Case No. S203478

IN THE SUPREME COURT
FOR
THE STATE OF CALIFORNIA

In the Matter of

CITY OF SAN DIEGO,
Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO LOCAL 127; SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO,
Real Parties in Interest,

REAL PARTY IN INTEREST SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO'S ANSWER TO PETITION FOR REVIEW

Of an Order Summarily Denying a Petition for Writ of Mandate and Application for Stay of the
Court of Appeal, Fourth Appellate District, Division One
Case No. D062090

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ANSWER TO PETITION FOR REVIEW

I. INTRODUCTION

Real Party in Interest SAN DIEGO FIREFIGHTERS IAFF LOCAL 145 ("Local 145") respectfully submits this Answer to the Petition for Review filed by Real Parties in Interest Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Boling Petitioners").

Local 145 is a recognized employee organization under the Meyers-Milias-Brown Act ("MMBA"), Government Code sections 3500 *et seq.*, representing approximately 782 sworn employees of the City of San Diego Fire - Rescue Department. Local 145 represents Firefighters, Firefighters/Paramedics, Engineers, Captains and Battalion Chiefs. Local 145 in its capacity as exclusive bargaining representative for the employees it represents, requested to meet and confer with the City concerning the Comprehensive Pension Reform Initiative ("CPRI"), which was designed and supported by City of San Diego Mayor Sanders, the chief labor negotiator for the City. While Mayor Sanders asserted that he was acting as a "private citizen," he used the prestige of the office of the Mayor and City resources to support and further the CPRI. He also publicly asserted that he was using the citizen initiative approach to avoid the meet and confer obligations of the MMBA. The City refused to meet and confer with Local 145 on the grounds that the CPRI was a citizens' initiative not subject to the

meet and confer process. Local 145 filed with the Pubic Employment Relations Board ("PERB") on March 2, 2012 an unfair practice charge alleging a failure to meet and confer by the City.

PERB issued a Complaint on March 28, 2012. A hearing has been set before PERB Administrative Law Judge Donn Ginoza for July 17, 18, 20 and 23, 2012.

In addition to Local 145, Real Parties in Interest, San Diego Municipal Employees Association ("MEA"), AFCSME Local 127 and Deputy City Attorneys Association filed unfair practice charges. PERB issued a Complaint in each case. The four labor organizations sought consolidation of the Complaints.

Administrative Law Judge Ginoza has ordered consolidation of all the unfair practice charges and that they be heard in the hearing set to begin July 17, 2012.

II. THE PETITION IS AN EXERCISE IN "HIDING THE BALL"

The Boling Petitioners are playing "hide the ball" with this Court in disregard of its important institutional role and limited resources.

With the stated objective of "preventing a waste of government resources before they occur," (Petition, p. 7), the Boling Petitioners ask this Court "to remand this matter (D062090) back to the Fourth District Court of Appeal, Division One, to answer basic jurisdictional questions before PERB

holds hearings" on Real Parties' unfair practice charges (Petition, p. 2.) They would have this Court believe that the Fourth Appellate District refused to answer these "jurisdictional questions" by a summary denial of the City's Writ on June 14, 2012. (Petition, Attachment A.)

Yet the Boling Petitioners fail to inform this Court that the Fourth District Court of Appeal filed a 25-page opinion on June 19, 2012, answering these "basic jurisdictional questions" in the companion writ case *San Diego Municipal Employees Association (MEA) v. The Superior Court of San Diego County (City of San Diego and PERB, Real parties In Interest)*, Case No. D061724.[1] Remarkably, the *Boling* Petitioners make only a passing reference on page 6 of their Petition to this crucial contemporaneous MEA Writ Case. Indeed, without elaboration, they simply include it as the last case on a list of seven "actions to be stayed." Although they mention the MEA Writ Case again at page 10 of their Petition, they *never* inform this Court that, in response to the MEA Writ Case, the City raised – and aggressively advocated – the points they make in their Petition for Review and that the Fourth Appellate District already answered these "basic jurisdictional questions" in its published opinion filed on June 19, 2012, in D061724.

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[1] No Petition for Review related to this companion Case No. 61724 has been filed. However, on June 28, 2012, the City of San Diego filed a Petition for Rehearing.

After avoiding any substantive description of this 25-page opinion in their 26-page Petition for Review, the Boling Petitioners also failed to provide this Court with a copy of the opinion.[2]

The Boling Petitioners fail to disclose to this Court that in the companion MEA Writ Case (D061724), the City vigorously asserted all of the jurisdictional issues which the Boling Petitioners raise in their Petition for Review and – most importantly – they fail to inform this Court that the Fourth Appellate District's opinion in MEA's Writ Case studiously analyzes and resolves those issues by applying this Court's applicable precedents and by following the relevant decisions of other intermediate appellate courts such that harmony and uniformity in this area of the law have been maintained.

Finally, the Boling Petitioners would have this Court believe that the Fourth District Court of Appeal's summary denial of the City of San Diego's Writ Petition in Case No. D062090 – in which the City named the Boling Petitioners as real parties in interest – means that the Fourth District declined to hear and consider the jurisdictional and constitutional arguments they raise in their Petition for Review. (See Petition, p. 11.)

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[2] On June 26, 2012, PERB filed a Notice of Related Cases in this Court which included a copy of the 25-page opinion filed in MEA's Writ Case No. D061724.

In fact, the opposite is true and the Boling Petitioners have created this mis-impression only by omitting the procedural context in which the court's summary denial occurred.

