COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

CALIFORNIANS AWARE, and
RICHARD P. McKEE,

Plaintiffs and Appellants,

v.

JOINT LABOR/MANAGEMENT
BENEFITS COMMITTEE, and
LOS ANGELES COMMUNITY
COLLEGE DISTRICT

Defendants and Respondents.

B227558

L.A. Sup. Ct. No. BS 124856
Hon. David P. Yaffe

Appeal Filed: September 17, 2010

APPELLANTS' REPLY BRIEF

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1. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees and Respondents Joint Labor/Management Benefits Committee ("JLMBC") and Los Angeles Community College District's ("District") arguments tend more to obfuscate than to illuminate. Fundamentally, JLMBC argues that public policy favors labor negotiations taking place behind closed doors instead of "in a fish bowl" in public view. (Respondents' Brief ("RB") at 9-10, 13, 16.) As a result, the argument goes, *Government Code § 3549.1* should be interpreted to exempt JLMBC completely from complying with the state's open meeting laws. The argument is a straw man.

Both the Ralph M. Brown Open Meeting Act (*Government Code § 54950, et seq.*, the "Brown Act") and the Educational Employment Relations Act (*Government Code Section 3540 et seq*., the "EERA") allow for the process attendant to actual labor negotiations — for example, the District consulting with its negotiator about specific proposals or statutorily defined "meeting and negotiating" between the District and exclusive employee representatives to reach a binding written agreement — to take place in closed sessions. (*Government Code §§ 54957.6(a), 54954.5, 3549.1, 3540.1*.[1]) Petitioners Californians Aware and Richard P. McKee ("Petitioners" or "CalAware") do not contend otherwise.

However, JLMBC is a "legislative body" as defined in the Brown Act (*Section 54952(b)*) and must comply with this state's open meeting laws which are constitutionally sanctioned. (*Cal. Constitution, art. I, § 3(b)*.) And, the EERA requires that, if meeting and negotiating takes place at JLMBC meetings, it must conduct public meetings at which *all initial proposals* offered *either* by the employees' representatives or by the District must be disclosed and made public records *before* any "meeting and negotiating" may take place.

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[1] Hereinafter, all references to "sections" refer to the Government Code, unless otherwise indicated.

> (a) **All initial proposals of exclusive representatives and of public school employers**, which relate to matters within the scope of representation, **shall be presented at a public meeting of the public school employer** and thereafter shall be public records.
>
> **(b) Meeting and negotiating shall not take place on any proposal** until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal **at a meeting of the public school employer**.

(*Section 3547*.) [2]

In effect, Respondents argue that the District may circumvent the express provisions of the Brown Act and the EERA by delegating to JLMBC (or to the District delegate on JLMBC[3]) the power to engage in "meeting and negotiating" on proposals before the public is afforded an opportunity to examine and voice their views about them. (RB at 18-19, 22-23.) To the contrary, the District does not have the power to circumvent the express statutory provisions of the Brown Act which requires that meetings of a legislative body be open to the public or of the EERA which requires holding public meetings before any "meeting and

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[2] Unless otherwise indicated, all emphasis supplied all internal quotation marks omitted.

[3] The analysis is the same if the District delegated the power to engage in "meeting and negotiating" to its representative *on* JLMBC since JLMBC is an advisory committee of the Board which must conduct public meetings and JLMBC argues that "JLMBC Is Engaged In 'Meeting And Negotiating.'" (RB at 18.)

negotiating" takes place. (*Education Code § 70902(d)*.[4]) The District cannot delegate the power to violate open meeting laws.

JLMBC's dilemma remains. JLMBC is a legislative body subject to the Brown Act, created by the District to advise the District's governing Board, at which proposals are initiated and "meeting and negotiating" takes place. If so, JLMBC is "legislative body" of a "public school employer" which must comply with *Section 3547* and disclose those initial proposals at its public meetings *before* any "meeting and negotiating" takes place.

Finally, because JLMBC is a legislative body, it is subject to suit under the Brown Act.

Respondents seek to continue violating the overarching public policy favoring open government guaranteed by our Constitution, the Brown Act and the EERA *all* of which require open meetings to ensure public participation in labor management relations involving our community colleges. The trial court should be ordered to issue a writ to compel Respondents to comply with the law.

2. JLMBC IS SUBJECT TO THE BROWN ACT BECAUSE IT IS A COMMITTEE CREATED BY THE DISTRICT BOARD TO ADVISE IT ON THE DISTRICT'S HEALTH BENEFITS PROGRAM

The trial court skipped over whether JLMBC was a "legislative body" as defined by the Brown Act deciding, instead, that *Section 3549.1* exempted JLMBC

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[4] "Wherever in this section or any other statute a power is vested in the governing board, the governing board of a community college district, by majority vote, may adopt a rule delegating the power to the district's chief executive officer or any other employee or committee as the governing board may designate. **However, the governing board shall not delegate any power that is expressly made nondelegable by statute**. Any rule delegating authority shall prescribe the limits of the delegation."

completely from complying with open meeting laws. The trial court put the cart before the horse. The JLMBC is, first, a legislative body created by the District Board to advise the Board therefore its activities are governed by the Brown Act even if specific "meeting and negotiating" may take place in closed sessions.

