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,

and

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.

Case No.: S242034

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

PUBLIC EMPLOYMENT RELATIONS BOARD'S COMBINED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

The Public Employment Relations Board (PERB or Board) hereby submits this combined answer to the three amicus briefs filed on behalf of the City of San Diego (City) and/or Catherine A. Boling, T.J. Zane, and Stephen B. Williams (collectively, the Ballot Proponents) by: (1) Pacific Legal Foundation, Howard Jarvis Taxpayers Association and National Tax Limitation Committee (collectively, PLF); (2) San Diego Taxpayers Educational Foundation (SDTEF); and (3) League of California Cities, California State Association of Counties and International Municipal Lawyers Association (collectively, LCC). As explained below, the arguments in those briefs offer no basis for affirming the Court of Appeal's erroneous decision in *Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853 (*Boling*).

Most of the arguments raised by PLF and LCC have previously been made. For instance, LCC follows the City and the Ballot Proponents by arguing that the court below was correct when it held, sua sponte, that *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*) required de novo review of the Board's interpretation of the Meyers-Milias-Brown Act (MMBA).[1] Like the City and the Ballot Proponents, LCC claims that given the presence of "other" legal issues,

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code.

the expert Board's interpretation of the MMBA is not entitled to any deference whatsoever. But, as PERB has explained previously, and briefly reiterates below, *Yamaha* has never been applied—by this or any other court—to the legal interpretations of expert labor boards such as PERB. Rather, courts have uniformly applied the "clearly erroneous" standard of review to PERB's final decisions. Further, *Yamaha* certainly does not support the proposition that PERB's legal interpretations are not entitled to deference merely because a case involves other issues.

LCC and PLF also echo the City and the Ballot Proponents by stressing the sanctity of the citizen's initiative process—a proposition with which PERB has no dispute. Contrary to PLF's and LCC's arguments, the Board's decision did not hold that the MMBA applies to all citizens' initiatives affecting terms and conditions of employment. Rather, based on the unique facts on this case, the Board held that the City violated its duty to meet and confer in good faith under MMBA section 3505. This determination was based on the actions of the City's "Strong" Mayor and chief labor negotiator, Jerry Sanders, who helped develop, draft and promote a citizens' initiative—drastically changing City employees' pension benefits—as a mechanism to evade the City's obligation under the MMBA to bargain in good faith. Nor did the Board's decision impact

the citizens' initiative referred to as Proposition B. The decision leaves the initiative intact in its entirety.

Unlike LCC and PLF, SDTEF covers new ground, but in the process of doing so, it seeks to considerably expand the issues presented to this Court. So far in this litigation, the City has argued that the Board's decision interfered with the Mayor's First Amendment rights to speak as a private citizen, and PERB has explained that those rights do not extend to the Mayor's speech in his official capacity, whether executing his duties as the City's chief executive officer, acting as lead labor negotiator, or using the resources of his City office. Now, however, SDTEF argues that the Mayor in fact enjoys a virtually unfettered First Amendment right whether speaking as a private citizen or as Mayor. Needless to say, this Court need not decide this issue, raised only by an amicus. Even if it does, however, SDTEF's argument does not withstand scrutiny. It chiefly relies on cases involving legislators, not executive officials such as the Mayor, who cannot be excused from performing their legally mandated duties on the basis of their First Amendment rights.

In short, the arguments of PLF, LCC, and SDTEF offer no basis for affirming the Court of Appeal's erroneous decision below. For the reasons discussed below as well as in PERB's Opening Brief (OB) and Reply Brief (RB), PERB urges this Court to overturn the Court of

Appeal's decision and affirm the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M.

ARGUMENT

I. Amici's arguments regarding the applicable standard of review of PERB's final decision add no value or insight into this case and can be disregarded.

A. *Yamaha* does not supply the standard of review for the legal interpretations of expert labor boards such as PERB.

LCC argues that this case presents the ideal "vehicle" for this Court to "re-confirm" a de novo standard of review based on *Yamaha*, *supra*, 19 Cal.4th 1. (LCC Br., p. 15.) *Yamaha*, however, has never previously been applied to an expert labor relations board such as PERB. Instead, this Court has determined that the "clearly erroneous" standard applies to PERB's decisions, just as it does to those of the Agricultural Labor Relations Board (ALRB). (See, e.g., *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*), citing *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 (*J.R. Norton*); *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856, citing *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859 and *J.R. Norton*, *supra*.)

Recently, this Court emphatically reaffirmed the deference it gives the ALRB. "[T]he Board, as the agency charged with the ALRA's

administration, 'is entitled to deference when interpreting policy in its field of expertise.'" (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1155, quoting *J.R. Norton, supra.* 26 Cal.3d 1, 29.) "The Legislature 'intended that the ALRB serve as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."' (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1161, 1168, quoting *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 346.) "Where the Board relies on its 'specialized knowledge' and 'expertise,' its decision 'is vested with a presumption of validity.'" (*Ibid.*, quoting *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1292.) As a result, to now affirm the Court of Appeal's reliance on *Yamaha* in this case would be an abrupt and unwarranted departure from settled law.

LCC argues that resort to *Yamaha* is appropriate because the Board's decision was a "foray into municipal, Constitutional and election laws, as well as common law [agency] principles," ostensibly outside of PERB's expertise. (LCC Br., p. 15.) While PERB acknowledges, as it has throughout this case, that it is not entitled to deference when

interpreting external laws, such as constitutional provisions (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583), the Legislature entrusted interpretation of the MMBA to the Board's expertise. Thus, the presence of other legal issues in a case does not allow a court to simply disregard the expert Board's interpretation of the MMBA. In PERB's more than 40-year history, the courts have consistently deferred to the Board's interpretation *even if* other extraneous issues were implicated. (*Id.* at pp. 586-587; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922; *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1287-1288 (*Palo Alto*) [applying the "clearly erroneous" standard in a case that dealt with election law and constitutional issues, in addition to issues of MMBA interpretation].)

LCC also attempts to defend the Court of Appeal's reliance on *Yamaha* by referring to Professor Asimow's article, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157. (LCC Br., pp. 14-15.) However, nothing in that article even remotely suggests that a reviewing court may ignore an agency's interpretation of its own statute when a case presents other legal issues. In fact, the article confirms that while California courts are not required to accept an agency's reasonable interpretation of an ambiguous

statute, there are circumstances in which "courts are required to accord deference or 'great weight' to an agency's interpretation." (*Id.* at p. 1194.) Among these circumstances are when the "interpretation [is] contained in a written opinion rendered in the course of formal agency adjudication" (*id.* at p. 1196), and when "the legal text to be interpreted is technical, obscure, complex, or open ended, or ... entwined with issues of fact, policy and discretion" (*id.* at p. 1195). Notably, as the Board previously argued, both of these circumstances are present in this case, and the Board's decision is therefore entitled to greater deference. (PERB OB, pp. 41, 61.)

LCC also cites a portion of Asimow's article in which he recounts confusion among Washington state judges about the differences between a "clearly erroneous" and a "substantial evidence" standard of review. (LCC Br., p. 15.) This part of the article, however, concerns judicial review of an agency's *factual findings*, not its legal interpretations. (See Asimow, *supra*, 42 UCLA L.Rev. 1157, 1191-1192.)[2] It is therefore

[2] None of the amici dispute that PERB's factual determinations are conclusive if supported by substantial evidence. (§ 3509.5, subd. (b).) Under this standard, "[i]f there is a plausible basis for the Board's factual decisions, [the court is] not concerned that contrary findings may seem ... equally reasonable, or even more so.... [A] reviewing court may not substitute its judgment for that of the Board." (*Regents of the Univ. of Cal. v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776-779, 781.)

irrelevant to whether the Board's legal interpretations are subject to review under the clearly erroneous standard.

In short, nothing in Asimow's article supports LCC's view that an agency's interpretation of its own statute should receive no deference when a case involves other legal issues.

Thus, LCC's arguments do not establish that the Court of Appeal applied the correct standard of review in this case. This Court has repeatedly affirmed that deference must be afforded the Board's final decisions under the clearly erroneous standard, and it should do so again here.

B. The Board's past decisions addressing local ballot measures are irrelevant to whether its interpretation of the MMBA in this case is entitled to deference.

Citing four Board decisions concerning local ballot measures—and three non-precedential decisions by PERB administrative law judges—LCC claims that the Board "has been consistently hostile to local ballot measures," has "posted legal interpretations in areas outside its specialized sphere of expertise, and has argued that these interpretations are subject to deference under the "clearly erroneous" standard of review. (LCC Br, p. 9.) LCC is, however, misrepresenting the Board's arguments and the cited Board decisions.

Most importantly, it is not true that the Board has argued that it is entitled to deference in its treatment of "external" legal issues, such as election law and constitutional law. The Board has repeatedly acknowledged that it is not. (See § I.A., ante.)[3] As a result, whether such issues are tangentially involved in the Board decisions LCC cites, and whether the Board offered an interpretation of those legal issues in those decisions, are irrelevant to the question before this Court: whether the Board's interpretation of the MMBA is subject to de novo or "clearly erroneous" review.