Nearly a month before the City of San Diego filed its new Writ Petition on June 7, 2012, in Case No. 62090 (on which the Boling Petitioners have filed their Petition for Review), the Fourth District Court of Appeal had already issued its Order to Show Cause on May 4, 2012, on MEA's Writ Case (D061724). In fact, on May 8, 2012, the Court calendared the matter for oral argument on June 13, 2012, and the parties filed additional briefs as directed by the court by the deadlines set.

Thus, when the City filed its *new* Writ Petition on June 7, 2012, raising the identical issues which were already being addressed in the pending MEA Writ Case (D061724), the same panel of the Fourth Appellate District issued its summary denial of the City's Writ on June 14, 2012, *after* this panel had heard oral argument on the MEA Writ on June 13, 2012, and shortly before filing its 25-page opinion in the MEA Writ Case No. 61724 on June 19, 2012. Associate Justice McDonald authored the opinion with Presiding Justice McConnell concurring and Associate Justice O'Rourke concurring in the result.[3] During oral argument – as it

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[3] With regard to the court's summary denial of the City's Writ Petition on June 14, 2012, Associate Justice O'Rourke stated that he would have requested a response.

had done in its written advocacy – the City of San Diego, by and through its elected City Attorney, vigorously argued the positions and perspective being advanced by the Boling Petitioners in this Petition.

III. WHY REVIEW SHOULD NOT BE GRANTED

A. NO REMAND IS WARRANTED SINCE THE CITY ALREADY RAISED – AND THE FOURTH APPELLATE DISTRICT ALREADY ANSWERED – THE "BASIC JURISDICTIONAL QUESTIONS" THE PETITION IDENTIFIES

The Boling Petitioners' invocation of this Court's expertise and resources as the institutional supervisor of our state courts is based on the false premise (as described above) that remand to the Fourth Appellate District is needed "to answer basic jurisdictional questions." These questions have already been answered in the 25-page published opinion granting MEA's Writ in Case No. D061724.

The Fourth District Court of Appeal concluded, as this Court's precedent establishes, that PERB has exclusive initial jurisdiction in this case and that no exception to the rule of administrative exhaustion applies. As this Court explained in *San Diego Teachers Assn. v. Superior* Court (1979) 24 Cal.3d 1, 2, the MMBA provides a comprehensive administrative procedure for investigating, hearing, and deciding charges of unfair practices against public agency employers and, as an expert quasi-judicial agency, PERB administers the MMBA with broad authority – analogous to

that of the National Labor Relations Board -- to interpret the MMBA in the interest of bringing "expertise and uniformity to the delicate task of stabilizing labor relations" in California. The expertise and specialized knowledge of quasi-judicial labor agencies and the need for judicial uniformity in labor relations entitle those agencies, such as PERB, to great deference. (See *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, 856 [superseded on other grounds by Ed. Code, § 45113.]

The Fourth Appellate District also properly concluded that our appellate courts will become involved in this case (if at all) if and when an extraordinary writ is filed *after* PERB issues a *final decision* in the matter. (Gov. Code §3509.5, subds. (a) and (b); CRC Rule 8.498.) This Court itself has emphasized that the rule of exhaustion requires the parties to make a full presentation upon all issues at all prescribed stages. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597.)

Thus, as the statutory MMBA scheme dictates, PERB must exercise its exclusive initial jurisdiction and apply its special expertise to determine if the *City* violated its duty to meet and confer over matters within the scope of representation. This determination will turn on case-specific facts adduced during an evidentiary hearing establishing the actual conduct of *City officials* in relation to CPRI, as well as the nature and scope of these *City officials*' discrete MMBA-related roles under the San Diego City's

Charter-based "Strong Mayor" form of governance. If PERB determines that the City did violate the MMBA, it is PERB's duty in the first instance to determine what the remedy should be to effectuate the purposes of the MMBA. (Gov. Code § 3509, subd. (b). Here is what the Fourth Appellate District wrote when ordering the Superior Court to lift its stay of PERB's proceedings:

> City next asserts it should be excused from exhausting the administrative process because PERB lacks the "'authority, statutory or otherwise, to resolve the underlying dispute between the parties.'" (*Coachella Valley, supra,* 35 Cal.4th at pp. 1081-1082.) However, the UPC charged City with violating its alleged meet and confer requirements of the MMBA. Whether the employer's conduct . . . constituted an unfair labor practice under the MMBA is a claim falling within PERB's exclusive jurisdiction (*Firefighters, supra*, 195 Cal.App.4th at pp. 1209-1211), and that initial exclusive jurisdiction extends to activities "'*arguably* protected or prohibited' by public employment labor law . . . ." (*San Jose, supra*, 49 Cal.4th at p. 606, italics added.) City does not dispute that, had City *directly* placed the CPRI on the ballot without satisfying the meet and confer procedures, it would have engaged in conduct prohibited by the MMBA under *Seal Beach, supra*, 36 Cal.3d 591. Because MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using strawmen to avoid its MMBA obligations, the UPC does allege City engaged in activity *arguably* prohibited by public employment labor law, giving rise to PERB's initial exclusive jurisdiction. (*San Jose, supra.*) (MEA Writ Decision, p. 16.)

In fact, the Fourth Appellate District also responded to the City's request that the court "exercise (its) original jurisdiction to speedily resolve

the basic legal issue in this case because it is a matter of statewide concern and does not depend on the resolution of disputed facts":

> [T]here are factual questions of sufficient significance that we decline to resolve the dispute in a vacuum, but instead defer to PERB's initial exclusive jurisdiction to resolve MEA's UPC. (MEA Writ Decision, p. 21, fn. 6.)

