IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

Consolidated Case Nos. D069626 and D069630

CATHERINE A. BOLING, ET AL. and CITY OF SAN DIEGO,
Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

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

Real Parties in Interest.

Petition For Writ Of Extraordinary Relief From Public Employment Relations Board Decision No. 2464-M (Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M)

UNION REAL PARTIES IN INTEREST SUPPLEMENTAL OPENING BRIEF AFTER REMAND FROM CALIFORNIA SUPREME COURT

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Real Parties in Interest San Diego Municipal Employees Association, Deputy City Attorneys Association, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (collectively "Unions") submit this joint Supplemental Opening Brief under California Rules of Court, Rule 8.200(b) following the California Supreme Court's reversal and remand in *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 [*Boling*].

I. On Remand, California Supreme Court Precedent Dictates Deference to PERB's Administrative Remedy and A Judicial Invalidation Order To Fully Redress City's *Seal Beach* Unilateral Change/Refusal-To-Bargain Violation

In 1984, seven years after voters had approved local charter amendments related to terms and conditions of public employment, the California Supreme Court invalidated the amendments because the City employer put them before voters in violation of section 3505 of the State's Meyers-Milias-Brown Act (MMBA). (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [*Seal Beach*].)

In *Boling,* the California Supreme Court concluded that the City of San Diego likewise violated section 3505 by putting the Proposition B Pension Reform Initiative ("Initiative") on the June 2012 ballot without having engaged in a good faith bargaining process with Unions.

Seal Beach and *Boling* are both unlawful "unilateral change" cases where terms and conditions of public employment – otherwise within the

scope of an employer's good faith bargaining obligation under the MMBA – were changed by charter amendment without bargaining. Such a unilateral change violation is a *per se* violation of the duty to bargain in good faith because an employer's failure and refusal to bargain has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship. (*San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 12-17; *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813, 818.)

By unanimous opinion, the high court reversed this Court's judgment and reinstated PERB's Decision. The Supreme Court noted, however, that when PERB reversed the ALJ on the question of remedy, PERB did so because it is the province of courts alone to invalidate the results of an initiative election" (*Boling* at 920), and, further, that this Court did not consider the remedy issue because it concluded the City had not violated the MMBA. (*Ibid.*) The Supreme Court directed this Court on remand to "address the appropriate *judicial* remedy for the violation identified in this opinion" (*ibid*, emphasis added), and clear precedent guides this Court in doing so.

First, the standard of review applicable to PERB's administrative remedy is one of deference. In 2001, the legislature transferred jurisdiction over the MMBA from the superior court to PERB as the state's expert labor

board and delegated to PERB the authority in any unfair practice case to impose a remedy necessary to effectuate the purposes of the Act. (Gov. Code § 3509, subd. (b).) The Supreme Court has now reaffirmed that PERB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Boling* at 911-912.) Second, the violation which the Supreme Court has identified is a *Seal Beach* violation. Accordingly, *Seal Beach* itself governs this Court's decision-making regarding the appropriate *judicial* remedy needed (*Boling* at 920).

On deferential review, PERB's make-whole remedy is free from error; it is within the scope of PERB's power as a quasi-judicial administrative agency; it is consistent with judicially-approved precedent in unilateral change cases. Most importantly, the restorative and compensatory features of PERB's order are essential to redress the City's destructive refusal-to-bargain conduct and to foster the principle of bilateralism in negotiations – which the Supreme Court reiterates is the *centerpiece* of the MMBA. (*Boling* at 913.) Under PERB's order, the City is obligated to make employees in Unions' bargaining units "whole" against any losses being incurred since July 20, 2012 when the unlawful Proposition B charter amendment took effect. This make-whole obligation continues indefinitely until full restoration of the prior status quo

can be achieved by a court order invalidating the amendment. However, PERB's "make-whole" order, by itself, does not cure the destructive effects of the City's violation. *Only* an invalidation decree will restore terms and conditions of employment to what they were before the City's violation and thereby give employees access to the defined benefit pension plan from which they have been wrongfully excluded.

Therefore, in addition to its affirmation of PERB's remedial order because it is free from error, this Court can and should exercise its power on remand to enter a *Seal Beach* invalidation order to undo this unlawful charter amendment. With no remaining factual or legal issues to be resolved by any *other tribunal*, invalidation is the "appropriate *judicial* relief" (*Boling* at 920) needed to effectuate the purposes of the MMBA.

II. The Scope of the Issues and Briefing On Remand Is Limited

When seeking extraordinary relief under Government Code section 3509.5, subdivision (b) and California Rules of Court, rule 8.498, the Boling and City Petitioners bore the burden to establish that PERB had erred. (*Butte View Farms v. ALRB* (1979) 95 Cal.App.3d 961, 966, fn. 1.)

Both Petitioners have been heard before this Court. Their Petitions were fully briefed before the cause was argued and submitted on March 17, 2017,[1] and both have been heard before the California Supreme Court on

[1] The Boling and City Petitioners filed separate Petitions for Writ of Extraordinary Relief on January 25, 2016, and, thereafter, filed their

petitions for review. The high court's reversal of this Court's judgment in favor of Petitioners reinstates PERB's Decision and rejects the errors Petitioners raised in support of their writ for extraordinary relief. These claims of error may not now be re-litigated.

Supplemental briefing on remand is limited under Rule 8.200(b)(2) to matters arising *after* the Court of Appeal decision was filed on April 11, 2017. Accordingly, Unions' Supplemental Opening Brief addresses the issue of remedy based on Petitioners' remedy-related assignments of error previously presented, and does so in light of the views stated by the Supreme Court when reversing this Court's judgment and reinstating PERB's Decision.

III. The City's *Seal Beach* Violation Arose When It Put the Proposition B Initiative On the Ballot Without Bargaining

The Supreme Court has reaffirmed the duty to meet and confer as a central feature of the MMBA. "Governing bodies 'or other representatives as may be properly designated' are required to engage with unions on matters within the scope of representation 'prior to arriving at a determination of policy or course of action,' (§ 3505), and 'this broad formulation encompasses more than formal actions taken by the governing body itself." (*Boling* at 904.) "Under the circumstances here, the MMBA applies to the mayor's official pursuit of pension reform as a matter of policy." (*Ibid.*)

Opening Briefs (cited herein as "BOB" and "COB") on May 9, 2016. Respondent PERB and Real Party Unions filed responsive briefs in mid-July 2016; and both Petitioners filed Reply Briefs on August 8, 2016.

