Case No. S242034

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

Petitioners,

v.

CALIFORNIA 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; and SAN DIEGO CITY FIREFIGHTERS LOCAL 145, AFL-CIO

Real Parties in Interest.

After a Decision of the Court of Appeal, Fourth Appellate District, Division One, Consolidated 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)

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS IN SUPPORT OF UNION REAL PARTIES IN INTEREST

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APPLICATION OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF UNION REAL PARTIES IN INTEREST

Pursuant to rule 8.200(c) of the California Rules of Court, the International Association of Fire Fighters ("IAFF") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of the Union Real Parties in Interest, San Diego Municipal Employees Association; Deputy City Attorneys Association; American Federation of State, County, and Municipal Employees, AFL-CIO, Local 127; and San Diego City Firefighters, Local 145, IAFF, AFL-CIO.

The IAFF is a labor organization representing almost 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF local affiliates protect the lives and property of over 85 percent of the continent's population in nearly 6,000 communities in every state in the United States and in Canada. The IAFF represents fire fighters throughout California with respect to collective bargaining, health and safety, training, and various other issues.

The IAFF has an interest in the uniform, orderly, and fair administration of the laws and regulations in the state of California that impact and pertain to public collective bargaining rights. The Court's holding in *Boling v. Public Employment Relations Board*, (2017) 10 Cal. App. 5th 853 ("*Boling*") hinders all of these aims. The California Supreme

Court has before it a potential precedent-setting case in *Boling* that, if upheld, will disrupt the proper function of the California Public Employment Relations Board ("PERB"), provide a road map for public employers throughout the state to avoid the requirements of the Meyer-Milias-Brown Act ("MMBA"), and create an imbalance in the relationship between public employers and employees in the state.

The question of whether the *Boling* court applied the proper deference to PERB's statutory interpretation and PERB's findings of fact is therefore of substantial importance to IAFF members who serve and have served as fire fighters, paramedics, and emergency responders for public employers in California. The IAFF supports the position of the union real parties in interest that the *Boling* court did not apply the proper standards of review, and should have deferred to PERB's role as an expert, quasi-judicial administrative agency, including PERB's interpretation of the MMBA, its application of common law principles in construing the duties set forth in the MMBA, and its findings of fact.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. *See* Cal. Rules of Court, rule 8.200(c)(3).

For these reasons, the IAFF respectfully requests permission to file the accompanying brief as amicus curiae in this matter.

Dated: November 29, 2017

Respectfully submitted,

/s/ Thomas A. Woodley

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AMICUS CURIAE BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS IN SUPPORT OF UNION REAL PARTIES IN INTEREST

I. ISSUES PRESENTED

1. When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov. Code §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?

2. Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?

II. THE MMBA IS A BROAD STATUTE THAT GOVERNS LABOR RELATIONS BETWEEN PUBLIC EMPLOYERS AND EMPLOYEES IN THE STATE OF CALIFORNIA, AND § 3505 IS NOT LIMITED TO FORMAL ACTIONS BY A GOVERNING BODY

The duty to meet and confer under the Meyers-Milias-Brown Act ("MMBA") is not limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment. This is evidenced from a plain reading of the text of Cal. Gov. Code §§ 3405.5 and 3505, as well as the purpose of the MMBA.

A. The text of §§ 3405.5 and 3505 shows that the sections are not congruent

PERB applied the proper reading of § 3505, one consistent with the purpose of the MMBA. The text of the very statute contemplates that the governing body may have other representatives whose acts or proposals trigger the meet-and-confer requirement under Cal. Gov. Code § 3505. Consistent with the text, both California courts and PERB have determined that public agencies violated Cal. Gov. Code § 3505 in cases where there was no formal action proposed by a "governing body." *See, e.g., Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal. App. 4th 521, 540; *Holliday v. City of Modesto* (1991) 229 Cal. App. 3d 528, 540; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal. App. 3d 492; *City of Davis* (2016) PERB Decision No. 2494-M; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M. The case law could not be clearer that a proposed formal action by the governing body alone is not necessary to trigger the meet-and-confer requirement of § 3505, and that "other representatives" may trigger the requirement.

The *Boling* court's novel interpretation of the MMBA is therefore incorrect. Section 3504.5 does not alter or limit the meet-and-confer requirement of § 3505, such that the meet-and-confer requirement in § 3505 is only triggered when a government body takes formal action. Rather, the

plain text of each section demonstrates that the duties set forth in each section are not congruent.

Section 3504.5(a) states that:

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

Cal. Gov. Code § 3504.5(a) (emphasis added).

