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IN THE
SUPREME COURT OF CALIFORNIA

Case No.: S242034

Court of Appeal Consolidated Case No.: D069626

Deputy

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

**JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS
TO AMICUS BRIEF FILED BY SAN DIEGO TAXPAYERS
EDUCATIONAL FOUNDATION IN SUPPORT
OF CITY OF SAN DIEGO**

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Introduction

Writing as an *amicus curiae* in support of the City of San Diego, the San Diego Taxpayers Educational Fund (SDTEF) fails to address the issues on which review was granted,¹ opting instead to construct a First Amendment argument which misstates the law and then applies it to a fictionalized account of this case. SDTEF's goal, like the City's, is to prevent the State from enforcing the Meyers-Milias-Brown Act (MMBA) against the City for its failure and refusal to bargain over pensions and compensation.

SDTEF's approach is to ignore PERB's findings and their legal significance under the MMBA – declaring that “this appeal presents the question whether a citizens' initiative on pension reform may be invalidated because an elected official – namely, a mayor – spoke vigorously on its behalf.” (SDTEF Brief at 12.) Sticking with a fiction which contradicts the controlling findings in this case, SDTEF incorrectly characterizes PERB's decision as a determination that the City violated the MMBA “because (its) Mayor spoke up regarding an important citizens' initiative,” (*Id.* at 9, 12, 17,

¹ (1) When a final PERB decision is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the MMBA, are PERB's interpretations of the statutes it administers and its findings of fact subject to deference under the “clearly erroneous” standard or are they subject to *de novo* review? and (2) Do the MMBA's good faith meet-and-confer obligations apply to public agencies under section 3505 or do these obligations apply only to the public agencies' governing bodies when they propose to take formal action affecting employee wages, hours, or other terms and conditions of employment under section 3504.5?

53-54), even though it was the Mayor's alleged "obligation" as an elected official to take positions on "controversial political questions." (*Id.* at 17.)

SDTEF's argument ignores Mayor Sanders' course of conduct from mid-November 2010 through early April 2011 – while he served as the City's Chief Executive Officer (CEO) and its Chief Labor Negotiator – and *before* any "citizens' initiative" was pending or a "notice of intent" to circulate a petition had been filed. During this period, Mayor Sanders' First Amendment right to "speak up" about the need for further pension reform, did not give him license to violate the MMBA by making and announcing his determination to "transform pensions" by using a citizens' initiative in order to bypass recognized employee organizations and avoid the City's state-mandated collective bargaining obligations.

SDTEF's argument also focuses exclusively on the fact that Mayor Sanders was an *elected official* – which is true – but ignores the fact that, by enacting a "strong Mayor" form of governance through the City's Charter, the people of San Diego made it the Mayor's job to serve as City's CEO and its Chief Labor Negotiator and to comply with the MMBA in the performance of his duties. SDTEF's theory that the State cannot enforce the MMBA against the City because its Mayor had an absolute and unfettered First Amendment right in the circumstances of this case to speak and act in derogation of his *executive* duties, is simply not supported in First Amendment case law.

SDTEF also fails to acknowledge and address the legal significance under the MMBA of Mayor Sanders' flat refusal to bargain in response to repeated Union demands for bargaining over the subject of pension reform – demands which were directed to him not because he was an *elected* City official but because he was the City's *executive* official in charge of the MMBA-mandated meet-and-confer process for the City.

Finally, while SDTEF is preoccupied solely with the Mayor's allegedly unfettered First Amendment rights, SDTEF never addresses PERB's conclusion that the City violated the MMBA by the *separate and independent* conduct of the City Council which, as City's governing body, is itself a statutory agent under section 3505 of the MMBA. Thus, whatever the scope of Mayor Sanders' First Amendment rights under the circumstances of this case, those rights could not and did not operate to relieve the City from accountability for the *City Council's* failure and refusal to meet and confer over pensions and compensation before voting to place the Prop B initiative on the June 2012 ballot.

