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IN THE
SUPREME COURT OF CALIFORNIA

Case No.: S_____
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

2nd

PETITION FOR REVIEW BY UNION REAL PARTIES IN INTEREST

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ISSUES PRESENTED

The State's Meyers-Milias-Brown Act (MMBA) has fostered labor peace for nearly 50 years by requiring communication, good faith meet-and-confer and, where achievable, agreement on all subjects within the scope of representation. The Fourth Appellate District's Opinion[1] now annuls PERB's Decision with directions to dismiss Union Real Parties' unfair practice complaints based on its *de novo* re-interpretation of the MMBA in a manner sharply at odds with longstanding court and administrative precedents. The Opinion rejects the deferential "clearly erroneous" standard of review which this Court established nearly three decades ago. In so doing, the Opinion frustrates the MMBA's statewide goals and undermines the role entrusted to PERB to apply its administrative expertise to achieve uniformity when enforcing the state's *eight* labor relations laws, including the MMBA.

Review is needed to provide public agencies and hundreds of thousands of public employees whose rights and duties are defined by the MMBA with definitive answers to the questions and doubts the Opinion has raised:

1. May a public agency's administrative officers act outside the MMBA to change matters within the scope of representation whether by citizens' initiative or otherwise?

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[1] A copy of the Opinion is attached as Appendix A.

2. Do the MMBA's good faith meet-and-confer obligations apply to *public agencies* under section 3505 or are they limited to *governing bodies* under section 3504.5?

3. Are the MMBA's good faith meet-and-confer obligations under sections 3504.5 and 3505 displaced entirely whenever citizens propose to change terms and conditions for public employees by local initiative?

4. Should the deferential "clearly erroneous" standard of review for PERB's decisions interpreting and applying the state's public sector labor relations laws be replaced with a *de novo* standard of review?

STATEMENT OF MATERIAL FACTS

City of San Diego employees and their recognized employee organizations, Union Real Parties, demonstrated their continuous commitment to the MMBA's good faith meet-and-confer obligations by reaching historic agreements to change pensions, retiree health benefits, and other forms of employee compensation – all designed to improve the City's budget. When announcing an end to the City's decade-long structural budget deficit, the City's Mayor gave credit, in part, to the successes of meet-and-confer which he led as the City's highest-ranking administrative officer and its "lead negotiator" under the MMBA. (AR:XX:5269-70; 5272-73; 5278-79; XIII: 3467:2-3468:6; XIV:3524:20-27.) [2]

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[2] All evidentiary citations are to the Administrative Record (AR).

The Mayor summed up the nature of his City Charter-mandated role during a press conference outside City Hall with representatives of City's recognized employee organizations to announce a *tentative agreement* on a new "hybrid" defined benefit/defined contribution pension plan for employees hired after July 1, 2009. The new plan was designed to achieve the Mayor's policy objectives to de-incentivize early retirements, shift risk away from taxpayers, and reduce City's pension costs. (XIV:3628:18-3630:4; XX-Ex.143:5354-56.)

> We are all assembled here today to announce that the unions and I as the City's lead negotiator have arrived at a *tentative agreement* regarding pension reform. [...] I think this is a very fair compromise for both taxpayers and future City employees. [...] [I] *would urge the City Council to pass it unanimously once it's before them.* (XXI:5519[video clip].)

The City Council approved this tentative agreement and it was included in a Council-approved Memorandum of Understanding (MOU), where the City also committed to "meet and confer if the City proposes to introduce ballot measures, which relate to or would impact wages, hours, working conditions or employee-employer relations." (XII:3183:6-12; 3184:3-3185:17; XIV: 3518:9-3519:1; XIX:4917.)

While this MOU remained in effect, and after having conferred with his staff in an effort to "rethink City government," the Mayor decided on a "bold move" to eliminate defined benefit pensions for all non-safety new hires and replace them with a 401(k)-style, defined contribution plan. He announced his

decision in November 2010 on the City's website, in a press release, and during a press conference from his offices at City Hall – where he was joined by the City's Chief Operating Officer and the City Attorney. (Op. 7-8 & fn. 3-4; XVIII:4742-43; 4745-47.) He promised to craft the ballot initiative language, lead the signature-gathering efforts, and place an initiative on the ballot. (Op. 7-8.) Rather than engage in a good faith meet-and-confer process with City's recognized employee organizations, the Mayor decided to achieve this change by means of a citizens' initiative. The Mayor explained to the media:

> [Y]ou do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point." (Op. 8, fn. 2.)

