIVEN THE MAYOR'S EXTENSIVE ACTIONS IN SUPPORT OF THE CPRI, IT WAS NOT A PURE CITIZENS' INITIATIVE.

The Ballot Proponents object that the Board's decision blurs the "bright line" between a citizens' ballot initiative and a city council-sponsored ballot measure, by determining the CPRI was not a "purely private citizens' initiative" due to the actions of the Mayor and other City officials. (BP Ans., p. 42.) Both the City and the Ballot Proponents also question how the CPRI could, after receiving the necessary number of signatures to be placed on the ballot, be deemed a "City-sponsored" or "governing-body-sponsored" initiative. (City Ans., p. 52; BP Ans., pp. 29-30.) These arguments misconstrue the Board's decision.

It is acknowledged that there are just two methods for submitting a charter amendment to a city's electorate, a citizen-sponsored initiative and a city council-sponsored measure. (Cal. Const., Art. XI, § 3, subd. (c).) But the Board did not find that the CPRI became a City-Council sponsored measure, rather than a citizens' initiative.[8] And the insistence of the City and the Ballot Proponents that no duty to meet and confer can ever arise in circumstances like this case invites mischief in the use of initiatives to thwart the objectives of the MMBA. As the Board noted, if it were concluded that the City could not be liable for the Mayor's actions simply because he was not the governing body,

> [b]y the same reasoning..., a majority of the City Council's members could propose an initiative measure as private citizens for the express purpose of circumventing the duty to meet and confer, thereby rendering the requirement of *Seal Beach* ineffectual.

(AR:XI:3079.)

Thus, it is the Mayor (along with two City Councilmembers and the City Attorney) and the City who have blurred the line between citizens' initiatives and governing body-sponsored measures. They have done this through the Mayor's use of the resources and prestige of his City office to

[8] Nor did the Board find that the Mayor became the "legal representative" of the initiative, as the Ballot Proponents claim. (BP Ans., p. 37.) The Board acknowledged the Ballot Proponents' role as official sponsors of the initiative (AR:XI:3066), and never suggested that the Mayor took over this role.

promote his pension reform proposal, and the City Council's failure to disavow or repudiate those actions. As the Board explained, this conduct "undermine[s] the principle of bilateral negotiations by exploiting the 'problematic nature of the relationship between the MMBA and the local [initiative-referendum] power.'" (AR:XI:2993-2994, quoting *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 782, second alteration in original.)

The Ballot Proponents' concern that PERB can now police the "purity" of citizens' initiatives (BP Ans., p. 44) is overstated. The Board's decision is based on a finding of an agency relationship—in the "peculiar circumstances of this case" (AR:XI:3011)—not a vague standard of purity or impurity, as the Ballot Proponents suggest. *Upland* does not undermine the Board's conclusion, because the Board did not determine that the local electorate was required to comply with the MMBA.

The Ballot Proponents claim that *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 (*Upland*) undercuts the Board's decision. (BP Ans., p. 27.) In *Upland*, this Court held that the term "local government" in article XIII C, section 2, subdivision (b) of the California Constitution does not include the electorate. (*Upland, supra*, at p. 936.) As a result, that provision was found not to limit the electorate's power to impose taxes by initiative. (*Id.* at p. 948.)

Upland's holding is not applicable here. The Board's decision did not conclude that the public agency subject to the MMBA includes the local electorate or the initiative proponents. The Board expressly rejected that notion when it explained that "[b]y not seeking to bargain over Proposition B per se, the [U]nions avoid the question left open in *Seal Beach*, *supra*, 36 Cal.3d 591." (AR:XI:3090-3091.) That question was "whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Seal Beach*, *supra*, p. 599, fn. 8.)

Instead, the Board found that the City violated the MMBA as a result of the Mayor's policy decision to alter the pension plan for City employees—a negotiable subject—and the agency relationship between the Mayor and the City. (AR:XI:3079.) It further explained that "even accepting the City's characterization of Proposition B as a purely citizens' initiative, the Unions' demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject." (AR:XI:3035.) Accordingly, the Board did not hold, as the Answers suggest, that the City was required to meet and confer over the text of Proposition B or over whether the City Council would fulfill its ministerial duty to place it on the ballot.[9]

[9] Nor did the Board hold that the Mayor was required to negotiate *with the Ballot Proponents* to convince them to change or withdraw the

Moreover, *Upland* does not foreclose the Board's holding that the actions of the Mayor with respect to a ballot initiative may be imputed to the City. In fact, this Court expressly left open the question of whether a local government can use the initiative process in collaboration with private citizens to avoid otherwise applicable procedural requirements. (*Upland, supra*, 3 Cal.5th 924, 947.)

