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

Case No. D069626

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents,

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

Real Parties in Interest.

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)

BRIEF OF REAL PARTIES IN INTEREST UNIONS IN OPPOSITION TO PETITIONERS CATHERINE A. BOLING, T.J. ZANE; AND STEPHEN B. WILLIAMS' PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This Certificate is being submitted on behalf of 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.

Pursuant to California Rules of Court, Rule 8.208, I certify that there are no interested entities or persons that must be listed in this certificate under rule 8.208.

Dated: July 13, 2016 SMITH, STEINER, VANDERPOOL & WAX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Federal Cases

California Administrative Decisions

Statutes

Regulations

Constitutions

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 the San Diego City Firefighters Local 145 (collectively "Unions"), submit this joint responsive brief in support of PERB's Decision No. 2464-M, in opposition to the Boling Petitioners' Petition for Writ of Extraordinary Relief, and in support of this Court's exercise of its power on the record before it, and in furtherance of the MMBA's objectives, to declare Proposition B invalid as applied to represented City employees covered by PERB's Decision.

INTRODUCTION

This case puts at issue whether a local public agency has the power to opt-out of the obligations imposed by the State's Meyers-Milias-Brown Act ("MMBA") by allowing its Strong Mayor, who serves as Chief Executive Officer and Chief Labor Negotiator, to co-legislate as a "private citizen" with official proponents of the "Comprehensive Pension Reform Initiative" ("CPRI") for the purpose of fundamentally changing pensions and compensation while avoiding the good faith meet and confer process the Act requires. The *City* set this MMBA-versus-local-initiative contest in motion by permitting its Mayor to defy the Charter-mandated "shared governance" roles assigned to its Mayor and City Council *in order to* defeat the representational rights of City employees and Unions guaranteed under State law.

As the expert state labor relations agency entrusted with the duty and the responsibility to enforce the MMBA in a manner which is both uniform across the State and consistent with its legislative purpose, PERB is correct to reject the City's MMBA opt-out scheme whereby the *City,* as public employer, seeks to enjoy the benefit of these enduring unilateral changes related to fundamental pension and compensation issues.

Nor does PERB's enforcement of the MMBA in this case in furtherance of its important statewide objectives pose a threat to First Amendment speech or petition rights or "core political speech." This case turns on *City's conduct* in violation of the MMBA. The act of *circulating* an initiative petition involves protected speech but the initiative process itself is a method of enacting legislation. There is no First Amendment right to place an initiative on the ballot. The act of proposing an initiative is not an exercise of the right to petition the government and it is not core political speech. It is the first step in an act of law-making. In fact, those who sign an initiative petition or vote for the proposed law are not involved in speech or petitioning; they are law-making.

While there is no question that initiative rights are important, the law is clear that these rights are *not* absolute. As co-legislators with Mayor Sanders, official proponents' local initiative effort to impose changes in terms and conditions of City employment must be tested against the state's interest

in having a uniform public sector collective bargaining law which confers substantive rights on public employees and imposes substantive duties on public employers. The largely undisputed record before this Court for review demonstrates that official proponents' exercise of their local initiative rights must yield in this case because the *City* abused the initiative power by allowing its Mayor to co-legislate as a "private citizen" in a manner inimical to the MMBA's principle goal of fostering communication, dispute resolution and *agreements* between public employers and their employees.

This Court should deny the Petition, affirm PERB's Decision and the remedies ordered, and, on the basis of this record, with the Boling Petitioners now before it, exercise its jurisdiction to declare Prop B invalid as applied to current and future City employees represented by Unions who are parties to the Decision. By such a declaration, this Court will provide a full measure of relief for the City's persistent failure and refusal to meet and confer despite Unions' repeated efforts to gain the City's timely compliance.

ADOPTIONS BY REFERENCE
[CRC rule 8.200(a)(5)]

To spare this Court additional reading, Unions oppose the Boling Petition and respond to the Boling Petitioners' Opening Brief, by joining in and adopting by reference the entirety of Unions' Brief in Opposition to the City's Petition for Writ of Extraordinary Relief in Case No. D069630. In further response to the Boling Petition, Unions also join in Respondent

PERB's Briefs in response to both the Boling Petition (D069626) and the City's Petition (D069630).

ADDITIONAL ARGUMENT

I. Unions Do Not Object to Boling Petitioners Being Heard Before This Court So That Complete Relief Is Attainable Without Further Protracted, Costly Proceedings

Unions join in and acknowledge the correctness of PERB's arguments that the Boling Petitioners do not have standing to petition for a writ of extraordinary relief from PERB's Decision No. 2464-M under the controlling MMBA statutory scheme.

However, since this Court has deferred the standing issue to be decided with the merits of the Boling Petition – after full briefing by all parties, Unions prefer that this Court hear and resolve Boling Petitioners' defense of their local initiative rights in the context of the MMBA and this record. Unions refer this Court to their Argument, Section V, in their Brief Opposing the City's Petition (69630) which they adopt here by reference.

