

**IN THE SUPREME COURT
STATE OF CALIFORNIA**

**CATHERINE A. BOLING; T.J. ZANE; AND
STEPHEN B. WILLIAMS,**

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

**SUPREME COURT
FILED**

MAY 22 2017

Jorge Navarrete Clerk

Deputy

**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.

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

3rd **PETITION FOR REVIEW**

J. FELIX DE LA TORRE, General Counsel, Bar No. 204282
WENDI L. ROSS, Deputy General Counsel, Bar No. 141030
JOSEPH W. ECKHART, Board Counsel, Bar No. 284628
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377
E-mail: PERBLitigation@perb.ca.gov

Attorneys for Respondent PUBLIC EMPLOYMENT RELATIONS BOARD

**IN THE SUPREME COURT
STATE OF CALIFORNIA**

**CATHERINE A. BOLING; T.J. ZANE; AND
STEPHEN B. WILLIAMS,**

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

**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.

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

PETITION FOR REVIEW

J. FELIX DE LA TORRE, General Counsel, Bar No. 204282
WENDI L. ROSS, Deputy General Counsel, Bar No. 141030
JOSEPH W. ECKHART, Board Counsel, Bar No. 284628
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377
E-mail: PERBLitigation@perb.ca.gov

Attorneys for Respondent PUBLIC EMPLOYMENT RELATIONS BOARD

TABLE OF CONTENTS

I.	ISSUES PRESENTED	9
II.	WHY REVIEW SHOULD BE GRANTED	10
III.	FACTUAL AND PROCEDURAL SUMMARY	14
	A. The Parties.....	14
	B. The Underlying Facts	16
	1. Background.....	16
	2. City Attorney Aguirre’s Legal Opinion about “Pension Measure Questions”	17
	3. The Mayor’s Pension Reform Proposal	18
	4. The Compromise Between Mayor Sanders and Councilmember DeMaio.....	20
	5. 2011 Contract Negotiations	23
	6. The Unions’ Demands to Meet and Confer over the CPRI	23
	7. Passage of Proposition B	24
	C. Procedural History.....	25
	1. Court Proceedings.....	26
	2. Administrative Hearing and ALJ Decision	27
	3. Board Decision	28
	4. Proceedings in the Court of Appeal	29
IV.	LEGAL DISCUSSION	32
	A. The Court of Appeal’s application of a de novo standard of review to the Board’s legal determinations and factual findings presents an important question of law and directly conflicts with existing precedent.....	32

1.	Until now, the courts of appeal have uniformly followed this Court in applying the clearly erroneous standard of review to PERB's interpretation of the statutes it administers.	33
2.	Review should be granted to secure uniformity of decision regarding the level of deference to be applied to the Board's factual findings.....	36
B.	The Court of Appeal's interpretation of sections 3504.5 and 3505 raises an important question regarding the scope of the MMBA's duty to meet and confer.	39
1.	The Court of Appeal's interpretation upends the long-held understanding of the MMBA evidenced in nearly five decades of judicial and administrative decisions.	41
2.	Resolution of this important question by the Court will provide critical guidance to PERB and the thousands of local public agencies and their employees who are subject to the MMBA.	43
V.	CONCLUSION	45
	EXHIBIT A - Published Opinion of the Court of Appeal	
	EXHIBIT B - Order Denying Rehearing	

TABLE OF AUTHORITIES

CALIFORNIA CASE LAW

<i>Banning Teachers Assn. v. Public Employment Relations Bd.</i> (1988) 44 Cal.3d 799	<i>passim</i>
<i>Butte View Farms v. Agricultural Labor Relations Bd.</i> (1979) 95 Cal.App.3d 961	38
<i>City of Palo Alto v. Public Employment Relations Bd.</i> (2016) 5 Cal.App.5th 1271	33
<i>Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.</i> (2005) 35 Cal.4th 1072.....	15, 35
<i>Cole v. City of Oakland Residential Rent Arbitration Bd.</i> (1992) 3 Cal.App.4th 693	43
<i>County of Los Angeles v. Los Angeles County Employee Relations Com.</i> (2013) 56 Cal.4th 905	33, 44
<i>Cumero v. Public Employment Relations Bd.</i> (1989) 49 Cal.3d 575	12, 36
<i>Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.</i> (1975) 45 Cal.App.3d 116	42
<i>Hoechst Celanese Corporation v. Franchise Tax Bd.</i> (2001) 25 Cal.4th 508.....	34
<i>Holliday v. City of Modesto</i> (1991) 229 Cal.App.3d 528	42
<i>Huntington Beach Police Officers' Assn. v. City of Huntington Beach</i> (1976) 58 Cal.App.3d 492	42
<i>Indio Police Command Unit Assn. v. City of Indio</i> (2014) 230 Cal.App.4th 521	42
<i>Inglewood Teachers Assn. v. Public Employment Relations Bd.</i> (1991) 227 Cal.App.3d 767	<i>passim</i>