Following his announcement, the Mayor "continued developing and publicizing his pension reform proposal" and was "aided" in this effort by members of his Mayoral Staff. (Op. 9 & fn. 6.) When speaking in public about his ballot initiative, [he] was identified as "Mayor." (Op. 9.) The Mayor formed a committee (San Diegans for Pension Reform [SDPR]) to "raise money to support his proposed initiative." (Op. 9.)

The Mayor also officially confirmed his pension-reform-by-initiative intentions when delivering his City Charter-mandated "State of the City Address" to the City Council – announcing that he, a Councilmember, and the City Attorney – "acting in the public interest but as private citizens, will soon

bring to voters an initiative to enact a 401(k)-style plan." (Op. 9 & fn. 5; XIV 3544:8-3545:1; XIX:4832.) The Mayor's Office issued a press release to reiterate these intentions while promising that "the ballot initiative next year will build on [his] earlier pension reforms which are projected to save $400 million over the next 30 years." (XVIII-Ex. 38:4816.)

Over the ensuing months, the Mayor and his staff pursued the Mayor's objectives to transform City pensions by means of initiative. *No* citizens' initiative was pending and no notice of intent to circulate a petition had been filed. "Negotiations" eventually ensued between the Mayor, his key policy advisors and City's Chief Operating Officer, on the one hand, and members of the business community (including the Lincoln Club and the San Diego County Taxpayers Association), on the other, due to a competing proposal from City Councilmember DeMaio who sought to eliminate defined benefit pensions for *all* new hires, with no exclusion of safety employees as the Mayor proposed. (Op. 10-11 & fn. 8.) A "compromise" initiative resulted which "melded elements" of both the Mayor's and Councilmember DeMaio's proposals to become the "Comprehensive Pension Reform Initiative" ("CPRI"). (Op. 11 & fn. 8.) A "Notice of Intent to Circulate Petition" was filed on April 4, 2011, to coincide with a press conference which the Mayor led. Standing at a podium bedecked with a "Pension Reform Now" sign, the Mayor announced: "We've made progress over the last few years in reforming

our (pension) system. Today we're taking the next step and let me tell you it's a big one."[3] (Op. 12-13 & fn. 12-13; XIX:5006-07, 5013-21, 5028-29 ["Pension Reformers Unite Behind Compromise Plan"] and XXI:5515 [KUSI videoclip].)

The Mayor "supported the campaign to gather signatures and promote the CPRI; he "touted its importance by providing interviews and quotes to the media" and by including it when speaking before various groups; he also approved issuance of a "message from Mayor Jerry Sanders" for circulation to members of the San Diego Regional Chamber of Commerce that solicited financial and other support for the signature gathering effort." (Op. 13-14 & fn. 13.) Members of the Mayor's staff "facilitated his promoting of the CPRI." (Op. 13-14, fn. 13.)

While the initiative petition was circulating but had not yet qualified for the ballot, Union Real Party San Diego Municipal Employees Association (MEA), the largest of the City's recognized employee organizations, made a series of written requests to the Mayor and the City Council seeking to meet-and-confer regarding the subject matter of *pension reform*. (Op. 14-15.[4]) On July 15, 2011, MEA wrote to the Mayor:

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[3] The "Notice of Intent" was signed and filed by three proponents who are the Boling et al. Petitioners in this consolidated case.

[4] The Opinion describes MEA's initial "meet-and-confer" demands to the Mayor as demands to meet and confer "over the CPRI" or "concerning the CPRI." (Op. 14.)(*Cf.* XIX:5109-10.)

> The contents of your Ballot Initiative clearly fall within the scope of MEA's representation [...]. Indeed, some of the **subject matter** [...] directly relates to matters on which MEA and the City have recently bargained and [...] reached agreements memorialized in MEA's MOU, Council Resolutions and Ordinances. [...] Please advise how you propose to proceed with this mandatory meet and confer process and when. **In preparation, and unless advised to the contrary, MEA will treat the Ballot Initiative, as presently written, as your opening proposal on the covered subject matter.** (XIX:5109-10, emphasis added.)