A. JLMBC Is A Legislative Body Under The Brown Act Because the District Created The Committee To Advise The District Board

JLMBC and the District dismiss as inapt the controlling authorities, primarily from this Court, which hold that an entity is a "legislative body" if the government was involved in its creation. (RB at 24-25.) Respondents' dismissal of these cases is legally unjustified because the question of whether JLMBC is a legislative body under the Brown Act must be determined by reference to the Brown Act not the EERA.

California law is clear: JLMBC is a legislative body because the District was involved in its creation *both* by the District's approval of the Master Benefits Agreement ("Master Agreement") and its adoption of Rule 101702.10 to Chapter X, Article XVII of the Board's Rules ("Rule 101702.10") and JLMBC is charged with the task of advising the District Board on the Master Agreement. (CT at 000029.) ***International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc***. (1999) 69 Cal.App.4th 287, 293 ("***International Longshoremen's***"); ***Epstein v. Hollywood Entertainment District II Business Improvement District*** (2001) 87 Cal.App.4th 862, 868, 869 ("***Epstein***"); ***Frazer v. Dixon Unified School District*** (1993) 18 Cal.App.4th 781.

There is no practical difference between the District's approval of the Master Agreement and adoption of Rule 101702.10 here and the facts in ***International Longshoremen's*** which involved the City's approval of the Shareholder's Agreement and adoption of Ordinance No. 168614 by which "[t]he Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the

President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement." ***International Longshoremen's***, 69 Cal.App.4th at 291.

JLMBC's contention that it is not a "board …of a local agency" because only one of its voting members is appointed by the District is another a straw man. (RB at 14.) JLMBC is a "legislative body" (*Section 54952(b)*) because it is a committee ("decisionmaking or advisory") created by the District Board to advise the District Board. The District Board's power over the JLMBC is, in fact, no less than the City and the Harbor Commission's power over the LAXT in which the City held a 15% stake. ***International Longshoremen's***, 69 Cal.App.4th at 290-291, 295.

The fact that the District member on JLMBC is in the numerical minority is of no legal consequence since JLMBC cannot pass proposals unless the District member votes for them and the District retains plenary authority to consider and approve any proposal made by JLMBC. (Clerk's Transcript ("CT") at 000027-28.)

> [T]he City Council, an elected legislative body with ultimate accountability to the voters, retains plenary decisionmaking authority over Harbor Department affairs and has jurisdiction to overturn any decision of the appointed Board of Harbor Commissioners. Here, by adopting an ordinance which approved the shareholders' agreement to form LAXT, as well as by acquiescing in the Board of Harbor Commissioners' activity in establishing LAXT, the City Council was involved in bringing LAXT into existence. Without the express or implied approval of the City Council, LAXT could not have been created.

International Longshoremen's, 69 Cal.App.4th at 296; ***Epstein***, 87 Cal.App.4th at 873 ("the elected legislative body [the City Council of Los Angeles] with ultimate accountability to the voters, retained plenary decisionmaking authority over the BID's activities.")

Contrary to JLMBC's argument (RB at 14), there is nothing in *Section 54952(b)* which limits the definition of a legislative body to committees comprised solely of members of the local agency. *Section 54952(b)* defines a "legislative body" subject to the Brown Act as: "A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body."

Nor is there is any requirement that all members of the JLMBC be appointed by the District. In ***Joiner v. City of Sebastopol*** (1981) 125 Cal. App. 3d 799 ("***Joiner***"), the advisory committee under analysis was to be composed of members appointed by the city council and members appointed by the city planning commission. ***Joiner***, 125 Cal.App.3d at 803, 804 ("The group contemplated by the city council's action in this case was not to be limited to members of the governing body [.]")

Nevertheless, the advisory committee created by the city in ***Joiner*** was an advisory committee within the definition of the Brown Act because it was created to advise the city council on a matter within the council's jurisdiction.

> The representatives of the city council and the planning commission were not to report back with information to their respective boards. Rather, they were as a "unitary body" to interview applicants and report, with recommendations, to the city council, which had sole legal responsibility for filling the vacancy. We conclude that the

> proposed meeting was to be of an "advisory committee" within the meaning of *Government Code section 54952.3*.

Joiner, 125 Cal.App.3d at 805.

In ***Frazer v. Dixon Unified School District*** (1993) 18 Cal.App.4th 781, 785 ("***Frazer***"), the court addressed the status of review committees created to review the recommendation of a prior school district task force on controversial school curriculum. The members of the review committees were not all employees of the school district. "Of the 21 members of the review committee, 17 were District employees and 4 were parents." ***Id***., 18 Cal.App.4th at 786.

In ***Frazier***, as here:

> Respondents also appear to argue that *section 54952.3* requires appellants to allege (and prove) that the Board itself appointed the members of the committees to fall within *section 54952.3*. definition of "legislative body." We do not believe that *section 54952.3* contains such a requirement.

Frazier, 18 Cal.App.4th at 792.

The court nevertheless held that the review committees were subject to the Brown Act. "[T]he hearing and review committees appointed by the District pursuant to a written board policy were advisory committees within the meaning of *section 54952.3*, whose meetings and deliberations were subject to the Brown Act." ***Frazier***, 18 Cal.App.4th at 785

JLMBC meets the definition of a committee under *Section 54952(b)* as a creation of the District Board for the purpose of advising the Board on the Master Agreement.