The purpose of § 3504.5 is clear: when a governing body of a public agency or designated commission proposes to adopt an "ordinance, rule, resolution, or regulation" that "directly relat[es] to matters within the scope of representation," it must give the employee organization notice and an opportunity to meet with the governing body or the board. *Id.* In other words, § 3504. imposes on a governing body the duty to give reasonable notice and an opportunity to meet whenever the governing body proposes to take legislative action.

In contrast, 3505 applies in additional circumstances and imposes separate or additional requirements. It states that

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

> body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

Cal. Gov. Code § 3505. By its terms, the requirements of § 3505 extend beyond governing bodies, and apply to its administrative officers or other representatives as designated by law or by the governing body. *Id.* This requirement is broader than the scope of § 3405.5, which only applies to governing bodies or designated commissions, and their formally proposed actions. Section 3505 imposes a good faith meet-and-confer requirement on **all** matters affecting "wages, hours, and other terms and conditions of employment." *Id.* This requirement is also broader than § 3405.5, which only applies to a governing body's legislative proposals.

In addition, under § 3505, employee organization presentations must be taken into account prior to any "determination of policy or course of action." *Id.* The meet and confer requirement is mutual, and either party can

initiate the request. *Id.* The *Boling* court ignored these critical substantive differences.

B. A broad reading of § 3505 is consistent with the purpose of the MMBA.

The purpose of the MMBA is

> to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies.

Cal. Gov. Code § 3500(a). Pursuant to and in furtherance of that purpose, the MMBA mandates a meet-and-confer process on public employers, including their representatives. Cal. Gov. Code § 3505 ("The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, **shall** meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations[.]") (emphasis added). "Though the process is not binding, it requires that the parties seriously 'attempt to resolve differences and reach a common ground.'" *Placentia Fire Fighters v. City of Placentia* (1976) 57

Cal. App. 3d 9, 25. The good faith requirement is mutual, and § 3505 has been described as the "centerpiece" of the MMBA. *Voters for Responsible Retirement v. Bd. of Supervisors*, (1994) 8 Cal. 4th 765, 780.

PERB's interpretation of §3505 is therefore the proper and correct interpretation. Such an interpretation promotes full communication between public employers and their employees. On the other hand, the *Boling* court's interpretation encourages public employers and employee organizations to ignore each other and circumvent the MMBA.

C. Upholding the Boling court's decision would wreak havoc on the state of labor relations in California

The *Boling* court's decision undermines the purpose of the MMBA. Indeed, the record before PERB showed that the Mayor took the position that he was acting as a private citizen expressly to avoid going through MMBA's meet-and-confer process. (XI-186:2997.) (*San Diego Municipal Employees v. City of San Diego*, (2015) PERB Decision No. 2464-M at 19). The unions repeatedly requested to meet-and-confer with the City, but the City denied or ignored all such requests. (XI-186:2985.)

Given the motive underlying the Mayor's stance, if the California Supreme Court upholds the *Boling* court's decision, the Court will ratify a public executive's express wish to avoid the MMBA's meet-and-confer requirement and show similar-minded executives and administrators how to do the same. Executives or administrators could claim to be acting as a

private citizen in sponsoring a citizen referendum, but all the while use their authority and power to promote and advocate for the referendum. If they are so enabled, this would erode the purpose of the MMBA and create an imbalance in the relationship between public employers and employees in the state.[1]

III. THE *BOLING* COURT SHOULD NOT HAVE APPLIED A *DE NOVO* STANDARD OF REVIEW; IT SHOULD HAVE APPLIED A "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO PERB'S INTERPRETATIONS OF LAW, AND A "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW TO PERB'S FINDINGS OF FACT

The *Boling* court applied a *de novo* standard and gave no deference to either PERB's findings of law or fact. This was the improper standard of review because the *Boling* court (1) failed to give the proper deference to PERB's interpretation of the MMBA, the very statute PERB is charged with enforcing; (2) failed to give the proper deference to PERB's interpretation of agency law as applied to the MMBA, and (3) failed to give the proper deference to PERB's findings of fact.

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[1] It is possible that affirming the *Boling* court's decision would also disrupt labor relations in that either employers or employee organizations may trigger the meet-and-confer requirement of § 3505; it stands to reason that, under such a decision, either employers or employee organizations could undercut or avoid § 3505's good faith meet-and-confer obligation by initiating a citizen referendum on matters relating to wages or conditions of work. Such an outcome would be disruptive to labor relations as well as the electoral process.

A. The Boling court was required to apply a clearly erroneous standard for PERB's analysis of the MMBA

First, California courts defer to PERB's interpretations of the statutes it is charged with enforcing, following PERB's interpretations unless PERB's interpretation is clearly erroneous. This is because

> PERB has a specialized and focused task -- to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by the [EERA]. As such, PERB is one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. The relationship of a reviewing court to an agency such as PERB, **whose primary responsibility is to determine the scope of the statutory duty to bargain** and resolve charges of unfair refusal to bargain, is generally one of deference and **PERB's interpretation will generally be followed unless it is clearly erroneous**.