Thereafter, and to no avail, persistent requests were directed to both the Mayor (as City's administrative officer and "lead negotiator") and to the City Council (as City's *governing body*) for either or both to act on the *City's behalf* to cure the failure to bargain by meeting-and-conferring *over pension reform*. (XIX:5112; XX:5123-6, 5142-9, 5157-62.) MEA asserted that the City was obligated to meet and confer because the Mayor was promoting the initiative in his capacity as *Mayor* and hence "has clearly made a determination of policy for this City related to mandatory subjects of bargaining," and was "using the pretense that [the CPRI] is a 'citizens' initiative' when it is, in fact, this *City's* initiative" as a deliberate tactic to "dodge the City's obligations under the MMBA." (Op. 15.) Through the City Attorney, *the City* flatly refused these and all subsequent demands by MEA (as well as other Union Real Parties) on the ground that the *City* had no meet-and-confer obligations because "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot." (*Ibid.*)

The City Council adopted a resolution on December 5, 2011, stating its intent to place the CPRI on the June 2012 ballot. (XVI:4067-69.) After MEA's unfair practice charge had been filed on January 20, 2012, the City Council enacted an ordinance on January 30, 2012 (XVI:4071-89), placing the CPRI on the June 2012 ballot as "Proposition B." (Op. 15-16.)

STATEMENT OF THE CASE

I. PERB Rejected City's Contention That Its Mayor Was Acting As A "Private Citizen" and Not As City's Statutory Agent Under MMBA Section 3505

PERB's ALJ decided various City Motions and conducted a 4-day evidentiary hearing in July 2012, followed by post-hearing briefs. The City defended against these Unfair Practice Complaints by asserting that its Mayor had exercised his Constitutional right as a "private citizen" to pursue and promote a pension-reform initiative to change City employee pensions and that the *City* had no MMBA obligations related to it or its subject matter.

The ALJ's Proposed Decision (X:2613-2682) concluded that, under the circumstances established by the record, the City's Mayor "was not legally privileged to pursue implementation of [pension reform] as a private citizen," and that, because of (his) "status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applie[d] to the City because it has ratified the policy decision resulting in the unilateral change." (Op. 18-19.)

The City filed a Statement of Exceptions. (X:2683-2724.) The three official ballot proponents (Boling Petitioners in this Consolidated case) were granted permission to file an informational brief as non-party interested individuals. (X:2730-2775, 2894-97; XI:2898-2927.) Unions responded to both filings. (X:2776-2782, 2817-2881; XI:2928-2957.)

The Board's 61-page Decision adopted the ALJ's findings of fact (with two exceptions) after concluding that these findings are supported by the record. (XI:2978-3126.) The Board affirmed the ALJ's Proposed Decision based on "well-reasoned" legal conclusions that the City violated the good faith meet-and-confer obligations in MMBA section 3505 and PERB Regulation 32603(c) and thereby interfered with City employees' rights. However, acknowledging that only *courts* have the power to invalidate voter-approved initiatives, the Board modified and narrowed the ALJ's proposed relief for the City's unilateral change in pensions by ordering traditional restorative and "make-whole" compensatory remedies while leaving the CPRI/Prop B Charter amendment in effect. (Op. 19-21 & fn. 20.)

II. Petitioner City Argued That the Mayor's First Amendment Rights Preempt the MMBA's Meet-and-Confer Process and That He and His Fellow Citizens Have An Absolute Right To Change Terms and Conditions By Local Initiative Without Implicating the City's Duties Under the MMBA

The Boling proponents and the City filed Petitions for Writ of Extraordinary Relief on the same day. The City also named the three Boling

proponents as real parties in interest on its Petition. Both the City and the Boling Petitioners filed an Opening Brief in support of its/their Petition; the Boling Petitioners filed a second brief in support of the City's Petition; and the City filed a Joinder in the Boling Petitioners' Opening Brief.

The City argued that PERB's Decision violates the federal and state constitutions because the MMBA's meet-and-confer process is preempted by the Mayor's First Amendment right to engage in direct democracy by initiative, like any other citizen, and because his and other citizens' constitutional right to initiative is absolute. The Boling Petitioners argued that a citizens' initiative is protected political speech which a governing body cannot modify and the MMBA cannot restrict.

III. The Court of Appeal Consolidated the Two Petitions and Annulled PERB's Decision

On April 10, 2017, the Court of Appeal issued an order consolidating the two Petitions for decision and filed its Opinion the next day. The Opinion denies PERB's motion to dismiss the three official proponents (Boling Petitioners) as real parties in interest on the City's writ petition, finding they "have a sufficiently direct interest to be named as real parties in interest in an action which is directed at the evisceration of the ballot measure for which they were the official proponents." (Op. 22.) The Opinion annuls PERB's Decision and directs it to dismiss Union Real Parties' unfair practice complaints, and, in light of this disposition, concludes that PERB's motion to

dismiss the Boling Petitioners' separate petition and the additional arguments raised therein are moot and need not be addressed. (Op. 21-22.)