Upland's summary of Elections Code sections 1405, 9212, and 9214, relied on by the Ballot Proponents, is also inapplicable to this case. *Upland* noted that "[c]ollectively, the intended purpose of these statutes is to require 'public officials to act expeditiously on initiatives.'" (*Upland, supra*, 3 Cal.5th 924, 935.) The Ballot Proponents argue that meeting and conferring with the Unions would have prevented the City from acting expeditiously on the CPRI. (BP Ans., p. 24.) However, the Elections Code provisions summarized in *Upland* did not apply to the CPRI. Those provisions apply to initiatives to enact a city ordinance. The CPRI was an initiative to amend a city charter, to which Elections Code section 9255 applies. As noted, that section includes no maximum time for the initiative to be placed on the ballot. (*Jeffrey v. Super. Ct., supra*, 102

CPRI. As a result, compliance with the Board's decision in no way risks a violation of Elections Code section 18620's proscriptions against bribing an initiative's proponents. (See BP Ans., p. 46.)

Cal.App.4th 1, 4.) Therefore, the Answer Briefs' reliance on *Upland* is misplaced.

A. Even assuming the CPRI was a pure citizens' initiative, the Board's decision may be affirmed on the grounds that the City refused to bargain over an alternative ballot measure.

Neither Answer Brief disputes PERB's argument that the Court may affirm the Board's decision on another ground, even if it was not the basis for the Board's decision. (PERB Opening Br., pp. 73-75.) As explained, the Board's finding that the Unions' demands to bargain reasonably contemplated an alternative ballot measure is conclusive. (See § II.C., *ante*.) Holding that the City was required, but failed, to bargain over an alternative measure avoids any concern over impacts on the citizens' initiative process.

The Ballot Proponents' claims about delays resulting from bargaining over alternative measures (BP Ans., pp. 44-45) are purely speculative and unsupported by the factual record here. That record discloses that the City and the Unions had a history of expedited bargaining over the Mayor's ballot measure proposals (AR:XI:3051-3053), and that the first demands to bargain came well before the CPRI qualified for the ballot (AR:XIX:5109-5110; AR:XX:5184-5185).

Therefore, even if this Court concludes that the agency relationship between the Mayor and the City is not sufficient to support the Board's

decision, the decision may nevertheless be upheld on these alternative grounds. (*South Bay Union School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 509.)

IV. THE BOARD'S DECISION DOES NOT IMPAIR THE MAYOR'S FREE SPEECH RIGHTS.

The City claims that the First Amendment and sections 3203 and 3209 protected the Mayor's actions in support of the CPRI. (City Ans., pp. 41, 50.) There is no dispute that the Mayor had constitutional and statutory rights *as a private citizen* to take positions on matters of City employee compensation, including by supporting the CPRI. (U.S. Const., 1st Amend.; §§ 3203, 3209.) The Board's decision did not, however, restrict any speech activity. And even if it did, the Board correctly concluded that the Mayor's speech was not undertaken as a private citizen.

A. The Board's decision regulates the City's economic conduct, not the Mayor's speech.

The City's First Amendment argument is premised on the erroneous proposition that the Board has punished the Mayor for his speech. In fact, the Board's decision regulates the City's economic conduct as an employer, not the Mayor's—or anyone else's—private political speech.

The Board's decision neither punishes the Mayor for his activities nor requires him to meet and confer with the Unions over his activities as

a private citizen. Instead, the decision requires that, in the factual circumstances of this case—where a city has adopted a strong mayor form of governance under which the mayor is the lead labor negotiator, and the mayor contributes city staff-time and resources and the prestige of his office to place a citizen's initiative on the ballot—the city may be required to meet and confer with the unions. (AR:XI:3005.) Because *the City* in this case refused to meet and confer, the Board found that the City violated the MMBA, ordered the City to make employees whole, and directed the City to refrain from refusing to negotiate before adopting future measures affecting employees' terms and conditions of employment. (AR:XI:3040-3041.) Nothing in the Board's order is directed at Jerry Sanders as a private citizen.