<i>Lantz v. Workers' Compensation Appeals Bd.</i> (2014) 226 Cal.App.4th 298	37
<i>Long Beach Police Officer Assn. v. City of Long Beach</i> (1984) 156 Cal.App.3d 996	42
<i>Los Angeles County Civil Service Com. v. Super. Ct.</i> (1978) 23 Cal.3d 55	44
<i>Los Angeles County Employees Assn., Local 660 v. County of Los Angeles</i> (1973) 33 Cal.App.3d 1.....	43
<i>Moreno Valley Unified School Dist. v. Public Employment Relations Bd.</i> (1983) 142 Cal.App.3d 191	37
<i>Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.</i> (1989) 210 Cal.App.3d 178	38
<i>Orange County Water Dist. v. Public Employment Relations Bd.</i> (2017) 8 Cal.App.5th 52	33
<i>People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach</i> (1984) 36 Cal.3d 591	11, 18, 44
<i>People v. Childs</i> (2013) 220 Cal.App.4th 1079	40
<i>Regents of the Univ. of Cal. v. Public Employment Relations Bd.</i> (1986) 41 Cal.3d 601	37, 38
<i>San Diego Housing Com. v. Public Employment Relations Bd.</i> (2016) 246 Cal.App.4th 1	33, 44
<i>San Diego Mun. Employees Assn. v. Super. Ct.</i> (2012) 206 Cal.App.4th 1447	26, 36
<i>San Diego Teachers Assn. v. Super. Ct.</i> (1979) 24 Cal.3d 1	13, 33
<i>San Lorenzo Education Assn. v. Wilson</i> (1982) 32 Cal.3d 841	33
<i>San Mateo City School Dist. v. Public Employment Relations Bd.</i> (1983) 33 Cal.3d 850	33

<i>Solano County Employees' Assn. v. County of Solano</i> (1982) 136 Cal.App.3d 256	42
<i>Telish v. California State Personnel Bd.</i> (2015) 234 Cal.App.4th 1479	38
<i>Voters for Responsible Retirement v. Bd. of Supervisors</i> (1994) 8 Cal.4th 765.....	14, 44
<i>Yamaha Corporation of America v. State Bd. of Equalization</i> (1998) 19 Cal.4th 1.....	12, 30, 33

FEDERAL STATUTES

29 U.S.C. § 151 et seq.	36
------------------------------	----

CALIFORNIA STATUTES

Gov. Code, § 3500 et seq.....	9
Gov. Code, § 3501, subd. (b)	15
Gov. Code, § 3501, subd. (c)	15, 43
Gov. Code, § 3504.5	<i>passim</i>
Gov. Code, § 3504.5, subd. (a)	40, 41
Gov. Code, § 3505	<i>passim</i>
Gov. Code, § 3509, subd. (b)	15, 26
Gov. Code, § 3509.5	38, 39
Gov. Code, § 3509.5, subd. (b)	<i>passim</i>
Gov. Code, § 3520, subd. (b)	32
Gov. Code, § 3520, subd. (c)	37
Gov. Code, § 3540 et seq.	34
Gov. Code, § 3542 , subd. (b)	32
Gov. Code, § 3542 , subd. (c)	37
Gov. Code, § 3564, subd. (c)	32, 37

Gov. Code, § 68081	31
Gov. Code, § 110000 et seq.	15
Lab. Code, § 1141 et seq.....	35