Since "it is undisputed that these (Proposition B) pension benefits fell within the scope of the unions' representation," the high court defined the question as "whether the mayor's pursuit of pension reform by drafting and promoting a citizens' initiative required him to meet and confer with unions." (*Boling* at 914.) "On these facts (detailed in *Boling* at 904-908 and 919), Mayor Sanders had an obligation to meet and confer with the unions." (*Id.* at 913.) The Supreme Court explained:

> Here, Mayor Sanders conceived the idea of a citizens' initiative pension reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward. He relied on his position of authority and employed his staff throughout this process. He continued using his powers of office to promote the Initiative after the proponents emerged. (*Id.* at 916.) [...] [T]he mayor was the city's chief executive, empowered by the city charter to make policy recommendations with regard to city employees and to negotiate with the city's unions. Under the terms of section 3505, he was required to meet and confer with the unions "prior to arriving at a determination of policy or course of action" on matters affecting the "terms and conditions of employment." Any doubts as to whether these key terms of section 3505 extended to the mayor's sponsorship of the Initiative must be resolved by adopting "the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the [statute's] general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. [...] Allowing public officials to purposefully evade the meet-and-confer requirements of the MMBA by officially sponsoring a citizens' initiative would seriously undermine the policies served by the statute: fostering full communication between public employers and employees, as well as improving personnel management and employer-employee relations. (§ 3500; *Seal Beach*, *supra*, 36 Cal.3d at p. 597.) (*Boling* at 918-919.)

Thus, the answer to the "relevant question" of "whether the City's chief executive was using the powers and resources of his office to alter the terms and conditions of employment," was "plainly yes," and the City's assertion that the mayor's "support was merely that of a private citizen does not withstand objective scrutiny." (*Boling* at 919.)

Accordingly, as was true in *Seal Beach*, the City had a duty to meet and confer before putting the Initiative on the ballot. The City's failure and refusal to do so was unlawful and resulted in a procedural irregularity in the adoption of the amendment. In *Seal Beach*, the remedy for its section 3505 violation was invalidation of the charter amendment. Though an invalidation order was beyond PERB's power, this Court must determine the "appropriate *judicial* remedy," as the *Boling* court has directed (*Boling* at 920), for the violation the Supreme Court identified, i.e., a *Seal Beach* section 3505 violation.

IV. PERB Did Not Err When Imposing A Traditional Make-Whole Remedy For City's *Seal Beach* Violation

A. The Legislature Granted PERB Broad Remedial Powers

When transferring jurisdiction over most MMBA matters from the superior courts to PERB[2], the Legislature directed PERB to interpret and apply the MMBA's unfair labor practice provisions "in a manner consistent with and in accordance with judicial interpretations" of the Act. (MMBA, §§ 3509,

[2] The amendment establishing PERB's jurisdiction excludes peace officers. (MMBA, § 3511.)

subd. (b), 3510, subd. (a).) It also granted PERB broad powers to remedy unfair practices or other violations of the MMBA and to take any other action the Board deems necessary to effectuate its purposes. (MMBA, § 3509, subd. (a); EERA, §§ 3541.3, subds. (i), (n), 3541.5, subd. (c); *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189-190.) This includes orders directed at an offending party to cease and desist from unfair practices or to take affirmative action to effectuate the purposes of the Act. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606.) The determination of an appropriate remedy is crucial to PERB's role in promoting and administering a uniform, statewide system of collective bargaining and labor relations. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090.)

B. Courts Must Review PERB's Remedial Orders With Deference To Its Expertise and Discretion

The Supreme Court unanimously reaffirmed settled law: (1) PERB's *legal findings* are entitled to deferential review and will not be set aside unless clearly erroneous; (2) PERB's *factual findings* are "conclusive" "if supported by substantial evidence," (Gov. C. § 3509.5, subd. (b)); (3) "when the matter falls within PERB's area of expertise, the deferential standard [...] applies to its legal determinations even if based on undisputed facts; and (4) when conflicting inferences may be drawn from undisputed facts, the reviewing

court must accept the inference drawn by PERB as the trier of fact so long as it is reasonable. (*Boling* at 904 and 911-912.)

Because PERB has been delegated broad remedial powers under Government Code section 3509, subdivision (b), PERB's remedial orders are subject to review for abuse of discretion (*Oakland Unified School District v. PERB* (1981) 120 Cal.App.3d 1007, 1014-1015), and will not be disturbed by a reviewing court "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Elec. & Power Co. v. NLRB* (1943) 319 U. S. 533, 540; *Santa Monica Comm. Coll. Dist. v. PERB* (1980) 112 Cal.App.3d 684; *J. R. Norton v. ALRB* (1987) 192 Cal.App.3d 874; *Butte View Farms v. ALRB* (1979) 95 Cal.App.3d 961, 967.)[3]

In *El Rancho Unified School District v. National Education Association* (1983) 33 Cal.3d 946, the California Supreme Court held: "In delimiting the areas of conduct which are within PERB's exclusive jurisdiction, the courts must necessarily be concerned with avoiding conflict not only in the substantive rules of law to be applied, but also in remedies and administration,

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[3] When interpreting matters under the MMBA, courts (and PERB) take appropriate guidance from cases interpreting other California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616.) Courts apply the same standards of review to decisions by the Public Employment Relations Board (PERB) and the Agricultural Labor Relations Board (ALRB). (See, e.g., *San Mateo City School District v. PERB* (1983) 33 Cal.3d 850, 856; *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, 804.)

if state policy is to be unhampered." (*Id.* at p. 960.) A court "cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB." (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d 1, 13.) "'Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" (*Mt. San Antonio Community College Dist. v. PERB, supra,* 210 Cal.App.3d at 189.)

After this Court's decision was filed, a unanimous Supreme Court in *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1168-69, described the degree of deference owed to PERB's sister labor board:

> Where the Board relies on its "specialized knowledge" and "expertise," its decision "is vested with a presumption of validity." (Citation omitted.) That presumption has even more force when courts review the Board's exercise of its remedial powers, which "are necessarily broad." (Citation omitted.) [...] "'[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions.'" (Citation omitted.) [...] In light of the Legislature's clear intent to confer broad remedial powers on the Board, the Board's orders imposing remedies are only "'subject to limited judicial review.'" (Citation omitted.)

