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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

JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS TO AMICUS BRIEF FILED BY LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF CITY OF SAN DIEGO

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Introduction

Unions respond to the *amicus curiae* brief filed in support of the City of San Diego by the League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association (collectively "League") as follows:

On matters of substance,[1] League's brief is devoid of any citation to the record or to the text of PERB's actual decision. League does not address the MMBA statutory scheme at the heart of this case and certainly does not argue that the *Boling* court's new-fangled interpretation of MMBA sections 3504.5 and 3505 is correct. Nor does League explain why or how PERB's application of section 3505 to Mayor Sanders, serving as he did as City's Chief Executive Officer and its Chief Labor Negotiator, is at odds with the well-established legal principle that the duty to meet-and-confer in good faith applies to the agency's governing body *and* to those "administrative officials" who have been designated by law or by the governing body to act on the agency's behalf.

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[1] Unions note that the law firm of Renne, Sloan, Holtzman, Sakai, LLP (Renne Sloan) which signed League's brief, is the same firm which represented the *City* before PERB. Renne Sloan's attorney Timothy G. Yeung appeared with Assistant City Attorney Donald R. Worley at each day of the four-day adversarial hearing. The ALJ's Proposed Decision notes this appearance. (AR:XI:3045.) When Renne Sloan attorney Arthur A. Hartinger previously applied to the Fourth District Court of Appeal for permission to file the League of California Cities' *amicus curiae* brief in support of City, Mr. Hartinger noted in a footnote to his application that his partner Timothy G. Yeung performed "a small amount of work in the underlying matter," but did not say what work or for whom.

League lectures about the undisputed importance of initiative rights in broad terms but does not acknowledge that local initiative rights are not absolute and that this Court has previously recognized the need to reconcile initiative and referendum rights – despite their constitutional pedigree – with the important statewide goals embodied in the MMBA. Rather than address this core issue, League resorts to an *ad hominem*-style attack against PERB's allegedly "hostile" decision-making in cases where local initiatives and the MMBA intersect – but fails to say how or why PERB's reasoning was wrong on the facts or law in *any* case League cites.

League also repeats the City's (and other *amici curiae* writing in support of City) ineffective invocation of the *Wood* and *Bond* cases to argue the improbable proposition that Mayor Sanders, while serving in a Charter-mandated *executive* role, had a First Amendment right as an *elected* official to declare himself to be a "private citizen" in order to avoid the City's obligations under the MMBA, all the while using his City-paid staff and City's resources to change terms and conditions of City employment for City's budget benefit. League offers this Court no new legal analysis or perspective making this "private citizen" ruse any more credible than it has ever been on this record.

League addresses the *de novo* versus "clearly erroneous" standard of review issue with a dishonest use of Professor Asimov's 1995 law review article, followed by a call for so-called "situational" deference under *Yamaha*

when a court reviews PERB's decisions. However, this Court determined *before Yamaha* – and has confirmed since – that the correct form of "situational" deference to be applied on review of PERB's decisions is a "clearly erroneous" standard of review. This is because PERB's interpretation and application of the MMBA is based on its unique knowledge and expertise as a labor board and because the legislature has delegated to PERB the role of achieving uniform enforcement of the MMBA through an adjudicatory process in furtherance of the State's objectives.

League's approach is to paint with a broad but ultimately colorless brush. While it is clear that League is opposed to PERB's enforcement of the MMBA against the City in this case, League offers no analysis of the facts or law which supports this opposition on any principled basis.

Argument

I. The League's *Ad Hominem*-Style Attack On PERB's Decision-Making Is No Substitute For Thoughtful Legal Analysis Which League Fails To Offer

League opens with an *ad hominem*-style attack against PERB as having been "consistently hostile to local ballot measures." (League at p. 9) League uses the term "hostile" to infer that PERB has an irrational opposition to local ballot measures in the Meyers-Milias-Brown Act (MMBA) context, but offers no analysis explaining if, how or why PERB's interpretation or application of the MMBA in any of the cited cases was either wrong based on PERB's

conclusive findings of fact or failed to follow existing judicial precedent. (See Gov. C. §§ 3509, subd. (b) and 3509.5, subd. (b).) Since League took no time to present this Court with any such analysis, League's unsupported "attack" on PERB's decisions should be entirely disregarded.[2]