Banning Teachers Assn. v. Public Employment Relations Bd. (1988) 44 Cal.3d 799, 804 (emphasis added).

Here, the Court of Appeal failed to apply a clearly erroneous standard to PERB's construction of Cal. Gov. Code § 3505, even though interpreting and applying the MMBA is part of PERB's very responsibility to determine the scope of the duty to bargain. PERB determined that, consistent with court precedent interpreting § 3505, the City of San Diego could not avoid the meet-and-confer requirement of § 3505 when its Mayor and other City employees initiated a voter referendum reforming the City's pension system. (XI-186:3038.) PERB considered judicial precedent and

interpreted § 3505 such that the section is not limited to a City's governing body, and is not confined to the governing body's formal or legislative policy actions. (XI-186:3013-3014.)

Rather than give any deference to this construction, the *Boling* court instead, *sua sponte*, applied a novel interpretation of the MMBA that rejected PERB's statutory construction. The *Boling* court's decision to apply a different standard was not warranted, as prior courts gave PERB deference under a clearly erroneous standard even when the case implicated principles of constitutional law. *See e.g., City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal. App. 5th 1271, 1287-1288 (Cal. 6th Dist. 2016) (applying a clearly erroneous standard in reviewing PERB's interpretation of the MMBA in a case that also implicated constitutional law and election law). As discussed, *supra*, PERB's interpretation was not clearly erroneous, and in fact, the *Boling* court's interpretation of the MMBA is incorrect; Cal. Gov. Code § 3504.5 does not limit the meet-and-confer rights found in Cal Gov. Code § 3505.

B. The Court of Appeal should also have deferred to PERB's interpretation of other laws or statutes that PERB used to interpret the MMBA.

Second, to the extent PERB needed to analyze other statutes or refer to the common law, it did so in the context of analyzing the statutory duty to meet-and-confer. Such analyses should be reviewed under the same deferential "clearly erroneous" standard.

Under § 3505, the plain text of the statute indicates that the meet and confer requirement does not just apply to government bodies; it also applies to "such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." Cal. Gov. Code § 3505. In interpreting this language, it should be expected that PERB might have to determine whether certain individuals constitute "other representatives" under the statute, and in doing so, PERB might have to consult or apply "external law." Such an application of law used to interpret a statute that PERB is charged to enforce should receive deference.

Banning sets forth the applicable standard of review in this case, and the California Supreme Court's decision in *Yamaha Corporation of America v. State Bd. of Equalization* (1998) 19 Cal 4th 1 does not change the standard. In *Yamaha*, the California Supreme Court stated that judicial deference to agency interpretations is "fundamentally situational." *Yamaha*, 19 Cal. 4th at 12. A high degree of deference is warranted where an agency "has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion" *Id.*

The *Yamaha* court explained that the "presumptive value" of the agency's views lies with the agency's "special familiarity with satellite legal and regulatory issues." *Id.* at 11. Notably, the *Yamaha* court did not

state that deference is only warranted for the specific statute that an agency is empowered to enforce or regulate; clearly, the agency's interpretation of a statute may be influenced by common law principles. *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal. App. 3d 767, 776, 778.

Deference is also appropriate where the agency "has consistently maintained the interpretation in question." *Id.* at 12. As the *Yamaha* court suggested and as subsequent courts determined, deference is more appropriate in decisions that are the result of adversarial proceedings. *Id.* at 14; *see Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal. 4th 508, 524-525. The task for the Court is to determine whether, in light of *Yamaha*'s articulation of the various standards of deference, the instant case before PERB was so outside of PERB's expertise of the MMBA, and the satellite legal and regulatory issues, that no deference was warranted.

The record in the instant case demonstrates that significant deference is warranted, because the issues are not outside of PERB's expertise. In the instant case, there was an underlying adversarial proceeding, after which PERB upheld an ALJ's construction of § 3505. PERB's interpretation is consistent with the precedent. *See, e.g., People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (analyzing the constitutional issues and applicability of §3505 to a charter amendment initiative that a governing body proposed).

PERB analyzed common law theories of agency, including applicable court and PERB precedent, in order to evaluate whether the Mayor of San Diego was acting as an agent of the City. (XI-186:2987-3005). After doing so, it rejected the City's exceptions to the ALJ's application of agency rules and affirmed the ALJ's findings of fact, including the finding that the Mayor was a representative of the City under the MMBA. (XI-186:3005).