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C. PERB's Traditional Remedy In An Unlawful Unilateral Change Case Includes *Both* Restoration of the Prior Status Quo and Appropriate Make-Whole Relief For Any Losses While the Unlawful Change Was In effect

Based on PERB's specialized knowledge and expertise, the appropriate remedy in an unlawful unilateral change case is to restore the prior status quo by undoing the change and making all injured parties and employees "whole" for losses suffered as a result of the unlawful conduct. Both the *restorative* and the *compensatory* features are essential to an effective remedy in any unlawful unilateral change case; both are well-established in PERB precedent and both enjoy judicial approval. (MMBA, §§ 3507, subd. (a), 3509, subd. (g); *County of Amador* (2013) PERB Decision No. 2318-M, p. 11; *County of Calaveras* (2012) PERB Decision No. 2252-M, pp. 4-5; *California State Employees' Assn. v. PERB* (1996) 51 Cal.App.4th 923, 946; *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 190-191; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 201-2002 and n. 12; *Oakland Unified School Dist. v. PERB* (1981) 120 Cal.App.3d 1007, 1014-1015; and *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 979.)

In *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, the court cited private-sector precedent which requires reversal of any unilateral change and restoration of the prior status quo:

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> In accord with the Supreme Court's position in [*NLRB v.*] *Katz* [(1962) 369 U.S. 736], California courts have adopted the private sector view that unilateral action constitutes a per se violation of the MMBA, and must therefore be set aside until the "meet and confer in good faith" duty has been met by the employer.[4] (*Vernon* at 824.)

Here PERB explains why *both* features serve important policy objectives set forth in the MMBA and in other PERB-administered statutes. (AR:XI:3018-3019.) Restoring the parties and affected employees to their respective positions *before* the unlawful conduct occurred is critical because restoration of the prior status quo prevents the employer from gaining a one-sided and unfair advantage in negotiations and thereby "forcing employees to talk the employer back to terms previously agreed to." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 22-23, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17; see also *San Francisco Community College District* (1979) PERB Decision No. 105, p. 17 [requiring the representative to pursue negotiations from a changed

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[4] In *City of Palo Alto* (2016) 5 Cal.App.5th 1271, 1311, the court agreed that restoration of the prior status quo in a unilateral change case is the appropriate remedy. However, citing *Vernon*, the *Palo Alto* court concluded that a remedial order directed to a public entity requiring it to *legislate* by rescinding a legislative action (whether the order is issued by a court or by PERB) runs afoul of the separation of powers doctrine. Accordingly, the *Palo Alto* court held that the prior status quo is properly restored by an order declaring the offending action to be void or invalid due to procedural violations of the MMBA, citing *El Dorado County Deputy Sheriff's Assn.v. County of El Dorado* (2016) 244 Cal.App.4th 950, 962-963 & 965 [invalidating County's action in deleting positions in the law enforcement bargaining unit in violation of the MMBA and ordering County "to proceed according to law and consistent with [the] opinion."].)

position caused by the employer's unilateral action "would be tantamount to requiring it to recoup its losses at the negotiations table"].) When carried out in the context of declining revenues, a public employer's unilateral actions "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*County of Santa Clara, supra,* at pp. 22-23.)

In short, restoration of the prior status quo is necessary to affirm the principle of bilateralism in negotiations which is the "centerpiece" of the MMBA, (*Voters for Responsible Retirement v. Board of Supervisors (*1994) 8 Cal.4th 765, 780), and to vindicate the authority of the exclusive representative in the eyes of employees. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51, p. 5.)

The compensatory aspect of the Board's standard remedy for an unlawful unilateral change is no less important. (AR:XI: 3019.) A back pay or other monetary award also provides a financial disincentive and thus a deterrent against future unlawful conduct. Make-whole relief also ensures that employees are not effectively punished for exercising their statutorily-protected rights. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13, and authorities cited therein.)

In light of these policy considerations and in keeping with Board and court-approved precedent, PERB correctly presumes that, in this case as in all

unlawful unilateral change cases, the appropriate remedy includes full restoration of the prior status quo plus make-whole relief for any losses incurred while the unilaterally changed terms and conditions were in effect. (AR:XI:3019-3020.)

D. PERB's Remedial Order In This Unilateral Change Case Makes Employees Whole Until *Full* Restoration of the Prior Status Quo Can Be Achieved By *Court* Order

As the Supreme Court noted when directing this Court on remand (*Boling* at 920), PERB explained the limits of its power to order a full restorative remedy in this case: "We have located no authority holding that PERB's remedial authority includes the power to overturn a municipal election. [...] We therefore do not adopt that portion of the proposed decision invalidating the results of the June 12, 2012 election in which the City's electorate adopted Proposition B." (AR:XI:3021-3023.) PERB concluded that where, as here, the unlawful unilateral change was implemented by a voter-approved charter amendment as it was in *Seal Beach*, only a *court* has the power to overturn the results of the municipal election – whether the appropriate civil action for doing so is a *quo warranto* action, a writ or a declaratory relief proceeding. (*Ibid.*)

Nevertheless, PERB emphasized that, "as a general rule, a labor board should not place the consequences of its own limitations on injured parties or affected employees who appear before it and thereby allow an offending

respondent to benefit from its unlawful conduct." (*Id.* at 3025 [*Mt. San Antonio Community College Dist. v. PERB, supra,* 210 Cal.App.3d 178, 190, citing *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 265; *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1390-1391; *International Union of Electrical, Radio & Machine Workers v. NLRB (Tiidee Products)*(D.C. Cir. 1970) 426 F.2d 1243; see also *City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 13-14.).]

Accordingly, PERB crafted a remedy designed to effectuate the purposes and policies of the Act within the scope of its power as a quasi-judicial administrative agency until full restoration of the terms and conditions in effect prior to the City's violation of the MMBA can be achieved by *court* order. To *compensate* employees, PERB directs the City to pay for all lost compensation, including but not limited to the value of lost pension benefits, resulting from the enactment of Proposition B, offset by the value of new benefits required from the City under Proposition B (with the dollar amount compounded with interest at the rate of seven (7) percent per annum), and to continue such payments as long as Proposition B is in effect or until such time as the Unions and the City have *mutually* agreed otherwise. (AR:XI:3023-3024, emphasis in original.)