JLMBC's charge to "filter out the changes [to the Master Agreement] that are brought to the negotiating table by requiring some degree of consensus by both labor and management members of the JLMBC *in order to submit a change to the*

board of trustees for its consideration" (CT at 000262) constitutes the activities of a legislative body under the Brown Act.

> It is now well settled that the term meeting, as used in the Brown Act *(§ 54950, 54953*), is not limited to gatherings at which action is taken by the relevant legislative body; deliberative gatherings are included as well. (*Sacramento Newspaper Guild, supra, 263 Cal.App.2d at p. 48*.) **Deliberation in this context connotes not only collective decisionmaking, but also the collective acquisition and exchange of facts preliminary to the ultimate decision**. (*Id., at pp. 47-48; Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234 [175 Cal.Rptr. 292*].)

Frazer, 18 Cal.App.4th at 794.

B. The Opinions of the California Attorney General Upon Which Respondents Rely Are Unpersuasive Because They Are Legally Flawed Or Simply Inapt.

Respondent's reliance upon Opinions of the California Attorney General is, in each case, misplaced. (RB at 11-15.)

Respondents' primary authority — *92 Ops.Cal.Atty.Gen. 102* (2009) (the "2009 Opinion") — is unpersuasive. The premise of the 2009 Opinion is that, "it is apparent that the JLMBC finds its genesis not in the Rule adopted by the District Board, but in the Master Agreement between the District and its employee labor representatives." (Opinion at 9.)

JLMBC was created by the District's necessary approval of the Master Agreement and adoption of Rule 101702.10. (CT at 000004 and 000040.) To hold that JLMBC is not a legislative body because the Master Agreement preceded the District's adoption of Rule 101702.10 both improperly ignores the District's

role in the approving the Master Agreement and improperly exalts form over substance. ***International Longshoremen's***, 69 Cal.App.4th at 290-291, 295; ***Shapiro v. Board of Directors of The Centre City Development Corporation*** (2005) 134 Cal.App.4th 170, 183 n17 ("***Shapiro***").

> In response to an analogous argument, this Court in ***Epstein*** stated:
>
> Defendants, however, would prefer that we ignore the POA's history vis-à-vis BID I, and concentrate instead on the POA's relationship to BID II. This is because the POA's existence preceded the creation of BID II. Defendants would have us look at the POA as simply a "preexisting corporation" that just "happened" to be available to administer the funds for BID II [.] [¶]
>
> The record shows that the POA was formed and structured for the sole purpose of taking over City's administrative functions as to BID I. Therefore, under the Brown Act, as interpreted by us in *International Longshoremen's, supra, 69 Cal. App. 4th 287*, the POA's board of directors, vis-à-vis BID I, was subject to the Brown Act, because the board was a legislative body within the meaning of *section 54952, subdivision(c)(1)(A)*.
>
> [W]e would improperly elevate form over substance if we were to treat the POA as a pre-existing private entity with which City just happened to decide to do business when it turned governance of BID II over to the POA. To turn a blind eye to such a subterfuge would allow City (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government. This we will not do.

Epstein, 87 Cal.App.4th at 871, 872.

Exalting form over substance is unacceptable when used to narrow the application of the Brown Act. (*Cal. Constitution, art. I, § 3(b)(2)*.)

The 2009 Opinion's subsequent reliance upon "meet and confer" sessions under the Meyers-Milias-Brown Act (*Sections 3500-3511*) to argue by analogy that "meeting and negotiating" under the EERA should not be subject to the Brown Act further highlights the Opinion's faulty reasoning.

First, the 2009 Opinion (as do Respondents) ignores the fact that not all of the activities of the JLMBC constitute "meeting and negotiating" analogous to "meet and confer" sessions. Hence, while "meeting and negotiating" may be excluded from the Brown Act's reach, the remaining activities of the JLMBC do not come within the reach of *Section 3549.1*.

As explained by the Court in ***El Rancho Unified School District v. National Education Association*** (1983) 33 Cal. 3d 946, 955 ("***El Rancho Unified School District***"): "[T]he term 'meeting and negotiating' is defined in *section 3540.1, subdivision (h)* as a process engaged in by the public school employer and an exclusive representative **in a good faith effort to reach a binding written agreement**."

Before JLMBC may convene behind closed doors to negotiate a binding written agreement, all initial proposals made in the JLMBC either by the District or the employee representatives must be presented to the public at an open meeting, and the public must be permitted to study and comment on the proposals at a public meeting. (*Section 3547*.)

JLMBC is also charged with reviewing and studying various aspects of the District's Health Benefits Program. JLMBC is to:

> 1**. review** the District's Health Benefits Program and effect any changes to the program it deems necessary to contain costs while maintaining the quality of benefits available to employees

(this includes, but is not limited to, the authority to substitute other plans for the District's existing health benefits plans);

2. recommend the selection, replacement, and evaluation of benefits consultants;

3. recommend the selection, replacement, and evaluation of benefit plan providers;

4. **review** and make recommendations regarding communications to faculty and staff regarding the health benefits program and their use of health care services under it;

5. **review** and make recommendations regarding booklets, descriptive literature, and enrollment forms;

6. **study** recurring enrollee concerns and complaints and make recommendations for their resolution;

7. **participate in an annual review** of the District's administration of the Health Benefits Program;

8. **review** and make recommendations about the District's health benefits budget;

9. if health care legislation that necessitates modification of the District's Health Benefits Program is enacted before termination of this agreement, **assess the effects of such legislation** and make recommendations to the District and the Exclusive Representatives about appropriate action to take.