Nevertheless, LCC's argument is an unfounded attack on the Board's neutrality and expertise. Each of the four cited decisions show the Board primarily deciding legal issues of pure MMBA interpretation, not issues outside its expertise. (*City & County of San Francisco* (2017) PERB Decision No. 2540-M [whether binding interest arbitration process was a "reasonable" dispute resolution process within the meaning of section 3507]; *City of Palo Alto* (2014) PERB Decision No. 2388-M [whether section 3507 required a city council to consult in good faith with an employee organization before approving a ballot measure terminating

[3] As argued in its Opening Brief, PERB maintains that common law agency principles are so intrinsically entwined with questions of MMBA interpretation and policy that the Board must receive deference on those issues as well. (See PERB OB, pp. 61-62.)

the city's interest arbitration process]; *County of Santa Clara* (2010) PERB Decision No. 2114-M (*Santa Clara I*) [whether section 3505 required a county to meet and confer with an employee organization before approving ballot measures concerning interest arbitration and prevailing wages]; *County of Santa Clara* (2010) PERB Decision No. 2120-M (*Santa Clara II*) [same].)[4]

Moreover, the Board's determinations in these cases followed existing judicial precedent, which the MMBA expressly dictates. (§ 3509, subd. (b) [the Board must "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter"].) For instance, the Board's conclusion in *Santa Clara I* and *Santa Clara II* was a direct and straightforward application of *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), in which this Court held that MMBA section 3505 requires local agencies to bargain in good faith with the employees' exclusive representatives, before proposing to the electorate a charter amendment that

[4] As noted, LCC cites three decisions by administrative law judges. These are not decisions of the Board and are not precedential unless adopted by the Board. (Cal. Code Regs., tit. 8, § 32215.) Only one of the cited decisions was adopted by the Board, in *City & County of San Francisco*, *supra*, PERB Decision No. 2540-M. The other two have been appealed to the Board but are in abeyance at the request of the parties. These cases therefore do not support LCC's claim regarding the Board's treatment of local ballot measures.

would impact the employees' terms and conditions of employment. (*Santa Clara I*, *supra*, at p. 9.) Likewise, the Board's conclusion in *City of Palo Alto*, *supra*, PERB Decision No. 2388-M, represented nothing more than an extension of *Seal Beach*'s rationale to section 3507's requirement that public agencies must consult in good faith before modifying their procedures for the resolution of bargaining disputes.[5] Significantly, the Courts of Appeal affirmed the Board's decision in three of these cases,[6]

[5] On review, the Court of Appeal embraced this conclusion: "*Seal Beach* dealt with the duty to meet and confer imposed by section 3505, not the duty to consult in good faith imposed by section 3507. Nonetheless, we see no reason why its reasoning should not apply here." (*Palo Alto*, *supra*, 5 Cal.App.5th 1271, 1298.)

[6] After full briefing, the Sixth Appellate District summarily denied petitions challenging *Santa Clara I* and *Santa Clara II* filed by both the employer and the employee organizations. (*County of Santa Clara v. Public Employment Relations Bd.* (December 29, 2011, H035791); *County of Santa Clara v. Public Employment Relations Bd.* (December 29, 2011, H035846); *Santa Clara County Correctional Peace Officers' Assn. v. Public Employment Relations Bd.* (Dec. 29, 2011 (H035786); *Registered Nurses Professional Assn. v. Public Employment Relations Bd.* (Dec. 29, 2011 (H035804).)

On review of *City of Palo Alto*, *supra*, PERB Decision No. 2388-M, the Court of Appeal recognized that PERB's construction of the MMBA "fall[s] squarely within its expertise" (*Palo Alto*, *supra*, 5 Cal.App.5th 1271, 1288); that the Board's interpretation was not "clearly erroneous" (*id.* at p. 1292); and that there was no conflict between the Board's interpretation of section 3507 and the employer's constitutional "power to propose charter amendments" (*id.* at p. 1298). Despite approving the Board's finding that the employer violated the MMBA, the Court of Appeal determined that part of the Board's remedial order was invalid. Specifically, the court concluded that the Board could not order the employer to rescind a resolution passed by its governing body,

with the fourth currently pending.[7] LCC's argument that the Board has posited legal interpretations outside its area of expertise is therefore meritless.

Also meritless is LCC's claim that the Board has been consistently hostile to local ballot measures. Contrary to LCC's assertion, in neither *Santa Clara I, supra*, PERB Decision No. 2114-M nor *Santa Clara II, supra*, PERB Decision No. 2120-M did the Board "strike down" a ballot measure. The Board found a violation of the MMBA only with respect to one of the two ballot measures involved in those cases, and its remedy did not affect the ballot measure, which had not been passed by the voters. (See *Santa Clara I, supra*, at p. 18.)

LCC's claim of hostility is further undermined by the fact that the Board has twice rejected the argument that the City and County of San Francisco's binding interest arbitration process, which was enacted by ballot measure, violates the MMBA. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M; *City & County of San Francisco* (2007) PERB Decision No. 1890-M.) Far from evidencing hostility or legal interpretations outside the Board's expertise, the Board's cases

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although the Board itself could declare the resolution void. (*Id.* at p. 1320.)

[7] *City & County of San Francisco v. Public Employment Relations Board* (A152913).

involving ballot measures show the Board carefully interpreting the MMBA in light of constitutional and election law issues—just as it did in this case.

C. LCC's selective quotations from a purported transcript of oral argument in the Court of Appeal are improper and irrelevant.

LCC further attempts to bolster its argument by citing a portion of a purported transcript of the oral argument before the Court of Appeal in this matter. (LCC Br., pp. 13-14.) Reference to this transcript is improper, and, in any event, does not support LCC's argument.

LCC's quotations from oral argument are inappropriate, given that no transcript of oral argument appears in the record of this case, and that LCC did not file a transcript with its brief or a request for judicial notice. (Cal. Rules of Court, rule 8.520(g).) As a result, the Court may properly disregard this extra-record evidence. LCC's quotations are also inaccurate, to the extent they represent that the Court of Appeal—as opposed to individual justices on the panel—posed questions to counsel.

Regardless, this questioning by one justice hardly sheds light on the issue in this case. Although the justice's questions indicate confusion about the meaning of the "clearly erroneous" standard of review, the court's ultimate decision to apply de novo review was not based on confusion. It was based on the court's erroneous view that *Yamaha*

allowed it to ignore the deferential standard of review because the case involved some legal issues other than interpretation of the MMBA. (*Boling*, *supra*, 10 Cal.App.5th 853, 880.) Therefore, LCC's reference to questioning in the court below does not assist its argument.

II. The Board correctly interpreted MMBA section 3505 to impose a duty to bargain on the City based on the Mayor's conduct.

LCC's brief offers up various objections to the Board's interpretation of the MMBA in this case.[8] These objections are unavailing.

For instance, LCC objects to the Board's conclusion that the Mayor was an agent of the City, claiming that the Board improperly found the Mayor to have engaged in the legislative act of placing a proposed charter amendment on the ballot. (LCC Br., p. 12.) As fully explained in PERB's Reply Brief, however, the Board did not find that the Mayor's actions were legislative; the MMBA is not confined to legislative acts; and the doctrine prohibiting delegation of legislative authority is not applicable to this case. (PERB RB, pp. 21-24.)

LCC also claims that the Mayor's actions cannot be attributed to the City, because "[w]hen a public official misuses public resources, the public official suffers the consequences as an individual," citing *People v.*

[8] Like the City and the Ballot Proponents, LCC makes no attempt to defend the Court of Appeal's mistaken sua sponte reliance on section 3504.5. (See PERB OB, pp. 45-58.)

Battin (1978) 77 Cal.App.3d 635 (*Battin*). (LCC Br. p. 13.) But *Battin* does not stand for such a categorical rule. It interprets Penal Code section 424's prohibitions on a public official's use of public funds for purposes not authorized by law. (*Battin*, *supra*, at p. 647.) It does not address whether a public official's actions can be charged to the public agency as a violation of the MMBA (or any other statute, for that matter), and is therefore inapposite.

LCC also raises several objections to PERB's argument that the Board's decision may be affirmed based on the City's refusal to bargain over an alternative measure. None have merit. First, LCC claims that this theory is "not contained in [PERB's] underlying decision." (LCC Br., p. 19.) Not so. While this was not the primary theory of the Board's decision, the City's ability to negotiate over an alternative measure without impacting the rights of the Ballot Proponents was in fact discussed by both the ALJ and the Board. (AR:XI:3034 & fn. 23; 3091, fn. 19.) Nevertheless, LCC does not dispute that the Court may affirm the Board's decision even if the particular theory the Board relied on was incorrect. (See PERB OB, pp. 73-74.)[9]

[9] LCC also does not dispute that the Court may remand the case to the Board for further consideration of this theory, in the event it is not foreclosed by the Court's decision. (*J. R. Norton*, *supra*, 26 Cal.3d 1, 39.)

Second, LCC argues that there is no authority for PERB's alternative theory. (LCC Br., p. 19.) Presumably LCC means there is no *case law* endorsing PERB's specific theory, because there is ample authority for PERB's argument—beginning with the plain language of the MMBA itself—and LCC does not cite any authority to the contrary.

