S242034

SUPREME COURT
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IN THE SUPREME COURT OF THE 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, Consolidated Case Nos. D069626 and D069630

PETITIONER AND REAL PARTY IN INTEREST CITY OF SAN DIEGO'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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ATTORNEYS FOR PETITIONER AND REAL PARTY IN INTEREST
CITY OF SAN DIEGO

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I. INTRODUCTION

Petitioner and Real Party in Interest City of San Diego (City), pursuant to California Rules of Court, rule 8.520(f)(7), respectfully submits this Consolidated Answer to the Amicus Briefs filed by amici curiae (1) International Association of Fire Fighters; (2) International Federation of Professional and Technical Employees Local 21, Operating Engineers Local Union No. 3, and Marin Association of Public Employees; (3) Orange County Attorneys Association; (4) San Diego Police Officers Association; and (5) Service Employees International Union, California State Council, in support of the Public Employment Relations Board (PERB) and the Union Real Parties in Interest, 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, IAFF, AFL-CIO.

II. ARGUMENT

A. The Court of Appeal Correctly Applied a *De Novo* Standard of Review to PERB's Determination that the Comprehensive Pension Reform Initiative Was Not a "Pure" Citizens' Initiative

The issues confronted by PERB in this case involved the convergence and interplay of numerous areas of law unquestionably outside of PERB's specialized area of expertise. PERB determined the Comprehensive Pension Reform Initiative (CPRI), a duly qualified citizens' initiative, was an "impure" citizens' initiative subject to the meet-and-confer procedural requirements of the Meyers-Milias-Brown Act (MMBA) based upon PERB's interpretation of common law agency principals, the City's charter provisions, and California's constitutional and statutory provisions governing charter amendments. (*Boling v. Public Employment*

Relations Bd., et al., Opinion of the Court of Appeal, Fourth Appellate District, Division One, published in Case No. D06926 (consolidated with Case No. D069630), p. 43 (hereinafter referred to as "Opinion" or "Opn.").)

Contrary to Amici, PERB, and the Unions' claims, PERB's decision did not *just* address labor relations issues and solely regulate the City's economic conduct, rather, it nullified the effects of the CPRI – a citizens' initiative brought by the three Citizen Proponents, whom PERB itself correctly concluded were ***not*** agents of the City or Mayor Sanders. (XI AR 186:003088-89.) As the *Boling* Opinion recognized, PERB ordered, among other remedies, "that the City in effect refuse to comply with the CPRI." (Opn., p. 5.)

This Court has recognized the citizens' initiative power to be one of the democratic processes most precious rights, and when such power is challenged, it is the duty of the courts to "jealously guard" and liberally construe such right so that it is not "improperly annulled." *Associated Home Builders etc., Inc. v. City of Livermore (Associated Home Builders)*, 18 Cal. 3d 582, 591 (1976); *Raven v. Deukmejian*, Cal. 3d 336, 341 (1990). All presumptions must favor the validity of citizens' initiative measures, and they "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991); *see also California Cannabis Coalition v. City of Upland (Upland)*, 3 Cal. 5th 924, 936 (2017) (reaffirming that courts are obligated to resolve any doubts in favor of the exercise of the initiative power, and any provisions that would limit or burden the exercise of such power must be narrowly construed).

The *Boling* Opinion correctly determined that it is the judiciary, not PERB, that must ultimately decide the "purity" of a duly certified citizens' initiative. The Court of Appeal correctly followed this Court's

circumstantial approach set forth in *Yamaha Corp. of America v. State Bd. of Equalization (Yamaha)*, 19 Cal. 4th 1 (1998), to apply a *de novo* standard of review since PERB lacks the requisite expertise and holds no comparative advantage over the courts with regards to interpreting "the constitutional or statutory scheme governing initiatives" or "common law principles of agency." (Opn. at p. 44.) Amici's reliance on *Banning Teachers Ass'n v. Public Employment Relations Bd. (Banning)*, 44 Cal. 3d 799 (1988), is inapposite, as PERB was addressing a pure labor relations issue which clearly fell within its area of expertise.[1] Amici have cited to no authority which establishes that PERB holds any expertise in the areas of law governing citizens' initiatives, the City's Charter, or common law principles of agency above that of the courts. Allowing PERB any deference regarding its determination of whether a citizens' initiative is "pure" or "impure" would improperly conflict with this Court's determination that it is the solemn duty of the courts (not PERB) "to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its existence." *See Legislature v. Eu*, 54 Cal. 3d at 501.