However, recognizing that this "make-whole" remedy, by itself, is an inadequate and ineffective remedy because it leaves the unlawful charter

amendment in effect – permitting the City to benefit from its wrongdoing by excluding employees hired on and after July 20, 2012 from the City's defined benefit pension plan – PERB also directs the City, at the Unions' option, to join in and/or to reimburse the Unions for legal fees and costs for bringing a *quo warranto* or other civil action aimed at overturning the municipal electorate's adoption of Proposition B. (*Id.* at 3023-3024.) By this means, PERB assures that the fees and costs expended outside PERB's proceedings to procure *full* restoration of the prior status quo will be borne by the City, as wrongdoer, not by the Unions.

Clearly, if the unlawful unilateral change in this case had been accomplished by means other than a municipal election, PERB would have ordered a full restorative remedy and this Court's review of such a remedy would be accomplished using a deferential, abuse-of-discretion standard.[5] Here, PERB's remedial order assures that *full* restorative relief will ultimately

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[5] In *City of Palo Alto v. Public Employment Relations Board, supra*, 5 Cal.App.5th 1271, the court agreed with PERB's determination that the City had violated the MMBA when it adopted a resolution putting a ballot measure before voters amending the city charter to repeal binding interest arbitration for firefighters and police officers. However, as noted above in footnote 4, the *Palo Alto* court concluded that PERB's order directing the City of Palo Alto to *rescind* this resolution offends the separation of powers doctrine because it is an order to *legislate.* On the other hand, the *Palo Alto* court concluded, a proper exercise of PERB's remedial power to undo the offending resolution would be an order declaring the resolution to be void which "effectively returns the parties to the status quo ante." (*Id.* at1316-1317.) On remand, PERB issued a new Order declaring the City's resolution *void.* (*IAFF, Local 1319 v. City of Palo Alto* (2017) PERB Decision No. 2388a-M.)

be made available to Unions and the employees they represent. The issue is not *whether* an invalidation order must eventually be entered under *Seal Beach* and *Boling*; the issue is *what court* will enter it and *when*. As explained below in Section V, this Court should do so in this writ proceeding because there are no remaining factual or legal issues for determination by *another* tribunal.

E. The Statewide Legislative Goals Embodied in the MMBA Require A Restorative Remedy In An Unlawful Unilateral Change Case Despite Adverse Effects On the Interests of Third Persons, Whether Blameless or Blameworthy

PERB addressed and rejected the notion that it was powerless to order an effective remedy against the City as the offending employer in this unlawful unilateral change case merely because any Board-ordered remedy would adversely affect the rights of ballot proponents or other persons who were not parties to PERB's proceedings and over whom PERB has no jurisdiction. (AR:XI:3026-3028.) As the Board explained, "the fact that third parties beyond the Board's jurisdiction, have benefitted by the unlawful conduct of a respondent in unfair practice proceedings does not preclude PERB from ordering the offending party to take whatever steps may be necessary to remedy its unlawful conduct and effectuate the statute's policies and purposes, including actions that may indirectly affect third parties." (*Id.* at 3026-3027 [*Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712].)

In *Folsom-Cordova*, PERB determined that a public school employer had entered into a contract with a private bus company to provide

transportation services for students without providing the exclusive representative notice and opportunity to bargain. As in other unilateral change cases, the Board ordered its traditional restorative and make-whole remedy, including an order for the school district to rescind its agreements with the private bus company. Importantly, there was no suggestion in *Folsom-Cordova* that the private bus company had acted unlawfully, that the substantive terms of its agreement with the school district were unlawful, or even that it was subject to PERB's jurisdiction. Not only was the private bus company not a party to PERB's proceedings, but, as far as PERB was concerned, its only action was to exercise its constitutionally-protected freedom to contract. (AR:XI: 3027.)

Moreover, as PERB also explained, its remedy in *Folsom-Cordova*, including its order to rescind existing agreements with a third party not subject to PERB jurisdiction, is in accord with judicial authority. (*Id.* at 3028 [*San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, 1135, 1137-1138, where this Court affirmed PERB's order directing a public school employer to rescind its agreement with an outside contractor and reinstate laid-off teachers with back pay and benefits because the employer committed an unfair practice by failing to bargain with their Union representatives].)

Accordingly, on deferential review, all aspects of PERB's remedial order must be upheld because they are consistent with PERB's legislatively-

delegated responsibility to impose a remedy designed to effectuate the purposes of the Act. PERB's order is a proper exercise of its power as a quasi-judicial administrative agency and it is free from error despite its effect – *not* on the general right of citizens to legislate by local initiative – but on the particular exercise of that right in this case.

Furthermore, the adverse impact of PERB's remedial order on the particular exercise of local initiative rights related to this Initiative is not a product of the Unions having invoked the rights guaranteed to represented employees under the MMBA. Nor is it a product of PERB's proper enforcement of those rights in accordance with its legislative mandate. The adverse impact is solely and entirely the product of the City's failure and refusal to bargain despite Unions' repeated efforts to gain the City's timely compliance with well-settled obligations under the MMBA.

F. Petitioners Failed To Carry Their Burden To Establish Error Related to PERB's Remedial Order

Before the matter was argued and submitted on March 17, 2017, both Petitioners had the obligation to establish error related to PERB's exercise of its remedial powers. However, both resorted only to a perfunctory attack without adequate analysis or authorities in support. Petitioners' points on this basis are treated as abandoned or forfeited. (*City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1302.)

1. Boling's Single Claim of Error Fails Because PERB Did Not Invalidate Prop B

The Boling Petitioners do not dispute PERB's well-established, court-approved authority to impose a make-whole remedy in an unlawful unilateral change case. Their only claim of error is that PERB "invalidated" Proposition B "without legal authority." (BOB, pp. 9-10, 23, 43-44, 48.) However, this claim of error fails entirely because it contradicts the undisputed record that PERB did *not* invalidate Proposition B but left it to a *court* to do so.

2. City Did Not Challenge PERB's Traditional Remedial Authority In Unlawful Unilateral Change Cases

The City also does not challenge PERB's traditional remedial authority in an unlawful unilateral change case. In fact, such a claim on writ review would directly contradict the City's affirmative assurances to the Superior Court in 2012 – when opposing PERB's Prop B-related injunctive relief requests – that PERB has the remedial power "to place employees back in the position they were in prior to the unfair labor practice – ordering those employees to be provided the City's defined benefit retirement plan subject, of course, to judicial review." (AR:XXI-Ex.158:5513:1-5.)

