IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S242034

CATHERINE A. BOLING; T.J. ZANE; and STEPHEN B. WILLAMS,
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.

After Decision by the Court of Appeal, Fourth Appellate District, Division One, Consolidated Case Nos. D069626 and D069630

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AMICUS CURIAE BRIEF OF INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES LOCAL 21, OPERATING ENGINEERS LOCAL UNION NO. 3, AND MARIN ASSOCIATION OF PUBLIC EMPLOYEES

ANDREW J. ZIAJA* (Cal. SB 262283)
ARTHUR LIOU (Cal. SB SB 252690)
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, California 94612
Telephone: (510) 272-0169
Facsimile: (510) 272-0174
E-mail: aziaja@leonardcarder.com
E-mail: aliou@leonardcarder.com

Attorneys for Amici Curiae International Federation of Professional and Technical Employees Local 21, Operating Engineers Local Union No. 3, and Marin Association of Public Employees

TABLE OF CONTENTS

APPLICATION TO FILE AMICUS CURIAE BRIEF 4

I. INTEREST OF AMICI CURIAE 4

II. HOW AMICI CURIAE WILL ASSIST THE COURT 5

III. CALIFORNIA RULE OF COURT 8.520(F)(4) DISCLOSURE 5

AMICUS CURIAE BRIEF OF INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES LOCAL 21, OPERATING ENGINEERS LOCAL UNION NO. 3, AND MARIN ASSOCIATION OF PUBLIC EMPLOYEES 6

I. INTRODUCTION 6

II. ARGUMENT 8

A. *YAMAHA* DOES NOT PROVIDE THE STANDARD OF REVIEW FOR PERB'S INTERPRETATIONS OF ITS STATUTES, WHICH INSTEAD ARE OWED DEFERENCE UNDER THIS COURT'S JURISPRUDENCE UNLESS THEY ARE CLEARLY ERRONEOUS. 8

B. CONTRARY TO THE COURT OF APPEAL'S UNSUPPORTED VIEWS, THE DUTY TO MEET AND CONFER ARISES FROM MMBA SECTION 3505 AND EXPRESSLY ATTACHES EQUALLY TO A PUBLIC AGENCY'S GOVERNING BODY AND ITS REPRESENTATIVES 14

C. THE COURT OF APPEAL WRONGLY INSERTED A DISCUSSION OF THE NONDELEGATION DOCTRINE INTO ITS STATUTORY AGENCY ANALYSIS UNDER THE MMBA, WHICH DEMONSTRATES THE IMPORTANCE OF DEFERRING TO PERB'S EXPERTISE IN INTERPRETING ITS STATUTES 19

III. CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

DECLARATION OF SERVICE 26

TABLE OF AUTHORITIES

Cases

American Federation of State and County Municipal Employees, Council 75, Local 2043 v. City of Lebanon
(2017) 360 Or. 809 17-19

Banning Teachers Association v. Public Employment Relations Board
(1988) 44 Cal.3d 799 .....*passim*

Boling v. Public Employment Relations Board
(2017) 10 Cal.App.5th 853 .....*passim*

California Cannabis Coalition v. City of Upland
(2017) 3 Cal.5th 924 15-16

City of Redwood City v. Moore
(1965) 231 Cal.App.2d 563 23

City of San Diego
(2015) PERB Dec. No. 2464-M 12

Claremont Police Officers Assn. v. City of Claremont
(2006) 39 Cal.4th 623 17

Cumero v. Public Employment Relations Board
(1989) 49 Cal.3d 575 .....*passim*

Hoechst Celanese Corporation v. Franchise Tax Board
(2001) 25 Cal.4th 508 13

Inglewood Teachers Association v. Public Employment Relations Board
(1991) 227 Cal.App.3d 767 .....*passim*

Kugler v. Yocum
(1968) 69 Cal.2d 371 21

Lancaster Symphony Orchestra v. National Labor Relations Board
(D.C. Cir. 2016) 822 F.3d 563.....10-11

Larkin v. Workers' Comp. Appeals Board
(2015) 62 Cal.4th 152 13

Pacific Legal Foundation v. Brown
(1981) 29 Cal.3d 168 23

The People ex rel. Seal Beach Police Officers Association et al. v. City of Seal Beach et al.
(1984) 36 Cal.3d 591 16-17

Yamaha Corp. of America v. State Board of Equalization
(1998) 19 Cal.4th 1 ..... *passim*