B. The Court of Appeal Did Defer to PERB's Factual Findings

Amici, like PERB and the Unions, also incorrectly contend the Opinion would have been different if the Court of Appeal applied Government Code section 3509.5's substantial evidence standard to PERB's findings of fact. (Int'l Ass'n of Fire Fighters' Amicus Brief, pp. 20-21; PERB Brief, pp. 62-64; Unions' Brief, p. 40.) The Court of Appeal,

[1] Likewise, the Court of Appeal appropriately distinguished *City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal. App. 5th 1271 (2016), which dealt with meet-and-confer obligations regarding a city council sponsored initiative, not a citizen sponsored initiative as is at issue in the present case. (Opn., p. 41 n.32.)

however, did defer to PERB's factual findings, noting "insofar as PERB's decision rests on its resolution of disputed factual questions, we apply the most deferential standard of review. . . . PERB's factual findings are conclusive as long as there is any substantial evidence in the record to support its factual findings." (Opn., p. 22 (citing *Trustees of Cal. State University v. Public Employment Relations Bd.*, 6 Cal. App. 4th 1107, 1123 (1992); *Regents of University of California v. Public Employment Relations Bd.*, 41 Cal. 3d 601, 618-23 (1986).)

The Opinion, however, correctly concluded that when the material facts are undisputed, as they were in the present case, the question of the existence of a principal agent relationship is a matter of law to be decided by the courts. (Opn. at p. 44, n. 34 (citing *Kaplan v. Caldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 745 (1997); *see also Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 299 (1984) (noting that if the essential facts are not in conflict the question of the existence of an agency relationship is a question of law).)[2] The Court of Appeal rightly noted that "the evidence was undisputed (and PERB did not conclude to the contrary) the charter amendment embodied in the CPRI was place on the ballot because it qualified for the ballot under the 'citizens' initiative' procedure for charter amendments as provided by [Cal. Const., art. XI, § 3(b)]." (Opn., p. 42.) It further found there was no evidence, and PERB made no finding, that the CPRI was placed on the ballot because it qualified as a ballot measure sponsored or proposed by the City's governing body. (*Id.*) Accordingly, the Opinion correctly concluded that, even giving

[2] The Opinion also pointed out, however, that "courts in other contexts have declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles." (Opn. at p. 26, n.21 (citing *Los Angeles Unified School Dist. v. Public Employment Relations Bd.*, 191 Cal. App. 3d 551, 556-57 (1983)).)

deference to PERB's factual findings pursuant to Government Code section 3509.5, PERB's decision was erroneous under applicable law. (*See* Opn., pp. 43, 65-66.)

C. The Court of Appeal Correctly Held the City's Charter and the Nondelegation Doctrine Prevent the City's Mayor from Unilaterally Proposing Legislation on the City's Behalf

PERB's decision erroneously held that "Sanders was a statutory agent of the City with actual authority to speak for and bind the City with initial proposals . . . ." (XI AR 186:003005.) Any attempt to hold the City liable for an MMBA violation under a statutory agency theory blatantly ignores the fact Mayor Sanders had absolutely no authority, without City Council direction or authorization, to sponsor or propose a Charter amendment on behalf of the City.

The City's Mayor derives his or her authority solely from the City's Charter, therefore, his or her power to act is measured wholly by the terms of such governing statute. *See, e.g., Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1086 (2004). The City's Charter is unambiguous, the Mayor does not have the power to unilaterally make City policy. *See* San Diego Charter §§ 11, 11.1. Under the strong mayor form of government Sanders was the City's designated negotiator, however, he did *not* have the statutory authority to act independently to create or propose legislation on behalf of the City. The law and the testimony before PERB is clear, only the City Council can establish *City* policy and propose legislation on behalf of the City, and such power is *nondelegable*. That is why the Mayor is required to *first* obtain City Council approval in advance of presenting initial proposals at the bargaining table. (XI AR 186:003048; XII AR 189:003226:11-3227:6.) It is undisputed that Mayor Sanders never

sought, nor was he ever given, the authority by the City Council to negotiate legislative policy on behalf of the City. PERB's determination that Sanders was acting as a statutory agent is erroneous no matter what standard of review is applied.[3]