IV. Boling Petitioners Served A Motion Seeking $635,000 In "Private Attorney General" Fees Against PERB and Union Real Parties

On May 10, 2017, the Boling Petitioners gave notice that they had filed a Motion under C. C. P. section 1021.5, asking the Court of Appeal to award them $635,000 in "private attorney general" fees against PERB and the four Union Real Parties. On May 12, 2017, the Clerk issued a notice returning the Boling Petitioners' Motion and Request for Judicial Notice unfiled because the court "no longer has jurisdiction in this matter."

DENIAL OF REHEARING

Petitioner City bore the burden to demonstrate error when seeking extraordinary relief from PERB's Decision under Government Code section 3509.5. City agreed in its opening brief that the "clearly erroneous" standard of review was applicable to PERB's interpretation and application of the MMBA, and did not raise or urge the novel interpretation of the MMBA which the Opinion adopts to annul PERB's Decision.

Although the court issued a "focus" letter 8 days before oral argument posing the question whether the *Yamaha* (*de novo*) or *Banning* (clearly erroneous) standard of review should apply, Respondents were not given the opportunity to present their views by supplemental briefing. Thus the Opinion decides these petitions adverse to Respondents on grounds which neither the

City nor the Boling Petitioners raised, which PERB never addressed during its administrative proceedings, and which the parties never briefed during writ review. Nevertheless, their timely-filed petitions for rehearing on this basis under Government Code section 68081, were promptly denied without comment.[5]

REVIEW IS NEEDED UNDER CRC RULE 8.500(b)(1) TO SETTLE CRITICAL QUESTIONS OF LAW THREATENING THE VITALITY OF THE MMBA AND TO RE-ESTABLISH PERB'S CENTRAL ROLE IN ACHIEVING UNIFORM ENFORCEMENT OF ALL EIGHT LABOR RELATIONS LAWS IN CALIFORNIA

The Opinion is a wholesale rejection of PERB's legal conclusions when interpreting and applying the MMBA to a record of largely undisputed facts in a manner consistent with both the text of the MMBA and case precedent. However, when invoking a *de novo* standard of review to "reject (PERB's) reading of the statutory scheme," (Op. 47, fn. 37), the Opinion offers no analysis to explain why PERB's construction is wrong nor any analysis to support the new construction it announces regarding sections 3504.5 and 3505. There is no mention of the MMBA statutory scheme as a whole, its legislative history or how the construction being announced will advance rather than frustrate the legislative objectives set forth in MMBA section 3500. (*Cf. San Diego Housing Com. v. PERB* (2016) 246 Cal.App. 4th 1, 8 [settled canons of statutory construction explained].) Nor does the Opinion conduct any review

[5] A copy of the Order Denying Rehearing is attached as Appendix B.

of prior court and administrative decisions which support PERB's "reading of the statutory scheme."

Moreover, the Opinion does more than defeat the MMBA rights guaranteed to thousands of public employees and Union Real Parties in the City of San Diego. It undermines nearly 50 years of consistent court and administrative precedent assuring that all affected parties in hundreds of MMBA-governed jurisdictions across the State have both clarity and certainty regarding their duties and rights. Only a grant of review can prevent this Opinion from spawning a range of appellate responses across the state which ultimately threaten the vitality of the MMBA in guaranteeing uniform duties and rights without regard to local politics or economics. Indeed, it is not too much to say that only a grant of review will be effective in preventing the City of San Diego's MMBA-opt-out scheme from becoming a court-sanctioned playbook for other MMBA-governed jurisdictions in California who seek to make small or big changes in negotiable subjects without a good faith meet-and-confer process.

I. The MMBA Will Be Gravely Weakened If A Public Agency's Administrative Officers Are Free to Act Outside the MMBA to Change Negotiable Subjects – Whether By Leading A Citizens' Initiative Or Referendum Or Otherwise

By announcing a new interpretation of MMBA sections 3504.5 and 3505 on *de novo* review, the Opinion rejects PERB's determination that the *City* violated the MMBA's meet-and-confer obligations based on the Mayor's

conduct as an administrative officer and "statutory agent" under section 3505. Instead, the Opinion writes the Mayor entirely out of the unfair practice narrative by limiting the MMBA's meet-and-confer obligations to *governing bodies* and permitting a *public agency's* "administrative officers" to act outside the MMBA to change matters within the scope of representation.