The primary authority supporting the Board's interpretation is section 3505, which imposes on public agencies and employee organizations a "mutual obligation personally to meet and confer promptly upon request by either party ...." This section has long been interpreted to allow an employee organization to initiate the meet-and-confer process by demanding to bargain over matters within the scope of representation. (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 5.) An employee organization that does so is necessarily proposing that the public agency take *some* action concerning the employees' terms and conditions of employment. There is no reason—and LCC does not identify one—why the proposed action cannot be the submission of a ballot measure to voters.

Although an employee organization may avail itself of the initiative process to present an alternative measure (LCC Br., p. 20), this option

does not foreclose negotiations over a measure sponsored by the public agency itself. "For one thing, as California Supreme Court precedent recognizes, the electoral process and the MMBA can coexist." (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 257, citing *Seal Beach*, *supra*, 36 Cal.3d 591, 602.) In fact, the Board has previously held that the MMBA *requires* negotiations when a public agency responds to a union-sponsored initiative by proposing a ballot measure of its own. (*Santa Clara I*, *supra*, PERB Decision No. 2114-M, pp. 2-3; *Santa Clara II*, *supra*, PERB Decision No. 2120-M, p. 3.)

LCC next argues that "it would make little sense to expend public resources bargaining when there is no guarantee the initiative ballot measure will actually pass." (LCC Br., pp. 19-20.) This argument appears to assume that the parties would be limited to bargaining over a measure whose effect is contingent on passage of the citizens' initiative. But LCC does not explain why this would be so. Thus, nothing would prevent the parties from negotiating a measure that could succeed and take effect independently.

Finally, LCC argues that the bargaining obligation should be limited solely to negotiations over the effects of an initiative after it passes—at which point the parties "can negotiate over timing, effects, potentially mitigating measures, and other issues." (LCC Br., p. 20.)

LCC here attempts to analogize between proposed ballot initiatives and proposed changes in state or federal law. This analogy fails. In general, the result of negotiations between a local agency and an employee organization cannot have any effect on proposed state or federal legislation.[10] The same is not true of a proposed initiative affecting the local agency's employees. A competing measure could affect whether the initiative passes. For example, as the Board explained, a competing measure in this case may have "giv[en] the electorate a more moderate option for addressing pension costs." (AR:XI:3091, fn. 19.)

LCC's effects bargaining argument also appears to assume that the "effects" the parties could bargain over after an initiative is approved by the electorate would include "tradeoffs." (LCC Br., p. 21.) To the extent LCC suggests that an employer and employee organization could negotiate an increase in other forms of compensation to offset a reduction imposed by initiative, that suggestion is disingenuous. The union would have little leverage—and the employer little incentive—to make such an agreement. The reason an employer is required to bargain *before* reaching a firm decision to change negotiable subjects is that otherwise a union would be required to try to bargain back to the status quo. (*City of Palo Alto* (2017)

[10] An exception would be if the proposed legislation will not supersede existing labor agreements. (See, e.g., § 7522.30, subd. (f).)

PERB Decision No. 2388a-M, p. 49.) It is improbable, at best, to believe that an employer that receives a windfall from an enacted citizens' initiative would simply return that windfall to the employees in effects bargaining. Thus, limiting the MMBA's meet-and-confer obligation to effects bargaining after an initiative passes is not a viable solution to the serious problems raised by citizens' initiatives changing terms and conditions of employment.

III. The Board's decision does not interfere with the local initiative right.

A. The Board did not hold that the MMBA applies to all citizens' initiatives affecting terms and conditions of employment.

To varying degrees, LCC and PLF both assert that the Board's decision is broader than it actually is. LCC argues that this case presents the question left open by *Seal Beach*, *supra*, 36 Cal.3d 591, 599, fn. 8, which was "whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (See LCC Br., p. 16.) PLF, meanwhile, claims that the Board "introduce[ed] a bureaucratic checkpoint and review process . . . in the form of the MMBA's 'meet and confer' process," which "would give government and labor officials a pre-clearance power over the proposed initiative or its subject matter." (PLF Br., p. 15.) Both contentions incorrectly characterize the Board's decision as holding that the MMBA applies to all citizens' initiatives.

As explained in PERB's Reply Brief (p. 32), the question left open in *Seal Beach*, *supra*, 36 Cal.3d 591, is not presented by this case. In fact, the Board squarely rejected the argument that this question was implicated: "By not seeking to bargain over Proposition B per se, the [U]nions avoid the question left open in *Seal Beach*, *supra*, 36 Cal.3d 591." (AR:XI:3090-3091; see also AR:XI:3038 ["[T]he ALJ did not conclude that the MMBA requires a public agency to meet and confer regarding every citizen's initiative"].)

Instead, the Board found that the City violated the MMBA as a result of the Mayor's policy decision to modify the pension plan for City employees—a mandatory subject of bargaining—by way of a citizens' initiative rather than through the meet-and-confer process. (AR:XI:3079.) The City's liability for the Mayor's conduct arose because of the statutory and common law agency relationship between the Mayor and the City. (*Ibid.*) It further explained that "even accepting the City's characterization of Proposition B as a purely citizens' initiative, the Unions' demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject." (AR:XI:3035.)

Thus, the Board's decision makes clear that its holding is based on and limited to the specific facts of this case: the Mayor's and other City officials' involvement in the creation and promotion of Proposition B, the

Mayor's role as chief labor negotiator for the City, and his deliberate use of a citizens' initiative to avoid the meet-and-confer process. Contrary to the arguments of LCC and PLF, the Board did not resolve the question left open by *Seal Beach*, and it did not hold that the MMBA applies to all citizens' initiatives.

B. The right of local initiative can be, and in this case is, constrained by a statute of statewide concern such as the MMBA.

PLF objects to the Board's use of agency theories to find that the City had a duty to bargain because "there is no provision in the Constitution that is concerned with who might have inspired, conceived of, campaigned for, or even underwritten a proposed initiative." (PLF Br., p. 11.) PLF's argument, however, relies on the mistaken premises that the initiative right is absolute, and that any limitation on that right in the Constitution or the MMBA must be expressly stated.

For over half a century, the courts have recognized that the Legislature can limit the local initiative power on matters of statewide, as opposed to purely local, concern. For instance, in *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 562 (*Mervynne*), the court stated: "When, in a matter of statewide concern, the state Legislature has specifically delegated a particular authority to the governing board, our courts have uniformly held that the initiative processes do not ordinarily apply."

Similarly, in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511 (*Committee of Seven Thousand*), this Court explained:

> In matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control. If the state chooses instead to grant some measure of local control and autonomy, it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum.

As relevant to this case, the process of setting public employees' terms and conditions of employment is "obviously a matter of statewide concern" and subject to regulation by the Legislature. (*City of Seal Beach, supra*, 36 Cal.3d at p. 600, fn. 11.) So, too, is the charter amendment process. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 387.)

Indeed, this Court has specifically held that there is no constitutional barrier to a state law prohibiting a local referendum on the adoption of a memorandum of understanding following negotiations pursuant to the MMBA. (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 783 (*Voters for Responsible Retirement*).) In doing so, this Court recognized "the problematic nature of the relationship between the MMBA and the local referendum power," owing to the "bifurcation of authority" that would occur if the entity

responsible for overseeing negotiation of the agreement did not have the ultimate authority to approve it. (*Id.* at p. 782.) As a result, it determined that the restriction on the referendum power was "constitutionally justified" because "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to exclusively delegate negotiating authority to the boards of supervisors, and therefore the power to curtail the local right of referendum." (*Id.* at p. 784.)[11]

Thus, it is not necessary that the Constitution expressly limit the right of local initiative, as such a limitation can be found in a statute of statewide importance. And although the MMBA does not expressly mention citizens' initiatives, it broadly requires

> [t]he governing body of a public agency, *or such ... other representatives as may be properly designated by law or by such governing body,* [to] meet and confer in good faith regarding wages, hours, and other terms and conditions of

[11] PLF argues that *Voters for Responsible Retirement* is inapplicable here because the referendum power is "more limited" than the initiative, suggesting that the Legislature has greater authority to restrict the referendum. (PLF Br., p. 19.) However, *Voters for Responsible Retirement* refers consistently to the Legislature's power to restrict *both* the initiative and the referendum. (See, e.g., *Voters for Responsible Retirement*, *supra*, at p. 779 ["such a distinction does not capture the full extent of the state's authority to restrict the local *initiative and referendum* power" (emphasis added)].) The only difference PLF cites is that the referendum may not address taxation, but this case has nothing to do with taxation.

> employment with representatives of such recognized employee organizations … prior to arriving at a determination of policy or course of action.

(§ 3505, emphasis added.)

These statutory terms are plainly broad enough to encompass "other representatives" such as the City's Mayor and chief labor negotiator, and "determination[s] of policy" such as the Mayor's decision to change the City's pension system through an initiative. Indeed, it is difficult to understate how profoundly it would undermine the MMBA if local public agencies were permitted to pursue this course of action without meeting and conferring. As the Board explained,

> for the City's elected officials, and particularly the Mayor as the chief labor relations official, to use the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by the Unions on these same subjects raises questions about what incentive the Unions have to agree to anything.

(AR:XI:3038-3039.)

For these reasons, the Board's decision does not, as PLF argues, violate the "clear statement" rule articulated in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 (*Upland*). (See PLF Br., p. 11.) In *Upland*, this Court announced that "[w]ithout an unambiguous indication that a provision's purpose was to constrain the initiative power, we will not construe it to impose such limitations." (*Id.* at p. 945-946.)