D. State Law Protected Mayor Sanders' Actions; and, Even *If* Public Resources Were Inappropriately Expended No Authority Supports a Violation Would Annul a Duly Certified Citizens' Initiative Which Was Overwhelmingly Approved by the Voters

The City acknowledges that City staff and public funds may not be expended to campaign in support of or opposition to initiatives or candidates, and violations of such laws can have dire consequences for City officials. *See, e.g., Stanson v. Mott*, 17 Cal. 3d 206, 223-26 (1976); *People v. Battin*, 77 Cal. App. 3d 635 (1978). Although, there is no known legal authority for overturning an election, or denying the Citizen Proponents and nearly 116,000 petition signers their constitutional right to initiative, due to any alleged violation of such laws by mayoral staff.

PERB admitted in its Court of Appeal briefing that Sanders and City staff had statutory rights as private citizens to support and take positions on the CPRI pursuant to Government Code sections 3203 and 3209. (PERB Court of Appeal Brief, pp. 70-71.) However, PERB, the Unions, and the Amici claim any such protections are lost because substantial evidence supports PERB's finding that Sanders' conduct was not that of a private

---

[3] It is unreasonable, and in fact disingenuous, for the Unions to claim they believed Sanders was acting in his official City capacity as a statutory authorized representative when time after time, including in the most public of settings such as the State of the City address, Sanders stated he would pursue his pension reform concept as a private citizen. Furthermore, as detailed in the City's Combined Answer Brief on the Merits, the Citizen Proponents of the CPRI were moving forward with *their* initiative "with or without" Sanders' support. (*See* XVI AR 191:003575:2-9.)

citizen since the imprimatur of the Mayor's office and minor City resources (City fact sheet and email) were used to promote an early pension reform concept. (*See, e.g.*, Service Employees Int'l Union Amicus Brief, pp. 10-11.)

The evidence, however, demonstrated Sanders attempted to make it clear at every opportunity, and in the most public of settings, that he was acting as a private citizen. He announced at the State of the City speech that he and then Councilmember Faulconer were bringing forth their initiative idea "as private citizens." (XVIII AR 195:004823.) When asked if he believed the public understood that in proposing an initiative, he was not acting as the Mayor, he answered:

. . . I think I was very public about it. I made that statement right in the State of the City, one of the most watched things, one of the most reported on things. I told the Union-Tribune to their editorial board, and all the writers' columns, that I'm acting as a private citizen. When I went on TV to talk about this, I frequently said I'm acting as a private citizen. I went out of my way to say I was acting as a private citizen so I think the very things that you've questioned what I did are exactly why I did them, to let the public know very clearly that I was acting as a private citizen.
(XIII AR 190:003361:1-3362:9.)

Noting he doesn't control how news articles are written or what they include, Sanders further testified, "[b]ut I can only make sure I'm making that clear whenever I have the opportunity, and I believe I did that probably ad nauseam." (XIII AR 190:003362:18-20; *see also* XXIII AR 200:005815, 5829, and 5834, "I am part of a private effort . . . .") Sanders' staff, too, attempted to always act in their private capacity. Sanders' Chief of Staff, Julie Dubick, testified:

> The people who volunteered to work on this understood very well their obligations at the City and as, and privately, so they didn't need separate instruction. I think all of them are salaried employees, so they didn't necessarily need to take leave, but on occasion, we would make sure everything was set after hours, or if there was a reason to, we would say, okay, this is, for some reason, in the middle of the day everybody take leave, just to be on the safe side.
> (XIV AR 191:003687:16-23.)