Constitutional Provisions

Cal. Const., art. XI,
§ 11(a) 20

Statutes

Gov. Code
§ 3500 4,6,16
§ 3504.5 7,14,16,17
§ 3505 ..... *passim*
§ 3540 9
§ 11340 13
§ 11400 13

Oregon Revised Statute
243.650 18
243.672 18

Regulations

8 Cal. Code. Reg.
§ 32305 12
§ 32320 12
§ 32325 12
§ 32602 12

City Charter Provisions

San Diego City Charter, art. III,
§ 11.1 20

Other Authorities

Keith E. Whittington & Jason Iuliano (2012)
The Myth of the Nondelegation Doctrine,
165 U. Penn. L. Rev. 379 22

APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT: Pursuant to California Rules of Court Rule 8.520(f), International Brotherhood of Electrical Workers Local 1245, International Federation of Professional and Technical Employees Local 21, Operating Engineers Local Union No. 3, and Marin Association of Public Employees ("Amici") request permission to file the accompanying brief in support of the Public Employment Relations Board ("PERB") and real-parties-in-interest unions San Diego Municipal Employees Association ("SDMEA") et al.

I. INTEREST OF AMICI CURIAE

Amici represent thousands of public employees across California in a wide range of jobs, including electricians, law enforcement personnel, city planners, clerical workers, and more. They work for a variety of public agencies including the City and County of San Francisco, Santa Clara County, Alameda County, Contra Costa County, San Jose, Oakland, Vallejo, the San Francisco Superior Court, and others.

Under the public employment relations statutes administered by PERB, including the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 *et seq.*, Amici represent workers in collective bargaining relationships with public employers throughout the state of California. Essential to their representational activities and obligations, Amici rely on

PERB's final and binding administrative adjudications in unfair labor practice and other proceedings. Amici in particular rely on PERB to resolve disputes over the scope of the duty to meet and confer under the MMBA and other public employment relations statutes. They have an interest in ensuring that the law is correctly interpreted toward those ends.

II. HOW AMICI CURIAE WILL ASSIST THE COURT

Amici will assist the Court by their experience as labor unions representing thousands of public-sector employees in the State of California, under the laws administered by PERB. They have experience participating in PERB proceedings and in meet-and-confer relationships with public employers. In the amicus curiae brief below, Amici draw on this experience to offer assistance to this Court in resolving the important legal questions before it.

III. CALIFORNIA RULE OF COURT 8.520(F)(4) DISCLOSURE

No party or counsel for any party authored the proposed amicus brief or any portion of it, or made any monetary contribution supporting the preparation or submission of the brief. No person or entity made any monetary contribution to fund the preparation or submission of the brief other than Amici, their members, and their counsel.

///

///

///

AMICUS CURIAE BRIEF OF INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES LOCAL 21, OPERATING ENGINEERS LOCAL UNION NO. 3, AND MARIN ASSOCIATION OF PUBLIC EMPLOYEES

I. INTRODUCTION

The Court of Appeal's decision in *Boling v. Public Employment Relations Board (2017)* 10 Cal.App.5th 853 severely errs in two ways that will significantly erode the certainty and finality of the Public Employment Relations Board's ("PERB") role in resolving disputes between public employers and unions. The Court of Appeal's decision breaks with established precedent regarding the standard of review applicable to PERB's legal conclusions, as well as who owes the duty to bargain under which provision of the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 *et seq.* The Court of Appeal's decision furthermore demonstrates the importance of deferring to PERB's statutory interpretations by relying on inapplicable doctrine.

First, the Court of Appeal wrongly overextends *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, which considered the standard of review owed to an agency's legal interpretations in the context of administrative rule-making. *Yamaha* does not supply the standard of review for PERB's adjudicative determinations, however. This Court's existing precedent in cases addressing PERB's adjudicative authority, especially *Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575 and *Banning Teachers Association v. Public Employment*

Relations Board (1988) 44 Cal.3d 799, holds that PERB may construe its statutes in light of other laws, and that its legal conclusions are owed deference unless clearly erroneous.

Second, as an additional ground for reversal, the Court of Appeal expressly rejects PERB's well-settled interpretation of the duty to meet-and-confer under section 3505 of the MMBA. Without citing a single supporting decision, the court holds that the duty to bargain arises from section 3504.5, rather than section 3505. Misconstruing section 3504.5, the court further holds that only the governing body of a public employer and not the public employer itself owes any duty to meet-and-confer with a union. This contradicts not only PERB's interpretation but this Court's longstanding view that the duty to bargain arises from section 3505 and attaches to public employers, including their representatives. By narrowing the duty to meet-and-confer to only governing bodies, the Court of Appeal's decision effectively bypasses that duty, giving free reign to public employers to impose unilateral changes to terms and conditions of employment through the acts of their labor-relations representatives.