Moreover, the Fourth Appellate District applied this Court's three-part analysis in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, when concluding that judicial intervention is not warranted here before the administrative process has been pursued and concluded.

> [R]esolution of MEA's UPC arguably involves factual elements, because MEA alleges the CPRI was not a true citizen-sponsored initiative but was instead a sham device employed by City officials to circumvent the meet and confer obligations imposed on City by the MMBA. More importantly, the fact City may have significant legal arguments militating against a finding that the CPRI violated the MMBA does not deprive PERB of the *authority* to rule on those arguments (cf., *Cumero, supra*, 49 Cal.3d at p. 583), which renders *Coachella Valley* inapposite. On the final factor, the *Coachella Valley* court noted "judicial intervention at this stage will not deny us the benefit of the PERB's administrative expertise; the issues are purely legal and of a kind within the expertise of courts, and we have received the benefit of the PERB's views on the issues through its briefs in this court." (*Coachella Valley, supra*, 35 Cal.4th at pp. 1082-1083.) In contrast, the issues here do involve mixed questions of law and fact, and therefore judicial intervention at this stage would deny us the benefit of PERB's administrative expertise. Moreover, on the core legal questions, we have not received the benefit of PERB's views on the issues through its briefs in this court, because PERB's briefs in this proceeding have been limited to defending its exclusive initial jurisdiction

> over the dispute, and have not contained PERB's view on the merits of whether the CPRI constituted an unfair labor practice. For the foregoing reasons, we are not persuaded by City's argument that the lack of authority exception justifies judicial intervention before the administrative processes have been exhausted. (MEA Writ Decision, pp. 20-21.)

In the final analysis, because the MMBA is designed to promote harmonious and cooperative labor relations between California's public sector employers and their employees, respect for the discrete roles allocated to PERB and to the courts of appeal – and ultimately to the rule of law which the legislative MMBA scheme represents – is as important to a healthy democracy as is the people's reserved power to act by initiative.

B. NO DIRECT REVIEW IS WARRANTED TO SECURE UNIFORMITY OF DECISION OR TO SETTLE AN IMPORTANT QUESTION OF LAW

Nor do the Boling Petitioners offer any justification for the alternative outcome they propose that this Court "grant the Petition and assume this case in this Court." Indeed, the Boling Petitioners make no showing at all that this Court's review is proper or necessary to "secure uniformity of decision or to settle an important question of law," or on any other ground set forth in California Rules of Court, Rule 8.500, subd. (b).

After acknowledging that PERB "has jurisdiction to determine if violations have occurred of the Meyers-Milias-Brown Act," the Boling Petitioners ask this Court to "consider a matter of statewide importance: whether a *citizen-sponsored* charter initiative must go through the Meyers-

Milias-Brown Act ("MMBA") 'meet and confer' process and be subject to pre-approval by the California Public Employee (sic) Relations Board ("PERB") before placement on the ballot because some elected officials supported the measure? In other words, do public sector labor laws trump the right of citizens to propose direct legislation?"

But this provocative issue framing is a complete distortion of what is actually before PERB for hearing and determination in this case based on MEA's and other Real Parties' UPCs. *Bona fide* citizen-sponsored initiatives are not under attack; nor are the legitimate rights of public employees which are protected by the MMBA being pitted against the legitimate rights of citizens to propose direct legislation.

The central legal issue raised by these UPCs is whether or not a *public employer* may permissibly dodge (with a wink and a nod) its obligations under the MMBA when its "Strong Mayor," who by Charter mandate is also the public entity's Chief Labor Negotiator, sets a policy course for the City using his City-paid time, his City-paid staff and other resources to *negotiate* with a small group of "other private citizens" (but not the recognized exclusive bargaining representatives) to shape the terms of *his pension reform initiative* – and then uses his willing citizen allies as surrogates to qualify the initiative for the ballot with the backing, visibility and credibility of his public office.

Thus, while the Boling Petitioners seek to put the cart before the horse, a proper legal analysis cannot be done in this case until PERB first determines – based on the evidence presented at the hearing set to begin on July 17, 2012 – what San Diego City officials actually did with regard to the CPRI and what that conduct means in terms of the City's obligations under the MMBA and its Charter.

The Boling Petitioners also assert that this Court must grant review because PERB has no primary jurisdiction over these unfair practice complaints (pp. 22-23), and because exhaustion of administrative remedies is excused (p. 22). However, as described above, each of these arguments was already considered and decided in the 25-page published opinion in the companion MEA Writ Case (D061724) – and decided in a manner which conforms to the settled rules and principles of law established by this Court's relevant precedent and by the opinions of other Courts of Appeal such that harmony and uniformity of decision are maintained.

The Boling Petitioners also argue that this Court must grant review because PERB has already predetermined the outcome of the administrative hearing set to begin on July 17, 2012 (pp. 3 & 10); because PERB has already submitted itself to the jurisdiction of the courts by seeking injunctive relief (p. 6); and because PERB has no "statutorily-designated expertise" over Election Law (p. 23). Yet, the Fourth Appellate District

addressed each of these assertions when the City made them in opposition to MEA's Writ Case (D061724), and rejected them by application of this Court's precedent and in conformity with its peer appellate courts.