PERB's Order does *not* invalidate Prop B in whole or in part. PERB specifically defers to the power of a *court* to address invalidation of this municipal election result. (XI-186:3023.) However, the Boling Petition treats PERB's Decision No. 2464-M *as if* it *does* invalidate the Prop B/Comprehensive Pension Reform Initiative ("CPRI"), though the Boling Petition erroneously entitles it "*Citizens'* Pension Reform Initiative." (BOB 9.)

As the Boling Petition sees it, "the outcome imposed by PERB was nullification of Proposition B." (BOB 48.) *Because* the Boling Petitioners read PERB's Decision as essentially "undoing" the effects of Prop B in its entirety (not only as applied to represented employees and Unions), they ask this Court to vacate and set aside PERB's Decision and Order.

For the reasons stated in Unions' Opposition Brief to City's Petition (D069630), this Court has the power – confirmed by established precedents in post-election proceedings – to declare the invalidity of Prop B as applied to represented employees covered by the PERB Decision and should do so on this record. With the City, PERB and all Real Parties In Interest now before it, including the Boling "official proponents," this Court's exercise of its jurisdiction to provide a declaration of Prop B's invalidity "as applied" to current and future represented employees covered by PERB's Decision 2464-M, will provide full relief in furtherance of the MMBA's statewide objectives while sparing all parties additional costly litigation – only to return here on review or appeal.

II. This Court Determined in 2012 That, Despite the Constitutional Issues Which May Be Implicated, PERB Has Exclusive Initial Jurisdiction To Adjudicate Unions' Unfair Practice Charges Related to the Comprehensive Pension Reform Initiative/Prop B

The California Legislature created a comprehensive labor relations scheme for local agencies (cities, counties and special districts) and employee

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organizations when it enacted the Meyers-Milias-Brown Act (MMBA) in 1968. The MMBA is codified at Government Code section 3500 *et seq.*

In 2000, the Legislature brought the MMBA within PERB's jurisdiction by adding section 3509 to give PERB exclusive initial jurisdiction over complaints alleging unfair labor practices under the MMBA.[1] (§ 3509; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605.) "A complaint alleging any violation of this chapter . . . shall be processed as an unfair practice charge by the board," with "the initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." (Gov. Code § 3509, subd. (b).)

Boling Petitioners assert that "PERB had no jurisdiction to conduct the hearing, which it so badly mismanaged to the exclusion of Proponents," and that this Court erred when it concluded otherwise in *San Diego Municipal Employees Association v. Superior Court* (*City of San Diego*)(2012) 206 Cal.App.4th 1447. (Boling Petitioners' Opening Brief ["BOB"] at 23.) However, the issue of PERB's initial exclusive jurisdiction has been fully-litigated and finally decided.

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[1] PERB's expanded jurisdiction to cover local government agencies does not apply to persons employed as peace officers. (Gov. Code § 3511, "Peace officer exemption.")

After this Court issued its Order to Show Cause and set oral argument on the petition for writ of mandate (D061724) leading to the published decision in *San Diego Municipal Employees Association,* the City filed a *new* Writ Petition (D062090), invoking this Court's original jurisdiction (Cal. Const., art. VI, §10), naming the *Boling* Petitioners as real parties in interest and seeking a stay of all CPRI-related proceedings before PERB or in the superior court on the basis of the identical jurisdictional and constitutional issues being addressed in the City's opposition to SDMEA's pending writ.

After oral argument in the *San Diego Municipal Employees Association* writ case on June 13, 2012, this Court issued a summary denial of the City's new Writ Petition (D062090), and on June 19, 2012, filed a 25-page published opinion in *San Diego Municipal Employees Association v. Superior Court (City of San Diego)*(2012) 206 Cal.App.4th 1447, granting MEA's Writ, upholding PERB's initial exclusive jurisdiction, and directing the respondent superior court to enter a new order denying the City's motion to stay the PERB proceedings. In pertinent part, this Court concluded:

> The mere fact that constitutional rights may be implicated or have some bearing on this dispute is not in and of itself sufficient to divest PERB of its exclusive *initial* jurisdiction to consider [the union's] allegations that City's conduct violated the MMBA. [...] [T]he issues here do involve mixed questions of law and fact, and therefore judicial intervention at this stage would deny us the benefit of PERB's administrative expertise. Moreover, on the core legal questions, we have not received the benefit of PERB's views on the issues through its briefs in this court, because PERB's briefs in this proceeding have been

> limited to defending its exclusive initial jurisdiction over the dispute, and have not contained PERB's view on the merits of whether the CPRI constituted an unfair labor practice. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458, 1463.)

In response, the Boling Petitioners and the City worked as a legal tag team to stop PERB's proceedings. On June 22, 2012, the Boling Petitioners filed a Petition for Review (S203478) of this Court's summary denial of the *City's* Writ Petition D062090, which named the Boling Petitioners as real parties in interest. However, the Boling Petitioners never mentioned this Court's Opinion in *San Diego Municipal Employees Association*; nor did they include a copy in their Petition. They told the Supreme Court that this Court "had summarily dismissed the City's Writ Petition D062090 without answering basic jurisdictional questions before PERB holds hearings."