The Court of Appeal's decision furthermore demonstrates the importance of deferring to PERB's statutory interpretations by inexpertly and incorrectly inserting a discussion of the nondelegation doctrine into its statutory agency analysis under the MMBA. The nondelegation doctrine plays no role in determining whether a public official acted on behalf of a

public employer under the MMBA for purposes of triggering the duty to meet and confer. Rigorous legal scholarship has revealed, moreover, that the nondelegation doctrine has never existed as the Court of Appeal imagines it—a categorical prohibition against delegations of legislative authority to executive branch officials. Thus even were the nondelegation doctrine relevant, it would not preclude PERB's finding of statutory agency.

None of these positions taken by the Court of Appeal is tenable under this Court's existing precedent. If allowed to stand, the Court of Appeal's decision will broadly undermine the certainty and finality of PERB's role in resolving disputes between public employers and unions. The Court of Appeal's own erroneous reliance on inapplicable doctrine in fact demonstrates the importance of deferring to PERB's statutory interpretations. Amici therefore ask that this Court correct these errors and overturn the Court of Appeal.

II. ARGUMENT

A. *Yamaha* Does Not Provide the Standard of Review for PERB's Interpretations of Its Statutes, Which Instead Are Owed Deference Under This Court's Jurisprudence Unless They Are Clearly Erroneous.

The Court of Appeal in this case overextended *Yamaha* rather than apply settled standard-of-review law applicable to PERB decisions. In so doing, the court treated the standard of review as though it were a matter of first impression whether any deference was owed to PERB's construction

of the MMBA. The court ignored law that answers this question and has been settled for decades, including this Court's decisions in *Cumero* and *Banning.*

This Court delineated PERB's interpretive power in *Cumero*. PERB faced the question of whether unions may charge representational service fees to non-member employees under the Educational Employment Relations Act ("EERA"), Gov. Code §§ 3540 *et seq.* PERB examined the balance struck by the Legislature between an individual's constitutional rights and the "important contribution of organizational security arrangements to the system of employer-employee relations established in the EERA." (*Cumero*, *supra*, 49 Cal.3d at pp. 583-84 [marks and citations omitted].) Although it would have exceeded PERB's authority to refuse to enforce EERA on constitutional grounds, this Court agreed that PERB could "*constru*[*e*] the EERA in light of constitutional standards." (*Id.* at p. 583 [emphasis original].)

Consistent with *Cumero*, the Second District Court of Appeal in *Inglewood Teachers Association v. Public Employment Relations Board* (1991) 227 Cal.App.3d 767 reviewed PERB's legal conclusions in view of facts closely relevant to this case. A high school principal retaliated against protected union activity by teachers who had challenged working conditions under his administration. (*Id.* at pp. 772-74.) The principal filed a personal law suit against those individual teachers, who were active in

their union. (*Ibid.*) The union responded by filing an unfair practice charge against the school district, alleging that the principal's personal lawsuit violated EERA, as he had been acting as the school district's agent when he filed it. (*Ibid.*) PERB agreed and, applying agency principles in view of EERA, found that the school district committed an unfair practice. (*Id.* at pp. 774-75.)

The Second District upheld the decision and "conclude[d] that PERB's interpretation of agency principles is subject to the clearly erroneous standard of review." (*Inglewood*, *supra*, 227 Cal.App.3d at p. 776.) PERB's interpretation of agency principles was essential to its "primary responsibility [. . .] to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain . . . ." (*Id.* at p. 776 [marks omitted] [quoting *Banning*, *supra*, 44 Cal.3d at p. 804].)

The Second District's holding that PERB's interpretation of agency principles is subject to clearly erroneous review parallels the intermediate level of deference afforded to the National Labor Relations Board's ("NLRB") agency law determinations in federal court. Agency status determinations involve mixed questions of law and fact, so federal courts "do not review the Board's determination[s] *de novo*. Instead, we take a middle course, and will uphold the Board if at least it can be said to have made a choice between two fairly conflicting views." (*Lancaster Symphony Orchestra v. NLRB* (D.C. Cir. 2016) 822 F.3d 563 [citations and marks

omitted].) California's "clearly erroneous" and the federal "two fairly conflicting views" standards are both intermediate standards of review, taking into account that applying agency law "requires an exercise of judgment about facts," even on an undisputed record. (See *ibid.*)

Instead of the settled and applicable precedent of *Cumero*, *Banning*, and *Inglewood*, the Fourth District here emphasized *Yamaha* in determining the standard of review as though it were a matter of first impression. (*Boling*, *supra*, 10 Cal.App.5th at p. 868.) The Court of Appeal seized on

> *Yamaha's* conceptual framework [which] noted that courts must distinguish between two classes of interpretive actions by the administrative body—those that are quasi-legislative in nature and those that represent interpretations of the applicable law—and cautions that because of their differing legal sources, each command significantly different degrees of deference by the courts.