This rule does not apply here. The Board did not in any way restrict the initiative power; Proposition B remains on the books unaltered by the Board's decision.[12] Rather, the Board restricted only the City's power, acting through the Mayor and others, to achieve changes to its pension system through the initiative process while refusing to engage in the meet-and-confer process.

PLF also claims, as authority against the Board's conclusion, that there is a "significant tradition" of elected officeholders supporting initiatives. (PLF Br., p. 20.) As evidence of this tradition, PLF cites two instances of elected officials supporting citizens' initiatives: Los Angeles County Supervisor Pete Schabarum's support for a *statewide* term limits initiative, and Governor Reagan's support for a *statewide* tax limitation initiative. (PLF Br., pp. 20-21.) Thus, whatever "tradition" is established by these anecdotes extends only to statewide initiatives, not local ones. Moreover, PLF cites no case where an appellate court considered whether

[12] The Board did not order the City to rescind Proposition B. The Board concluded that the authority to do so lies exclusively in the courts, and it therefore crafted a make whole remedy that did not include rescission of Proposition B. (AR:XI:3023-3025.) Specifically, the Board ordered the City to make affected employees whole by paying the difference in value between the defined benefit plan and the 401(k)-style plan enacted by Proposition B. (AR:XI:3023-3024.) The Board also ordered the City to pay the Unions' attorneys' fees if they chose to pursue a court action to rescind Proposition B. (AR:XI:3024-3025.)

an elected official's support for an initiative had any legal significance.[13] Therefore, the "tradition" evidenced by PLF's examples does not assist PLF's argument.

C. Negotiating over an alternative ballot measure does not interfere with the initiative right.

PLF claims that requiring bargaining between the Mayor and the Unions over the subject of pension reform interferes with the rights of the initiative's proponents by requiring "a process that could have derailed or subverted [the citizens' initiative] by introducing a competing measure." (PLF Br., p. 22.) But nothing in the Board's decision suggests that bargaining may derail or subvert a citizens' initiative. The Board held that the policy decision triggering the City's obligation to negotiate was the Mayor's decision to pursue pension reform. That decision was reached in November 2010 (AR:XV:3911-3912)—well before the initiative even began circulating in April 2011 (AR:XIX:5009-5021). And the first of the Unions' demands to bargain came months before the initiative qualified for the ballot.[14] It is certainly possible that bargaining at these earlier stages could have resulted in an agreement that reduced the

[13] PLF cites *Legislature v. Eu* (1991) 54 Cal.3d 492, which concerned the term limits initiative, but Schabarum's support for that initiative is not even mentioned in that opinion.

[14] The first demand to bargain was made on July 15, 2011. (AR:XIX:5109-5110.) The CPRI was not placed on the ballot until January 30, 2012. (AR:XX:5184-5185.)

necessity or political impetus for an initiative.[15] Yet the mere fact that an initiative might be unnecessary or less likely to pass after a successful MMBA meet-and-confer process does not mean such negotiations deny citizens their constitutional rights to propose and sponsor initiatives.

Nor would the presence of an alternative measure on the ballot "subvert" the initiative process. The proponents of a citizens' initiative have no right to prevent a competing measure from being placed on the same ballot. Conflicting ballot measures may be presented at the same election, and if both pass, the measure with the most affirmative votes prevails. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188.)

Therefore, contrary to PLF's arguments, the Board's decision does not interfere with the constitutional right of initiative.

IV. Amici's First Amendment arguments do not provide a basis for affirming the Court of Appeal's decision.

SDTEF urges this Court to affirm the Court of Appeal's decision on an alternate ground: that the Board's decision violated the Mayor's First Amendment rights, regardless of whether he supported Proposition B as Mayor or as a private citizen. (SDTEF Br., p. 19.) This is a far more

[15] For instance, in 2008, the Mayor developed a ballot proposal concerning pension reform, and through negotiations, the Unions and the Mayor reached an agreement that rendered a ballot measure unnecessary. (AR:XII:3206-3207, 3212-3213, 3217-3219.)

expansive argument than the City's, and the Court should decline to consider it. But even if the Court chooses to address this argument, it fails on its merits.

A. The Court may properly decline to consider SDTEF's argument that the Board's decision violates the Mayor's right to speak in his official capacity.

The City has argued that the Mayor was merely exercising his right as a citizen to support an initiative on a matter of public importance.[16] SDTEF's arguments go much further: "[T]he First Amendment equally protects the speech rights of elected officials and public citizens. It is therefore irrelevant whether Mayor Sanders was speaking as any other citizen or as the mayor; either way, the First Amendment protected his right to express his views...." (SDTEF Br., p. 19.)[17]

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[16] See, e.g., City Ans., p. 41 ["PERB's Decision ignored the fact that, apart from his official duties, Sanders, as well as any public official, may act privately and have fundamental First Amendment rights to petition their government for redress and to express their views on 'matters of public concern'"]; *id.* at p. 42 ["The Mayor and individual Councilmembers have a right to weigh in on this issue, just as any other citizen"]; *id.* at p. 45 ["Accordingly, the Mayor, like any other public official, was and is 'free to join a citizens' group supporting the legislative goals expressed in [a] purposed [*sic*] initiative; as individuals they [have] the right to advocate qualification and passage of the initiative'"].

[17] LCC makes a First Amendment argument in cursory fashion, without stating whether it agrees with the City that the Mayor was speaking as a private citizen. (LCC Br., pp. 11-12.) To the extent LCC adopts the City's position, the Board has already responded to that argument on pages 38 through 42 of its Reply Brief. To the extent LCC intends to make the same argument as SDTEF, the Board's response to SDTEF herein responds to LCC as well.

By going beyond the limited First Amendment issue raised by the City and briefed by the parties, SDTEF violates the rule that amici "must take the case as they find it" and not "interject[] new issues." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1275.) This rule "promotes judicial efficiency and an orderly appellate process." (*People v. Hannon* (2016) 5 Cal.App.5th 94, 105.) Without it, "amic[i] curiae, rather than the parties, themselves, would control the issues litigated." (*Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America* (2001) 90 Cal.App.4th 1151, 1161, fn. 6.)

SDTEF claims it is not really expanding the issues before the Court, but merely "elaborat[ing] on why" the Board's decision "violates the First Amendment." (SDTEF Br., p. 47, fn. 4.) SDTEF is being too modest. It is attempting to establish that local elected executive officials have a nearly unqualified First Amendment right to use the resources of their public offices to evade the requirements of state law.

SDTEF also preemptively invokes *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503 (*Lavie*) for the proposition that the Court may consider a pure "question of law based on undisputed facts, and [which] involves important questions of public policy," even though raised only by an amicus. (SDTEF Br., p. 47, fn. 4.) This Court,

however, has never endorsed such a broad exception to the rule against amici expanding the issues before it.

The Court of Appeal in *Lavie* relied on *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 (*Fisher*). In that case, this Court decided what it called "*extremely* significant issues of public policy and public interest" that were initially raised by amici. (*Id.* at p. 655, fn. 3, emphasis added.) This is a higher standard than *Lavie*'s "important questions of public policy," which makes sense. After this Court grants review, any potentially dispositive issue raised by an amicus is likely to present an important question of public policy. (Cf. Cal. Rules of Ct., rule 8.500(b)(1).) *Lavie*'s lower standard would place precious little constraint on the types of issues amici could present.

Significantly, *Lavie* stands alone in citing *Fisher* for the broad proposition SDTEF relies on. And only a single case has in turn cited *Lavie* for that proposition, although expressing doubt about its soundness. (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 473 ["It has also been suggested that, by extension of the rule that a *party* can raise a purely legal issue for the first time on appeal, an appellate court may exercise its discretion to permit amicus curiae to raise new issues where the issues touch on public policy and the facts are undisputed" (emphasis in original)].) More often,

it has been stated that there are only two, much narrower exceptions recognized by this Court—neither of which apply here: "The amicus curiae may raise an issue that will support affirmance and the amicus curiae may assert jurisdictional questions that cannot be waived even if not raised by the parties." (*American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal.App.4th 258, 275; see also *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177, 1188, citing *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511.)

SDTEF does not argue that the First Amendment right of Mayor Sanders to speak as part of his official duties is the type of "extremely significant issue of public policy and public interest" warranting this Court's consideration. (*Fisher, supra*, 37 Cal.3d 644, 655, fn. 3.) If it were of such extreme significance, one might have expected either the City or the Ballot Proponents to have raised it in their own briefing, using SDTEF's amicus brief to the Court of Appeal as a roadmap. They did not. Therefore, the Court should decline to address the expansive First Amendment issue raised by SDTEF.

B. Even if this Court decides to consider them, SDTEF's arguments fail on their merits.

SDTEF's claim that the Board's decision violates the First Amendment regardless of whether the Mayor was acting in his official or

his private capacity fails for at least two reasons. First, the Board did not punish the Mayor or restrict his speech in any manner. Liability for violations of the MMBA lies with the City, not the Mayor. The Board's decision thus decision regulates the Mayor only indirectly, as an agent of the City. Second, even assuming the Board's decision could be viewed as somehow restricting the Mayor's speech, that speech was not protected to the degree SDTEF claims. The cases cited by SDTEF acknowledge that the speech of executive officials in their official capacities may be restricted, which is consistent with settled law on speech by government officials and entities.