(CT at 000027-28.)

The activities of the JLMBC far exceed "meeting and negotiating."

Second, the 2009 Opinion's analysis does not address the impact of *Section 3547* on JLMBC which is decidedly different from the provisions of Meyers-Milias-Brown. Under Meyers-Milias-Brown there is no requirement that *initial*

proposals be presented to the public and no prohibition on engaging in "meeting and negotiating" until after receiving public input on a proposal.

Under Meyers-Milias-Brown, meet and confer sessions, if successful, result in a Memorandum of Understanding presented to the governing body for approval. (*Section 3505.1*.) Notices of changes proposed by the governing body of the local agency are, likewise, not submitted to the public in general but only to the employee organizations affected by the proposed change. (*Section 3504.5*.[5]) Meyers-Milias-Brown does not provide a useful analogy for determination of the issues here. The 2009 Opinion should not be followed.

The remaining Opinions of the California Attorney General offer no greater support for Respondents' positions. (RB at 13-15.) In *61 Ops.Cal.Atty.Gen. 1* (1978) (the "1978 Opinion") the Attorney General dealt with "meet and confer" sessions under Meyers-Milias-Brown, not the EERA. The issue upon which the Attorney General opined was whether such "meet and confer" sessions involving a group of designated Supervisors (less than a quorum) were covered by the Brown Act.[6] The answer there, under repealed provisions of the Brown Act, was no.

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[5] "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."

[6] 1978 Opinion at 2 ("The first question presented is whether 'meet and confer' sessions held pursuant to section 3505 between employee representatives and the county must be open and public where the county's representatives include not more than two supervisors.")

First and foremost, the 1978 Opinion also resolves another straw man because the question addressed there was "whether "meet and confer" sessions held pursuant to section 3505 between employee representatives and the county must be open and public [.]" (1978 Opinion at 2.)

CalAware does not contend that the actual "meeting and negotiating" sessions conducted by JLMBC must be open to the public. The issue here is whether JLMBC must comply with the Brown Act in conducting its regular business of making initial proposals (which be presented at public meetings before meeting and negotiating takes place) as well as reviewing and studying aspects of the Health Benefits Program.

The 1978 Opinion is distinguishable in several other respects as well. The 1978 Opinion (addressing prior versions of the Brown Act [7]) involved a temporary committee consisting of two Supervisors (which constituted less than a quorum of the County Board) and County Counsel acting as the Board's agents authorized to meet and negotiate on behalf of the County.[8] (1978 Opinion at 12 (the bargaining committee was "a non-permanent committee formed for limited purposes").)

The "bargaining committee" to which the 1978 Opinion refers is equivalent to the sole District representative on the JLMBC, *not* the JLMBC itself. JLMBC is a standing committee with ongoing jurisdiction to advise the District Board as to the Master Agreement governed by the EERA. JLMBC is comprised of more than members of the District Board. And, under the Brown Act now, *Section 54952(b)*

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[7] 1978 Opinion at 14 ("The term 'legislative body' is defined in three sections, that is, *sections 54952* [since revised]*, 54952.3* [since repealed] [.]")

[8] Meyers-Milias-Brown permits the governing body to designate agents to negotiate (*Section 3505, ¶ 2*) while the EERA contains no provision for designating agents. ***Inglewood Teachers Association v. Public Employment Relations Board*** (1991) 227 Cal.App.3d 767, 778.

defines legislative bodies to include committees "whether permanent or temporary." [9]

Moreover, the 1978 Opinion based the view that, "[t]he need to bargain in private *and caucus in private* in labor negotiations is clear. If section 54952.3 were to be *interpreted* as including bargaining committees, the ability of local agencies to bargain effectively could be nullified." (*Id*., at 17; emphasis in original.) The concerns expressed in the 1978 Opinion are irrelevant here because the designated negotiating representative of the legislative body is an individual, not the JLMBC itself.

The express provisions of Brown Act and the EERA establish the proper balance between labor negotiations and open government in this case. *Section 54957.6* provides that a legislative body may meet with its labor negotiator in closed session. The District can give all appropriate advice to its member of JLMBC behind closed doors. And, assuming *Sections 3540.1(h)* and *3549.1* apply, when the members of JLMBC are actually engaged in "meeting and negotiating" that is exempt from the Brown Act.

However, when JLMBC is engaged in "reviewing" and "study[ing]" and "participat[ing] in an annual review of the District's administration of the Health Benefits Program" and making "initial proposals" (CT at 000027-28) those activities must be open to the public under the Brown Act or the EERA.

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[9] As *Section 54952(b)* reads now, advisory committees "whether temporary or permanent, decisionmaking or advisory" are legislative bodies, except:

> *Advisory committees composed solely of members of the legislative body that are less than a quorum of the legislative body are not legislative bodies except* that *standing committees* of a legislative body, *irrespective of their composition*, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body *are legislative bodies for purposes of this chapter*.

JLMBC's citation to *87 Ops.Cal.Atty.Gen. 19* (2004) (the "2004 Opinion") is also unavailing. In the 2004 Opinion, the Attorney General addressed the question of whether "the governing board of a jointly administered trust fund, whose members are appointed equally by a city and a labor union representing city employees and whose purpose is to address labor-management issues relating to the health, safety, and training of city employees." (*Id*., at 1.)