(*Id.* at pp. 868-69 [marks and citations omitted].) Agency-enacted "quasi-legislative rules have the dignity of statutes" and are owed deference so long as they fall within the authority delegated by the Legislature. (*Id.* at p. 869.) "Interpretive actions," according to the Court of Appeal, by contrast are owed no deference other than that justified by an agency's expertise; interpretation of the law is the province of the judiciary. (*Ibid.*) The Court of Appeal therefore found *de novo* review to be the applicable standard, wrongly ignoring the settled view that agency determinations blend questions of law and fact. (*Id.* at p. 880 [cf. *Lancaster*, *supra*, 922 F.3d at p. 566].)

The Court of Appeal's construction of "interpretive actions" in this case is a straw man, moreover. The "interpretive actions" in *Yamaha* were the publication by the State Board of Equalization of

> the Business Taxes Law Guide summaries of opinions by its attorneys of the business tax effects of a wide range of transactions. Known as "annotations," the summaries are prompted by actual requests for legal opinions by the Board, its field auditors and businesses subject to statutes within its jurisdiction. The annotations are brief statements—often only a sentence or two—purporting to state definitively the tax consequences of specific hypothetical business transactions. More extensive analyses, called "back-ups," are available to those who request them.

(*Yamaha*, *supra*, 19 Cal.4th at p. 2.) *Yamaha's* "quasi-legislative" versus "interpretive" framework does not apply at all in this case because the advisory "annotations" and analyses in *Yamaha* are formally distinct from the adversarial adjudicative proceedings conducted by PERB regional attorneys, administrative law judges, and the full Board. PERB decisions are final, binding, and precedential. (E.g., 8 CCR §§ 32305 [finality of board agent decisions], 32320(c)-(d) [precedential nature of decisions], 32325 [remedial power of Board], 32602 *et seq.* [unfair practice proceedings].) Far from occupying "a sentence or two," by contrast, the full Board decision in this case spans 63 pages of analysis. (*City of San Diego* (2015) PERB Dec. No. 2464-M.)

PERB and real-parties-in-interest San Diego Municipal Employees Association ("SDMEA") et al. rightly point to this reasoning in their briefs. As they correctly argue, this Court affords greater deference to statutory

interpretations rendered in adjudicatory proceedings. (PERB Opening Brief, p. 41, SDMEA Reply Brief, p. 11.) PERB and SDMEA marshal this Court's decisions holding that administrative adjudicatory interpretations are owed deference due to their procedural and substantive rigor. (PERB Opening Brief, p. 41 [citing *Hoechst Celanese Corporation v. Franchise Tax Board* (2001) 25 Cal.4th 508, pp. 524-25]; SDMEA Reply Brief, p. 11 [citing *Larkin v. Workers' Comp. Appeals Board* (2015) 62 Cal.4th 152, p. 158; *Hoechst, supra,* 25 Cal.4th 508, pp. 524-25].)

PERB and SDMEA could go further still in distinguishing the Court of Appeal's misapprehension of *Yamaha*. Contrasted with PERB's *adjudicative* function in this case, the *Yamaha* framework is correctly understood as a distinction between levels of deference owed to an agency's *rulemaking* activities. (*Yamaha*, *supra*, 19 Cal.4th at p. 6 [identifying "two categories of administrative rules," contrasting quasi-legislative rules with advisory statutory interpretations on the basis that the former are made subsequent to legislative delegations and the latter are not]; also compare Gov. Code, §§ 11340 *et seq*. ["Administrative Regulations and Rulemaking"] with Gov. Code, §§ 11400 *et seq.* ["Administrative Adjudication: General Provisions"].) Although they relate to statutorily distinct administrative functions, the court here wrongly merged the two by applying *Yamaha's* standard-of-review framework for *rulemaking* to PERB's *adjudicative* role in resolving labor disputes.

(*Boling*, *supra*, 10 Cal.App.5th at pp. 868-69.)