1. The Board did not punish the Mayor or restrain his speech.

Much of SDTEF's brief misses the point, because it fails to confront PERB's primary argument that the Board's decision regulates the City's economic conduct as an employer and "neither punishes the Mayor for his activities nor requires him to meet and confer with the Unions over his activities as a private citizen." (PERB RB, pp. 35-36.) SDTEF dismisses this entire argument by asserting "the Board cannot fairly contend that its decision regulates only the City" (SDTEF Br., p. 54), but this is precisely what the decision does and no more. The City was the respondent before PERB and the City was ordered to remedy the unfair practices found by the Board. (AR:XI:3040-3041.) The Board's decision

assigns no individual liability to the Mayor, either as a private citizen or in his official capacity, and the Board's remedial order directs the Mayor to take no action. Thus, the Board's decision in this case regulates the City directly, and the Mayor only indirectly, if at all. This is insufficient to establish a violation of the Mayor's First Amendment rights.

The reason the Board did not restrain or punish the Mayor is that the Mayor is not personally subject to the MMBA. The City is. Although an individual may act as an agent of a public agency—and the Board here correctly found that the Mayor acted the City's agent—only the public agency is responsible for complying with the MMBA. (§ 3506.5, subd. (c) [prohibiting "[a] public agency" from refusing or failing "to meet and negotiate in good faith with a recognized employee organization"]; Cal. Code Regs., tit. 8, §§ 32602-32604 [specifying unfair practices by public agencies and by employee organizations, but not by individuals].) In fact, the administrative record reflects the City's awareness—well before this case arose—of its responsibility for the actions of its agents. City Attorney Goldsmith advised the City Council in a memorandum: "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." (AR:XVIII:4730; emphasis added.)

In its arguments that the Board's decision restricts the Mayor's speech, SDTEF bemoans the "significant time and energy" the Mayor must devote to the meet-and-confer process. (SDTEF Br., p. 49.) But the Board did not impose these requirements on the Mayor, and neither did the MMBA. They are imposed by the City Charter, which designates the Mayor as the City's chief labor negotiator.[18]

As a result, SDTEF tries without success to distinguish *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U.S. 469. As SDTEF notes, that case held that "conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion." (*Id.* at p. 477.) The "speech" for which SDTEF claims First Amendment protection in this case was conduct that amounted to a refusal to bargain with the Unions. Although this is not coercion in a strict sense, it is certainly conduct, not speech. The Board's decision does not prevent the Mayor from expressing his views on pension reform in general or on

[18] SDTEF also falsely suggests that the Board imposed on the Mayor a personal obligation to meet with the Unions. (SDTEF Br., p. 48.) This suggestion misconstrues the Board's decision and the MMBA. As the Board explained in its Opening Brief, the Mayor as an "other representative" of the City, was permitted by the plain language of section 3505 to designate a representative to meet personally with the representatives of the Unions. (PERB OB, pp. 50-51.) There is, in fact, no dispute that the Mayor did not physically sit at the bargaining table with the Unions, and there is no claim that he was required to do so. (See AR:XIII:3350.)

the CPRI in particular.[19] It prevents the City from refusing to bargain with the Unions.

SDTEF further claims that the Mayor "was barred from publicly sharing his views on pension reform until he went through the meet-and-confer process." (SDTEF Br., p. 48.) This argument is essentially speculative. Since the Mayor never negotiated with the Unions, but simply announced a course of action and pursued it with the resources of his City office, SDTEF is assuming that the Mayor could not have shared his views on pension reform before meeting and conferring. Nothing in the Board's decision supports that assumption.

SDTEF also implies that the Board imposed upon the Mayor something akin to "'criminal penalties or other remedies . . . in its sovereign capacity.'" (SDTEF Br., p. 41, quoting *Ex parte Perry* (Tex. App. 2015) 471 S.W.3d 63, affd. in part, revd. in part (Tex. Ct. Crim. App. 2016) 483 S.W.3d 884.) This is plainly not true; again, *the Mayor* has not been subjected to anything remotely approaching a direct sanction

[19] Notably, SDTEF does not challenge PERB's reliance on this Court's statement in *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (2012) 55 Cal.4th 1083, 1103 (*Ralphs*) that "statutory law ... may single out labor-related speech for particular protection or regulation, in the context of a statutory system of economic regulation of labor relations, without violating the federal Constitution."

of any kind. As noted, there is no question that the only party held responsible for violating the MMBA was the City.

In short, SDTEF can point to nothing in the Board's decision prohibiting the Mayor from speaking, or penalizing him for having done so. Instead, it confuses the issue by selectively quoting from the Board's decision, arguing that "the Board held that the City violated that duty [to meet and confer] when Mayor Sanders 'launch[ed] a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it.'" (SDTEF Br., p. 17, quoting AR:XI:3096.) This quotation omits, however, the critical detail that follows within the same sentence: "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.) Thus, the Board's finding did not rest solely on the Mayor's speech in support of Proposition B, but on that support *combined with* other affirmative actions and the refusal to bargain with the Unions. In other words, the City's liability in this case stems from conduct that is indisputably prohibited by the MMBA. (See § 3506.5, subd. (c) ["A public agency shall not … [r]efuse or fail to meet and negotiate in good faith with a recognized employee organization"].)

Put differently, even if the Mayor had the type of First Amendment right SDTEF claims, there is no reason—and SDTEF does not offer one—why this would excuse the City from satisfying its obligations under the MMBA. Regardless of who sponsored or supported Proposition B, nothing prevented the City from negotiating over an alternative or competing measure. (AR:XI:3034 & fn. 23.) As noted, conflicting ballot measures may be presented at the same election. (*Howard Jarvis Taxpayers Assn. v. City of Roseville*, *supra*, 106 Cal.App.4th 1178, 1188.) Nevertheless, the City was not required to agree to an alternative ballot measure, so long as it participated in the meet-and-confer process in good faith. (*Seal Beach*, *supra*, 36 Cal.3d 591, 601 ["Although [section 3505] encourages binding agreements resulting from the parties' bargaining, the governing body of the agency—here the city council—retains the ultimate power to refuse an agreement and to make its own decision"]; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 23.) The City was not free, however, to refuse the Unions' requests to bargain over the subject. (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.*, *supra*, 45 Cal.App.3d 116, 118.)

Moreover, the City Council was not required to present Proposition B to the voters when it did. (*Jeffrey v. Super. Ct.* (2002) 102 Cal.App.4th 1, 4 [Elections Code section 9255, which governs the placement of charter

initiatives on the ballot, "enumerates minimum time limits, but no maximum time limits"].)[20] SDTEF does not explain how either negotiations over an alternative measure or a delay in submitting Proposition B to the voters, pending those negotiations, would have restricted the Mayor's First Amendment rights, assuming he had them in this instance.

Because what the Board found unlawful was the City's refusal to bargain with the Unions, and not the Mayor's speech, the Board's decision regulates the City directly, and the Mayor only indirectly as the City's designated representative for the meet-and-confer process. Thus, SDTEF's First Amendment argument fails, regardless of whether the Mayor had a First Amendment right to speak in his official capacity.

[20] Specifically, charter initiatives must be submitted "at an established statewide general, statewide primary, or regularly scheduled municipal election . . . occurring not less than 88 days after the date of the order of election." (Elec. Code, § 9255, subd. (c).) Under former Elections Code section 9214, other local initiatives, if not adopted by governing body, had to be submitted at a special election "immediately." (Stats. 2000, ch. 55, § 17.) Now, however, a qualifying initiative must be presented at the next regular election, unless the governing body decides to call a special election. (Elec. Code, § 1405.)

2. The Mayor did not have a First Amendment right to use City staff and City resources to support a citizens' initiative.

Even if the Board's decision could be viewed as regulating the Mayor's speech, SDTEF fails to establish that the Mayor had a nearly absolute right to speak in his official capacity. SDTEF claims that "the First Amendment prohibits the government from silencing elected officials on matters of public concern" (SDTEF Br., p. 26), whether or not those officials speak in their official or private capacities (*id.* at p. 19). But the cases relied on by SDTEF recognize this broad right for elected *legislative* officials. These cases do not apply to the Mayor, who is, under the City's strong mayor form of government, the City's chief *executive* officer and lead labor negotiator. (AR:XVII:4492-4493; XIII:3349.) The speech of elected executive officials like the Mayor is subject to greater restraint, because they cannot shirk their official duties by invoking the First Amendment. Moreover, none of the cases cited by SDTEF conflict with the settled proposition that an elected official has no First Amendment right to engage in political activity using public resources.

a. The cases cited by SDTEF do not support a broad free speech right for executive officials acting in their official capacities.

SDTEF cites more than a dozen cases in support of its claim that elected officials have broad First Amendment rights regardless of whether they speak in their official or private capacities. But only one of these

cases—a federal district judge's ruling on a preliminary injunction—holds that elected executive officials have a right of free speech in the course of their official duties. The remaining cases either do not consider the rights of executive officials at all, or they distinguish between speech in the individual's private and official capacities.