CALIFORNIA ADMINISTRATIVE DECISIONS

<i>City of Davis</i>	
(2016) PERB Decision No. 2494-M.....	42
<i>City of Riverside</i>	
(2009) PERB Decision No. 2027-M.....	42
<i>City of San Diego (Office of the City Attorney)</i>	
(2010) PERB Decision No. 2103-M.....	42
<i>County of Contra Costa</i>	
(2014) PERB Order No. Ad-410-M	44
<i>County of Riverside</i>	
(2012) PERB Decision No. 2233-M.....	42
<i>County of San Bernardino (Office of the Public Defender)</i>	
(2015) PERB Decision No. 2423-M.....	42
<i>Omnitrans</i>	
(2009) PERB Decision No. 2030-M.....	42
<i>Omnitrans</i>	
(2010) PERB Decision No. 2143-M.....	42

REGULATIONS

Cal. Code Regs., tit. 8, § 32016, subd. (b)	16
Cal. Code Regs., tit. 8, § 32603, subd. (c).....	27

OTHER AUTHORITIES

Stats.1968, ch. 1390, p. 2728	42
Stats.2012, ch. 45, section 3.....	16

CALIFORNIA SECONDARY SOURCES

Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1999) 50 Hastings L.J. 717.....41

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Respondent Public Employment Relations Board (PERB or Board) respectfully petitions this Court for review of the published opinion of the Court of Appeal, Fourth Appellate District, Division One, in *Boling v. Public Employment Relations Board* (April 11, 2017, D069626 & D069630) 5 Cal.App.5th 853 (attached hereto and cited herein as Exhibit A).

I. ISSUES PRESENTED

1. When a final decision of the Public Employment Relations Board (PERB or Board) is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the Meyers-Milias-Brown Act (MMBA),¹ are the Board's interpretation of the statutes it administers and its findings of fact subject to de novo review?

2. Is a public agency's duty to "meet and confer" under section 3505 of the MMBA limited only to those situations when its governing body proposes to take formal action affecting wages, hours, or other terms and conditions of employment pursuant to section 3504.5?

¹ The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code, unless otherwise noted.

II. WHY REVIEW SHOULD BE GRANTED

Review is necessary in this case to secure uniformity of decision and to settle important questions of law regarding the appropriate standards of review of the Board's final decisions and a public agency's duty to bargain under the MMBA. This Court has long recognized that "[t]he 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." (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*)). The Court of Appeal below failed to heed this instruction, and proceeded to announce its own interpretation of the statutory duty to bargain. In doing so, it issued a decision with far-reaching consequences for the MMBA and the other public sector collective bargaining statutes under the Board's jurisdiction.

In the administrative decision under review, the Board concluded that the City of San Diego (City) violated its duty to bargain under the MMBA as a result of the actions of its Mayor, Jerry Sanders, who helped draft and promote a citizens' initiative to change pension benefits for City employees. The Mayor is the City's chief executive and its lead labor negotiator pursuant to the City Charter. He admitted the citizens' initiative in this case was designed to avoid the City's duty under *People*

ex rel. Seal Beach Police Officers Association v. City of Seal Beach (1984) 36 Cal.3d 591, 602 (*City of Seal Beach*) to meet and confer with the City's recognized employee organizations before proposing to amend the City Charter. The Board rejected this attempt to skirt the MMBA's requirements, concluding that the Mayor was the City's agent, and that the City was therefore required to meet and confer with the City's unions.

In the process of reversing the Board's decision, the Court of Appeal quoted this Court's directives in *Banning, supra*, 44 Cal.3d 799, but then decided not to apply them in this case. (Exh. A, pp. 23-24). Its resulting decision raises the following issues requiring this Court's review:

First, the Court of Appeal created a conflict of authority regarding the proper standard of review when an appellate court considers the Board's interpretation of the statutes within its jurisdiction. For nearly 35 years, this Court and the courts of appeal have held that the "clearly erroneous" standard of review applies. In particular, in *Inglewood Teachers Association v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776 (*Inglewood*), the court applied the "clearly erroneous" standard to the Board's interpretation of how agency principles apply to the statutes it administers. In addition, this Court and the courts of appeal have held that the Board may interpret its statutes in

light of external law, i.e., legal principles that are outside of the Board's expertise. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583 (*Cumero*).