The court in this case erred, contradicting *Cumero* and *Banning* and diverging from other Courts of Appeal. *Inglewood* expressly holds that PERB's interpretative authority extends to agency law when adjudicating unfair practice charges. (*Supra*, 227 Cal.App.3d at p. 776.) The court's decision in this case cuts directly against that holding. (*Boling*, *supra*, 10 Cal.App.5th at pp. 868-69.) This Court should correct the error and overturn the Court of Appeal on this basis.

B. Contrary to the Court of Appeal's Unsupported Views, the Duty to Meet and Confer Arises from MMBA Section 3505 and Expressly Attaches Equally to a Public Agency's Governing Body and Its Representatives

The Court of Appeal's decision gravely misconstrues the duty to bargain under the MMBA, while also locating it in the wrong section. The court asserts without citation the novel views that the duty arises from section 3504.5 rather than section 3505, and that it attaches only to a public employer's governing body and not its representatives. Relying on this misinterpretation, the court holds that no breach of the duty to bargain occurred when the Mayor of San Diego and at least one individual City Council member advocated for a pension-altering ballot initiative because the City Council itself had not acted in its official capacity. (*Boling*, *supra*, 10 Cal.App.5th at pp. 882-83, *also* n.37.)

According to the court's misreading, section 3504.5 defines the duty to bargain, whereas section 3505 merely supplies details. As the court

concludes, "[t]he designation in section 3505 of who shall *conduct* the meet-and-confer process does not expand who *owes* the meet-and-confer obligations imposed by section 3405.5." (*Boling, supra,* 10 Cal.App.5th at 882 n.37 [emphasis original].) The court's misunderstanding is plainly evident on the face of the statute.

Section 3505, titled "Conferences; meet and confer in good faith," expressly defines the duty to bargain. It reads:

> The governing body of a public agency, or such boards, commissions, administrative officers *or other representatives as may be properly designated by law or by such governing body*, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means *that a public agency, or such representatives as it may designate* and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party . . . .

(Gov. Code, § 3505 [emphasis added].) The statute is clear. The duty to meet and confer in good faith explicitly attaches equally to governing bodies and their representatives. The duty to "meet and confer in good faith" adheres to the "public agency" itself, in fact, and not just to any one of its subparts.[1]

[1] Boling *et. al* and the City center their Answer Briefs on this Court's recent ruling in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, arguing that the initiative power can never be subject to the meet-and-confer requirement under the MMBA. (Boling *et al.* Ans., pp. 20 *et seq.*; City Ans., pp. 34, 36.) This entire line of argument is a non sequitur, which PERB adeptly and rightly demonstrates in its Reply Brief. (PERB Reply,

Section 3504.5, entitled "Notice of proposed act relating to matters within scope of representation; meeting; emergencies" specially applies to formal law-making that impacts terms and conditions of employment. Rather than define the duty to bargain, subsection (a) provides:

> Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

(Gov. Code § 3504.5.) Subsection (b) applies to emergency law-making and requires "notice and opportunity to meet at the earliest practicable time," while subsection (c) provides special rules for health plan legislation by "a public agency with a population in excess of 4,000,000." (*Ibid.*)

Section 3505 establishes and defines the duty to bargain. As this Court has held, "the city council of a charter city must comply with the Meyers-Milias-Brown Act's (MMBA) (Gov. Code, § 3500 set seq.) 'meet-and-confer' requirement (Gov. Code, § 3505) before it proposes an amendment to the city charter concerning the terms and conditions of public employment." (*The People ex rel. Seal Beach Police Officers*

---

pp. 29-35.) Amici reiterate PERB's arguments, emphasizing that this Court expressly distinguished *Upland* from the salient facts in this case: coordination between city government and a private citizens' group to use the initiative process to skirt procedural constraints on governmental power. (*Upland*, *supra*, 3 Cal.5th at p. 947.) *Upland* has no bearing here.

Association et al. v. City of Seal Beach et al. (1984) 36 Cal.3d 591, 594 [marks and citations original]; also *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 628 [observing "[s]ection 3505 mutually obligates a public employer and an employee organization to meet and confer in good faith . . . ."].) Section 3504.5 explains how the duty applies in specific law-making circumstances.

The Court of Appeal in this case thus wrongly concluded that "[t]he designation in section 3505 of who shall *conduct* the meet-and-confer process does not expand who *owes* the meet-and-confer obligations imposed by section 3405.5." (*Boling*, *supra*, 10 Cal.App.5th at p. 882 n. 37 [emphasis original].) This is exactly backward. The duty to bargain is *owed* under section 3505 and *conducted* in the context of certain law-making under section 3504.5.