By choosing to frame its argument based on a fictionalized account of the case and failing to confront the *City's* obligations under the MMBA, SDTEF's perspective as an *amicus curiae* is of no help to this Court. Worse still, SDTEF misdirects this Court by misstating and misapplying First Amendment law to argue for a Court-sanctioned means for *government* to

engage in direct democracy for the purpose of changing terms and conditions of employment outside the good faith meet-and-confer process mandated by the MMBA. Such a result must be rejected as contrary to the text of the MMBA and decades of case law interpreting and applying it (all of which SDTEF ignores) – and because allowing government to use such an MMBA opt-out scheme would represent a resounding defeat for the legislative goals embodied in this statewide law.

Argument

I. SDTEF Ignores The Evidence And PERB’s Findings Of Fact – Conclusive On Review – Regarding Mayor Sanders’ *Actual Conduct As City’s Chief Executive Officer And Its Chief Labor Negotiator During The Months Before Any Initiative Petition Was Circulating*

PERB concluded that the City violated the MMBA by implementing unilateral changes in matters within the scope of representation in a context where its chief executive officer and “strong” mayor, Jerry Sanders, used the prestige, resources, and staff of his City office to promote and pursue a pension reform initiative – in an admitted effort to avoid the City’s bargaining obligations under the MMBA – “*all while denying the [U]nions an opportunity to meet and confer over his policy determination in the form of a ballot proposal.*” (AR:XI:3096, emphasis added.²)

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² Unless otherwise noted, all citations are to the Administrative Record. Citations to *Boling* are to the Court of Appeal’s decision below.

SDTEF never analyzes these key features of PERB’s decision – i.e., that the Mayor’s conduct occurred when he served as City’s Chief Executive Officer and its Chief Labor Negotiator and in a context where the *City* failed and refused to meet and confer over this pension reform subject matter. No fair reading of PERB’s decision can lead the reader to conclude that, “in the Board’s view [...] (Mayor Sanders) had an obligation to remain silent on controversial political questions,” (*id.* at 18), or that PERB “effectively invalidated the citizens’ initiative because an elected official, namely the Mayor, publicly supported it” or “spoke vigorously on its behalf” (*id.* at 9, 12, 17 and 54.) The record provides a startling contrast to SDTEF’s mischaracterization of PERB’s decision as having been based on an elected official’s public support of a citizens’ initiative (SDTEF Brief at 9, 12, 17-18, and 53-54.)

A. Mayor Sanders Made A Policy Decision To Achieve Further Pension Reform For The City By Initiative To Avoid Bargaining With City’s Unions

Mayor Sanders used the visibility, power and prestige of his Office as Mayor, as well as his City-paid staff and City resources, in furtherance of his pension-reform-by-initiative effort for a full *five months before* leading a press conference outside City Hall to announce the filing of a “notice of intent” to circulate a citizens’ initiative. SDTEF ignores but does not challenge the

substantial evidence which supports PERB's conclusive findings³:

◆ Mayor Sanders decided, after discussions with his City-paid staff, that he “would promote and pursue a 401(k)-style pension concept as his focus during his last two years in office,” and use a citizens' initiative rather than a Council-sponsored ballot proposal.⁴ (*Boling* at 858-859; XIII:3306-07; XIV:3527, 3531-32, 3653-54, 3667-68; XV:3835-36.)

◆ The Mayor's Office issued a press release in early November 2010 – styled as a “Mayor Jerry Sanders Fact Sheet” – declaring the Mayor's intent to “place an initiative on the ballot” to implement a “radical idea” of eliminating traditional pensions for new hires at the City “as part of his aggressive agenda [...] for eliminating the city's [...] structural deficit by the time he leaves office in 2012.” (XVIII:4742-43.)

◆ This “Mayor Jerry Sanders Fact Sheet” included a “headline” under the City's seal announcing the Mayor's plan to “push a ballot measure to eliminate traditional pensions for new hires ” and to do so in furtherance of *City's* interests. (XVIII:4742.)

³ PERB's findings of fact, including ultimate facts, are conclusive on review when supported by substantial evidence. (Gov. C. § 3509.5, subdivision (b).)

⁴ It is undisputed that Mayor Sanders was acting for the *City's* benefit after deciding that 401(k)-style pension reform was a “necessary and expedient” measure to eliminate City's structural budget deficit and “permanently fix” City's financial situation. (XIII:3312-13; XV:3918-23; XXIII:5764, 5766.)