The Court of Appeal, however, determined that it owed no deference to the Board's decision. It determined that the decision "turned almost entirely upon" legal authority outside of the Board's expertise, including agency principles. (Exh. A, pp. 43-44.) Thus, the Court of Appeal's conclusion in this regard directly conflicts with both *Inglewood*—which held that agency principles *are* within the Board's expertise—and with *Cumero*. The Court of Appeal also introduced further uncertainty regarding these issues by becoming the first appellate court to apply the standard articulated in *Yamaha Corporation of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*) on review of a final Board decision.

Second, the Court of Appeal also created a conflict of authority regarding the standard of review of the Board's findings of fact. Section 3509.5, subdivision (b), makes PERB's findings of fact conclusive if supported by substantial evidence. More than 25 years ago, the Court of Appeal in *Inglewood, supra*, 227 Cal.App.3d 767, 776, confirmed that the substantial evidence test applies to PERB's factual determinations regarding the existence of an agency relationship. By holding to the

contrary, the Court of Appeal established another direct conflict with *Inglewood*.

Finally, the Court of Appeal offered a sua sponte interpretation of section 3505 that radically changes the long-accepted understanding of the duty to meet and confer under the MMBA. In the nearly 50-year history of the MMBA, no court has held that a public agency's duty to meet and confer under section 3505 is confined to only those instances when the agency's governing body proposes to act on matters within the scope of representation. And many courts, as well as the Board, have found that the duty to meet and confer was violated without any direct involvement by the agency's governing body. The Court of Appeal held, to the contrary, that the duty arises *only* when the agency's governing body proposes to take official action.

In addition to the conflicts of authority presented, these questions have profound importance for PERB and its constituents under the eight collective bargaining statutes it administers. Clearly established standards of review are critical to the Board's role in bringing "expertise and uniformity to the delicate task of stabilizing labor relations." (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d 1, 12.) For example, each statute contains identical language governing appellate review of the Board's factual findings, including ultimate facts, and this Court has made

clear that the PERB statutes are to be construed as part of a “coherent and harmonious system of public employment relations laws.” (*Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090 (*Coachella*).

Moreover, this Court has described section 3505’s meet-and-confer requirement as the MMBA’s “centerpiece.” (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.) Whether the duty to meet and confer applies to actions taken by the representatives of a public agency, or only to proposals of the agency’s governing body, is a question that strikes at the very heart of the MMBA.

PERB rarely seeks this Court’s review of erroneously-decided appellate decisions, but given the direct conflicts in settled law and the important legal issues raised by the Court of Appeal’s wide-ranging decision, PERB respectfully requests that this Court grant review.

III. FACTUAL AND PROCEDURAL SUMMARY

A. The Parties

The Board is the expert public sector labor agency that, since, 2001, has been vested with exclusive initial jurisdiction to interpret the MMBA, including determining whether charges of unfair practices are

justified and, if so, what remedy is necessary to effectuate the purposes of the Act. (§ 3509, subd. (b); *Coachella*, *supra*, 35 Cal.4th 1072, 1077.)²

The City is a “public agency” subject to the MMBA. (§ 3501, subd. (c); AR:III:842.)³ The City was the respondent in the proceedings before PERB and the petitioner in the Court of Appeal in Case No. D069630.

The San Diego Municipal Employees Association (SDMEA), the Deputy City Attorneys Association of San Diego (DCAA), the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME), and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters) (collectively, the Unions) are each a “recognized employee organization” (§ 3501, subdivision (b)), and an “exclusive representative” (Cal. Code Regs., tit. 8, § 32016, subd. (b)), representing an appropriate unit of City employees. (AR:III:842; V:1193; VII:1777, 1814.) The Unions were the charging parties in the consolidated proceedings before PERB and real parties in interest in the Court of Appeal.

² *Coachella* identifies seven of the statutes currently administered by PERB. (*Id.* at pp. 1085-1086.) An eighth statute, the In-Home Supportive Services Employer-Employee Relations Act (§ 110000 et seq.), was enacted by Statutes 2012, chapter 45, section 3.

³ Citations to the 24-volume Administrative Record are abbreviated as “AR:[volume number]:[page number].”