The Court of Appeal's decision furthermore is out of step with the Supreme Court of Oregon's well-considered analysis of similar facts and state public-sector labor law, which it harmonized with federal precedent under the National Labor Relations Act ("NLRA"). In *American Federation of State and County Municipal Employees, Council 75, Local 2043 v. City of Lebanon* (2017) 360 Or. 809 ("*AFSCME*"), a city council member published an open letter in a local newspaper, claiming she wrote "as an individual and not a reflection of a majority of the City Council, the City or my employer." (*Supra*, 360 Or. at p. 812.) The city council member

had no involvement in city labor relations policy. (*Ibid.*) She nevertheless published the letter in the context of a city budget crisis and on-going labor negotiations to encourage city employees "to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors." (*Ibid.*)

The question before the Oregon Supreme Court was whether the city council member acted as a "designated representative" such that the city could be held liable for an unfair labor practice on the basis of her publishing the letter in the local newspaper. (*AFSCME*, *supra*, 360 Or. at p. 831.) Surveying federal precedent under the NLRA, the Oregon Supreme Court adopted the NLRB's

> 'reasonable belief' standard . . . for determining which individuals constitute a 'public employer representative,' such that a public employer may be held responsible for the unfair labor practices committed by such individuals. Specifically, when employees of a public employer would reasonably believe that a given individual acted on behalf of the public employer in committing an unfair labor practice, that individual is a 'public employer representative' under ORS 243.650(21), and the public employer may be held liable for the conduct of that individual under ORS 243.672(1).

(*Id.* at p. 832.)[2] The Oregon Supreme Court then remanded the mixed question of law and fact of "whether city employees would have

[2] Oregon Revised Statute 243.650(21) provides that "Public employer representative" includes any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues. Oregon Revised Statute 243.672(1) proscribes public-employer unfair labor practices, including to "[i]nterfere with, restrain or coerce employees in or because of the exercise of [protected] rights" and to "[r]efuse to bargain collectively in good faith with the exclusive representative. (ORS 243.672(1)(a), (e).)

reasonably believed that [the city council member] acted on behalf of the city in urging those employee [*sic*] to decertify the union" to the Oregon Employment Relations Board. (*Id.* at p. 835 [emphasis added].) The Oregon Supreme Court's decision in *AFSCME* likewise urges this Court to overturn the Court of Appeal and defer to PERB's application of agency law to determine that the Mayor constituted a "representative" of the City of San Diego as a public employer in this case.

If left to stand, the court's decision will create significant confusion over when and by whom the duty to bargain is triggered. Accordingly, the Court should overturn this decision on this ground.

C. The Court of Appeal Wrongly Inserted a Discussion of the Nondelegation Doctrine Into Its Statutory Agency Analysis Under the MMBA, Which Demonstrates the Importance of Deferring to PERB's Expertise in Interpreting Its Statutes

The Court of Appeal's decision demonstrates the importance of deferring to PERB's statutory interpretations per *Cumero* and *Banning* by errantly invoking the nondelegation doctrine, while in the process mischaracterizing the California Constitution, the San Diego City Charter, and this Court's decisional law. (*Boling*, *supra*, 10 Cal.App.5th at pp. 883-84.) The court incorrectly reasons that the nondelegation doctrine should invalidate PERB's conclusion that the Mayor acted as the City's statutory agent in implementing its labor relations policy with the real-party-in-interest unions, and in promoting the ballot initiatives at issue. (*Id.* at pp. 883-86.) The nondelegation doctrine plays no role in MMBA analysis. The

doctrine does not even exist as a categorical prohibition against legislative delegations to executive branch officials as the Court of Appeal seems to imagine.

The Court of Appeal misreads the restrained nondelegation principle in the City Charter. (See *Boling*, *supra*, 10 Cal.App.5th at pp. 883-86 [citing San Diego City Charter, art. III, § 11.1].) The City Charter provides that

> The same prohibition against delegation of the legislative power which is imposed on the State Legislature by Article XI, Section 11a of the Constitution of the State of California shall apply to the City Council of The City of San Diego, so that its members shall not delegate legislative power or responsibility which they were elected to exercise in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to . . . setting compensation for City employees . . . .

(San Diego City Charter, art. III, § 11.1.) The California Constitution meanwhile provides that "[t]he Legislature *may not delegate to a private person or body* power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." (Cal. Const., art. XI, § 11(a) [emphasis added].) The limited nondelegation principle borrowed from the California Constitution by the San Diego City Charter thus does not prohibit intragovernmental delegation—from City Council to Mayor—but only delegation to "a private person or body" of specified municipal powers. (*Ibid*.)

