IN THE
SUPREME COURT OF CALIFORNIA

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

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

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

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

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

REPY BRIEF ON THE MERITS BY UNION REAL PARTIES IN INTEREST

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Federal Cases

Califoria Administrative Decisions

State Statutes

TABLE OF AUTHORITIES
(continued)

Page

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. PERB's Agency Determinations Were Within Its Authority

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

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

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

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

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

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

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

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

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

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

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

deference under *Banning*.

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

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

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

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

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

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

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

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

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

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

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