Dubick went on to testify:

> Every effort was made, if there were meetings, to hold them after official hours. All of us are salaried, so whether we take lunch at noon or we take lunch at three, whether we come in at eight or we come in at ten, it doesn't matter, because we're salaried, so we need to get our work done, but not on an official, we put in a, we stamp in and stamp out. But every effort was made to allow people to do their City work during normal City hours, and do any work they were volunteering to do on this initiative after or before normal City hours.
> (XIV AR 191:003688:22-3689:3)

City staff did take leave and filled out leave slips. (*See* XXII AR 200:000005886-5904, 5944-56, and XXIV AR 201:006109-6123.) On January 3, 2011, when someone outside the City attempted to communicate through City email accounts on the subject of pension reform, Rachel Shira, Executive Assistant to Sanders, responded, "[p]lease be advised that emails

pertaining to this particular subject cannot be communicated or addressed through the City of San Diego email accounts." (XVIII AR 195:004786.)

Thus, Sanders and his staff attempted to adhere to local and state law policy on political activity. Any minor imperfections in such effort should not be relevant to this case, as it would likely be a local enforcement issue or personnel issue regarding violations of internal City personnel regulations. Any de minimis infraction certainly would not transform the Sanders/Faulconer concept, let alone the CPRI, into a "City-sponsored" initiative subject to the MMBA's meet-and-confer requirements. Nor would such allow Sanders to be deemed to have somehow created City policy in direct conflict with the City's Charter requirements. The proper remedy would not, and could not, be to disenfranchise the Citizen Proponents, whom PERB expressly found were *not* agents of Sanders or the City, and the hundreds of thousands petition signers and voters who overwhelmingly passed the CPRI/Prop. B.

E. Upholding the *Boling* Decision Would Not Erode Labor Relations, Rather, It Would Ensure that Those with the Greatest Stake in Municipal Fiscal Responsibility are Not Disenfranchised

When the City and its labor unions meet-and-confer on subjects of bargaining and reach an agreement under the procedures set forth by the MMBA it has an impact on *all* the City's citizens. As the CPRI/Prop. B's recitals state, in pertinent part:

> (b) The cost of City pensions has become unsustainable and the Citizens find that the City faces a financial emergency that require immediate controls on pension costs and long term reforms of pension benefits.

> (c) In 1996 and 2002, the San Diego City Council retroactively increased pension benefits for City employees under the defined benefit plan, without identifying adequate funds to cover the costs of those benefits in the future.
>
> . . . .
>
> (f) As a result of the increased pension benefits and past decisions to improperly fund the pension system, the city's pension fund currently has unfunded liability of over $2 billion." (XIX AR 196:005013-14.)

At the time the Citizen Proponents' proposed the CPRI, the City's annual required contribution for defined benefit pensions amounted to over 20% of the City's budget. (XIII AR 190:003476:26-3477:10.) Those payments come at the expense of public safety and other important neighborhood services that directly affect the City's citizens. While the PERB Decision attempts to sidestep the issue by erroneously concluding that the CPRI was a City initiative, the Unions, PERB, and Amici now appear to contend that citizens cannot directly legislate by initiative in the area of pensions, because MMBA procedures preempt initiatives altogether on that subject. (*See* San Diego Police Officers Ass'n Amicus Brief; Unions' Reply Brief, pp. 33-34; PERB Court of Appeal Brief, pp. 82-84.) To accept that premise is to deprive the very people who are most impacted by collective bargaining decisions, those who pay the bills, from ever having any say over these matters. It deprives the citizens of a constitutional right, which they reserved for themselves and have had for over 100 years, to "reclaim the legislative power" over these matters. California law simply does not, and cannot, support such a deprivation of the rights of the electorate.

F. There Is No Authority Requiring Public Agencies to Negotiate Over Whether to Adopt a Citizens' Initiative, Its Content, or Whether or Not to Propose a Competing Initiative

Once an elections official certifies that a sufficient number of registered voters have signed a petition to qualify as a citizen initiative, a city council *must* perform its ministerial duty to place it on the ballot *without change* and, *without compliance* with procedural prerequisites that usually attach to measures proposed by a city's "governing body," such as the MMBA's meet-and-confer requirements. *See Save Stanislaus Area Farm Economy v. Bd. of Supervisors*, 13 Cal. App. 4th 141, 149 (1993) ("A local government is not empowered to refuse to place a duly certified initiative on the ballot."); *Native American Sacred Site and Envtl. Protection Ass'n v. City of San Juan Capistrano*, 120 Cal. App. 4th 961, 968 (2004) ("it is plain that voter-sponsored initiatives are not subject to the procedural requirements that might be imposed on statutes or ordinances proposed and adopted by a legislative body, regardless of the substantive law that might be involved.").