◆ The Mayor’s staff posted this “Mayor Jerry Sanders Fact Sheet” on City’s website and the Mayor held a “kick-off” press conference on the 11th floor of City Hall to announce his initiative. Standing in front of the City seal, the Mayor was joined by City’s Chief Operating Officer Jay Goldstone, Councilmember Kevin Faulconer and City Attorney Jan Goldsmith. (*Boling* at 859 and fn. 3 & 4; XVIII:4742-43, 4747; XIII:3307-09, 3312-13, 3319-20; XV:3914-15, 3917; XIV:3533-34.)

◆ The media covered the Mayor’s press conference with the news that “San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [C]ity employees.” (*Boling* at 859.)

◆ Mayor Sanders used his City-paid staff to draft and issue press releases as “Mayor Sanders’ Fact Sheets;” his staff posted updates to the City’s website, and sent mass e-mail messages to promote the Mayor’s determination that a citizens’ initiative should be undertaken – and that he would undertake it – to amend the City Charter to transform pensions. (XVIII:4742-43, 4745-47, 4816; XXIII:5747-49.)

◆ Several thousand community leaders and individuals received an e-mail from JerrySanders@sanidiego.gov announcing the Mayor’s intent to “craft language and gather signatures for a ballot initiative to eliminate public pensions as we know them.” (XXIII:5747-49; XV:3907-08, 3910-13.)

◆ With help from his City-paid staff, Mayor Sanders conducted other press conferences, in addition to the one on the 11th floor of City Hall, to promote pension reform by initiative. (XIII:3312-13; XV:3948-49; XIII:3419.)

◆ In early December 2010, Mayor Sanders' City-paid staff began promoting his pension reform initiative directly to the media and others. (XIII:3320-22; XV:3922-25, 3989-90; XVIII:4772; XXIII:5810-12, 5923-24, 5926.)

◆ The Mayor built support with key business groups and individuals, including its three "official proponents." (XV:3918-21; XXIII:5806-08.) The Mayor personally promoted his pension reform initiative plan before the Chamber of Commerce's public policy committee and its full Board of Directors. (XV:3797-3800, 3925-27; XVIII:4474, 4786; XXIII:5764, 5766.) He formed a campaign committee "San Diegans for Pension Reform" (SDPR) under FPPC rules, to "push forward with financing and fund-raising." (XIII:3378-79, 3409-11, 3432-35, 3437-40; XVIII:4782-84; XIX:4980-81, 4990-5002.) The committee's treasurer gave updates to the Mayor's Deputy Chief of Staff who kept "tabs" on the committee's activities. (XV:3816-17.)

◆ On January 7, 2011, the Mayor's Director of Communications sent an e-mail to Fox News: "We're eliminating employee pensions as we know them and putting in place a 401(k) plan like the private sector. My boss, San Diego Mayor Jerry Sanders, is available any time to come on The Factor

to talk about what he's doing here in San Diego and the greater national problem.” (XIII:3329-31; XVIII:4788.)

◆ In January 2011, the Mayor delivered his annual, Charter-mandated “State of the City” Address *directly to the City Council* to report on “the conditions and affairs of City” and to make “recommendations on such matters as he or she may deem expedient and proper.” (*Boling* at 859; City Charter, Art. XV § 265(c); XVII:4494.) Vowing to “complete our financial reforms and eliminate our structural budget deficit,” the Mayor described 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:”

“Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan [...]. We are acting in the public interest, but as private citizens.” (*Boling* at 859; XIX:4832, 4836.)

◆ Mayor Sanders issued another press release to promise 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.” (*Boling* at 859; XVIII:4816.)

◆ In the months following his “State of the City” Address, with *no* citizens’ initiative filed or pending – the Mayor and his staff continued to develop, evaluate, promote and publicize his pension reform initiative while fine-tuning its terms based on the legal and financial analyses he commissioned. (*Boling* at 859-860 and fn. 6; XIII:3380-85; XIV:3545-49;

XV:3809-11, 3827-28, 3937-42, 3948-51, 3990-91; XIX:4983-84, 4986-88; XXIII:5782-83, 5814-30, 5928-30.)