The Court of Appeal's interpretation is clearly astray against this

background. The Court of Appeal misleadingly cites this Court's decision in *Kugler v. Yocum* (1968) 69 Cal.2d 371, for the proposition that "legislative power may not be delegated." (*Boling*, *supra*, 10 Cal.App.5th at p. 883.) *Kugler*'s reasoning is the opposite, however.

Kugler held that a suburb pegging its employees' salaries to those of the City and County of Los Angeles "does not unlawfully delegate legislative power because the power to legislate has been expressed and exerted in the enactment of the policy of such parity [between salaries in the city and suburb]." (*Kugler*, *supra*, 69 Cal.2d 371, 373.) Far from holding that legislative power categorically may never be delegated, this Court identified "well established principles" intrinsic to the nondelegation doctrine that limit its scope, "[f]or example, *legislative power may properly be delegated* if channeled by a sufficient standard." (*Id*. at p. 375 [emphasis added].) This Court further clarified, "[n]or does the fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme render the legislation invalid as an unlawful delegation." (*Id.* at pp. 389-90.) This Court in fact envisioned that even delegations of legislative authority to actors outside the State of California would pass muster:

///

///

> If an external private or governmental body will be involved in the application of the legislative scheme, it must be an agency that the Legislature can expect will reasonably perform its function. If, for instance, the statute provides that salaries are to be adjusted to future changes in the cost of living, the legislation must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living.

(*Id.* at p. 382.) If the nondelegation concept permits the United States Department of Labor to "be involved in the application of the legislative scheme" on behalf of the State of California, then surely it permits the Mayor of San Diego to act on behalf of the City of San Diego and its City Council in implementing labor relations policy. The nondelegation doctrine therefore does not undermine PERB's finding that the Mayor of San Diego acted as the statutory agent of San Diego City Council in carrying out San Diego labor-relations policy.

Even more to the point, rigorous recent scholarship reveals the nondelegation doctrine to be "nothing more than a myth." (Keith E. Whittington & Jason Iuliano (2012) *The Myth of the Nondelegation Doctrine*, 165 U. Penn. L. Rev. 379.) Drawing from a comprehensive dataset of more than two thousand state and federal nondelegation cases, Professors Whittington and Iuliano "show that *there was never a time* in which the courts used the nondelegation doctrine to limit legislative delegations of power." (*Id.* at p. 381 [emphasis added].) By relying on the nondelegation doctrine to find that the Mayor could not have acted as City Council's statutory agent, it is no exaggeration that the Court of Appeal

stands alone against legal history.[3]

This underscores the importance of deferring to PERB's statutory interpretations within its legislatively prescribed area of expertise. As held in *Inglewood*, *supra*, the Legislature placed agency law within PERB's interpretative authority when adjudicating unfair practice charges. (227 Cal.App.3d at p. 776; see also *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 175 [rejecting Pacific Legal Foundation's claim that PERB lacked authority to investigate and adjudicate unfair practices].) The nondelegation doctrine meanwhile plays no role in statutory agency analysis under the MMBA. The Court of Appeal nevertheless inexpertly and erroneously injected that doctrine—which lacks any foundation in legal history—into the analysis, hampering PERB in discharging its legislatively assigned duty to administer the MMBA. This Court should overturn the Court of Appeal on this additional ground.

///

///

///

[3] The Court of Appeal relied on only one other appellate decision for its formulation of the nondelegation doctrine, *City of Redwood City v. Moore* (1965) 231 Cal.App.2d 563. (*Boling*, *supra*, 10 Cal.App.5th at p. 883 [citing *Redwood City*].) The *Redwood City* court rejected the nondelegation argument advanced in that case as well. (*Redwood City*, *supra*, 231 Cal.App.2d at pp. 575-76.)

III. CONCLUSION

The Court of Appeal's decision departs from settled precedent, including this Court's decisions in *Cumero* and *Banning*, regarding the standard of review that applies to PERB's applications of agency law in relation to its statutes. The court's decision hollows out the duty to bargain by finding it to attach only to a public employer's governing body, while also suggesting that it arises from the wrong section of the MMBA. The court's decision additionally fails to correctly apply statutory agency law, wrongly relying on a discussion of the nondelegation doctrine. This Court should restore clarity to these important areas of public-sector labor law and correct these errors by overturning the Court of Appeal's decision.