The Fourth Appellate District determined that none of the three recognized grounds for excusing exhaustion of administrative remedies is present in this case (*City of San Jose, supra,* 49 Cal.4th at p. 601) – neither futility nor lack of jurisdiction (*Coachella Valley, supra*, 35 Cal.4th at pp. 1080-1082), nor inadequacy of the administrative remedy (*Glendale City Employees' Assn. Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342.) (MEA Writ Decision, pp. 13-22.)

The party invoking the futility or "predetermined outcome" exception must "positively state that the [agency] has declared what its ruling will be on a particular case." (*Jonathan Neil & Assoc., supra*, 33 Cal.4th 917, 936.) The City argued in the MEA Writ (and the Boling Petitioners reassert the argument here) that PERB's Superior Court action for injunctive relief shows that the outcome of the administrative process is "certain." In concluding that this argument lacks merit, the Fourth Appellate District noted that PERB's statutorily-enumerated powers under Government Code section 3541.3, subdivision (j), include the discretion to petition the court for temporary injunctive relief. Moreover, the standard for doing so in order to preserve the *status quo* is not whether the unfair

labor practice has *in fact* occurred but whether there is "reasonable cause" to believe an unfair labor practice has occurred and whether preserving the *status quo* [pending resolution of the dispute would be "just and proper." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-897.) Thus, when PERB invoked its power under Government Code section 3541.3, subdivision (j), to seek injunctive relief in the superior court in order to preserve the *status quo* pending resolution of the MEA's UPC in the administrative proceedings, this action was filed as an adjunct to, and in aid of, the administrative proceedings to resolve a dispute over which PERB had initial exclusive jurisdiction and not as an action to resolve the merits of the UPC. (MEA Writ Decision, pp. 10-11 and 13-16.)

Moreover, the Fourth Appellate District also rejected City's argument (reasserted here by the Boling Petitioners) that PERB forfeits its initial exclusive jurisdiction under the MMBA if it exercises a power contemplated by the MMBA to preserve the *status quo* while it fulfills its statutory function to resolve MMBA claims. In its Decision on MEA's Writ, the Fourth Appellate District rejected this argument because it "is not supported in logic or case law and appears inconsistent with the statutory scheme." (MEA Writ Decision, p. 24.)

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Finally, the Fourth Appellate District concluded that the City's argument (reasserted here by the Boling Petitioners) that MEA's UPC is beyond PERB's purview and therefore outside PERB's exclusive *initial* jurisdiction because it implicates constitutional issues ignores settled precedent that PERB may construe employee relations laws considering constitutional precedent (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583). (MEA Writ Decision, pp. 12 & 23.) And the Fourth Appellate District further emphasized that the mere fact that constitutional rights or election laws may be implicated or have some bearing on this dispute is not in and of itself sufficient to divest PERB of its exclusive *initial* jurisdiction to consider MEA's allegations that City's conduct violated the MMBA. (MEA Writ Decision, p. 12.) The court went on to note that any argument that PERB has no "jurisdiction to resolve constitutional and legal issues related to election laws," would be contrary to decisional law:

> [C]onstitutional challenges are frequently raised to the application of the administrative statutory scheme yet the courts typically require such issues be presented to the administrative agency in the first instance." (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 169.)(MEA Writ Decision, p. 19, fn. 5.)

Moreover, as the Fourth Appellate District determined when addressing the City's vigorous opposition to MEA's Writ, the City's legal argument under *People ex rel. Seal Beach Police Officers Assn. v. City of*

Seal Beach (1984) 36 Cal.3d 591 – as well as any other statutory or constitutional arguments – must be presented in the PERB administrative forum in the first instance. If the City believes that the ALJ's resolution of MEA's UPC is legally flawed, the City may appeal to PERB based on a fully-developed factual record and, if necessary, may seek writ relief from the Court of Appeal under Government Code section 3509.5; however, the mere fact that City contends the actions of its elected officials in connection with the CPRI cannot violate the MMBA as a matter of law, does not excuse the City from exhausting the administrative process before it seeks relief through the judicial branch. (MEA Writ Decision, pp. 12-13.)

C. THE BOLING PETITION IS NOT SUPPORTED BY AN ADEQUATE RECORD

This Court, of course, is *not* a trier of fact nor is it a tribunal of *first resort.* The Boling Petitioners seek review of the complex factual and legal issues based on only three exhibits attached to their Petition. While the underlying Fourth District Court of Appeal file in D062090 also includes two volumes of Exhibits A through T (totaling 397 pages) which the City filed in support of its failed Petition (from which review is sought), these Exhibits are substantially incomplete when compared with the twelve volumes of Exhibits included in the record related to the MEA Writ Case in D061724. The Boling Petitioners make no reference at all to any of these

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Exhibits, nor do Petitioners ask this Court to take judicial notice of the full record in D061724.[4]

Furthermore, while the Boling Petitioners have peppered their Petition with assertions about the underlying facts related to MEA's UPC, as well as the voluminous and hectic proceedings in the Superior Court, the Court of Appeal and before PERB, they have offered *no evidentiary support for these assertions.* Instead, at pages 4, 7 and 13 of their Petition, they rely on unsupported (and insufficient or inaccurate) predictions about what they *think* will happen if PERB proceeds with a hearing on the consolidated UPCs related to the CPRI: (1) there will be subpoenas (which have not been served) "seeking information from Proponents about their campaign activities;" (2) there will be motions to quash subpoenas for records and testimony (which have not been filed); (3) there will be alleged adverse impacts on *three elected City officials* (whom the Boling Petitioners