Moreover, League's assignment of an "irrational hostility" label to *any* decision-maker who upholds the statewide objectives embodied in the MMBA when threatened by local exercises in direct democracy (i.e., initiatives and referenda), would logically include this Court.[3] In *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach* (1984) 36 Cal.3d 591, this Court rejected the notion that a City Council's constitutional right to propose charter amendments under article XI, section 3(b) was absolute – finding instead that

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[2] League cites three decisions by PERB's Administrative Law Judges which have no precedential value unless adopted by the Board, (Cal. Code Regs., tit. 8, § 32215), and only one has been. (*City & County of San Francisco* (2017) PERB Decision No. 2540-M [Board interpreted and applied MMBA section 3507 to determine whether a binding interest arbitration process was a "reasonable" process for dispute resolution].)

[3] California's Attorney General has likewise enforced the important rights guaranteed by the MMBA by granting the Bakersfield Police Officers' Association and the San Jose Police Officers' Association leave to sue *in quo warranto* where they asserted that the City of Bakersfield and the City of San Jose, respectively, had placed initiatives on the ballot to change terms and conditions of employment without first engaging in a good faith meet-and-confer process under the MMBA. (Opinion 11-702 (2012) 95 Ops. Cal. Atty. Gen. 31; Opinion No. 12-605 (2013) 96 Ops. Cal. Atty. Gen. 1.) In both cases, the police unions, like the police union in *People ex rel. Seal Beach Police Officers Ass'n, supra*, were not subject to PERB's exclusive initial jurisdiction to hear and decide a bad faith bargaining unfair practice charge. (See Gov. C. § 3511.)

this constitutional right must yield to the important statewide objectives of the MMBA. Accordingly, this Court ordered the vote on three charter amendments set aside and the *status quo ante* restored until the good faith meet-and-confer requirements of the MMBA could be satisfied. (*Id.* at 594-95, 600-01.) Then in *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765, this Court held that "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to curtail the local right of referendum" when used to challenge a Memorandum of Understanding reached after a good faith meet-and-confer process under the MMBA. (*Id.* at 784.)

While League recites basic legal principles related to California's initiative and referendum rights as tools of direct democracy, (League at p. 11), League does not confront the prior landmark cases of this Court constraining these rights in furtherance of the State's goals embodied in the MMBA. Thus, League has contributed nothing to the legal discourse on the fundamental question before this Court: How will the State's legitimate goal of fostering statewide public sector labor peace through communication, good faith meet-and-confer and, if possible, agreements between public sector employers and hundreds of thousands of public employees, be achieved if *government* itself is permitted to use the tools of direct democracy to change negotiable subjects outside the MMBA?

PERB has provided the answer and League offers no basis in fact or law to overturn PERB's decision.

II. League's Vague But Unspecified Concern About The Free Speech Rights Of Elected Officials Cannot Logically Arise From What PERB Actually Decided Based On The Unique Facts Of This Case

In their briefing on the merits and in answer to the *amicus curiae* brief of San Diego Taxpayers Educational Foundation, Unions have already rebutted the notion that, on this record, any First Amendment rights available to Mayor Sanders while serving as City's *executive* official, excused the City from its obligations under the MMBA. Unions will not repeat themselves here except to address League's vague "concern" that PERB's decision, "if permitted to stand, would "likely impinge" on and "effectively chill the right of *elected* officials to communicate and offer their opinions about legislation and other issues affecting their respective communities." (League at p. 12, emphasis added.) Although League does not say how or why such "likely" impingement or "chilling" effect would occur, such an idle prediction is frivolous when viewed against PERB's narrowly-drawn decision applying mainstream MMBA precedent to a set of facts which stands in sharp contrast to League's fictionalized version that City's Mayor acted "privately" in his "political support" for the underlying initiative. (*Ibid.*)

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A. PERB's Decision That City Violated The MMBA In This Case Is Driven By Mayor Sanders' Role As An *Executive* Not An *Elected* Official

League's assertions about a broad impact on *elected* officials ignores the fact that this case turns on Mayor Sanders' specific *executive* duties and his use of City-paid staff and resources.[4] And these duties were not assigned to him willy-nilly by PERB; these duties were entrusted to him by City's Charter. His obligation to perform these duties in compliance with the MMBA distinguished him from every other elected official in the City – and, for that matter, other elected officials around the State who are not designated either by law or by their public agencies' governing bodies to be the agency's "administrative official or other representative" for purposes of compliance with the MMBA section 3505.