Preliminarily, the Attorney General stated, "if the Board qualifies as a 'legislative body of a local agency' as defined in the Brown Act, it must hold its meetings open to the public." (*Id*., at 3.) However, as pertinent here, the 2004 Opinion based its conclusion that the Board under consideration was not covered by the Brown Act based upon its view that:

> [T]he Board does not constitute a "legislative body" under the language of section 54952, subdivision (b), since half of its members are appointed by the Union as part of the collective bargaining agreement. It thus cannot be considered a "board . . . of a local agency," such as a city planning commission or county civil service commission, *which has all members appointed by the local agency*.

(*Id*., at 4.)

The 2004 Opinion's restrictive interpretation is not based upon the language of *Section 54952(b)* nor any published case. *Section 54952(b)*, as it reads now in full, defines a "legislative body" as:

> (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that

> standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

There is no requirement that all members of a committee such as the JLMBC be members of or appointed by the local agency to which the committee reports. ***Joiner***, 125 Cal. App.3d at 804 ("The group contemplated by the city council's action in this case was not to be limited to members of the governing body [.]") The controlling distinction is whether the advisory committee is tasked to advise the legislative body which created it. ***Joiner***, 125 Cal. App.3d at 804, 805 ("[T]he proposed meeting [of the advisory committee] was for the purpose of making a recommendation to the city council concerning a matter within its sole responsibility.")

The ***Joiner*** court held that the advisory committee so comprised and so tasked fell within the Brown Act's definition of a legislative body. ***Joiner***, 125 Cal.App.3d at 801. The 2004 Opinion's conclusion to the contrary is entitled to no weight.

In the end, the task of interpreting and applying the Brown Act is the responsibility of this Court and Opinions of the Attorney General, even if generally considered persuasive (when logical and apt), are not controlling. ***Shapiro v. Board of Directors of The Centre City Development Corporation*** (2005) 134 Cal.App.4th 170, 183 n17 ("***Shapiro***") ("In the end, however, whatever the force of administrative construction ... final responsibility for the interpretation of the law rests with the courts.")

3. ***SECTION 3549.1*** DOES NOT COMPLETELY EXEMPT JLMBC

FROM COMPLYING WITH THE BROWN ACT

Respondents contend that the District is subject to *Section 3549.1* and that the District's agent conducts "meeting and negotiating" sessions involving the Master Agreement in the JLMBC, hence, "the JLMBC is a form of 'meeting and negotiating' discussions under the EERA." (RB at 18-19.) The argument misconstrues the issue.

JLMBC is an advisory committee subject to the Brown Act created by the District to advise the District Board on issues arising under the Master Agreement. As such, JLMBC must comply with the Brown Act except as provided in specific, narrowly interpreted, exceptions. No exceptions apply here to exempt JLMBC completely from complying with the state's open meeting laws.

The District's reliance upon authorities involving agency *liability* under Meyers-Milias-Brown to legitimize JLMBC's "meeting and negotiating" is misplaced in light of the statutory scheme by which California's Community Colleges were created and prescribes the conditions for any delegation of the District Board's powers.

If the District is properly to delegate its obligation to engage in "meeting and negotiating" then the District must do so within the strictures of the law (which it did not do). The District could not legally delegate to JLMBC only the power to engage in "meet and negotiating" on proposals without requiring public meetings to disclose those proposals and to allow public input as to those proposals in advance of their consideration by JLMBC. (*Section 3547*.)

A. JLMBC Does Not Come Within The Definition Of A Public School Employer That May Engage In Meeting And Negotiating

Section 3549.1 provides in pertinent part:

> All the proceedings set forth in subdivisions (a) to (d), inclusive, are exempt from the provisions of …the Ralph M. Brown Act …, unless the parties mutually agree otherwise:
>
> (a) Any meeting and negotiating discussion **between a public school employer and a recognized or certified employee organization**.

The EERA does not include advisory committees, such as JLMBC, or agents, in its definition of either the governing board of a District or the District itself. As a consequence, JLMBC's citations to cases interpreting other statutory schemes (such as Meyers-Milias-Brown or the National Labor Relations Act ("NLRA") involving labor management relations of other public entities are not apt because those statutes provide different definitions of employers and who may represent them.[10] (RB at 18-23.)

Meyers-Milias-Brown and the EERA differ substantially in their definitions of whom may represent the government employer. Meyers-Milias-Brown permits the governing body to designate agents to negotiate on the body's behalf (*Section 3505, ¶ 2*) while the EERA contains no provision for agents. (*Section 3540.1(k)*.)

> Under Meyers-Milias-Brown:
>
> 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

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[10] The NLRA provides that an employer "includes any person acting as an agent or the employer, directly or indirectly…." (*29 U.S.C. § 152(2)*.)

such recognized employee organizations, as defined in subdivision (b) of Section 3501….

[¶] "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 and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

(*Section 3505.*)

Under the EERA:

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties

(*Section 3540.1(h)*.)

In the authority cited by JLMBC on the point (RB at 19), ***Inglewood Teachers Association v. Public Employment Relations Board*** (1991) 227 Cal.App.3d 767 ("***Inglewood Teachers Association***"), *this Court* observed:

The Association also argues that an agent should be included in the definition of employer under the EERA as it can be seen in

> *Education Code sections 44681* and *44860* and California Code of Regulations, title 5, sections 5550- 5551 that the Legislature has acknowledged that districts act through their principals. **We disagree with this contention**. Since the Legislature is deemed to be aware of the content of its own statutory enactments, it is a reasonable inference that the Legislature would have included the term agent in the definition of employer under the EERA if it wanted school districts perpetually exposed to liability for any unfair labor practice committed by an agent of a school district.