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[4] See the filed Motion by MEA Requesting Judicial Notice of the entire record in the companion MEA Writ Case No. 61724, which includes multiple filings on the merits, together with eight (8) volumes of Exhibits arising from the **San Diego County Superior Court proceedings (in which the Boling Petitioners play a featured role)** – and another four (4) volumes arising from PERB's administrative proceedings on which the Fourth Appellate District granted MEA's Motion Requesting Judicial Notice. While the Boling Petitioners complain that they "have yet to be allowed to become parties in any other action, judicial or administrative, that seeks to allow PERB to act," (Petition, p. 2), they have filed their own Superior Court action against PERB – as they acknowledge at pages 5 and 9 of their Petition, and they have appeared and participated in multiple Superior Court proceedings related to PERB's request for injunctive relief. (See MEA's RJN related to entire record in MEA's Writ Case, D061724.)

do not represent) whose "private lives" will be delved into and "who will be forced to seek protective orders to protect their deliberative privilege, as elected officials, and their First Amendment rights, as citizens."[5]

The Boling Petitioners also predict that "the opponents of the CPRI will use these (PERB) proceedings as discovery to conduct fishing expeditions to find potential weakness in the substance of the CPRI for their inevitable request for *quo warranto* status from the Attorney General now that the measure is approved." While it is unclear what the Boling Petitioners actually fear about an evidentiary hearing before PERB in this matter, it is clear that they understand that the process for any *future invalidation* of the CPRI will involve a *quo warranto* proceeding (if approved by the Attorney General) and that such an invalidation will not and cannot automatically occur as a result of any determination PERB makes on MEA's or other Real Parties' UPCs.

Finally, the Boling Petitioners raise the specter that, during a hearing before PERB's Administrative Law Judge, the opponents of the initiative "will seek unprivileged confidential political conversations which will chill future political activity." However, they offer no evidence that they have

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[5] Petitioners do not explain how or why an elected public official would have any expectation of privacy or confidentiality when communicating with others about matters within the scope of his/her official duties. With limited exceptions, these communications are subject to disclosure under the Public Records Act. Nor do they explain how a private person's participation in meetings with such elected officials can or should be kept secret in a democracy.

been subpoenaed to testify or to produce any documents at the administrative hearing set to begin on July 17, 2012 (nor has Local 145 subpoenaed them). Nor do they explain why they feel confident in predicting to this Supreme Court that PERB's Administrative Law Judge will be unable or unwilling to manage the hearing in accordance with due process and applicable rules of evidence. Moreover, in view of PERB's important role as a quasi-judicial state agency, it is hard to imagine why the Boling Petitioners, as vocal allies of the Mayor's efforts, would find it so cumbersome to appear in a proceeding before an Administrative Law Judge to offer truthful testimony under oath on the important factual issues to be determined in this case.[6]

In this regard, when the Fourth Appellate District noted in its opinion in the MEA Writ Case at page 16 that "MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using strawmen to avoid its MMBA obligations," this observation derived from the

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[6] The Boling Petitioners assert at page 19 of their Petition that, "if PERB goes ahead with its hearings, (they) will not be parties . . . They will be witnesses." Later, at page 22, they assert that "they have no administrative remedy." However, it should be noted that PERB Regulation 32164(d) authorizes the Board to order joinder of individuals in specific situations despite their lack of status under 32164(a) as an "employee, employee organization or employer." Despite the Boling Petitioners' active participation in Superior Court proceedings related to this case since mid-February, they have not applied to the Board for joinder – even after PERB's Deputy General Counsel Wendi Ross specifically cited their opportunity to do so during an *ex parte* proceeding on March 15, 2012, when counsel for the Boling Petitioners were present as the moving parties.

voluminous record before the court – including MEA's UPC and twenty-one supporting exhibits filed on January 18, 2012 – which is the subject of MEA's contemporaneously-filed Request for Judicial Notice. Lest this Court doubt the substantial nature of the factual issues to be resolved through an evidentiary administrative hearing, a sampling of this evidence includes *but is not limited to*:

> (1) **San Diego City Attorney's Memorandum of Law dated June 19, 2008**: (9 PE 96, Bates 2356)
>
> "The City Charter itself under the Strong Mayor provisions, grants the Mayor the authority to represent the City regarding labor issues and labor negotiations, including employee pensions. . . . Since the Strong Mayor Amendment was added, the City Council has repeatedly acknowledged the Mayor's authority as the City's spokesperson on labor negotiations . . . In some instances, this included his authority to negotiate on behalf of the City over his ballot proposals to amend the charter. The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors or initiates, including a voter-initiative. **The City, therefore, would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal** implicating wages, hours, or other terms ans conditions of employment." (at 2364, emphasis added.)
>
> (2) **San Diego City Attorney's Memorandum of Law dated January 2009:** (9 PE 96, Bates 2476-2496)
>
> ✔"Under this authority, the Mayor assumes the responsibility of labor negotiations, which is an administrative function of local government." (at 2478)
>
> ✔"Inherent within the authority of the Mayor as the elected head of the executive and administrative service is the responsibility of representing the City in labor negotiations

with the City's recognized employee organizations. However, it is a shared duty with the City Council." (at 2484)

✔"It is a duty of the Mayor to ensure that the City's responsibilities under MMBA as they relate to communication with employees are met. *See* Gov't Code section 3500(a). . . . The administrative duties of the Mayor include the work of meeting and conferring with the City's represented employee organizations." (at 2485).