DATED: November 29, 2017

Respectfully submitted,

LEONARD CARDER, LLP

By: _____

Andrew J. Ziaja* (Cal. SB 262283)
Arthur Liou (Cal. SB 252690)
1330 Broadway, Suite 1450
Oakland, CA 94612
T: (510) 272-0169

Attorneys for Amici Curiae International Federation of Professional and Technical Employees Local 21, Operating Engineers Local Union No. 3, and Marin Association of Public Employees

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Application to File Amicus Curiae Brief and Amicus Curiae Brief of International Federation of Professional and Technical Employees Local 21, Operating Engineers Local Union No. 3, and Marin Association of Public Employees is proportionately spaced, has a typeface of 13 points or more, and contains 4,676 words.

Dated: November 29, 2017

LEONARD CARDER, LLP

By: _____

Andrew J. Ziaja* (Cal. SB 262283)
Arthur Liou (Cal. SB 252690)
1330 Broadway, Suite 1450
Oakland, CA 94612
T: (510) 272-0169

DECLARATION OF SERVICE

I, Maribel Arzola, declare as follows:

I am a resident of the State of California, residing or employed in Oakland, California. I am over the age of eighteen (18) years and am not a party to the above-entitled action. My business address is Leonard Carder LLP, 1330 Broadway, Suite 1450, Oakland, California 94612. On November 29, 2017, I served the following documents in the manner described below:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF;

AMICUS CURIAE BRIEF OF INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES LOCAL 21, OPERATING ENGINEERS LOCAL UNION NO. 3, AND MARIN ASSOCIATION OF PUBLIC EMPLOYEES

_____ **BY REGULAR MAIL:** I caused such envelope to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with LEONARD CARDER, LLP's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Services on that same day in the ordinary course of business.

__X__ **BY ELECTRONIC SERVICE:** By electronically transmitting via TRUE FILING to each of the parties listed below.

///

Kenneth H. Lounsbery, Esq.
LOUNSBERY FERGUSON ALTONA & PEAK
960 Canterbury Place, Suite 300
Escondido, CA 92025
Tel: (760) 743-1226
Fax: (760) 743-9926
Email:khl@lfap.com
Attorneys for Petitioners/Real Parties in Interest Catherine A. Boling, T.J. Zane and Stephen B. Williams

J. Felix De La Torre, General Counsel
Joseph Eckhart, Esq.
Stacy Taylor, Esq.
Jeremy G. Zeitlin, Esq.
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811-4142
Tel: (916) 322-8231
Fax: (916) 327-7960
Email:perblitigation@perb.ca.gov
fdelatorre@perb.ca.gov
jeckhart@perb.ca.gov
staylor@perb.ca.gov
jzeitlin@perb.ca.gov
Attorneys for Respondent Public Employment Relations Board

Michael Travis Phelps, Esq.
Mara Elliot, Esq.
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101
Email: mphelps@sandiego.gov
cityattorney@sandiego.gov
Counsel for Real Party in Interest, City of San Diego

Clerk of the Court of Appeal
Fourth District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Ann M. Smith, Esq.
Fern M. Steiner, Esq.
SMITH STEINER VANDERPOOL & WAX
401 West A Street, Suite 320
San Diego, CA 92101
Tel: (619) 239-7200
Fax: (619) 239-6048
Email:asmith@ssvwlaw.com
fsteiner@ssvwlaw.com
Attorneys for Real Party in Interest San Diego Municipal Employees Association and San Diego City Firefighters, Local 145

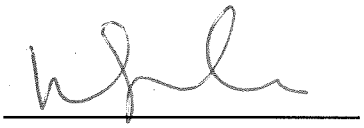
James J. Cunningham, Esq.
LAW OFFICES OF JAMES J. CUNNINGHAM
4141 Avenida De La Plata
Oceanside, CA 92056
Tel: (858) 565-2281
Email:jimcunninghamlaw@gmail.com
Attorneys for Real Party in Interest Deputy City Attorneys Association

Ellen Greenstone, Esq.
ROTHNER SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101
Tel: (626) 796-7555
Fax: (626) 577-0124
Email:egreenstone@rsglabor.com
Attorneys for Real Party in Interest AFSCME AFL-CIO, Local 127

Kerianne R. Steele, Esq.
Anthony J. Tucci, Esq.
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Tel: (510) 337-1001
Fax: (510) 337-1023
Email: ksteele@unioncounsel.net
atucci@unioncounsel.net
Attorneys for SEIU, California State Council

Harold Johnson, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Tel: (916) 419-7111
Fax: (916) 419-7747
Email: hjohn90975@aol.com
Attorneys for Pacific Legal Foundation

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 29th day of November, 2017 at Oakland, California.



Maribel Arzola