3. PERB Did Not Order the City To Violate Its Charter

The City argues that **"unless Prop B is invalidated by a court**, the City is obligated and bound to enforce its provisions which make it impossible for the City to fully comply with (PERB's) order even if it wished to." (COB, p.

68, emphasis added.) Apparently, as the City mistakenly sees it, if PERB "lacks authority" (*ibid*) to overturn Proposition B then PERB is powerless to fashion *any* remedy that makes affected employees "whole" for their losses so long as Proposition B remains in effect.

Characterizing PERB's make-whole order as a directive to the City to take actions which "effectively nullify its (Charter's) effects," and "to negotiate away a duly certified citizens' initiative," (COB, p. 68), the City cites *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171. However, the City offers no explanation as to how *Domar* applies here. In *Domar*, the Supreme Court simply ruled that a city cannot violate its charter. But PERB's remedial order does not direct the City to put employees hired on and after July 20, 2012, into the City's defined benefit pension plan in violation of the Proposition B charter amendment. To the extent the City is attempting to assign error on the basis that PERB's make-whole remedy may make the Proposition B charter amendment of *less use or value* to the City as wrongdoer, *Domar Electric* offers no support for this argument. Nor does the City cite any other case law to establish that PERB erred when ordering compensatory relief to vindicate preemptive state law.

4. PERB's Remedy Does Not Interfere With Future Exercises of Citizen Initiative Rights

The City also asserts – again without analysis or citation to any authority – that PERB's order requiring the City to bargain with Unions in

good faith prior to adopting ballot measures affecting employee pension benefits and other negotiable subjects, constitutes an "illegal infringement [] on the people's constitutional right to exercise their reserved initiative power" (COB, p. 67), because, once a citizen's initiative is passed by the voters, the City "*must* adopt such measure." (*Id.* at pp. 67-68, emphasis in original.) But the Board's actual remedial order has no effect on the voters' right to exercise initiative powers. The Board's order is clear that the City's obligations and responsibilities under the MMBA arise *before* an initiative is placed on the ballot, not afterwards. This order in no way prevents an initiative from being submitted to the voters.

5. PERB's Order For City To Pay Fees and Costs Associated With Procuring *Full* Restoration of the Prior Status Quo Is Within the Scope of Its Remedial Discretion

Finally, the City asserts that PERB has exceeded its remedial authority by ordering the City to reimburse Unions for attorneys' fees and costs to "bring a *quo warranto* or other civil action aimed at overturning the municipal electorate's adoption of Proposition B." (COB, p. 68.) The City fails to address any of the legal authorities on which the Board relied – citing instead *City of Alhambra* (2009) PERB Decision No. 2036-M for the proposition that fees may not be awarded unless bad faith is shown to exist. (COB, p. 68.) *City of Alhambra* concerned PERB's award of attorneys' fees incurred for proceedings *before* PERB and has no applicability to the analysis here.

The Board's determination that the fees and costs needed to procure a full restoration remedy must be borne by the City as wrongdoer, rather than by Unions, is a proper exercise of PERB's remedial authority. (AR:XI:3026.) An award of attorneys' fees to the injured party to remedy the *effects* of the employer's wrongdoing – as distinct from the fees incurred to prosecute or defend an unfair labor practice *before* PERB – is an established feature of PERB's traditional make whole remedy. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 3-5 [employer ordered to pay attorneys' fees incurred in a collateral criminal matter arising from employer's violation of the Act]; and *County of San Joaquin (Health Care Services* (2003) PERB Decision No. 1524-M, pp. 2-3 [county ordered to reimburse physician's attorneys' fees incurred in collateral disciplinary proceedings arising from employer's violation of the Act].)

Finally, the City makes an unexplained and unsupported claim that PERB's award of fees and costs to Unions in this limited remedial circumstance somehow violates the "separation of powers" doctrine allocating legislative, executive and judicial powers among the three branches of government. However, PERB's legislatively-bestowed remedial powers include the power to order the offending party in an unfair practice case to pay the costs of separate litigation before another tribunal whenever necessary to remedy unlawful conduct within PERB's jurisdiction. (*Omnitrans, supra,*

PERB Decision No. 2030-M, p. 33; *County of San Joaquin, supra,* PERB Decision No. 1524-M, pp. 2-3.) (AR:XI:3026.) PERB's order for the City to bear Unions' fees and costs associated with procuring *full* restoration of the prior status quo is free from error.[6]

Accordingly, neither Petitioner carried its burden to establish that PERB abused its discretion when shaping its remedial order.

G. PERB's Remedial Order Is Free From Error and Deserves Affirmance On Deferential Review

A labor board's remedial goal is to "recreate the conditions and relationships that would have been had there been no unfair labor practice." (*Franks v. Bowman Transp. Co.* (1976) 424 U.S. 747, 769; *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 263; see also *Los Gatos Joint Union High School District* (1980) PERB Decision No. 120, p. 4, fn. 3.)

PERB has applied its expertise and specialized knowledge to shape a remedy in this case within the scope of its legislatively-delegated administrative powers which is designed to redress the City's *Seal Beach* violation of MMBA section 3505. On deferential review, this remedy must be upheld as a proper exercise of PERB's discretion under Government Code section 3509, subdivision (b).

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[6] The *Seal Beach* court ordered an award of private attorney general attorneys' fees under California Code of Civil Procedure 1021.5 to Union counsel representing the Seal Beach Police Officers' Association who filed the *quo warranto* action to challenge and overturn the municipal election based on the MMBA section 3505 violation.

Both the compensatory and restorative features of PERB's remedial order are essential to effective relief. Make-whole compensation without restoration of the prior status quo would allow the City to benefit – perhaps even *profit* – from its wrongdoing *and* continue to deny employees access to the terms and conditions which existed prior to the violation of the MMBA, including the right to participation in City's defined benefit pension plan. Make-whole awards reduce an employer's financial incentive for refusing to honor its statutory duty to bargain by ensuring that the employer does not retain the fruits of its wrongful conduct. (*Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1390-1391.) On the other hand, restoration without make-whole compensation would permit the City to benefit from an MMBA scofflaw scheme it has taken six years to remedy.