✔ "Notwithstanding any distinction in the Charter's roles for the Council, the Mayor, the CSC, and other City officials or representative, the City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. *See* Charter section 1. The City itself is the public agency covered by the MMBA. In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City." (at 2487)

(3) **Media Alert dated November 19, 2010: "Mayor Jerry Sanders Fact Sheet"** (9 PE 96, Bates 2407-2409, Exhibit 7) [See also News Center – Office of the Mayor, published on City's Website (9 PE 96 at 2411-2412, Exhibit 8)]

"The mayor also announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector. . . . (Mayor) Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot."

(4) **Mayor's 2011 State of the City Address** (9 PE 96, Bates 2413-2424)

"This city is already a recognized leader in pension reform. And now, I'm proposing a bold step to complete our work. By creating a 401(k)-style plan for future employees, including elected officials, we'll contain pension costs and restore sanity to a situation confronting every big city (at

2415). . . . **Councilmember Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan that is similar to the private sector's and reflects the reality of our times. We are acting in the public interest, but as private citizens."** (at 2419, emphasis added).

(5) **Mayor Jerry Sanders Fact Sheet Published on City Website January 12, 2011** (9 PE 96, Bates 2426, Exhibit 10) "Mayor Lays Out Vigorous Agenda for 2011" . . . **Next Wave of Pension Reform**. "On pension reform, the mayor vowed to push forward his ballot initiative to replace pensions with a 401(k)-type plan for most new city hires. . . The ballot initiative next year will build on the mayor's earlier pension reforms, which are projected to save $400 million over the next 30 years."

(6) **Sampling of Media Reports** (9 PE 96, Bates 2373 *et seq.*, Exhibit 6B-1)

3/24/11 – A proposed ballot measure by Mayor Jerry Sanders and City Councilman Kevin Faulconer . . . (at 2375); Faulconer and (Mayor) Sanders plan to announce the ballot measure Thursday as they launch a signature drive that would place it on the June 2012 ballot. (at 2376) By releasing their plan first, Faulconer and (Mayor) Sanders hope to rally the business community behind the ballot measure, "an important endorsement given how expensive it is to gather signatures and then fund a successful campaign." (Mayor) Sanders . . . has said he hopes permanently fixing the city's budget woes will be **his legacy as mayor.**" (at 2376-2377) Faulconer and (Mayor) Sanders have already created a campaign committee called "San Diegans for Pension Reform," which has raised about $100,000 and paid for legal and financial analyses of their plan." (at 2377)

4/5/11 – (Mayor) Sanders said the measure would create a national model. "We worked with a coalition of concerned citizens and the result is a legally defensible measure that will save taxpayers hundreds of millions of dollars that can be used to enhance vital city services for decades to come," he said. (at 2378) "The proposed ballot measure is the result of

weeks of negotiations between Faulconer and (Mayor) Sanders on one side and DeMaio, the pro-business Lincoln Club and the San Diego County Taxpayers Association on the other side. . . . The compromise was largely driven by everyone's desire to focus the political clout and fundraising capabilities of the business community behind a single comprehensive ballot measure. T. J. Zane, president and chief executive of the Lincoln Club, said necessity motivated the two sides to create one measure they could all agree on. "We're up against the wall in terms of the city's finances," he said. "I think that when you're in that sort of situation you'll find the willingness on the part of all stakeholders to come to a compromise." (at 2379)

4/9/11 – City Attorney Jan Goldsmith said: "(CPRI) does provide pension relief within legal parameters." (at 2380)

(7) **April 2011 Press Conference Photo on the City Concourse**. (9 PE 96, Bates 2331)

Press Conference included Mayor Jerry Sanders, Council President Pro Tem Kevin Faulconer, Councilmember Carl DeMaio, City Attorney Jan Goldsmith, and "Ballot Proponents" Catherine A. Boling, T. J. Zane and Stephen B. Williams (Petitioners here).

(8) **"Message from Mayor Jerry Sanders"** to Members of San Diego Regional Chamber of Commerce re fundraising and other support for initiative signature gathering (9 PE 96, Bates 2459, Exhibit 17)

(9) **FPPC Form 460 filings** – Mayor Sanders' "San Diegans for Pension Reform (Primarily Formed Ballot Measure Committee) paid $89,016.49 to support CPRI on 4/4/11 (which included $9,970 in Nonmonetary Contribution – Research; $38,046.49 in Nonmonetary Legal, and $15,000 in Monetary (at 2446); and another $26,00 on 6/2/11 in Monetary (9 PE 96, Bates 2441-2447, Exhibit 15)

(10) **Sampling of Meetings Among Mayor's Staff On City-Paid Time** (9 PE 96 at 2430-2431, Exhibit 12; 9 PE 96 at 2455 and 2457, Exhibit 16)

(11) **Sampling of communications from Darren Pudgil as "Director of Communications, Office of San Diego Mayor Jerry Sanders."** (9 PE 96 at 2433-2434, 2438-2439, Exhibits 13 and 14)

[Per Pudgil e-mail: "Mayor is acting as private citizen – not as mayor" because, otherwise, if he had authored (CPRI) *as Mayor*, he'd have been legally obligated to meet with the city's labor unions – and while he wouldn't have been obligated to accept the unions' counter-proposals, he'd at least have to entertain them.]

(12) ***CityBeat* News Article dated December 7, 2011.** (9 PE 96, Bates 2370-2371, Exhibit 6A-4.)