"It is the rule under the MMBA 'that a public agency is bound to so 'meet and confer' only in respect to 'any agreement that the public agency is authorized [by law] to make . . . .' [citation]." *American Federation of State etc. Employees v. County of San Diego*, 11 Cal. App. 4th 506, 517 (1992), italics in original (citing *San Francisco Fire Fighters v. Board of Supervisors*, 96 Cal. App. 3d 538, 545 (1979)).

Requiring the City to meet-and-confer with the Unions regarding the terms of the CPRI necessarily assumes that the City had the power to change the language of the CPRI. However, it clearly did not. Pursuant to Elections Code section 9255(b)(2), the City had a ministerial duty to place any qualified citizens' initiative on the ballot as authored and worded by the

citizens themselves. "As in other areas of the law, the MMBA is not to be construed to require meaningless acts." *American Federation of State etc. Employees v. County of San Diego*, 11 Cal. App. 4th at 517 (citing *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 336 (1975)).

No legal authority has ever before applied the MMBA meet-and-confer requirements to a citizens' initiative. To do so would make no sense, because a public agency is barred from changing an initiative after it qualifies, nor may a public agency amend an initiative after it is adopted by the voters. Therefore, there is nothing to be negotiated because nothing could be changed. The meet-and-confer process, in such a situation, would be an exercise in futility.

Additionally, neither PERB, the Unions, nor Amici provide any authority that the City was obligated to meet-and-confer over a potential competing alternative initiative. As noted in the League of California Cities et al. Amicus Brief at pages 19-20, it would make no sense to require the City to expend public resources when there is no guarantee the citizens' initiative ballot measure would even pass.

In response to the Unions' demands to meet-and-confer *over the CPRI*, the City appropriately responded that it would (and it eventually did) provide notice to the Unions and opportunity to meet-and-confer over the impacts of the CPRI if approved by the voters. (XX AR 197:005129 & 5152.)

G. If the *Boling* Opinion Were Reversed, Government Body Designated Administrative Officers or Representatives Would Have the Ability to Defeat the Outcome of Citizens' Initiatives

PERB, the Unions, and the Amici contend that, pursuant to Government Code section 3505, if a government body designated "administrative officer" or "other representative" supports or campaigns for a citizens' initiative which addresses MMBA covered subjects, such initiative then becomes subject to the MMBA's meet-and-confer requirements set forth in *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591 (1984). If this were to become the state of the law, it is easy to see that public agencies could simply defeat any attempt by the citizens to exercise their initiative power. All a public agency designated "administrative officer" or "representative" would need to do would be to openly support or use (even minimal) public agency resources to promote such an initiative. Doing so would require the citizens' initiative to comply with the MMBA's meet-and-confer requirement, which if not fulfilled, would subject it to a legal challenge which would nullify any effects of the initiative – just as the PERB decision holds.

If the *Boling* Opinion were reversed, and PERB's decision allowed to stand, public officials who may disagree with proposed citizens' initiatives could easily thwart their effectiveness. Furthermore, the rights of public officials to communicate their positions about crucial legislation affecting their representatives would be chilled for fear of converting a citizens' initiative into a public agency sponsored initiative subject to the MMBA's meet-and-confer requirements.

III. CONCLUSION

For the reasons set forth above, as well as those stated in the City's Answer Brief on the Merits, Amici's arguments in support of PERB and the Unions should be rejected, and the Court of Appeal's *Boling* Opinion should be affirmed.

Dated: January 29, 2018

MARA W. ELLIOTT,
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By:
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CITY OF SAN DIEGO

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3975 words, including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), and is printed in a 13-point typeface. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: January 29, 2018

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IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

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Boling v. Public Employment Relations Board

Case No. S242034
Appellate Case No. D069626 and D06930
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

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On January 29, 2018, I served true copies of the following document(s) described as:

- **PETITIONER AND REAL PARTY IN INTEREST CITY OF SAN DIEGO'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS**

on the interested parties in this action as follows:

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