However, if a public agency's meet-and-confer obligations exclude its administrative officers and are confined instead to its *governing body* – and then only when the governing body takes one of the affirmative legislative actions defined in section 3504.5, as the Opinion declares – the MMBA's legislative goals in fostering labor peace will not only be undermined but the potential for labor discord and rancor will increase exponentially.

The Opinion's unprecedented interpretation narrowing the MMBA invites a host of actions to change terms and conditions outside the MMBA. Governing bodies in many public agencies, following the City of San Diego opt-out model, will likewise choose to be spared the difficult policy and economic decisions often arising during good faith collective bargaining. Since the agency's administrative officers are free to operate outside the MMBA, as the Opinion declares, the governing body likewise has its own option to "make a policy determination" outside the MMBA by simply remaining on the sidelines while the agency's administrative officers use their position, power, and the agency's resources to lead a citizens' initiative or

referendum changing terms and conditions of employment for the agency's benefit or budget. This new freedom to act outside the MMBA – which the Opinion bestows upon all administrative officers in every public agency otherwise governed by the MMBA – will affect routine day-to-day administrative matters which can profoundly impact the quality of public employees' work lives – schedules, shift times, and work rules – as well as matters at the very core of the compensation and employment bargain as occurred in this case.

A. A *Public Agency's* Good Faith Meet-and-Confer Obligations Must Continue To Be Defined By Section 3505 and *Not Limited* To Section 3504.5 As the Opinion Holds

MMBA section 3501, subdivision (c), defines a covered "public agency" to include municipal corporations such as the City of San Diego. (City Charter, art. I, § 1.) The *City* is thus the entity governed by the MMBA. Section 3505 states, in pertinent part:

> The governing body of a public agency [...] 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.

In *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, this Court stated that it is section 3505 which "requires *public employers* to 'meet and confer in good faith [with union

representatives] regarding wages, hours, and other terms and conditions of employment." (*Id.* at 922, emphasis added.)

Before *County of Los Angeles*, this Court had recognized section 3505 as the centerpiece of the MMBA in cases spanning nearly four decades. (*Glendale City Employees Assn. v. Glendale* (1975) 15 Cal.3d 328, 336; *Los Angeles County Civil Service Comm. v. Super. Ct.* (1978) 23 Cal.3d 55, 61-61; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 596-597; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 536-537; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

The Fourth Appellate District itself relied on this Court's precedent when recently explaining section 3505 in *San Diego Housing Commission v. PERB* (2016) 246 Cal.App.4th 1, 8-9:

> The (MMB)Act imposes a duty on a public agency to "meet and confer in good faith" with recognized unions, "regarding wages, hours, and other terms and conditions of employment . . . prior to arriving at a determination of policy or course of action." (§3505.) The duty to bargain applies to a decision "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls." (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259, 272.) [...] Thus, the duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU [...].

In *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, this Court did not treat section 3504.5 as defining who "owes" the

MMBA's meet-and-confer obligations while limiting section 3505 to defining how the process should be accomplished and by whom when a section 3504.5 event arises. This Court read sections 3504.5 and 3505 *together* to define the MMBA's meet-and-confer obligations:

> The MMBA has two stated purposes: (1) to promote full communication between public employers and employees, and (2) to improve personnel management and employer-employee relations. (§3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§3502), and obligates employers to bargain with employee representatives about matters that fall within the "scope of representation" (§§3504.5, 3505). Specifically, section 3504.5 provides that *public agencies* must give employee organizations "reasonable written notice" of any proposed "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation"; section 3505 provides that representatives of *public agencies* and employee organizations "shall have the mutual obligation personally to meet and confer promptly upon request by either party . . . and to endeavor to reach agreement on matters within the scope of presentation prior to the adoption by the public agency of its final budget for the ensuing year." (*Id.* at p. 657, emphasis added, original emphasis omitted.)

This functional reading of the statute's bargaining obligations as applicable to public agencies as a whole, not just their governing bodies, is borne out by a multitude of cases in which public agencies have been found in violation of section 3505's duty to meet and confer in the absence of any formal action by the governing body. This includes cases decided by the courts,[6] and cases

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[6] See, e.g., *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1011 [city police chief unilaterally changed practice relating to officer reports regarding the use of force]; *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147