Mayor Sanders explains why he used a "citizens initiative" to get for his pension reform plan on the ballot:"You do that so that you get the ballot initiative on that you actually want," he said. "Otherwise, we'd have gone through meet-and-confer [negotiations], and you don't know what's gonna go on at that point through the meet-and-confer process." Sanders says he's just another citizen supporting a citizen-sponsored initiative that sidesteps that trigger. (at 2371)

Moreover, in a Verified Answer to the Unfair Practice Complaint which PERB issued on MEA's charge on February 10, 2012, Executive Assistant City Attorney Andrew Jones, acting as agent and attorney for Respondent City, *denied* each and every allegation in Paragraphs 3, 4, 6, 7 and 8 of the Complaint and raised twelve affirmative defenses. (11 PE 115, Bates 2841-2844.) Among the allegations the City *denied* are the following:

3. From approximately April 2011 to date, Respondent (City), through its agents, including chief labor negotiator San Diego City Mayor Jerry Sanders, has co-authored, developed, sponsored, promoted, funded, and implemented a pension

reform initiative, referred to as the "Comprehensive Pension Reform Initiative for San Diego" (CPR Initiative).

4. Commencing on or about August 16, 2011, Respondent, through its agent San Diego City Attorney Jan I. Goldsmith, has refused to meet and confer with Charging Party regarding the provisions of the CPR Initiative that impact wages and retirement benefits for bargaining unit members. (11 PE 115, 2841-2842, responding to 11 PE 109.)

In the final analysis, when fulfilling its discrete institutional role in our state's system of justice, this Court is not the trier of fact. Nor can it properly fulfill its critical but limited role when mixed questions of fact and law are involved until and unless a full record is before it. By legislative mandate, PERB's duty is to assure the development of that record in accordance with due process before its final decision in the matter comes before our appellate courts for review.

IV. PENSION REFORM HAS BEEN SUCCESSFUL IN SAN DIEGO BY COMPLIANCE WITH RATHER THAN DEFIANCE OF THE MMBA

It is often said that "bad facts make bad law." Even worse, however, is the legal mischief threatened when false "facts" are stated as the Boling Petitioners have done in their Petition unaccompanied by *any* evidence – let alone a full evidentiary record developed during an adversarial proceeding. Petitioners assert, for example, that allowing a PERB administrative hearing to go forward means that PERB will "be used as a political arm of public sector labor unions who oppose "compensation" and "pension" reform

measures . . . The fate of Proponents' CPRI will be left in the hands of state political appointees and a San Diego City Council whose majority did not support the measure." (Petition, p. 8.) **This is false.** Local 145 has a proven track record of forging appropriate compromises on the Mayor's "reform" agenda during the past six (6) years – reforms implemented *after meeting and conferring* under the MMBA and *with the approval of the San Diego City Council.* The Boling Petitioners have absolutely no basis to assert what the outcome of any meet and confer process over the policy ideas reflected in the CPRI would have been *because the City refused to engage in this process.*

Local 145 has engaged in the meet and confer process with the City in a meaningful way which has benefitted the City:

(1) Local 145 successfully met and conferred with Mayor Sanders' negotiating team over his proposed Charter amendment in 2006 – leading to the passage of Proposition B (requiring voter approval for *any* increase in retirement benefits);

(2) During the meet and confer process with the Mayor's negotiators in 2009, 2010, 2011 and again in 2012, Local 145 agreed to substantial compensation concessions which ultimately contributed to the Mayor's announcement in late February 2012 that "the City's decades-long structural budget deficit is history" and "is effectively resolved." The City's

website (www.sandiego.gov) includes a series of "Fact Sheets" issued by Mayor Sanders;

(3) While Mayor Sanders, Councilmembers DeMaio and Faulconer, the City Attorney, and the "official" ballot proponents were holding a press conference related to the CPR Initiative on the City Concourse in early April 2011 (described above), Local 145 was at the bargaining table with the Mayor's negotiators reaching a landmark compromise over the City's retiree health benefits and thereby achieving **$802 million** in savings to the City over the next 25 years – what Mayor Sanders himself described as "the largest cost-saving measure ever implemented by this City." The City's website (www.sandiego.gov) includes a "Fact Sheet" issued by Mayor Sanders: "More Good Financial News for San Diego – (Mayor) Sanders Upgrades Total Retiree Healthcare Reform Savings to $802 Million" (April 19, 2012)

V. THE ELECTED CITY ATTORNEY HAS LED THE CITY'S VIGOROUS OPPOSITION TO PERB'S ACTIONS WHILE PUBLICLY MALIGNING PERB AS A "MICKEY MOUSE STAR CHAMBER"

The Boling Petitioners assert at page 19 of their Petition that "they cannot rely on the City of San Diego to defend their interests." It should be noted, however, that it is the City of San Diego's elected City Attorney who has led a vigorous opposition to MEA's UPC and PERB's actions in issuing a Complaint and seeking injunctive relief. In so doing, he has by no means

been a dispassionate governmental middleman caught between Local 145, MEA and other Real Parties with pending UPCs (on the one side) and the "official" ballot proponents (on the other). The City Attorney has openly acknowledged that he has had political ties and even friendships with the three "official" ballot proponents for decades.

Notably, when Mayor Sanders announced during his 2011 State of the City Address that he was "proposing a bold step to complete our (pension reform) work," he made it plain who would be involved: "Councilmember Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan that is similar to the private sector's and reflects the reality of our times. We are acting in the public interest, but as private citizens." (9 PE 96, Bates 2413-2424 at 2419, emphasis added).