Thus, the Board's decision regulates the City's economic conduct, and therefore does not run afoul of the First Amendment or sections 3203 or 3209. (See *National Labor Relations Bd. v. Virginia Electric & Power Co.* (1941) 314 U.S. 469, 477 [National Labor Relations Board did not violate the First Amendment by finding an unfair labor practice based on the employer's speech, because "[t]he sanctions of the [National Labor Relations] Act are imposed not in punishment of the employer but for the protection of the employees"]; see also *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (2012) 55 Cal.4th 1083, 1103 ["[S]tatutory law ... may single out labor-related speech for

particular protection or regulation, in the context of a statutory system of economic regulation of labor relations, without violating the federal Constitution"]; *id.* at pp. 1117 (conc. opn. of Liu, J.).)

The City's cursory argument that the Board's decision imposes a prior restraint on the Mayor's speech (City Ans., p. 49) is procedurally and substantively deficient. The City cites a sentence from the ALJ's proposed decision (AR:XI:3096), but the City did not include this issue in its statement of exceptions to the Board (AR:X:2685-2724). It is too late for the City to raise this issue now. (*Carian*, *supra*, 36 Cal.3d 654, 668, fn. 6.)

Moreover, the City's argument fails on its merits, because it is based on a selective quotation from the ALJ's proposed decision. In its entirety, the sentence demonstrates that the ALJ's conclusion (which was affirmed by the Board) was informed by agency principles and the duty to meet and confer:

> By virtue of the Mayor's status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applies to the City because it has ratified the policy decision resulting in the unilateral change, and because the Mayor was not-legally privileged to pursue implementation of that change as a private citizen.

(AR:XI:3096.) It was not a "blanket restriction" based solely on the Mayor's status, as the City claims. (City Ans., p. 49.)

In addition, a speech restriction is not the same as a "prior restraint." "The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886, internal quotation marks omitted, emphasis in original.) The Board's decision was not issued in advance of the Mayor's communications, and is therefore not a prior restraint.

B. Because Mayor Sanders' activities were undertaken in his official capacity, they were not protected speech.

Even if viewed through the prism of First Amendment and statutory speech protections, the Mayor's activities that were imputed to the City were not protected. The First Amendment does not protect activities undertaken in the course of a government employee's official duties. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 (*Garcetti*).) Similarly, state law does not protect political activity undertaken during working hours and using public resources. (§§ 3207, 3209; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213, 223-224, 227.) And the "government speech" doctrine makes clear that individuals do not have a First Amendment right to use government-controlled means of communication. (*Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 470.)

Wood v. Georgia (1962) 370 U.S. 375 (*Wood*) and *Bond v. Floyd* (1966) 385 U.S. 116, 135-136 (*Bond*), cited by the City, are not to the contrary. *Wood* considered whether an elected sheriff could be held in contempt for his public statements regarding a matter pending before a grand jury. In answering the question in the negative, the Supreme Court emphasized that there was:

- no "finding by the trial court that the petitioner issued the statements in his capacity as sheriff" (*Wood*, *supra*, at p. 393);
- no indication that the state court found it significant that he was a sheriff (*id.* at p. 394); and
- no evidence that his statements actually "interfered with the performance of his duties as sheriff or with his duties, if any he had, in connection with the grand jury's investigation" (*ibid.*).

In other words, it was relevant that the speech was made in the sheriff's individual capacity, and that it did not interfere with his official duties. Accordingly, *Wood* does not support the unfettered free speech right the City claims for the Mayor.

Nor does *Bond*, *supra*, 385 U.S. 116, support the City's argument. In that case, the court explained that "[t]he manifest function of the First Amendment in a representative government requires that *legislators* be given the widest latitude to express their views on issues of policy" (*Bond v. Floyd* (1966) 385 U.S. 116, 135-136 (*Bond*), emphasis added), and

"*[l]egislators* have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office...." (*id.* at pp. 136-137, emphasis added).

The City quotes these passages selectively, without acknowledging that *Bond* refers only to "legislators," not generally to "elected officials." (See City Ans., p. 44.) "Legislator" and "elected official" are not interchangeable terms in this context, because legislators and executive officials serve different governmental functions. Executive officials must uphold and enforce the law regardless of whether it is consistent with their own views. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082.) They are not privileged to evade or ignore the law at all (*ibid.*), much less by invoking the First Amendment.