As the *Boling* Supreme Court observed: "a public official's purposeful evasion of the meet-and-confer requirements of the MMBA" will "seriously undermine the policies served by the statute: fostering full communication between public employers and employees, as well as improving personnel management and employer-employee relations. (*Boling* at 918-919 [§ 3500; *Seal Beach, supra*, 36 Cal.3d at p. 597].) Thus, to be effective, the appropriate *judicial* remedy for the violation the high court identified (*Boling* at 920) must complete PERB's administrative remedy to provide a *full* restoration of the prior status quo. This means giving employees access to the defined benefit

pension plan which was a critical component of their negotiated compensation bargain before the City's destructive refusal to bargain in violation of the MMBA occurred. Without an invalidation decree, employees continue to be denied participation in the City's defined benefit pension plan because this unlawful charter amendment remains in effect to exclude them.

Thus, in addition to affirming PERB's remedial order on deferential review, this Court is called upon by the record before it and by Supreme Court precedent in *Seal Beach* and *Boling* to exercise its writ power under Government Code section 3509.5, subdivision (b), to enter an invalidation decree related to the Proposition B charter amendment. Such a decree is the appropriate *judicial* remedy for the wrong now definitively established.

V. On This Record, *Seal Beach* Precedent Mandates A Judicial Remedy Invalidating the Proposition B Charter Amendment and This Court Should Order It

Affirmance of PERB's remedial order assures that the City will be held responsible for any economic losses employees have incurred since the Proposition B Charter amendment was made effective on July 20, 2012, in violation of preemptive state law.[7] However, only an invalidation order will end the City's on-going violation, allow the parties to define the period to which make-whole relief applies, and give employees the access to City's

[7] PERB retains jurisdiction concerning any compliance matter. (Cal. Code Regs., tit. 8, § 32980; *Pasadena Management Association v. City of Pasadena*, PERB Order No. Ad-406-M, January 28, 2014.)

defined benefit pension plan which has been denied them since July 20, 2012. Moreover, once PERB's exercise of its remedial powers is upheld on deferential review, the issue is not *whether* an order invalidating the Proposition B charter amendment must eventually be entered; the issue is what *court* will enter it and *when*.

As shown below, this invalidation remedy can and should be provided by *this Court* when concluding these writ proceedings on remand.

A. The Statewide Goals of the MMBA Require A *Seal Beach* Invalidation Order Regardless of Ballot Proponents' Involvement

In its *Boling* opinion, the Supreme Court repeats with approval the "truism" acknowledged more than three decades ago in *Seal Beach* that "few legal rights are so 'absolute and untrammeled' that they can never be subjected to peaceful coexistence with other rules." (*Boling* at 915.) Further, the high court notes that, before *Seal Beach*, case law had already established that "a city's power to amend its charter can be subject to legislative regulation," and that "'general law prevails over local enactments of a chartered city, [...] where the subject matter of the general law (e.g., fair labor practices uniform throughout the state) is of statewide concern.'" (*Ibid.*) "The meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices." (*Ibid.*) A charter city does not expand its powers to affect matters of statewide concern simply because it acts

through the mechanism of local initiative rather than by traditional legislative means. (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.)

Though it is true that there are ballot proponents in this case where there were none in *Seal Beach*, their rights as legislators in this local initiative effort, derive from the very same constitutional source as the City Council's rights at issue in *Seal Beach*. (Cal. Const., art. XI, § 3, subd. (b).) "There is no constitutional right to place an invalid initiative on the ballot." (See *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389.) It was the City employer here – as it was in *Seal Beach* – who caused the failure to harmonize the constitutional right of local initiative with the statewide obligations of the MMBA by putting this charter amendment relating to terms and conditions of employment before voters without the good faith bargaining process required by section 3505.[8]

In the final analysis, the driving principle of *Seal Beach* lives on in this case: because the constitutional right to amend a city charter, whether by the

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[8] Here, ballot proponents joined Mayor Sanders – the City's Chief Executive Officer and Chief Labor Negotiator – as co-legislators of this Initiative despite well-established and settled law related to the MMBA. They did not pursue the pension initiative because their elected public officials had refused or declined to adopt pension change. (Compare *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140-1141.) Instead, they shepherded the City formulated pension change via the citizens' signature route in order to adopt *the City's plan*. (AR:XI:3030-3034, citing Mayor's testimony, XIII:3343-3345; see also *Boling* at 916.)

governing body or by initiative, *can* be harmonized with the statewide rights guaranteed by the MMBA – it *must be*. Thus, while the Supreme Court does not directly address the substance of the appropriate judicial remedy to be determined on remand, nothing in the opinion suggests that a *different* or *lesser* remedy than a *Seal Beach* invalidation decree would be appropriate here despite the involvement of ballot proponents. To the contrary, the Supreme Court concludes that the City engaged in the same MMBA violation at issue in *Seal Beach* because the City elevated the constitutional right of local initiative over the statewide rights guaranteed to City employees and their Unions. The City's failure to *harmonize* those rights means the harm must be undone by invalidation of the unlawful charter amendment. Such an invalidation order directed at redressing *City's* unlawful conduct in this case will have no broader effect on the general exercise of local initiative rights.

Accordingly, a fair reading of the Supreme Court's decision is that a *Seal Beach* invalidation order *is* the "appropriate *judicial* remedy" (*Boling* at 920) if the legislative goals embodied in the MMBA are to be achieved on a uniform statewide basis when a public employer puts a charter amendment affecting terms and conditions before voters without bargaining.

B. Adoption of the Proposition B Charter Amendment In Violation of the MMBA Offends the State's Sovereign Power

In its sovereign capacity, the state protects the interest of the people as a whole and guards the public welfare. Local public agencies exercising

governmental functions "do so by reason of a delegation to them of a part of the sovereign power of the state." (*Protect Our Benefits* (2012) 95 Ops.Cal.Atty.Gen.50 at p. 7.) "Where they are claiming to act and are actually functioning without having complied with the necessary prerequisites, they are usurping franchise rights as against paramount authority." (*Ibid.*)

Thus, the state has a sovereign interest in assuring that city charter amendments are *validly enacted* in compliance with state law. (*Ibid*, citing *Intl. Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694, emphasis in original.) That sovereign interest, and the general public interest, "are uniquely implicated where a local agency has enacted or amended charter provisions in violation of state laws governing the lawmaking process." (95 Ops.Cal.Atty.Gen. 50 at p. 8.)