SDTEF's faulty analysis begins with *Wood v. Georgia* (1962) 370 U.S. 375 (*Wood*), a case discussed in the City's Answer Brief and PERB's Reply. *Wood* considered whether an elected sheriff could be held in contempt for his public statements regarding a matter pending before a grand jury, and addressed the argument that an elected sheriff's "freedom of expression must be more severely curtailed than that of the average citizen." (*Id.* at p. 393.) The Court stated:

> Under the circumstances of this case, this argument must be rejected.
>
> First, *although we do not rely on the point exclusively*, we noted at the outset of this opinion that there was no finding by the trial court that the petitioner issued the statements in his capacity as sheriff; in fact, the only evidence in the record on this point is the petitioner's allegation in his response ... that the statements were distributed by petitioner as a private citizen.

(*Wood, supra*, 370 U.S. 375, 393, emphasis added.) The court added that there was no indication that the state courts found it significant that he

was a sheriff. (*Id.* at p. 394.) Thus, *Wood* logically distinguishes between an elected executive official's private and official speech.

SDTEF strains credulity by arguing that the "Supreme Court put little weight—if any" on the lack of a finding that the sheriff spoke in his official capacity. (SDTEF Br., pp. 24-25, fn. 1.) In order to dismiss that finding, which was the principal ground for the court's conclusion, SDTEF describes the court's following point as an "express[]" holding: "However, *assuming* that the Court of Appeals did consider to be significant the fact that petitioner was a sheriff, we do not believe this fact provides any basis for curtailing his right of free speech." (*Wood*, *supra*, 370 U.S. 370, 374, emphasis added.) SDTEF also does not explain how its view is consistent with the court's next point—that "[t]here [was] no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if any he had, in connection with the grand jury's investigation." (*Ibid.*)

In sum, there is no way to read *Wood* as endorsing an elected executive official's unfettered right to speak in his official capacity. Therefore, *Wood* does not defeat the Board's argument that the Mayor's conduct—as the conduct of the City—was subject to regulation, because it was undertaken not as a private citizen, but in his official capacity as the City's strong mayor and chief labor relations representative.

After overstating the holding of *Wood*, SDTEF turns to an inapposite case: *Bond v. Floyd* (1966) 385 U.S. 116. There, the court determined that "[t]he manifest function of the First Amendment in a representative government requires that *legislators* be given the widest latitude to express their views on issues of policy." (*Id.* at pp. 135-136; emphasis added.)

In response to the obvious objection that *Bond* concerns the speech of legislators, not *executive officials* like the Mayor, SDTEF argues that PERB "has not cited a single case suggesting that the First Amendment singles out legislators for such special treatment." (SDTEF Br., p. 26, fn. 2.) But PERB *has* cited the only two federal appellate courts to consider whether executive officials have First Amendment rights to speak in their official capacities. (PERB RB, p. 40.) Both courts answered that question "no," relying on *Garcetti v. Ceballos* (2006) 547 U.S. 410, 421, which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Parks v. City of Horseshoe Bend* (8th Cir. 2007) 480 F.3d 837, 840, fn. 4 (*Parks*) [elected city treasurer]; *Miller v. Davis* (6th Cir., Aug. 26, 2015, No. 15-5880) 2015 WL 10692640, at *1 [elected county clerk].)

To argue that legislators are not "singled out," SDTEF cites three cases: (1) *Wood, supra*, 370 U.S. 375, (2) *Jenevein v. Willing* (5th Cir. 2007) 493 F.3d 551 (*Jenevein*), and (3) *City of El Cenizo v. State* (W.D. Tex. Aug. 30, 2017, No. SA-17-CV-404-OLG) 2017 WL 3763098 (*City of El Cenizo*), stayed in relevant part pending appeal (5th Cir., Sept. 25, 2017, No. 17-50762) 2017 WL 4250186, at *2.[21] These cases are not

[21] All of the remaining cases cited by SDTEF involve elected legislative officials and are therefore inapposite: *Werkheiser v. Pocono Twp.* (3d Cir. 2015) 780 F.3d 172, 179-180 (*Werkheiser*) [member of township board of supervisors]; *Rangra v. Brown* (5th Cir. 2009) 566 F.3d 515, 526, vacated (5th Cir. 2009) 584 F.3d 206 (en banc) [city council members]; *Velez v. Levy* (2d Cir. 2005) 401 F.3d 75, 98 [school board member]; *Nordstrom v. Town of Stettin* (W.D. Wis. May 15, 2017, No. 16-CV-616-JDP) 2017 WL 2116718, at *3 [town supervisor]; *Hoffman v. Dewitt Cty.* (C.D. Ill. Mar. 31, 2016, No. 15-3026) 2016 WL 1273163, at *2 [county board member]; *Holloway v. Clackamas River Water* (D. Or. Dec. 9, 2014, No. 3:13-CV-01787-AC) 2014 WL 6998084, at *1 [board of commissioners member]; *Willson v. Yerke* (M.D. Pa. Dec. 23, 2013, No. 3:10-CV-1376) 2013 WL 6835405, at *1 [member of township board of supervisors]; *Carson v. Vernon Twp.* (D.N.J. July 21, 2010, No. 09-6126 (DRD)) 2010 WL 2985849, at *1 [township council member]; *Pistoresi v. Madera Irr. Dist.* (E.D. Cal. Feb. 3, 2009, No. CV-F-08-843-LJO-DLB) 2009 WL 256755, at *1 [member of special district governing board]; *Conservation Com. of Town of Westport v. Beaulieu* (D. Mass. Sept. 18, 2008, No. CIV.A. 07-11087-RGS) 2008 WL 4372761, at *1 [members of conservation commission]; *Hartman v. Register* (S.D. Ohio Mar. 26, 2007, No. 1:06-CV-33) 2007 WL 915193, at *1 [member of township board of trustees]; *Hogan v. Twp. of Haddon* (D.N.J. Dec. 1, 2006, No. CIV. 04-2036 (JBS)) 2006 WL 3490353, at *1 (*Hogan*) [township commissioner].

As SDTEF admits, other district courts have reached the opposite conclusion (SDTEF Br., p. 38, fn. 3), but this split of authority on the rights of legislators is tangential to this case.

persuasive that non-legislators have unfettered rights to speak in their official capacity.

As explained above, *Wood*, *supra*, 370 U.S. 375, does not support SDTEF's argument. And while *Jenevein*, *supra*, 493 F.3d 551, decided that *Garcetti* was not the framework for analyzing the speech rights of an elected judge, it ultimately concluded that a judge could be censured for his "use of the trappings of judicial office to boost his message, his decision to hold a press conference in his courtroom, and particularly stepping out from behind the bench, while wearing his judicial robe, to address the cameras." (*Jenevein*, *supra*, 493 F.3d 551, 560.) Thus, this case hardly demonstrates the sweeping speech right SDTEF claims.[22]

Finally, *City of El Cenizo* involved a motion for preliminary injunction against a Texas law restricting the speech of local government officials. The state defended the law by arguing that "the First Amendment should not apply to government officials acting in their

[22] SDTEF also fails to note that the Seventh Circuit has taken a more restrictive view of the speech rights of elected judges. In *Siefert v. Alexander* (7th Cir. 2010) 608 F.3d 974, 984-985, the Seventh Circuit rejected *Jenevein*'s analogy between elected judges and elected legislators, noting the state's strong interest in regulating the speech of elected judges to protect the integrity of the judicial system. Accordingly, it determined—relying on *Garcetti* and its precursors—that the appropriate test was to weigh the state's interest "against the [judge's] interest in speaking." (*Id.* at p. 985; see also *Bauer v. Shepard* (7th Cir. 2010) 620 F.3d 704, 711.)

official capacity," citing *Garcetti*. The court rejected that argument, because it found *Garcetti* only applicable to discipline imposed by a public employer on its own employees. (*City of El Cenizo*, *supra*, 2017 WL 3763098, at *18.) But, as explained in section IV.B.2.b., *post*, *Garcetti* is not so limited. As a result, the cases cited by SDTEF do not advance the argument that the Mayor in this case had an unfettered right to speak in his official capacity.

SDTEF also does not grapple with the startling implications of its argument. As PERB argued in its Reply Brief, legislators and executive officials serve different governmental functions. While legislators represent their constituents in making law, executive officials must uphold and enforce the law; they are not allowed to disregard laws they disagree with or find inconvenient. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082.) Surely, for instance, the City could not avoid its bargaining obligations under the MMBA by electing as its Mayor and chief labor negotiator an individual who refuses to engage in the meet-and-confer process because of a philosophical objection to that process. The result should be no different in this case, where Mayor Sanders found the meet-and-confer process an impediment to the goals of his administration.

Instead of addressing the fundamental problems of empowering executive officials to ignore the law based on the First Amendment, SDTEF attempts to buttress its argument with out-of-context quotations. For instance, its brief at page 26 omits the first clause of the following sentence from *Keller v. State Bar of California* (1990) 496 U.S. 1, to make that case appear relevant here:

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

(*Id.* at pp. 12-13.) Needless to say, PERB is not a citizen objecting to the Mayor's speech in this case; it is the expert administrative agency designated by the Legislature to interpret and administer the MMBA's statutory provisions.