As a result, the City's argument that the rationale of *Garcetti, supra*, 547 U.S. 410, is limited to discipline of public employees and cannot be applied to elected executive officials is untenable. In fact, the federal courts that have considered this question have rejected the view that those officials have a First Amendment right to speak within the scope of their official duties. (*Parks v. City of Horseshoe Bend* (8th Cir. 2007) 480 F.3d 837, 840, fn. 4 (*Parks*) [elected city treasurer]; *Miller v. Davis* (6th Cir., Aug. 26, 2015, No. 15-5880) 2015 WL 10692640, at *1

[elected county clerk].)[10] Thus, the Mayor had no First Amendment right to speak in his official capacity.

The factual record of this case does not support the City's claim that the Mayor was merely exercising his individual right to support a citizens' initiative. (City Ans., p. 45.) The Board correctly found that the Mayor and his City-paid staff determined a course of action to solve the City's budget problems, which, according to his chief of staff, was official business of the City. (AR:XIV:3653-3654, 3667-3668.) City-paid staff issued press releases (XVIII:4745-4747, 4816) and mass e-mail messages. (AR:XXIII:5747-5749.) The Mayor conducted press conferences, supported by his staff, to promote the initiative. (AR:XIII:3312-3313; XV:3948-3949; XIII:3419.) The Mayor discussed the initiative in his State of the City address before the City Council—a speech that the City Charter reserves exclusively to the Mayor. (AR:XIX:4832; XVII:4494.) And while the Mayor sometimes claimed to be taking these actions as a "private citizen," the Board focused on the Mayor's actions, not his perfunctory references to his rights as a private citizen (see, e.g.,

---

[10] *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, cited by the City, addressed a different question than is presented here or in the above-cited federal cases: whether a suit based on a school official's speech is protected by the anti-SLAPP statute. However, the protections of that statute are not coextensive with the First Amendment. (See *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1001.)

AR:XI:2904): he was always identified as the Mayor (AR:XIII:3361-3363), his communications carried the City seal (e.g., XVIII:4745-4747), he repeatedly identified his pension reform proposal as the major component of his mayoral agenda and as the "next step" in a line of reforms he had achieved *as Mayor* (AR:XIX:4832; XXI:5515, 5521), he signed the argument in favor of Proposition B as "Mayor Jerry Sanders," not as a private citizen (AR:XX:5193), and one of his staff, Chief Operating Officer Jay Goldstone, used his position to arrange for a consultant to receive actuarial data from the City pension system's database in order to obtain a financial analysis of the Mayor's proposal. (AR:XIV:3545-3549) The information obtained by Goldstone was not available to "someone off the street" (*ibid.*), and there is no evidence in the record that private citizens have access to City websites and e-mail accounts and City-paid staff to promote their efforts, or Charter-mandated speeches to the City Council. Therefore, substantial evidence supports the finding that the Mayor's conduct was not that of a private citizen.

Apparently conceding that these activities involved the use of public resources, the City claims they were nevertheless sanctioned by *League of Women Voters v. Countywide Criminal Justice Coordination Committee* (1988) 203 Cal.App.3d 529 (*League of Women Voters*). (City Ans., pp. 46-47.) Not so. The question in that case was whether using public funds to draft, propose, and seek supporters for a citizens' initiative

was proper under the "'general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.'" (*League of Women Voters*, *supra*, 203 Cal.App.3d at p. 542, emphasis omitted.) Because the question was *not* whether those activities violated the MMBA, the City's argument is without merit.

Also without merit is the argument that, even if the activities of the Mayor and his City-paid staff were improper, the only recourse would be "criminal or...ethical violations," not a violation of the MMBA. (City Ans., p. 51.) The City offers no authority or explanation for its argument, which lacks any limiting principle. In the City's view, it could have taken any action in support of Proposition B, including contributing funds directly to the campaign in favor of it, without violating the MMBA. This argument must be rejected.

The City's further assertion that the Mayor's activities cannot be the basis for an MMBA violation because they were "communications" directed at the "public at large," not employees (City Ans., p. 45), must also be rejected. The City is correct that PERB will permit an employer to express its opinion on labor relations matters as long as it does not threaten employees or communicate directly with them to circumvent their right to exclusive representation. (See, e.g., *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, pp. 7-14.) It does

not follow that the lack of direct communications with employees in this case precludes an MMBA violation. (See, e.g., *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 22-23 [threatening statement made in public meeting, not just to employees].) Although accomplished in some instances by communications with non-employees, the Mayor's activities—using the resources and prestige of his office to bring about a change in terms and conditions of City employment without meeting and conferring in good faith—were conduct aimed at circumventing the MMBA, not protected statements of opinion. Nothing in the cases cited by the City suggests that the MMBA permitted this conduct.