Inglewood Teachers Association, 227 Cal.App.3d at 778.

However, there is specific statutory authority for a Community College District Board to delegate its power contained in the Education Code. (*Education Code § 709020(d)*.) As will be discussed further in the next section, the power of a Community College District Board to delegate its powers is limited by the proviso that it may not delegate a power "that is expressly made nondelegable by statute [.]" *(Id.)*

Since all legislative bodies must conduct public meetings under the Brown Act, and all initial proposals must be presented at a public meeting of the public school employer before any meeting and negotiating may take place under the EERA, the District could not delegate its power to conduct "meeting and negotiating" sessions but not obligate JLMBC to hold public meetings to disclose initial proposals beforehand.

Under the Brown Act, JLMBC is not a "local agency" because that is defined as the District itself or a *commission* or *board* or *agency* of the District. Likewise, JLMBC is not the "governing board" of the District. The JLMBC is an advisory committee to the District Board created by the District through adoption

of the Master Agreement and Rule 101702.10 of the District Board's Rules. JLMBC is a "legislative body" not the "local agency" itself.

In this light, JLMBC cannot reasonably be seen as the District or as the governing board of the District to which *Section 3549.1* would apply. *Compare* ***Shapiro v. San Diego City Council*** (2002) 96 Cal.App.4th 904, 917 ("Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act sunshine law is construed liberally in favor of openness in conducting public business.")

Further, since JLMBC is neither the District nor the governing Board of the District, any attempt by the District Board to delegate their power to meet and negotiate in circumvention of express provisions of law is not permitted. (*Education Code § 70902(d)*.)

B. <u>If JLMBC Has Been Delegated The District's Power To Engage In "Meeting And Negotiating" Then JLMBC Must Comply With The Brown Act And *Section 3547*</u>

Respondents argue that JLMBC engages in "meeting and negotiating" through its District representative and the exclusive employee representatives therefore JLMBC is exempt from application of the Brown Act by *Section 3549.1*. (RB at 17-19.) JLMBC's arguments are wide of the mark for several reasons.

First, the authority upon which JLMBC relies for that proposition does not support its argument as to the delegation of the District's powers. JLMBC's primary authority, ***Inglewood Teachers Association v. Public Employment Relations Board*** (1991) 227 Cal.App.3d 767 ("***Inglewood Teachers Association***"), deals with the District's liability for unfair labor practices based upon the actions of a high school principal, not a power to engage in meeting and

negotiating which by statute is to be exercised by the District or the District's Board.

JLMBC citation to ***Inglewood Teachers Association*** for the proposition that "the term 'employer' under EERA includes common law agents" (RB at 19) is doubly curious because the Court *rejected* that principle.

> The Association also argues that an agent should be included in the definition of employer under the EERA as it can be seen in *Education Code sections 44681* and *44860* and California Code of Regulations, title 5, sections 5550- 5551 that the Legislature has acknowledged that districts act through their principals. **We disagree with this contention**. Since the Legislature is deemed to be aware of the content of its own statutory enactments, it is a reasonable inference that the Legislature would have included the term agent in the definition of employer under the EERA if it wanted school districts perpetually exposed to liability for any unfair labor practice committed by an agent of a school district.

Inglewood Teachers Association, 227 Cal.App.3d at 778.

Second, assuming *arguendo* that the District is arguing that it sought to follow statutory requirements in delegating to JLMBC the District's power to engage in meeting and negotiating between its representative and the exclusive employee representatives, such a delegation would have to (but does not) conform to the law which prohibits a delegation of authority which is contrary to express provisions of law.

The District is a creature of state law. (*Education Code § 70900* ("There is hereby created the California Community Colleges, a postsecondary education system consisting of community college districts heretofore and hereafter established pursuant to law and the Board of Governors of the California

Community Colleges….[L]ocal districts shall carry out the functions specified in Section 70902.")

The power of the District to delegate its powers is also circumscribed by state law.

> Wherever in this section or any other statute a power is vested in the governing board, the governing board of a community college district, by majority vote, may adopt a rule delegating the power to the district's chief executive officer or any other employee or committee as the governing board may designate. **However, the governing board shall not delegate any power that is expressly made nondelegable by statute.** Any rule delegating authority shall prescribe the limits of the delegation.

Education Code § 709020(d).

Section 54953(a) provides, in pertinent part: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body."

Section 3547 requires open meetings and public participation for all initial proposals from either a public school employer or exclusive representatives before the parties may engage in meeting and negotiating.

> (a) **All initial proposals** of exclusive representatives and of public school employers, which relate to matters within the scope of representation, **shall be presented at a public meeting of the public school employer** and thereafter shall be public records.
>
> **(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public**

has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

The District's power to delegate its obligation to conduct "meeting and negotiating" sessions is circumscribed by the Education Code, not the EERA or common law.

The District may not legally delegate to JLMBC a power to circumvent the express provisions of the Brown Act requiring that all legislative bodies conduct open meetings because the Brown Act does not permit such an exemption. And, exceptions to the Brown Act must be interpreted narrowly to prevent circumvention of the law. ***Shapiro v. San Diego City Council*** (2002) 96 Cal.App. 4th 904, 917 ("Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act sunshine law is construed liberally in favor of openness in conducting public business.")