SDTEF also quotes *Waters v. Churchill* (1994) 511 U.S. 661, 674 for the proposition that "government employees 'are often in the best position to know what ails the agencies for which they work,' and thus 'public debate may gain much from their informed opinions.'" (SDTEF Br., p. 27.) SDTEF argues that the "same goes for elected officials." (*Ibid.*) This argument does not follow. Government employees, as SDTEF recognizes, do *not* have a right to speak within the scope of their

official duties. (SDTEF Br., p. 29, citing *Garcetti*, *supra*, 547 U.S. 410.) Thus, knowledge of the workings of government alone does not justify protecting the speech of elected executive officials in their official capacity.[23]

b. The fact that the Mayor's actions were taken within the scope of his official duties is relevant even though the Board was not the Mayor's employer.

SDTEF also argues that *Garcetti*'s rule that speech undertaken in the course of an employee's official duties is not protected is inapplicable when the government acts as a "sovereign," as the Board did here, rather than as an employer. (SDTEF Br., pp. 39-40.) But *Garcetti* is not so limited.

Although SDTEF is correct that *Garcetti* discussed "employer discipline" and "managerial discipline," this does not mean that *Garcetti* actually forecloses other forms of regulation where the government is not the direct employer. In *Garcetti*, the Supreme Court stated unequivocally: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, *and* the Constitution does not insulate their

[23] For the same reasons, SDTEF's reliance on *City of San Diego v. Roe* (2004) 543 U.S. 77 is also unavailing. (SDTEF Br., p. 28.) That case did not involve the speech of an elected official.

communications from employer discipline." (*Garcetti*, *supra*, 547 U.S. 410, 421, emphasis added.) Thus, *Garcetti* does not say that other forms of regulation aside from employer discipline are impermissible. Additionally, it has been suggested, for instance, that the "rationale" of *Garcetti*'s precursors "could be extended to allow a general speech restriction on sitting judges." (*Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 796 (conc. opn. of Kennedy, J.), citing *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois* (1968) 391 U.S. 563 (*Pickering*) and *Connick v. Myers* (1983) 461 U.S. 138 (*Connick*).) Similarly, the Seventh Circuit has recognized that:

> while *Garcetti, Connick,* [*U.S. Civil Service Commission v. National Assn. of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548], and *Pickering* all concern public employees, the ability of the government to regulate the speech of the employees in those cases is not solely dependent on its authority as an employer. ... The rationale behind government restriction identified in *Pickering*, therefore, is related both to the government's power as an employer and its duty to promote the efficiency of the public services it performs.

(*Siefert v. Alexander*, *supra*, 608 F.3d 974, 985.)

It is true that *Ex parte Perry*, *supra*, 471 S.W.3d 63, 109, cited by SDTEF, declined to extend the *Garcetti* exception to a criminal statute applied to a state governor. But the MMBA is not a criminal statute. Nor is it a direct regulation of the speech of any government officials or

employees, none of whom are subject to the MMBA as individuals. Thus, if the MMBA regulates their speech at all, it is only indirectly when those individuals act as agents of the public entity they serve. Therefore, *Ex parte Perry* does not assist SDTEF in demonstrating that the Board has less interest in regulating the Mayor's conduct on behalf of the City in this case.

c. SDTEF fails to demonstrate that the Mayor had a First Amendment right to use the City's website or e-mail system, his State of the City address to the City Council, his City-paid staff, and other City resources to promote Proposition B.

In addition to overstating the general nature of the Mayor's First Amendment rights, SDTEF's argument also overlooks that much of what it claims was protected "speech" by the Mayor involved the use of City resources. In so doing, SDTEF ignores that its argument is inconsistent with settled law on the speech of government officials and entities.

As PERB argued in its Respondent's Brief, state law does not protect political activity by government officials and employees during working hours and using public resources. (§§ 3207, 3209; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213, 223-224, 227.) This proposition is consistent with the "government speech" doctrine, which recognizes that 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 (*Summum*).)[24] This is because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." (*Id.* at p. 467.) Limits on government speech are instead supplied by the First Amendment's Establishment Clause; by "law, regulation, or practice" restricting "[t]he involvement of public officials in advocacy"; and by the political process. (*Id.* at p. 468.)[25]

SDTEF does not dispute that political activity by government officials and employees undertaken during working hours and using public resources is unprotected by state law, and can be validly

[24] As *Summum* explains, there are three types of forums for private speech: (1) traditional public forums; (2) designated public forums; and (3) nonpublic forums. Speech restrictions in traditional and designated public forums are subject to strict scrutiny, while in nonpublic forums they must only be reasonable and viewpoint-neutral. (*Id.* at p. 470.)

[25] Under the government speech doctrine, for instance, individuals do not have a right to have the government promote their messages through: monuments in public parks (*id.* at p. 473); specialty license plates (*Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) 135 S.Ct. 2239, 2246); murals in government buildings (*Newton v. LePage* (1st Cir. 2012) 700 F.3d 595, 602-603); government websites (*Sutliffe v. Epping School Dist.* (1st Cir. 2009) 584 F.3d 314, 334); or pamphlets displayed in public parks (*Illinois Dunesland Preservation Society v. Illinois Dept. of Natural Resources* (7th Cir. 2009) 584 F.3d 719, 725-726).

restricted.[26] Yet SDTEF claims that the Mayor has a nearly unrestrained First Amendment right to engage in "speech" in his official capacity. It is important to consider this claim in the context of the factual record in this case. It means, according to SDTEF, that the Mayor had a First Amendment right to do the following:

- determine, along with his City-paid staff, a course of action to solve the City's budget problems (AR:XIV:3653-3654, 3667-3668);
- use City-paid staff to issue press releases, City website postings, and mass e-mail messages to promote the initiative (AR:XVIII: 4742-4743, 4745-4747, 4816; XXIII:5747-5749);
- conduct press conferences, supported by his City-paid staff, to promote the initiative (AR:XIII:3312-3313; XV:3948-3949; XIII:3419)[27];
- discuss the initiative in his State of the City address before the City Council—a speech that is reserved exclusively to

[26] Similar restrictions have been upheld by the U.S. Supreme Court. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601.)

[27] The Board noted that, at least with respect to one of these press conferences, there was no evidence that the Mayor communicated to the press or the public that he was speaking in his private capacity. (AR:XI:3068.)

the Mayor under the City Charter (AR:XIX:4832; XVII:4494);

- have City-paid staff negotiate the content of the initiative (AR:XIII:3401-3402; XIV:3570-3576, 3676-3679; XV:3812-3814), and review and approve its language (AR:XIV:3585-3588, 3680-3682).

SDTEF does not attempt to argue that such a sweeping First Amendment right is consistent with state law prohibitions on using government time and resources to promote ballot initiatives. Nor does SDTEF explain how those resources constitute a government-provided "forum" for private citizens to speak regarding matters of public concern. Instead, it claims that under the Board's decision, "*all* residents of San Diego could freely advocate for or against the citizens' initiative on pension reform, *except* for the Mayor." (SDTEF Br., p. 33, emphasis in original.) But, as PERB explained in its Reply Brief, "[t]here is no evidence in the record that private citizens have access to City websites and e-mail accounts and City-paid staff to promote their efforts, or Charter-mandated speeches to the City Council." (PERB RB, p. 42.) Therefore, SDTEF's argument that the Mayor was restricted from exercising the same rights as other residents of San Diego must be rejected.

3. Even if the Board's decision implicates the Mayor's First Amendment rights, it should be upheld.

SDTEF claims that strict scrutiny should apply because the Board's decision imposes a viewpoint-based prior restraint. (SDTEF Br., p. 42.) But the Board's decision, like the MMBA itself, is justified without reference to the content of the Mayor's speech, and therefore qualifies as content-neutral under this Court's cases. And its after-the-fact determination that the Mayor's conduct triggered a duty by the City to bargain with the Unions is not a *prior* restraint. For these reasons, strict scrutiny does not apply. But even if it did, the Board's decision would satisfy this level of scrutiny due to the substantial interest in enforcing the MMBA's meet-and-confer obligation uniformly across the State.

a. Because it is aimed at the City's economic conduct, not the Mayor's speech, the Board's decision is content- and viewpoint-neutral, and therefore does not trigger heightened scrutiny.

As SDTEF notes, the MMBA concerns "wages, hours, and other terms and conditions of employment." (SDTEF Br., p. 50, citing § 3505.) But the fact that the MMBA is directed at certain *subjects* does not mean it is a content-based restriction on *speech*. As discussed below, under this Court's own First Amendment precedents, the MMBA is content-neutral.

For a statute or regulation to be considered content-neutral, "literal or absolute content neutrality" is not required. (*Ralphs*, *supra*, 55 Cal.4th

1083, 1102, internal quotation marks omitted.) The regulation must only "be justified by legitimate concerns that are unrelated to any disagreement with the message conveyed by the speech." (*Ibid.*, internal quotation marks omitted.) Applying this standard, this Court has concluded that state laws giving employees and labor unions special rights to engage in speech related to labor disputes are content neutral because they are justified by, among other things, "the state's interest in promoting collective bargaining to resolve labor disputes," rather than any disagreement with the message conveyed by speech on other subjects not protected by the statutes. (*Ibid.*)

Here, too, the MMBA's prohibitions, as interpreted by the Board, are not justified by any disagreement with the Mayor's speech in favor of Proposition B, or pension reform in general. The MMBA is justified by the state's interest in "promot[ing] full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500, subd. (a).) It is well settled that the MMBA's meet-and-confer process is a procedural requirement; the MMBA does not impose or dictate substantive terms and conditions of employment. (*County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278, 289, citing *Seal Beach, supra*, 36 Cal.3d 591, 600-601, fn. 11; see also *County of*

Riverside v. Public Employment Relations Bd. (2016) 246 Cal.App.4th 20, 29-30 [rejecting constitutional challenge to the MMBA's advisory factfinding process because "[t]he public agency retains the ultimate power to refuse an agreement and make its own decisions"].) In keeping with these principles, the Board has recognized that it may not judge or prescribe the substantive terms of the parties' agreements or proposals. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 9; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 13-14, citing *H.K. Porter Co. v. National Labor Relations Bd.* (1970) 397 U.S. 99, 106.) Thus, the MMBA neither favors nor opposes pension reform.