It is settled law that a city's charter may not be amended in violation of governing *state law* and that any amendment put before voters for approval in proven violation of MMBA section 3505 suffers from a fatal "procedural irregularity." (*Seal Beach, supra*, 36 Cal.3d at 595; *Bakersfield Police Officers Association* (2012) 95 Ops.Cal.Atty.Gen. 31; *Fresno Police Officers and Firefighters Associations* (1993) 76 Ops.Cal.Atty.Gen. 169, 171-173.)

Here, the Supreme Court's *Boling* opinion reversing this Court's judgment and reinstating PERB's decision conclusively establishes that a violation of MMBA section 3505 occurred when the City's charter was

amended, effective July 20, 2012, by enactment of the Proposition B Pension Reform Initiative. The *fact* of a procedural irregularity requiring invalidation of this amendment has thus been conclusively established and is not subject to re-litigation before this or another tribunal or trier of fact.

C. A *Quo Warranto* Legal Action Is Only A *Means* To Get An MMBA-Related Invalidation Inquiry Before A Court For Determination As Trier of Fact

The Boling Petitioners argued in support of their Petition that this dispute should never have been subjected to a "four-year star chamber proceeding" before PERB where the "hearing (was) a monumental waste of time, energy and public funds" because a *quo warranto* action[9] was the *only remedy* available to Unions to challenge the validity of Proposition B as a local citizen's initiative measure. (BOB 25-26.) They erroneously rely on *quo warranto* cases decided under the MMBA *before* 2001 when the Legislature transferred MMBA jurisdiction away from the superior courts and delegated exclusive initial jurisdiction instead to PERB as the trier of fact. (*Id.* at 25.)

The Attorney General's determination in *Bakersfield Police Officers Association, supra*, 95 Ops.Cal.Atty.Gen. 31, highlights Petitioners' error. In *Bakersfield*, the Attorney General authorized the Bakersfield Police Officers'

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[9] *Quo warranto* is Latin for "by what authority." (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 875.) Here, as in *Bakersfield Police Officers Association, supra*, the "authority" question focuses on whether a charter city's placement of an initiative measure on the ballot without bargaining under MMBA section 3505 was an unlawful exercise of the city's franchise.

Association to present the alleged violation of the MMBA to the Superior Court because of the "Peace Officer Exemption" to PERB's jurisdiction. (Gov. Code § 3511.)[10] By contrast, as this Court already recognized in *San Diego Municipal Employees Association (City of San Diego)* (2012) 206 Cal.App.4th 1447, PERB had initial exclusive jurisdiction over Unions' unfair practice charges alleging that the City violated MMBA section 3505 when failing and refusing to bargain before placing the Proposition B charter amendment before voters. Unions did not have the option to bypass PERB. *Only* the MMBA enforcement actions of police unions go directly to the Superior Court under the "Peace Officer Exemption."

Moreover, Unions filed their unfair practice charges against the City in early 2012 *before* the Proposition B Initiative appeared on the June 2012 ballot. (I:3-237; III:579-589, 609-613; IV:935-939.) No action in *quo warranto* was even available at the time these unfair practice proceedings began because no election had yet occurred. (See *City of Palo Alto, supra,* 5 Cal.App.5th at 1317.)

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[10] In *Seal Beach*, the issues of fact and law related to the MMBA were decided by the Superior Court and, on review, by the Court of Appeal and California Supreme Court. Superior courts continue to have jurisdiction to hear and decide MMBA-related cases affecting peace officers and their unions. However, all other public employees and their Unions must present unfair labor practice charges alleging a violation of the MMBA to PERB as the trier of fact. (Gov. C. § 3509.)

Furthermore, when a private party invokes the Attorney General's *quo warranto* procedure, it is only as a *means* to gain access to a court to seek a determination over the alleged procedural irregularity of a charter amendment. A *quo warranto* action "must" be brought when the Attorney General "has reason to believe" the conditions warranting the remedy exist. (§ 803.) (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 875.) Because a private party – as "relator" – seeks to bring suit in the Superior Court in the name of the People of the State of California, the Attorney General in such instance is *not* a trier of fact but only a gatekeeper. The prerequisite of Attorney General consent provides a safeguard against baseless litigation over a charter amendment's enactment. (95 Ops.Cal.Atty.Gen. 50 at p. 8, citing *Oakland Mun. Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 172-173.) The Attorney General conducts a preliminary investigation of proposed *quo warranto* litigation to determine whether a substantial issue of fact or law exists which should be judicially determined and thus, by definition, would serve some public interest. (*California Chamber of Commerce* (1984) 67 Ops.Cal.Atty.Gen. 151, 153.) When determining whether to grant the application (C. C. P. §§ 803-811), the Attorney General does not attempt to resolve the merits of the controversy. In *Bakersfield Police Officers Association, supra*, 95 Ops.Cal.Atty.Gen. 31 at pp. 2-3, the Attorney General acknowledged that the California Supreme Court has held that a charter city

must comply with the MMBA's meet-and-confer requirements before placing an initiative measure on the ballot that would affect matters within the scope of the Act. For this reason – and because the Peace Officer Exemption makes PERB unavailable – the Attorney General concluded that an action in quo warranto would be the appropriate means to resolve the Association's allegations that the City of Bakersfield's placement of an initiative measure on the ballot without bargaining was an unlawful exercise of the city's franchise.

Here, the fact of a procedural irregularity in the adoption of the Proposition B charter amendment has been conclusively established by the State's highest court. It is an irregularity which strikes at the heart of the state's sovereign interest in the enforcement of state laws respecting the amendment of city charters. No safeguard against "baseless litigation" is now needed and no discretion remains for the Attorney General to exercise. (*Rando v. Harris*, *supra*, at 875.)

While *quo warranto* actions typically begin their legal journey in a Superior Court, here there is no remaining role for a Superior Court or *another* trier of fact since PERB has fulfilled its legislatively-delegated, exclusive role as the *trier of fact* in this MMBA case. Moreover, PERB's determination that the City violated the MMBA when it put the Proposition B Initiative before voters without bargaining has been unanimously upheld by the State's highest court such that any further debate over the central issue of procedural

irregularity is now foreclosed. Under the circumstances, the City itself needs relief from the terms of this unlawful charter amendment – which requires it to exclude employees from the City's defined benefit pension plan – because the City is otherwise continuing to "function without having complied with the necessary prerequisites" for proper amendment to its charter and it is thus "usurping franchise rights as against paramount authority." (*Protect Our Benefits* (2012) 95 Ops.Cal.Atty.Gen.50 at p. 7.)