Likewise, the District could not delegate to JLMBC the power to conduct "meeting and negotiating" sessions without conducting public meetings in advance on every initial proposal because *Section 3547* expressly prohibits such a subterfuge.[11]

According to the trial court, JLMBC conducts "meeting and negotiating" with the purpose of "filtering out" initial proposals to form a "consensus." (CT at 000262.) The proposals considered and recommended by JLMBC are then submitted to the District for action. (CT at 000027-28.) The District simply does not have the statutory authority to delegate to JLMBC the power to conduct "meeting and negotiating" with the purpose of "filtering out" initial proposals to

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[11] It is ironic that Respondents argue that the EERA provides sufficient safeguards for public participation in labor negotiations (RB at 16) by citing ***San Mateo City School District v. Public Employment Relations Board*** (1983) 33 Cal. 3d 850, 864, since the ***San Mateo*** court expressly cited to *Section 3547* for that proposition.

form a "consensus" but not allowing the public to learn of these proposals until they are "recommend[ed]" to the District Board.

Third, JLMBC's (and the trial court's) over expansive interpretation of *Section 3549.1* to exempt everything JLMBC does as "meeting and negotiating" is not legally justified. As discussed above, not everything JLMBC does is "meeting and negotiating." Initial proposals must be presented to the public at an open meeting and become public records. According to the Master Agreement and Rule 101702.10, JLMBC is also charged with the obligation to review and study various aspects of the District's Health Benefits Program which do not entail "meeting and negotiating" on specific proposals. (CT at 000027-28.)

JLMBC does more than meet and negotiate a written agreement. If it is a "public school employer" it must.

4. RESPONDENTS' CONTENTION THAT JLMBC'S COMPLIANCE WITH THE BROWN ACT AND THE EERA WOULD "UNNECESSARILY COMPLICATE" THE DISTRICT'S COLLECTIVE BARGAINING EFFORTS IS PROPERLY ADDRESSED TO THE LEGISLATURE

Respondents' contention that compliance with the law would "unnecessarily complicate" its collective bargaining strategies (RB at 25) should be addressed to the Legislature. The people and their Legislature have already struck the desired balance between confidential labor negotiations and open government through the Brown Act (*e.g.*, *Sections 54957.6, 54954*) and the EERA

(*Section 3547*). *Compare*, ***Epstein***, 87 Cal.App.4th at 874[12]; ***San Mateo City School District v. Public Employment Relations Board*** (1983) 33 Cal.3d 850, 864.[13]

As this Court observed in dealing with a similar argument in ***McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force*** ("***LA IMPACT***") (2005) 134 Cal. App. 4th 354, 363:

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[12] In response to an analogous contention, the Court observed:

> [D]efendants' pleas that the result we reach here is somehow "unfair" to businesspeople are simply not persuasive. When an individual business owner's money can be taken without his or her individual consent, when it can be taken through use of the government's power to tax and assess, and when it can be used to benefit others' property through the provision of services (whether or not such services include such traditional municipal services as street and sidewalk improvements), it is clearly not "unfair" for such individual business owners to expect to have an opportunity to participate in the decisionmaking process by which one benefit or another is actually conferred. Nor is it unfair for us, given the language of the Brown Act and the rules of interpretation related to it, to validate that expectation.

[13] In contrast to Respondents (RB at 15-16), CalAware does not cite ***San Mateo City School District*** for the proposition that *Section 3547 supplants* the Brown Act because that was not the holding of the case; indeed, the Brown Act is never mentioned in the opinion. In the context of determining whether PERB properly determined whether certain issues were negotiable under *Section 3543.2*, our Supreme Court was addressing the school district's argument that: "[*T]he collective bargaining process* transforms the traditionally multilateral nature of governmental decisionmaking into a bilateral process. As to subjects within the scope of mandatory bargaining, input from members of the public at large is excluded and school employees gain a significant advantage in pressing their own interests." ***Id.***, 33 Cal.3d at 863-864. The Supreme Court disagreed with that proposition because of *Section 3547*. ***San Mateo City School District*** cannot be cited for broader propositions concerning the Brown Act that were not decided therein. ***Ginns v. Savage*** (1964) 61 Cal.2d 520, 524 n2.

> Finally, L.A. Impact urges that public policy requires that its meetings not be open to the public. It contends that "[w]hile the public right of access to legislative bodies is supported by strong public policy, an equally important interest to our democratic society is for law enforcement personnel to enforce criminal laws effectively and as safely as possible." For that reason, L.A. Impact's meetings regarding task force strategies and operations should not be subject to public disclosure. What L.A. Impact ignores, however, is that not all of its meetings are required to be open to the public. (See, e.g., *§ 54957; Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 331 [87 Cal. Rptr. 2d 813]*.) For example, *section 54957.8* allows for closed meetings of multijurisdictional drug law enforcement agencies in order "to prevent the impairment of ongoing law enforcement investigations, to protect witnesses and informants, and to permit the discussion of effective courses of action in particular cases." *(§ 54957.8*.) And, *section 54957* was amended in 2002 to provide for greater confidentiality for local and state public meetings when issues of public safety are being discussed. Given these (and other) exceptions to the open meeting requirements of the Brown Act, we hardly believe that the Legislature intended crime-fighting-strategy meetings to be open to the public.