Nor should PERB's assessment of the limits on the Mayor's First Amendment rights – when construed in the context of the MMBA and his *executive* duties – have come as a surprise to City or League as a student of the MMBA. Mere months before Mayor Sanders conducted his November 2010 press conference inside City Hall to announce his pension-reform-by-initiative determination as a means to bypass Unions, the City was put on notice that the

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[4] Individuals do not have a First Amendment right to use government-controlled means of communication. Where the government "is speaking on its own behalf" rather than "providing a forum for private speech," free speech principles do not apply. (*Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 470.)

alleged "free speech" rights of an elected City official would not permit the City to violate the MMBA. In *San Diego Firefighters, Local 145, I.A.F.F. v. City of San Diego [Office of the City Attorney]* (March 26, 2010) PERB Decision No. 2103-M, PERB cited its three-decades-old decision in *Rio Hondo Community College District* (1980) PERB Decision No. 128, when explaining its rejection of the City's defense in an unfair practice complaint against its elected City Attorney:

> [E]mployer speech that goes beyond mere expression of opinion or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections. (*State of California [Department of Transportation]* (1996) PERB Decision No. 1176-S.) Furthermore, the Board in *Rio Hondo* specifically held that protection is afforded to employer speech "provided the communication is not used as a means of violating the Act." (*Id.*) Thus, the Board specifically exempts from protection speech that is used as a means to commit an unfair labor practice, such as bypassing the exclusive representative. (*Office of the City Attorney* at 8-9.)

PERB's determination that Mayor Sanders' conduct is imputed to the City because he served as its statutory agent under MMBA section 3505, is not only supported by substantial evidence, it is the only rational finding dictated by that evidence. *Nothing* in this conclusion impairs the "right of public officials to express their political and policy opinions about all pending legislation, whether supported by labor or not." (League at p. 13.) Thus, this "right" can be reaffirmed as League urges while this Court nevertheless upholds PERB's decision to ensure the MMBA's continued vitality.

B. PERB's Agency Determination Is Consistent With What City's Own Municipal Lawyers Predicted

League accuses PERB of offering interpretations outside its MMBA expertise over "how San Diego's government is structured under its charter, and whether common law agency principles apply in a charter city." (League at p. 9.) League offers no specifics.

Yet, ironically, PERB's agency determination in this case is fully consistent with what two elected City Attorneys had previously told the Mayor and City Council it would be. By Memorandum in **2008** entitled "Pension Ballot Measure Questions," (XVIII:4708-17),[5] the City Attorney expressly advised Mayor Sanders and the City Council that if Mayor Sanders led a pension initiative as a "private citizen," the City's obligations to meet and confer under section 3505 would be triggered because the Mayor's sponsorship "would legally be considered as (his) acting with apparent governmental authority." (XVIII:4710, 4716 and fn. 9.) Then, by Memorandum of Law issued in January 2009, the same City Attorney – who later stood with Mayor Sanders to announce his pension-reform-by-initiative plan in November 2010 – had cautioned that the City's compliance with the MMBA would be determined based on the actions of all its agents despite the shared duties assigned to Mayor and City Council under the Charter:

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[5]Unless otherwise noted, all citations are to the Administrative Record. Citations to *Boling* are to the Court of Appeal's decision below.

> [T]he City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. *See* Charter §1. The City itself is the public agency covered by the MMBA. In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City." (XVIII:4730, emphasis added.)

This is precisely what PERB's decision does when evaluating the consequences *to the City* of the Mayor's actions taken on its behalf while serving as City's "administrative official" under section 3505 of the MMBA. According to the League, *nothing* Mayor Sanders did or said as the City's highest-ranking executive officer and Chief Labor Negotiator could ever constitute an unfair labor practice under the MMBA. But this view stands in direct conflict with the City Charter and the MMBA.