What the MMBA does, among other things, is proscribe conduct that constitutes a failure or refusal to meet and confer in good faith. (§§ 3505, 3506.5, subd. (c).) The theory under which the Board found a violation in this case, a unilateral change to terms and conditions of employment, is a particularly harmful form of refusal to bargain due to its destabilizing effect on labor relations. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 23.) Such a change is unlawful because it interferes with the bilateral process of collective bargaining, regardless of whether the new terms and conditions of employment are more or less favorable to employees. (See, e.g., *National Labor Relations Bd. v. Katz* (1962) 369 U.S. 736, 743; *Ruline Nursery Co. v. Agricultural Labor*

Relations Bd. (1985) 169 Cal.App.3d 247, 266; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 47-48.)

As a result, the Board's decision did not interpret the MMBA to target "particular views taken by speakers on a subject," as SDTEF argues (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 829), but conduct that undermines the collective bargaining process. Because the Board's decision applying the MMBA is justified without reference to the content of the Mayor's speech, it is content-neutral. (*Ralphs*, *supra*, 55 Cal.4th 1083, 1102.)

b. As an after-the-fact ruling on the applicability of the MMBA, the Board's decision is not a prior restraint.

SDTEF argues that the Board imposed a prior restraint on the Mayor by determining that the City was under a duty to bargain with the Unions in this case. (SDTEF Br., p. 51.) SDTEF claims that the Board required the Mayor to obtain the City Council's "approval" before speaking in support of pension reform. (*Id.* at p. 53.) This claim reflects a misunderstanding both of what a "prior restraint" is and of the Board's decision.

"The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886; internal quotation marks

omitted; emphasis in original.) Prior restraints are distinct from criminal or civil penalties imposed after the speech takes place, which are "subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559.) "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (*Ibid.*)

The very nature of this proceeding demonstrates that the Board's decision is not a prior restraint.[28] The decision was issued more than three years after the last "speech" by the Mayor in favor of Proposition B. It plainly holds the City liable for actions of the Mayor that have already occurred. Plainly, the decision does not forbid any communications in advance of when they are to occur. (*DVD Copy Control Assn., Inc. v. Bunner*, *supra*, 31 Cal.4th 864, 886.)

SDTEF appears to believe that the decision imposes a prior restraint because the Board required the Mayor to obtain City Council approval

[28] It bears repeating that the Board's decision is not any kind of "restraint"—prior or otherwise—on the Mayor, as the Mayor himself is not subject to the MMBA and the Board took no action against him. (See section IV.B.1., *ante*.)

before publically supporting Proposition B. (SDTEF Br., pp. 52-53.) Nothing in the Board's decision supports this notion. The Board held that the City violated the MMBA through actions taken by the Mayor within the scope of his duties as the City's chief executive officer and lead labor negotiator—i.e., as an agent of the City—*combined with* the actions of the City in refusing to bargain with the Unions. (AR:XI:3096.) That holding does not require the Mayor to have kept his personal views on a proposed citizens' initiative to himself absent the approval of the City Council. Moreover, it was not simply the public nature of the Mayor's support that the Board focused on, but his authority to act on behalf of the City with respect to collective bargaining and his use of City resources—websites, e-mail, press releases, the State of the City address, and the Mayor's City-paid staff—to promote the initiative. (See AR:XI:2989 ["[T]he Mayor, his staff, and other officials … appeared at press conferences and other public events, used City staff, e-mail accounts, websites and other City resources, as well as the prestige of their offices, to publicize and solicit support for an initiative aimed at altering the pension benefits of City employees"].)

c. Even if it were required to satisfy strict scrutiny, the Board's decision would be upheld.

"Strict scrutiny for purposes of the federal Constitution means that a content-based speech restriction must be 'necessary to serve a compelling

state interest, and … narrowly drawn to achieve that end.'" (*Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 869.) Even if the MMBA or the Board's decision could be construed to impose a content-based speech restriction or a prior restraint, it satisfies this test.

First, the MMBA's purpose is, as noted, promoting labor peace through the collective bargaining process. (§ 3500, subd. (a).) This is, unquestionably, a compelling state interest. (See *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees* (1984) 466 U.S. 435, 455-456 [the "significant impingement on First Amendment rights" resulting from the requirement to pay a service fee for the union's collective bargaining costs is "justified by the governmental interest in industrial peace"]; *Catholic High School Assn. of Archdiocese of New York v. Culvert* (2d Cir. 1985) 753 F.2d 1161, 1171 ["There is a compelling public interest in finding that all unions and employers have a duty to bargain collectively and in good faith"].)

Second, preventing a public agency's chief executive officer from using the resources of his office to support a change to terms and conditions of employment outside the collective bargaining process is necessary to achieve that interest. As the Board explained, the Mayor's conduct in this case "undermine[s] the [MMBA's] principle of bilateral negotiations by

exploiting the 'problematic nature of the relationship between the MMBA and the local [initiative-referendum] power." (AR:XI:2993-2994, quoting *Voters for Responsible Retirement, supra*, 8 Cal.4th 765, 782.) Further, "for the City's elected officials, and particularly the Mayor as the chief labor relations official, to use the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by the Unions on these same subjects raises questions about what incentive the Unions have to agree to anything." (AR:XI:3038-3039.) As a result, the necessity of the Board's "restriction" is beyond dispute.

Third, the Board's decision is narrowly tailored to advance the compelling interest in promoting collective bargaining. In this regard, it must be shown that there is no less restrictive means of achieving the end sought. (*U.S. v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 813.) It is important to note that the Board's decision imposed minimal, if any, restrictions on the Mayor's speech. The Board did not hold that the Mayor was prohibited from speaking entirely; instead, it held that the Mayor's support of Proposition B using the prestige of his office along with City resources and staff is imputed to the City, such that *the City* was required to meet and confer with the Unions under the MMBA. (Cf. *Jenevein, supra*, 493 F.3d 551, 560-561 [upholding against strict scrutiny

challenge an order censuring elected judge for his "use of the trappings of judicial office to boost his message"].) It must also be noted that the Board's decision does not suggest that *all* speech by the Mayor will necessarily be imputed to the City.

Moreover, the available alternatives to protect the collective bargaining process may be less restrictive of speech, but they raise other constitutional concerns. The only other effective means to prevent a local agency from exploiting the citizens' initiative process to obtain additional concessions from employees outside of the MMBA's meet-and-confer process would be a categorical prohibition on the use of citizens' initiatives for these subjects. Because this would restrict the act of legislating, not speaking, it would not run afoul of the First Amendment. (See *Initiative and Referendum Institute v. Walker* (10th Cir. 2006) 450 F.3d 1082, 1099 ["Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise"]; *Marijuana Policy Project v. U.S.* (D.C. Cir. 2002) 304 F.3d 82, 85 ["[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject"].) Nor would this restriction necessarily violate California's Constitution, because the Legislature may restrict the use of local initiatives to legislate over matters of statewide concern. (See *Voters for Responsible Retirement*,

supra, 8 Cal.4th 765, 779.) Nevertheless, it is unlikely that the City, the Ballot Proponents, or SDTEF would consider this to be a palatable alternative to the rule laid out in the Board's decision.

Therefore, if it were required to, the Board's decision would satisfy strict scrutiny.

CONCLUSION

For all of the foregoing reasons, the amici's arguments in support of the City and the Ballot Proponents should be rejected, the judgment of the Court of Appeal should be reversed, and the Board's decision should be affirmed in full.

Dated: January 24, 2018

Respectfully submitted,

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COUNSEL'S CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman-type font and contains, including footnotes, 14,498 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 24, 2018

Wendi L Ross

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Declarant
PUBLIC EMPLOYMENT RELATIONS BOARD

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

COURT NAME: In the Supreme Court for the State of California

CASE NUMBER: S242034

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)

CASE NAME: *City of San Diego v. Public Employment Relations Board; 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 14; and Catherine A. Boling, T.J. Zane, and Stephen B. Williams*

I, the undersigned, declare that I am, and was at the time of service of the documents referred to herein, over the age of eighteen years and not a party to the action; and I am employed in the County of Sacramento, California, in which county the within-mentioned service occurred. My business address is 1031 18th Street, Sacramento, CA 95811-4124

On January 24, 2018 I served **PERB's Combined Answer to Amicus Curiae Briefs** regarding the above-referenced case on the parties listed below:

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[X] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. The envelope or package was placed in the mail at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 24, 2018, at Sacramento, California.

S. Taylor
(Type or print name)

(Signature)