◆ There was an expectation that the Mayor's staff would regard the Mayor's pension reform initiative as City business and within the scope of their official duties. (XIII:3321, 3330-32; XV:3807, 3957.) The Mayor's Chief of Staff viewed all the initiative-related work she and other City-paid Mayoral staff members did *before* April 2011 (when the Mayor announced that a "notice of intent" had been filed) as "official City business." (XIII:3401-02, 3480-81; XIV:3570-76, 3653-54, 3667-68, 3676-79; XV:3812-14.)

◆ Between January 1st and March 31st 2011, the Mayor and his key policy staff, including City's Chief Operating Officer, explored the fiscal viability of the Mayor's pension reform proposal;⁵ while the Mayor's SDPR committee paid a law firm to provide legal research and advice related to it. (*Boling* at 860, fn. 7; XIII:3378-81, 3439-41; XIX:4980-81, 4990-5002.)

◆ The Mayor and his staff negotiated with supporters outside the City to achieve the Mayor's policy goals for 401(k)-style pension reform through a single initiative, with transition costs associated with closing the defined benefit plan to most new hires "paid for" by imposing a 5-year pensionable pay freeze (through 2018) on existing employees. (*Boling* at 860-

⁵ City's COO testified that his fiscal analysis on the Mayor's pension reform initiative was facilitated because of his access to actuarial data from the City's defined benefit plan which was not available to "someone off the street." (XIV:3509, 3547-54, 3565-66.)

861 and fn. 7-8; XIII:3376-77, 3396-3405, 3408, 3414-15, 3421-24, 3479-81, 3485-87; XIV:3568-76, 3676-80; XV:3729-30, 3811-14, 3821.) The Mayor “got the pieces [he] really needed, which were a 401(k) and having police remain competitive so that *we* [i.e., the City] can hire and retain.” (XIII:3423-24.)

◆ The Mayor’s Chief of Staff, City’s COO, and the City Attorney, all reviewed drafts of the initiative to assure it achieved the agreed-upon objectives. (*Boling* at 861 & fn. 9; XIV:3576-79, 3582-85, 3587-91, 3680-82, 3684-87, 3693-94; XV:3821-24.) Before announcing the intent to circulate, the Mayor made sure the text of the initiative was right. (XIII:3430-31, 3482, 3491; XIX:5013-21.) (See Proposition B, XVI:4073-87.)

◆ On April 4, 2011 – a full five months after the Mayor had announced his policy decision to change pensions by initiative to avoid the MMBA, the City Clerk received a notice of intent to circulate a petition seeking to place the CPRI on the ballot. The three “official proponents” (*Boling*, Williams and Zane) are Ballot Proponents here. (*Boling* at 861.)

◆ The Mayor led a widely-covered press conference outside City Hall the next day to announce the filing. Among others, the City Attorney, Councilmembers Faulconer and DeMaio, and two Ballot Proponents surrounded the Mayor during his press conference, (*Boling* at 862), and the Mayor’s Director of Communications attended with another communications

staff member. (XIII:3395-99, 3415-17, 3419, 3428-32; XIX:5004, 5006-07, 5013-21.)

◆ Introduced as “Mayor Jerry Sanders,” the Mayor spoke under a banner touting “Pension Reform Now.” Referring to the contents of the CPRI, he said: “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.” (XIII:3339-40, 3376-77, 3421, 3431; XIX:5006-07, 5013-21, 5028-29 [Fox News: “Pension Reformers Unite Behind Compromise Plan”]; XXI-Ex:5515 [KUSI videoclip].) Councilmember Carl DeMaio stepped to the podium to say: “Mr. Mayor, it was your leadership that allowed us to reach the deal we have today.” (*Ibid.*)

SDTEF turns a blind eye to the Mayor’s actual conduct as well as his use of City resources and City-paid staff – preferring to construct a First Amendment argument on the fiction that Mayor Sanders simply fulfilled his “obligation” as an elected official to “speak up” for pension reform. (SDTEF Brief at 9, 12, 17-18, and 53-54.) Having done so, SDTEF fashions an irrelevant (and overstated) legal analysis which ultimately offers this Court no useful perspective on the issues before it.