Catherine A. Boling (Boling), T.J. Zane (Zane), and Stephen B. Williams (Williams) (collectively, the Ballot Proponents) were the official proponents of an initiative to modify City employees' pension benefits, referred to as the Comprehensive Pension Reform Initiative (CPRI) or Proposition B. Although they did not participate as parties in the PERB administrative proceedings, they filed their own petition for writ of extraordinary relief in the Court of Appeal, Case No. D069626, and were named as real parties in interest in the City's petition, Case No. D069630.⁴

B. The Underlying Facts

1. Background

The City is a charter city governed by a nine-member City Council and a "strong Mayor." (AR:XVII:4492-4497.) Under the City Charter, the Mayor is the chief executive officer, responsible for the City's day-to-day operations. (AR:XVII:4492-4493 [Charter, § 265]; XIII:3349.) The Mayor has no vote on the City Council, but may recommend legislation and veto certain Council actions. (AR:XVII:4493, 4498-4500.)

⁴ PERB moved to dismiss the Ballot Proponents as real parties in interest in Case No. D069630, and moved to dismiss the petition in Case No. D069626. The Court of Appeal denied the former motion and deemed the latter motion—as well as the issues raised by the Ballot Proponents' petition—moot. (Exh. A, p. 22.)

Under the strong mayor system, Sanders was the City's lead negotiator in collective bargaining with its nine represented bargaining units. (AR:XIII:3349-3350.) In this role, Mayor Sanders developed the City's negotiating strategy and initial bargaining proposals.

(AR:XIII:3350-3351.) In practice, the Mayor briefed the City Council and obtained its agreement on his strategy and proposals, before presenting them to the Unions. (AR:XIII:3349-3352.)

In two instances before this dispute arose, in 2006 and 2008, Mayor Sanders developed ballot measures affecting matters within the scope of representation; in both instances he met and conferred with the Unions before attempting to place them on the ballot. (AR:XIII:3345; XII:3194-3197, XII:3206-3207, 3212-3213, 3217-3219.)

2. City Attorney Aguirre's Legal Opinion about "Pension Measure Questions"

During the 2008 ballot measure negotiations, then-City Attorney Michael Aguirre (Aguirre) issued a legal memorandum explaining the City's bargaining obligations with respect to pension-related ballot measures. (AR:XVIII:4708-4717.) Aguirre concluded that if the Mayor proposed a citizens' initiative affecting terms and conditions of employment, the City would be required to negotiate with its unions over the proposal, because the Mayor would "legally be considered as acting with apparent governmental authority." (AR:XVIII:4710.)

City Chief Operating Officer Jay Goldstone (Goldstone), who reports directly to the Mayor, testified that during the 2008 negotiations, the Aguirre memorandum prompted Mayor Sanders to present his ballot proposal to the City Council, rather than to pursue a citizens' initiative. (AR:XIV:3627.)

3. The Mayor's Pension Reform Proposal

In late 2010, the Mayor determined, with his staff, that one of his primary goals was fixing what he perceived as the unsustainable cost of the defined benefit pension for City employees. (AR:XIII:3306-3307, 3390-3391; XIV:3532-3533.) To meet this goal, he proposed placing all newly-hired employees, except for police and firefighters, in a 401(k)-style defined contribution plan. (AR:XIII:3308-3309.) He believed this change was necessary to eliminate the City's \$73 million structural deficit before he left office in 2012. (AR:XIII:3308.)

After discussions with his City staff, Mayor Sanders decided to pursue his pension reform proposal as a citizens' initiative, rather than submit it to the City Council. (XIV:3653-3656.) He acknowledged that one of his reasons for doing so was to avoid negotiating with the Unions over the proposal as required by *City of Seal Beach, supra*, 36 Cal.3d 591. (AR:XIII:3344)

On November 19, 2010, Mayor Sanders unveiled his proposal to the public. The Mayor's Communications Director reviewed and

approved an announcement, titled “Mayor Will Push Ballot Measure to Eliminate Traditional Pensions for New Hires at City,” which appeared on the Mayor’s section of the City’s website, and was released to the media as a “Mayor Jerry Sanders Fact Sheet” bearing the City’s seal.

(AR:XV:3911-3912; XVIII:4742-4743, 4745-4747.) The Mayor’s staff also announced the plan in an e-mail message titled “Rethinking City Government,” which was sent to approximately 3,000 to 5,000 community members using the Mayor’s official City e-mail address (JerrySanders@sandiego.gov). (AR:XV:3910-3912; XXIII:5747-5749.)