The result in *City of Palo Alto v. Public Employment Relations Board*, *supra*, 5 Cal.App.5th 1271, is instructive. The *Palo Alto* court upheld PERB's determination that the City had violated the MMBA by failing to meet and consult in good faith with the International Association of Firefighters, Local 1319 (IAFF) before adopting a resolution putting a ballot measure before voters to repeal binding arbitration for labor disputes involving police officers and firefighters. However, the *Palo Alto* court concluded that, although PERB could not order the City of Palo Alto to rescind its resolution due to the separation of powers doctrine, PERB could properly declare the resolution void and thereby "effectively return the parties to the status quo ante." (*Id.* at 1317.) [PERB did so on remand, *supra* at 26, fn. 5.] In this context, the *Palo Alto* court's agreement with the general principle that an action in quo warranto is the exclusive remedy to challenge a voter-approved ballot initiative is *dicta* because the IAFF, the only party with standing to invoke the court's

judicial power to provide an invalidation remedy, did not do so but simply conceded that it "may separately elect to pursue a *quo warranto* remedy with the trial court." (*City of Palo Alto, supra,* 5 Cal.App.5th at 1320.) Nor was an additional court-ordered invalidation remedy ultimately needed to fully restore the prior status quo for the benefit of the IAFF and the employees it represents. Once PERB declared the City of Palo Alto's resolution void, as it did on remand, this remedy "effectively returned the parties to the status quo ante," just as the *Palo Alto* court said it would. (*Id.* at 1317.)

In contrast, without court-ordered invalidation of the Proposition B charter amendment, the harmful effects from the City's *Seal Beach* violation will continue. There is no valid reason for Unions to be turned away from *this Court* on the frivolous ground that the Attorney General's permission is still needed to achieve court-ordered relief from enforcement of this charter amendment when its procedural irregularity has been conclusively established and the parties are already *in court.* This Court itself has the judicial power to enter an invalidation decree in furtherance of the State's sovereignty and in the interest of justice based on the record in this writ proceeding and the *Seal Beach* and *Boling* precedent.

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D. This Writ Proceeding Provides the Proper Procedural Vehicle For This Court's Exercise of Judicial Power To Invalidate the Proposition B Charter Amendment

This Court has jurisdiction in this MMBA-related matter as a result of Petitioners' invocation of extraordinary review under Government Code section 3509.5, subdivision (b). In pertinent part, this Court is empowered "to grant any temporary relief or restraining order it deems just and proper, and in like manner to make and enter a decree enforcing [...] the decision or order of the board." On August 17, 2016, this Court issued a writ of review. Both Petitioners prayed for this Court to "grant such other and further relief as may be just and proper." (City Pet., p. 23; Boling Pet., p. 16.) Because Unions have exhausted their administrative remedies before PERB when seeking relief from City's enactment of the Proposition B charter amendment in violation of the MMBA, and, when doing so, have secured a final determination of legal issues from the Supreme Court, all prerequisites for the relief otherwise available in a *quo warranto* legal action have been fulfilled.

Based on the authority legislatively delegated under section 3509.5, this Court has the duty to affirm PERB's remedial order on deferential review, and it has the power to achieve the *full* restoration of the prior status quo which PERB's remedial order envisions, by invalidating the Proposition B charter amendment in accordance with *Seal Beach* precedent.

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Affirmance of PERB's remedial order in all respects (AR:XI:3040-3041, including its customary cease-and-desist and posting-of-notice provisions), *and* this Court's invalidation decree will restore the negotiated terms and conditions in effect before the City's MMBA violation. This is the only outcome which will effectuate the purposes and policies of the MMBA and this Court should enter its judgment accordingly.

VI. Conclusion

The MMBA has fostered labor peace in California for 50 years. In furtherance of its goals and in keeping with settled precedent, this Court must uphold PERB's exercise of its broad discretion to impose an appropriate remedial order to effectuate the purposes of the Act. PERB's order, in both its *compensatory* and *restorative* features, is essential to this purpose and free from error. However, as foreshadowed by the California Supreme Court when remanding for an "appropriate *judicial* remedy," the *Seal Beach* violation which occurred here must be fully remedied by court-ordered invalidation of the charter amendment.

Affirmance of PERB's remedial order alone only assures that the City does not benefit from its wrongful refusal-to-bargain conduct *while* the Proposition B charter amendment has remained in effect. But this affirmance without invalidation will not restore the terms and conditions which were in effect before the City violated the MMBA because employees have been and will continue to be denied entry into the City's defined benefit pension plan

since the Proposition B amendment took effect on July 20, 2012. Without an invalidation decree, employees have no full and effective relief from the harmful results of the City's wrongful refusal to bargain in violation of MMBA section 3505. *Only* this Court's invalidation decree will provide the complete relief needed to effectuate the purposes and policies of the MMBA and define the end of the make-whole period.

After six years of litigation, with fees and costs having been incurred by all parties – and generous judicial resources having been expended – entry of an invalidation decree is the "appropriate *judicial* remedy" needed on remand (*Boling* at 920) to complete PERB's make-whole remedy.

This is the result *Seal Beach* dictates and the *Boling* Supreme Court's analysis on reversal warrants. It is the result affected City employees deserve after the City's destructive denial of the rights guaranteed to them by State law. It is the result justice and judicial economy demand.

Dated: October 15, 2018

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)

I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect 11), contains 9,552 words.

Dated: October 15, 2018

Ann M. Smith
ANN M. SMITH

PROOF OF SERVICE

COURT NAME: In the Court of Appeal of the State of California

CASE NUMBER: Appellate Court: D069626 and D069630

CASE NAME: Boling, et al.; City of San Diego v. Public Employment Relations Board

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 340, San Diego, California.

On October 17, 2018, I served the within document described as:

UNION REAL PARTIES IN INTEREST SUPPLEMENTAL OPENING BRIEF AFTER REMAND FROM CALIFORNIA SUPREME COURT

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BY ELECTRONIC SERVICE by transmitting via TrueFiling to the above parties at the email address listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 17, 2018, at San Diego, California.

ELIZABETH DIAZ