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B. Mayor Sanders Was Elected To Serve As City’s Chief Executive Officer And Its Chief Labor Negotiator Under The MMBA

SDTEF’s argument that PERB’s decision creates a so-called “elected-officials exception to the First Amendment,” (SDTEF Brief at p. 27), also rests on a false foundation – i.e., that Mayor Sanders enjoyed absolute and unfettered First Amendment rights as an *elected official* despite his Charter-mandated duties as City’s CEO and its Chief Labor Negotiator – i.e., City’s “administrative official” within the meaning of MMBA section 3505.

1. The City’s Charter Defined The Mayor’s Executive Duties

The San Diego City Charter article XV establishes a “Strong Mayor Form of Government,” defining roles and veto power for a “Strong Mayor” elected on a City-wide basis and a 9-member City Council elected by Districts. (XIII:3337-38; XIV:3512; XVII:4492-4502; XVIII:4707-40; XXI:5532-47.) When elected and sworn into office, the City’s Mayor agrees to serve as the City’s Chief Executive Officer, responsible for the day-to-day operations of the City functioning as a business, government, and employer.⁶ (XIII:3348-49; City Charter § 265.)

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⁶ As explained in PERB’s decision, with the adoption of the strong mayor form of government, the City’s Mayor “acquired the executive authority previously held by the City Manager but lost his vote on the City Council.” (XI:3048.) Thus, under the previous form of government, the Mayor was a legislative official.

The City Attorney's Office (under Jan Goldsmith) published a Memorandum of Law (MOL) in January 2009 (XVIII:4719-39) entitled "Impasse Procedures Under Strong Mayor Trial Form of Governance," which addresses the respective roles of the Mayor and City Council on behalf of the City as a "municipal corporation" and "single employer" under the MMBA.⁷ (XII:3191-93; XVIII:4626-38, 4727-28.) This MOL confirms that, as the City's elected chief executive officer, the Mayor gives controlling direction to the administrative service; recommends to the Council such measures and ordinances the Mayor deems necessary or expedient for the City and its residents; makes other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable; has inherent authority and responsibility for labor negotiations because it is an administrative function of local government; and retains veto power over certain Council legislative actions. It is the Mayor who must "ensure that the City's responsibilities under section 3500, subdivision (a) of the MMBA as they relate to communication with employees are met." (XVII:4493; XVIII:4721, 4727-28.)

The Mayor also serves as City's Chief Labor Negotiator in collective bargaining with City's recognized employee organizations, including Unions. It is the Mayor's duty (1) to conduct a good faith meet-and-confer process

⁷ This MOL was published to clarify the duties of Mayor and City Council in response to PERB's determination in a prior case (Case No. LA-CE-352-M) that City had violated the MMBA. (XVIII:4719-20.)

under the MMBA “whenever, under the law, the obligation to meet and confer is triggered” (XIII:3349); (2) to communicate with City’s employees and their Unions in a manner consistent with the MMBA; and (3) to give direction to City’s Negotiating Team by determining City’s bargaining objectives – what concessions, reforms, changes in terms and conditions of employment are important to achieve. (XIII:3349-52; XII:3191-93; XIV:3705; XVIII:4721, 4727-28.)

This 2009 MOL also explains that the Mayor’s role is not an advisory function. The Mayor “must ensure that City’s responsibilities under section 3500, subdivision (a) of the MMBA [...] are met,” (XVIII:4721, 4727-28), and has a “duty to negotiate with Unions in an attempt to reach agreement for the Council’s consideration and possible adoption.” (*Id.* at 4728.) Any “tentative agreements” are submitted to the City Council for determination under MMBA, Government Code section 3505.1, because, as the City’s legislative body, the Council has “ultimate authority to set salaries and to approve Memoranda of Understanding.” (*Id.* at 4738-39.)

With the City Council’s ultimate authority in mind, the Mayor obtains Council’s pre-approval for any proposed increase in wages or benefits before offering such an increase to Unions.⁸ Though not required by the Charter

⁸ Needless to say, if the Mayor succeeds in reaching a tentative agreement with recognized employee organizations over *concessions* in wages or benefits, any concern over a disconnect between the Mayor and City Council at the end of the bargaining process is removed.