C. City Was Not The Victim Of Mayoral "Misconduct" But Fully Embraced The MMBA Opt-Out Scheme At Issue In This Case

League suggests that Mayor Sanders may have engaged in "misconduct" by misusing public resources for which the City must not "suffer the consequences." (League at p. 13.) City has never argued, nor is there anything in the record, to support this view of the City as "victim" in this case. The Mayor believed he had a right to do what he did as a private citizen – without triggering *any* duty by the City to comply with the MMBA. He was told by the City Attorney that he had this right and, indeed, the City Attorney "stood" with the Mayor during his first press conference inside City Hall to

announce his determination and his plan; the Mayor named the City Attorney as a participant in his pension-reform-by-initiative plan when describing it during his State of the City Address; and the City Attorney stood with the Mayor again during his press conference outside City Hall to announce the filing of a "notice of intent" as the Mayor's next "big step" to reform City's pension system. (XIII:3339-40, 3376-77, 3421, 3431; XIX:5006-07, 5013-21, 5028-29 [Fox News: "Pension Reformers Unite Behind Compromise Plan"]; XXI:Ex. 159:5515 [KUSI videoclip].)

Before he led this press conference, the Mayor's Chief of Staff, City's Chief Operating Officer, and the City Attorney, had all reviewed drafts of the initiative to assure it achieved the Mayor's objectives. (*Boling* at 861 & fn. 9; XIV:3576-79, 3582-85, 3587-91, 3680-82, 3684-87, 3693-94; XV:3821-24.) And this press conference came after *months* devoted to this initiative effort – treated as "official business" by the Mayor's City-paid staff.[6]

Moreover, 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 use of pubic funds to develop and draft a proposed

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[6] See AR:XIII:3321, 3330-32, 3401-02, 3480-81; XIV:3570-76, 3653-54, 3667-68, 3676-79; XV:3807, 3812-14, 3957.

initiative does not violate campaign financing law because it is not partisan campaign activity seeking to persuade voters. (*League of Women Voters v. Countywide Criminal Justice Coord. Comm.* (1988) 203 Cal.App.3d 529, 550.)

Thus, what happened in this case was not the product of Mayoral misconduct; nor was City the victim of any rogue actor. What happened in this case was according to *City's plan* – a plan designed to change pensions by initiative to avoid the obligations of meet-and-confer under the MMBA. For this reason, the City – through its two statutory agents, the Mayor and City Council – remained adamant in its failure and refusal to meet and confer over this pension reform subject matter: (1) when the City's duty first arose in November 2010; (2) during the months thereafter when *no initiative was pending*; (3) *before* any initiative had qualified for the ballot; (4) despite Unions' repeated written requests directed to the Mayor, City Council and City Attorney; and (5) even *after* Unions had filed unfair practice charges against the City based, in part, on a detailed account of the Mayor's conduct. Notably, Unions sent seven letters beginning in early July 2011, repeatedly and consistently asserting the belief that, because he served as City's Chief Executive Officer and Chief Labor Negotiator, Mayor Sanders was acting as City's agent in pursuing 401(k)-style pension reform, and urging the Mayor, City Attorney, and City Council not to go forward with their unlawful actions. (XIX:5109-10, 5112; XX:5123-26, 5142-44, 5157-62.)

With full knowledge of the Mayor's highly-publicized activities and his stated intentions – explained directly to the City Council during the State of the City Address in early January 2011 – the City Council sat idly on the sidelines waiting to take the benefits of this bypass scheme *for the City*.

Thus, far from seeing itself as the victim of the Mayor's alleged misconduct, as League suggests, the City has asserted the alleged righteousness of what the Mayor did, as well as the alleged lawfulness of its own failure and refusal to bargain, throughout this case. The City's defense of this case is indeed reminiscent of the iconic moment in *A Few Good Men*: "you're damn right (the City) ordered the code red."