Any alteration in the explicit balance already struck by our Constitution, the Brown Act and the EERA should be made by the Legislature not the courts whose function is to interpret the law as written. (*Code of Civil Procedure § 1858*.)

5. CONTRARY TO JLMBC'S CONTENTION, THE APPLICATION OF *SECTION 3547* IS PROPERLY BEFORE THIS COURT BECAUSE IT WAS RAISED BELOW AND INVOLVES PURELY A QUESTION OF LAW

Respondents argue that this Court should not consider the application of *Section 3547* here because CalAware did not raise the argument below and because the Public Employment Relations Board ("PERB") has the initial exclusive jurisdiction to determine violations of *Section 3547*. (RB at 27-28.) The contentions are bootless in this case which is subject to de novo review.

CalAware did raise the issue of the application of *Section 3547* below and PERB's exclusive jurisdiction is not at issue here. What is at issue is JLMBC's violation of the Brown Act, not of *Section 3547*. Moreover, the application and interpretation of *Section 3547* presents purely a question of law on facts in the record that are undisputed, the issue may properly be considered by this Court.

In the briefing to Judge Yaffe below, CalAware cited to *Respondents'* violation of *Section 3547* as evidence that JLMBC and the District were not acting pursuant to the provisions of the EERA. (CT at 000236 ("a review of the District Agendas and Minutes reveal no evidence of compliance with any of those provisions [*Section 3547*] prior to JLMBC meetings, as would have been required by EERA if these were truly negotiating sessions").) And, JLMBC does not contend that it conducts open meetings under the Brown Act at all. (Compare CT at 000007 [¶] 12 with CT 000040 [¶] 12.)

At all events, the application of *Section 3547* is purely a question of law on the facts in the record that are undisputed therefore this Court may properly take up the question. ***Collins v. Department of Transportation*** (2003) 114 Cal. App.4th 859, 865 ("Here, the issue presented is the interpretation of *subdivision (i)*. The facts are undisputed. The interpretation and applicability of a statute on the undisputed facts in the record is a question of law, which we may address for the

first time on appeal."); ***Hale v. Morgan*** (1978) 22 Cal.3d 388, 394 ("We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.")

The application of *Section 3547* is also an important issue of law with an impact statewide on constitutionally protected open government as well as labor management relations; the issue should be considered by this Court. See ***Ford v. Gouin*** (1992) 3 Cal. 4th 339, 346 n2 ("Although the statute was not cited or relied on in the trial court, it is appropriate for us to consider the provision in determining the legal issue ….The matter is one of general public significance and interest, affecting all persons in the state…and presents a pure question of law.")

6. JLMBC IS SUBJECT TO SUIT UNDER THE BROWN ACT ACTION BECAUSE IT IS A LEGISLATIVE BODY

Without citing to any Brown Act authority, JLMBC argues that it is not subject to suit. (RB at 29.) JLMBC is wrong. ***LA IMPACT***, 134 Cal.App.4th at 362 n5 ("Because we conclude that L.A. Impact's board of directors and executive council are legislative bodies of a local agency, it follows that L.A. Impact was a properly named defendant. (See *§ 54960* ['any interested person may commence an action by mandamus ... for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency'].")

JLMBC's citation to ***Laidlaw Environmental Services, Inc., Local Assessment Committee v. County of Kern*** (1996) 44 Cal. App. 4th 346 ("***County of Kern***") is inapposite. In ***County of Kern***, a special committee was appointed by the County to advise it on a specific application for a hazardous waste facility project sought by Laidlaw Environmental Services, Inc. Prior to completion of the committee's work, the County issued the specific use permit and ordered the

special committee to cease operations. The special committee sued to obtain a writ to prevent issuance of the permit.

The Court of Appeal held that the special committee did not have standing to sue. As the Court explained:

> LAC does not have …permanence and continuity…. LAC is appointed when a specific application is being considered and ceases to exist after final administration by the state or local agency. Its membership, which reflects the makeup of the community, changes as each local assessment committee is created.
>
> Nor is LAC authorized to exercise sovereign power of government. *Health and Safety Code section 25199.7, subdivision (d)* directs LAC to function as an advisory committee to the appointing legislative body of the affected local agency. Its duties include advising the affected local agency of the terms and conditions under which the proposed hazardous waste facility project may be acceptable to the community. The statute does not authorize LAC to engage in any legislative, judicial or otherwise decisionmaking powers. We do not equate advising with decisionmaking.

County of Kern, 44 Cal.App.4th at 352-353.

County of Kern has nothing to do with the Brown Act's provisions allowing suit *against* a legislative body to stop or prevent future violations of the Brown Act. (*Section 54960(a)*.) The opinion "is not authority for a proposition not therein considered." ***Ginns v. Savage*** (1964) 61 Cal.2d 520, 524 n2.

7. CONCLUSION

For the foregoing reasons, the trial court's denial of a writ of mandate should be reversed and the lower court ordered to enter the writ as sought.

DATED: April 5, 2012,

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CERTIFICATE OF COMPLIANCE WITH *RULE 14(c)(1)* OF CALIFORNIA RULES OF COURT

I, Dennis A. Winston, am appellate counsel in this matter and I hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that Appellant's Opening Brief contains 7,682 words, according to the computer program count used to produce this brief.

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Dennis A. Winston