The same day, the Mayor, accompanied by Councilmember Kevin Faulconer, Goldstone, and City Attorney Jan Goldsmith (Goldsmith), held a press conference in his office at City Hall to announce his proposal.

(AR:XIII:3312-3313.) The Mayor’s Communications Director prepared his talking points for the press conference. (AR:XV:3913-3914.)

Over the next two months, the Mayor and his staff, particularly his Communications Director, continued to develop his pension reform proposal and publicize his efforts in the media. (AR:XVIII:4772; XXIII:5923-5924, 5926; XV:3923-3925; XVIII:4788.) Mayor Sanders acknowledged that he never directed his Communications Director not to engage in these activities. (AR:XIII:3321-3322.)

On January 12, 2011, the Mayor gave his annual “State of the City” address, as mandated by the City Charter. (AR:XVIII:4816.) In the speech, the Mayor vowed to “complete our financial reforms and eliminate our structural budget deficit,” proposing the “bold step” of “creating a 401(k)-style plan for future employees” to “contain pension costs and restore sanity to a situation confronting every big city.” (AR:XIX:4832.) Later in the speech, the Mayor explained that, acting “as private citizens,” “Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan.” (AR:XIX:4836.) Later that day, the Mayor’s office issued a press release publicizing, among other things, Mayor Sanders’ “vow[] to push forward his ballot initiative to replace pensions with a 401k-type plan for most new city hires.” (AR:XVIII:4816.)

Following the speech, the Mayor continued his publicity efforts with appearances on local and national broadcast media. (AR:XV:3937, 3940-3942.) The Mayor’s talking points for these appearances were all prepared by his City-paid staff. (*Ibid.*)

4. The Compromise Between Mayor Sanders and Councilmember DeMaio

City Councilmember Carl DeMaio (DeMaio) had similarly proposed a citizens’ initiative to reform the City’s finances.

(AR:XVI:4103-4192.) Like Mayor Sanders, DeMaio’s proposal included

replacing defined benefit pensions with 401(k)-style plans for newly hired employees. (AR:XVI:4157.) DeMaio's plan differed in that it included a "hard cap" on pensionable pay and did not exempt police and firefighters. (AR:XIII:3484.)

At a March 24, 2011 press conference, the Mayor and Faulconer announced their intention to move forward with their own initiative, which now included a cap on total City payroll. (AR:XV:3948-3949; XXIII:5828-5830.) The Mayor's remarks for the conference were prepared by his City staff. (AR:XV:3950.)

At a meeting in March 2011, representatives of the Lincoln Club and the San Diego Taxpayers Association told the Mayor that only one initiative should appear on the ballot, and that they intended to support DeMaio's plan. (AR:XIII:3480-3481; XIV:3574-3575.) This prompted the supporters of the two plans to meet and develop a compromise initiative. The Mayor personally attended some of these meetings, as did three members of his City-paid staff. (AR:XIII:3401-3402; XIV:3570-3576, 3676-3679; XV:3812-3814.) Most notably, the resulting compromise excluded police from the 401(k)-style plan, an exclusion that the Mayor insisted upon. (AR:XIX:5013-5021; XIII:3423; XIV:3595.) The Mayor's Chief Operating Officer and Chief of Staff received drafts of

the initiative and provided comments on the Mayor's behalf.

(AR:XIV:3585-3588, 3680-3682.)

On April 4, 2011, the Ballot Proponents filed with the City Clerk a notice of intent to circulate a petition—the CPRI—to amend the City Charter. (AR:XIX:5009-5021.)

The following day, April 5, 2011, Mayor Sanders conducted a press conference in the concourse area directly outside City Hall to announce the filing of the CPRI petition. (AR:XIII:3419.) Also present were Faulconer, DeMaio, Goldsmith, Boling, and Zane. (AR:XIII:3394-3396.) Although the Mayor testified that he appeared in his private capacity, and assumed the same was true for Goldsmith, there is no evidence that this fact was communicated to the press or the public at the time.

(AR:XIII:3427-3428.) In fact, Mayor Sanders touted his previous efforts to achieve pension reform as Mayor, and described the CPRI as “the next step.” (AR:XXI:5515.)