Accordingly, there is *nothing* in PERB's decision which serves to restrain or chill the "right of elected officials to communicate and offer their opinions about legislation and other issues affecting their respective communities," as League predicts. Nor is there anything "unworkable and ambiguous" about what this decision means and how elected officials should comply with it *if* they serve as their public agency's chief executive officer and chief labor negotiator under the MMBA. PERB's decision, if upheld, clearly and unambiguously forecloses "administrative officials or other representatives" of local public agency governing bodies (as defined by MMBA section 3505) from using their *governmental* positions and power – as Mayor Sanders did in this case – to exploit the initiative process as a means

to change terms and conditions of employment for the benefit of the public entity they serve while failing and refusing to engage in a good faith meet-and-confer process with recognized employee organizations.

III. League's Call For "Situational Deference" Under *Yamaha* Means A "Clearly Erroneous" Standard Of Review For PERB's Adjudicatory Decisions Because Of Its Expertise As A Labor Board

One of the two issues before this Court for review is this: 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?

Despite the City's acknowledgment as Petitioner before the Fourth Appellate District that a "clearly erroneous" standard of review applied to review of PERB's decision under MMBA section 3509.5, subdivision (b), (City's Opening Brief to *Boling* Court of Appeal, p. 20), the *Boling* court declared that, under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), *de novo* review of PERB's final decision was appropriate. (*Boling* at 870.) This result was at odds with decades of case law, led by this Court, establishing a "clearly erroneous" standard of review. It was also at odds with the Fourth District Court of Appeal's own application of a "clearly erroneous" standard of review when upholding PERB's decision less than a year earlier in *San Diego Housing Commission v. PERB* (*SEIU Local*

221) (2016) 246 Cal.App.4th 1, 12. In *San Diego Housing Commission*, the court stated that PERB's interpretation of the MMBA falls squarely within PERB's legislatively designated field of expertise, and since PERB's primary responsibility is to determine the scope of the statutory duty to bargain and to resolve charges of unfair refusal to bargain, a reviewing court owes PERB's legal determinations deference and its "interpretation will generally be followed unless it is clearly erroneous." (*Ibid.*)

According to the *Boling* court, PERB's decision allegedly turned on questions of law outside PERB's area of expertise and did not involve its interpretation and application of the MMBA itself. Unions have addressed the *Boling* court's fundamental error in this regard in their Opening and Reply Briefs on the Merits – noting that *Boling's* rejection of PERB's conclusion that the City violated the MMBA turned entirely on the *Boling* court's decision to substitute its own (unexplained) interpretation of MMBA sections 3504.5 and 3505 for PERB's interpretation. The correct interpretation and application of these two sections of the MMBA is at the heart of the matter before this Court.

League, however, does not address the text of either section 3504.5 or 3505 or the interplay between them in light of the statute as a whole. League does not argue that PERB's interpretation of these sections was wrong or that *Boling*'s interpretation is right. Instead, League argues that the "clearly erroneous" standard of review when applied to PERB's decisions "does not

square with this Court's holding in *Yamaha*." (League at p. 14.) League asserts that this Court only haphazardly applied a "clearly erroneous" standard of review in *Banning Teachers Ass'n v. PERB* (1988) 44 Cal.3d 799 (*Banning*), "with no real analysis as to its meaning or practical application," and that this "clearly erroneous" standard has been mindlessly applied by this Court and other courts ever since. Thus, League calls on this Court to "re-set the standard of review and confirm that the degree of deference accorded PERB's interpretations is "situational." (League at p. 10.) Although League appears to believe that if a "situational deference" standard as described in *Yamaha* is applied, it will defeat PERB's interpretation and application of the MMBA to the facts of this case, League misunderstands. When League describes the *Yamaha* standard of review as the court's exercise of its "independent judgment, giving deference to the determination of the (agency) appropriate to the circumstances of the agency action," (League at pp. 15-16), League is *not* invoking a *de novo* standard of review. Rather, when it comes to PERB's interpretation and application of the MMBA, League is calling for application of the established "clearly erroneous" standard of review.

A. The "Clearly Erroneous" Standard of Review For PERB's Decisions Is Consistent With *Yamaha*'s Notion of "Situational Deference"

Yamaha did not involve the review of a decision by a presumptively expert administrative agency in an adjudicatory context. However, *Yamaha*'s