PERB also noted that such inquiries are routine for labor boards. (XI-186:2987-2993.) ("labor boards adhere to common law principles of agency, and routinely apply [such] principles with reference to the broad, remedial purposes of the statutes they administer"). PERB's analysis of satellite issues and regulations should therefore be given substantial deference, and should be reviewed under the same "clearly erroneous" standard of review as PERB's interpretation of the MMBA under *Banning*.

C. The Court of Appeal should have applied a substantial evidence standard of review to PERB's findings of fact, including undisputed facts, concerning the Boling appeal

Until the *Boling* decision, California courts have followed Cal. Gov. Code § 3509.5, which provides that PERB's factual findings, including findings of ultimate fact, are conclusive if supported by substantial evidence in the record considered as a whole. Cal. Gov. Code § 3509.5. *See Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal. 3d 601, 617; *see e.g., Cal. State Employees' Ass'n v. Public*

Employment Relations Bd., (1996) 51 Cal. App. 4th 923, 933 (Cal. App. 2d Dist.) (applying a substantial evidence standard and overturning a PERB finding when finding was not supported by evidence and finding was contrary to PERB's own precedent). When the state legislature has mandated a specific evidentiary standard, it is not up to reviewing courts to disregard such standards. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, (1979) 24 Cal. 3d 335, 340-341.

Had the Court of Appeal applied the proper standard to PERB's factual findings, including PERB's ultimate finding that the mayor was acting as representative of the City of San Diego under statutory and common law principles, it would have found that PERB's findings were supported by substantial evidence; there is ample evidence in the record to support PERB's findings.

In its decision, PERB set forth key facts that were not in dispute: (1) the Mayor of San Diego serves as the City's lead negotiator in the City's collective bargaining matters; (2) the Mayor makes initial policy determinations with respect to what positions the City will take in collective bargaining; (3) Mayor Sanders and Council President Pro Tem Kevin Faulconer and their staff used City e-mail accounts and the City website to publicize and solicit support for the proposed ballot initiative; (4) the City benefited financially from the passage of the Proposition; and (5) Mayor Sanders refused repeated requests by the Unions to meet and

confer over the initiative, and the City Council knew and acquiesced to his rejection of the meet and confer requests. (XI-186:2983-2985.)

PERB specifically pointed out that "the Mayor, staff, and City officials appeared at press conferences and other public events, used City staff, e-mail accounts, websites and other City resources, as well as the prestige of their offices, to publicize and solicit support for an initiative aimed at altering the pension benefits of City employees." (XI-186:2989.) PERB cited specific City employees who understood that there was an expectation that the Mayor's staff would support his pension reform efforts. *Id.* The Mayor even identified pension reform as a principal goal for his term in his State of the City address to the City Council. (XI-186:2992.)

PERB used these facts and others to find that the Mayor was the City's statutory agent and common law agent, which informed its legal reasoning and interpretation of the MMBA:

> Given the extent to which the Mayor, his staff, and other City officials used the prestige of their office to promote Proposition B, and given the City's legal responsibility to meet and confer and its supervisory responsibility over its bargaining representatives, the MMBA's meet-and-confer provisions must be construed to require the City to provide notice and opportunity to bargain . . . .

(XI-186:2992.) The facts clearly support such a determination, and the Court of Appeal should have deferred to PERB's findings of fact under a substantial evidence standard of review, and should have deferred to PERB's legal reasoning under a clearly erroneous standard of review.

IV. CONCLUSION

For the foregoing reasons, the IAFF supports the position of the union real parties in interest, and respectfully requests that this Court reverse the Court of Appeal's decision and enforce PERB's decision.

Dated: November 29, 2017

Respectfully submitted,

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

I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, has a typeface of 13 points, and based upon the word count feature contained in the word processing program used to produce this brief (Microsoft Word), contains 3994 words.

Dated: November 29, 2017

Thomas A. Woodley

Thomas A. Woodley

PROOF OF SERVICE

I declare that I am a citizen of the United States and employed in city of Washington, District of Columbia. I am over the age of eighteen (18) years and not a party to this action. My business address is 1101 Vermont Avenue NW, Suite 1000, Washington, DC 20005. I certify that on November 29, 2017, I served the following document(s):

AMICUS CURIAE BRIEF

Re: Catherine A. Boling, *et al,* and City of San Diego v. PERB Supreme Court Case No. S24203

By U.S. Mail to the parties in this action, as addressed below, in accordance with California Code of Civil Procedure §1013(a), by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail. At Woodley & McGillivary LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Washington, DC.

I certify under penalty of perjury that the above is true and correct. Executed at Washington, D.C., on November 29, 2017

/s/Shayn L. Stephens

Shayn L. Stephens

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