Throughout the summer and fall of 2011, while signatures were being gathered for the CPRI, the Mayor's City-paid staff continued the publicity effort by arranging for interviews and appearances with print and broadcast media, providing quotes to the media, and preparing talking points for Sanders' speaking appearances. (AR:XV:3820-3821; XXIII:5843, 5845, 5837-5838, 5840-5841.) In addition, the Mayor's staff

prepared a message from the Mayor—identified three times as “Mayor Jerry Sanders”—to members of the San Diego Regional Chamber of Commerce, which solicited financial and other support for the signature-gathering effort. (AR:XIII:3468-3470; XX:5135.)

5. 2011 Contract Negotiations

Between January and May 2011, the City, led by the Mayor, was negotiating successor memoranda of understanding (MOUs) with each of the six unions representing City employees. (AR:XII:3223-3224.) The City and the Unions were also separately negotiating limits on retiree health benefits. (AR:XII:3224.) Each of the Unions agreed to significant concessions limiting retiree health benefits, which were subsequently approved by the City Council in May 2011. (AR:XIX:5074-5079.)

6. The Unions’ Demands to Meet and Confer over the CPRI

In a letter dated July 15, 2011, Ann Smith (Smith), an attorney representing SDMEA, demanded that the Mayor bargain over his “much publicized ‘Pension Reform’ Ballot Initiative.” (AR:XIX:5109-5110.) The letter stated that if the Mayor did not present his own bargaining proposal, SDMEA would assume that the contents of the CPRI were his opening proposal. (AR:XIX:5109.)

Goldsmith responded in a letter dated August 16, 2011, copies of which were sent to the Mayor and members of the City Council.

(AR:XX:5115-5117.) Goldsmith denied that the City Council was obligated to negotiate with SDMEA. (AR:XX:5117.)

On September 9, 2011, Smith responded by letter, asserting that the Mayor had made a “determination of policy *for this City* related to mandatory subjects of bargaining” and sponsored “this ‘pension reform’ initiative in furtherance of the City’s interest[s] as he defines them.” (AR:XX:5123-5126, emphasis in original.) Copies of Smith’s letter were sent to the City Council. (AR:XX:5126.)

Smith and Goldsmith exchanged two more rounds of correspondence regarding the issue. (AR:XX:5128-5130, 5142-5144, 5151-5155, 5157-5162.) In one letter, Goldsmith disagreed with the conclusion in the 2008 Aguirre memorandum that the Mayor would be deemed to be acting with the apparent authority of the City if he proposed a citizens’ initiative. (AR:XX:5152-5155.) The City also rejected demands to bargain by DCAA, the Firefighters, and AFSCME. (AR:XV:4016-4017; XXIII:5908, 5910, 5913, 5915.)

7. Passage of Proposition B

On September 30, 2011, signed petitions in support of the CPRI were submitted to the City Clerk. (AR:XVI:4065.) The County Registrar of Voters then determined that the number of signatures was sufficient to qualify the CPRI for the ballot. (AR:XX:5164.)

On December 5, 2011, the City Council adopted a resolution declaring its intention to submit the CPRI to voters at the June 2012 election. (AR:XX:5178-5180.) On January 30, 2012, the City Council adopted a resolution directing the preparation of the title, summary, and analyses of the CPRI for the voter pamphlet. (AR:XX:5184-5185.)

The CPRI appeared on the June 2012 election ballot as Proposition B. The published argument in favor of Proposition B was signed by, among others, “Mayor Jerry Sanders,” Faulconer, and DeMaio. (AR:XX:5193.) The initiative was subsequently approved by the voters. (AR:XVI:4094-4096.) At the election night celebration hosted by the Lincoln Club, the Mayor was the keynote speaker, referring to Proposition B as the latest in a list of City fiscal reforms he had helped achieve, including the ballot measures in 2006 and the pension reforms in 2008, both of which had been the subject of negotiations with the Unions. (AR:XXI:5521.)

C. Procedural History

In early 2012, before the election, each Union filed an unfair practice charge alleging that the City had violated the MMBA by refusing to bargain before placing the CPRI on the ballot. (AR:I:3-237; III:579-589, 609-613; IV:935-939.) In February 2012, and thereafter, PERB’s