Because the Mayor undertook his activities not as a private citizen but as the City's mayor, using City-paid staff and resources, his rights under the First Amendment and sections 3203 and 3209 are not implicated by the Board's decision.

CONCLUSION

Although the factual scenario in this matter may be unique, assessing whether parties are required to engage in good faith bargaining is a determination that the Legislature entrusted PERB to make in a variety of scenarios and circumstances. Under the proper standard of review, the City and the Ballot Proponents were required to show clear error or a lack of substantial evidence in PERB's decision. They failed to do so.

Stripping this case to its core, the purposes of section 3500—providing a reasonable method of resolving disputes between public employers and their employees—were not met, and section 3505 was violated, because the City, including its agent—Chief Labor Negotiator/Strong Mayor Sanders—refused to negotiate with the Unions over his proposal to alter City employees' pensions.

Therefore, PERB respectfully urges the Court to overturn the Court of Appeal's decision and affirm the Board's decision.

Dated: October 30, 2017

Respectfully submitted,

J. FELIX DE LA TORRE, General Counsel
WENDI L. ROSS, Deputy General Counsel

By ______________________
JOSEPH ECKHART, Board Counsel
Attorneys for Respondent
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNSEL'S CERTIFICATE OF COMPLIANCE
WITH CALIFORNIA RULES OF COURT 8.504(d)(1)

Counsel of Record hereby certifies that pursuant to rule 8.504(d)(1) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman-type font and contains, including footnotes, 8,326 words, which is less than the maximum—8,400 words—permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 30, 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 October 30, 2017, I served the Public Employment Relations Board's **Combined Reply Brief on the Merits** regarding the above-referenced case on the parties listed below.

Attorneys for Petitioners:
Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Lounsbery Ferguson Altona & Peak, LLP
960 Canterbury Place, Suite 300
Escondido, CA 92025-3836
Telephone: (760) 743-1226
E-mail: khl@lfap.com
E-mail: jpl@lfap.com
E-mail: aso@lfap.com

Attorneys for Real Parties in Interest:

Ann M. Smith
Smith, Steiner Vanderpool & Wax
401 West A. Street, Ste. 320
San Diego, CA 92101
Telephone: (619) 239-7200
E-mail: asmith@ssvwlaw.com
Attorney for Real Party in Interest
San Diego Municipal Employees Association

Fern M. Steiner
Smith Steiner Vanderpool & Wax
401 West A Street, Ste. 320
San Diego, CA 92101
Telephone: (619) 239-7200
E-mail: FSteiner@ssvwlaw.com
Attorney for Real Party in Interest
San Diego City Firefighters, Local 145

Mara W. Elliott, City Attorney
George Schaefer, Assistant City Attorney
M. Travis Phelps, Deputy City Attorney
City of San Diego
1200 Third Avenue, Ste. 1100
San Diego, CA 92101
Telephone: (619) 533-5800
E-mail: cityattorney@sandiego.gov
gschaefer@sandiego.gov
mphelps@sandiego.gov
Attorneys for Real Party in Interest
City of San Diego

James Cunningham
Law Offices of James J. Cunningham
9455 Ridgehaven Court, #110
San Diego, CA 92123
Telephone: (858) 565-2281
E-mail: jimcunninghamlaw@gmail.com
Attorney for Real Party in Interest
Deputy City Attorneys Association of San Diego

Ellen Greenstone
Rothner, Segal & Greenstone
510 S. Marengo Avenue
Pasadena, CA 91101
Telephone: (626) 796-7555
E-mail: egreenstone@rsglabor.com

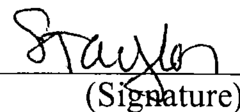
Court of Appeal:
Clerk of the Court
Fourth District Court of Appeal, Division One
Via TrueFiling

[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.

[X] **(BY ELECTRONIC SERVICE (E-MAIL))** I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) to the electronic service address(es) listed above on the date indicated. I did not receive within a reasonable period of time after the transmission any electronic message or other indication that the transmission was unsuccessful.

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 October 30, 2017, at Sacramento, California.

S. Taylor
(Type or print name)


(Signature)