The City Attorney later appeared with the City's Mayor *and the three Boling Petitioners* at a press conference on the City Concourse outside City Hall during business hours on April 5, 2011, to announce the deal they had made with regard to getting the "Comprehensive Pension Reform" initiative (CPRI) on the ballot. (9 PE 96, Bates 2331) A few days later, on April 9, 2011, the City Attorney assured the public that: "(CPRI) does provide pension relief within legal parameters." (9 PE 96, Bates 2373 at 2380.)

Indeed, the elected City Attorney's personal support for the CPRI has led to a number of inexcusable excesses. When MEA filed its UPC and the PERB Board directed PERB's General Counsel to seek injunctive relief in response to MEA's request, City Attorney Jan Goldsmith responded with a level of vitriol unbecoming his office as City Attorney.[7]

On February 15, 2012, in his capacity as *City's* attorney in the matter, he took to the radio airwaves at KFMB 760AM calling PERB "a Mickey Mouse Star Chamber;" he accused PERB's General Counsel of misusing her authority to help her "union friends." He called PERB's argument in this case "absurd, ridiculous and nonsense." When asked by the radio host what PERB does on a daily basis, City Attorney Goldsmith responded: "I think what they do more than anything else is sit down and have coffee with the labor unions. They are owned and operated by labor unions. As is most of Sacramento by the way." (12 PE 130, Exhibit 2.)

Thus, it cannot be denied that the City Attorney is *"all in"* on the side of the Mayor and the other ballot proponents in this fight. In the person of the *City*'s elected City Attorney, the Boling Petitioner have – and have had – a "true believer" as their advocate.

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[7] Mr. Goldsmith's remarks which impugned the integrity of PERB's General Counsel as well as of PERB as a quasi-judicial state agency, violated the duty lawyers owe in proceedings before the Court to "refrain from impugning the integrity of the judicial system, its proceedings, or its members." (Super. Ct., San Diego County, local Rules, Rule (I).)

VI. THE IMPARTIAL FISCAL ANALYSIS RELATED TO CPRI DEMONSTRATES THAT THERE ARE NO IMMEDIATE SAVINGS – AND THERE MAY BE NONE AT ALL

While there is no doubt at all that the City of San Diego has achieved *major* budgetary savings from the above-described "meet and confer" successes, the potential for *any* savings to be achieved as a result of the CPRI (Proposition B) remains in doubt.

According to the Fiscal Impact Analysis provided to San Diego's voters, the pension benefit changes embodied in the proposed CPRI (Proposition B) are projected to *cost the City a net $13 million over 30 years* ($56 million when adjusted for inflation). (D062909, Exhibit Q, 2 PE at 323.) The only potential savings will come, if at all, if a five-year pensionable pay freeze for all city employees is in fact implemented by the City Council despite growing recruitment and retention challenges in many critical positions. It is this hoped-for pensionable pay freeze – not the switch to a 401(k) plan – which has the *potential* to save $963 million over 30 years ($581 million when adjusted for inflation).

Whether such a freeze occurs or not will depend on future actions of the City Council *after* each MMBA-mandated meet and confer process with each of the City's six recognized employee organizations because voters cannot mandate city employee salaries at the ballot box. This aspect of the

initiative measure is thus a *recommendation* not a mandate. Yet it is the only provision which produces any arguable savings.

Finally, even if this five-year freeze in pensionable pay does in fact occur, it would *continue* the cycle of pay freezes and/or pay reductions which have been in effect (following the MMBA-mandated meet and confer process) for the past *five* years – and which remain in effect pursuant to a new series of final and binding Memoranda of Understanding between the City and its six labor unions, including Local 145, for fiscal year 2013. Accordingly, regardless of how quickly CPRI (Proposition B) is implemented, a freeze in pensionable pay is already in effect between the City and *all six* of its recognized employee organizations (including Local 145) through June 30, 2013, and it is this freeze that saves the City money, not the switch to a 401(k) plan called for under CPRI.[8]

VII. CONCLUSION

For all of the foregoing reasons, Real Party in Interest Local 145 urges this Court to deny the Petition for Review.

Dated: July 3, 2012 TOSDAL, SMITH, STEINER & WAX

By: _____
Fern M. Steiner, Attorneys for
Real Party in Interest Local 145

[8] On its face, Proposition B acknowledges that its implementation may be delayed if binding MOUs are in effect (as they are through June 13, 2013) between the City and its recognized employee organizations.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.504, subdivision (d), the text of this Answer, excluding the cover page and tables, consists of 7,906 words, as counted by the computer word processing system used to generate these materials.

Dated: July 3, 2012

TOSDAL, SMITH, STEINER & WAX

By: _____
Fern M. Steiner, Attorneys for
Real Party in Interest Local 145

Re: City of San Diego v. California Public Employment Relations Board; San Diego Municipal Employees Association; et al.
Supreme Court Case No. S203478

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West "A" Street, Suite 320, San Diego, California, 92101.

On July 3, 2012, I served the within document described as:

REAL PARTY IN INTEREST SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO'S ANSWER TO PETITION FOR REVIEW

via the method indicated:

Party	Method of Service
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Office of the Clerk California Fourth District Court of Appeals, Division One 750 B Street, Suite 300 San Diego, CA 92101	First Class Mail

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 3, 2012, at San Diego, California.

Elizabeth Diaz