On June 28, 2012, the City filed a petition for rehearing in *San Diego Municipal Employees Association* which this Court denied on July 3, 2012.

On June 25, 2012, the Supreme Court requested Answers from PERB and Unions in response to the Boling Petition (S203478) which were filed on July 3, 2012. The Boling Petitioners filed a Reply on July 9, 2012, and on July 11, 2012, the court denied the petition and application for stay of PERB's administrative proceedings scheduled to begin on July 17, 2012.

The same day as this denial issued – 6 days before the scheduled PERB hearing – the City filed a new Petition for Extraordinary Relief, Including

Writ of Mandate and Request for Immediate Stay of PERB's Proceedings, Case No. S203952. On July 13, 2012, the Supreme Court denied the City's petition and application for stay.

On July 27, 2012, the City filed a Petition for Review (S204306) in *San Diego Municipal Employees Association*, which the Supreme Court denied on August 29, 2012.

Boling Petitioners' re-assertion in their Petition of the same jurisdictional argument already decided by this Court in *San Diego Municipal Employees Association,* is frivolous.

III. Despite Their On-Going Litigation Efforts Before the Superior and Appellate Courts in 2012, the Boling Petitioners Never Sought Party Or Intervenor Status Before PERB

Boling Petitioners assert that "PERB excluded Proponents from the hearing, except to allow limited testimony by their attorney," (BOB 15), and that "PERB denied Proponents any role in the active adversarial process, the only exception being through the City calling one of Proponents' attorneys as a witness." (BOB 44) In support of both assertions, Petitioners cite only AR 15:192:3994, line 1-4007, line 16, which is the testimony of their attorney Lounsbery, called as a witness by the City. There is no record citation to support the assertion of "exclusion" or "denial." Nor *did* PERB in fact order them excluded as parties, intervenors or witnesses. The three individual Boling Petitioners (Catherine April Boling, T. J. Zane and Stephen B.

Williams) never applied to intervene in the PERB proceedings under PERB's joinder regulation as individuals with an interest relating to the subject of the UPC action. (Cal. Code Regs., tit. 8, § 32164, subd. (d).) Nor did the City apply for a joinder order on their behalf. With no limitations having been set by PERB on the witnesses to be called by any party to the unfair practice proceedings, the City called only one witness – Kenneth Lounsbery, Boling Petitioners' attorney. (AR:XV:3993-4008.)

Moreover, the Boling Petitioners assert that the scope of the PERB hearing and the questions posed to Mayor Sanders and his staff about the Mayor's involvement with "private persons, including Proponents," were "improper," because these private persons are "political opponents" of Unions and they were "preparing a ballot measure to be circulated, using private funds and discussing related political issues." (BOB 15, 49.) This argument alone strongly suggests that the Boling Petitioners did not in fact wish to be made parties to the PERB proceedings at all. This explains why they directed their legal resources elsewhere and never sought directly, or through the City, to be made parties.

Furthermore, Boling Petitioners were actively litigating as a tag-team with the City during the months leading to the hearing before PERB which began on July 17, 2012, after this Court lifted the stay by writ granted in *San Diego Municipal Employees Association.* In addition to their efforts detailed

in Section I, above, to procure a stay of all PERB proceedings from the California Supreme Court after this Court lifted the stay, the three Boling Petitioners had also filed a civil complaint (SDSC Case No. 37-2012-00093347-CU-MC-CTL) on March 5, 2012, against PERB and five individually-named Board Members for injunctive relief to halt all administrative actions related to CPRI, actual damages and attorneys' fees.

Finally, Boling Petitioners assert that PERB denied their application to submit exceptions to the ALJ's Proposed Decision. (BOB 17.) However, their citation to the record in support is to their proposed "Brief In Support of City of San Diego's Statement of Exceptions." (X, 162:2735-2760.) There was no PERB order denying this request and Petitioners cite no such order. Their application came before the Board itself in due course and was granted. (X, 178:2890.) In response, Boling Petitioners repackaged their original proposed submittal simply renamed as "Proponents' Brief In Support of Their Right to Prepare and Circulate A Citizens' Initiative," with an argument added that PERB had improperly and unconstitutionally excluded them from participating in the Administrative Proceedings and from defending Proposition B. (XI, 180:2899-2927.)

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IV. Boling Petitioners' *Quo Warranto* Jurisdictional Argument Lacks Merit Because Unions Were Obligated By Government Code Section 3509 to Establish City's Violation of MMBA In Connection With CPRI In Proceedings *Before* PERB

The Boling Petitioners argue 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 (Gov. C. § 810) filed in the Superior Court, upon a grant of authority by the Attorney General, was the *only remedy* available to Unions to challenge the validity of CPRI as a local citizen's initiative measure. (BOB 25-26.) This argument is also frivolous.

Boling Petitioners erroneously rely on *quo warranto* cases decided under the MMBA *before* 2001 when the Legislature expanded PERB's exclusive initial jurisdiction to include the Meyers-Milias-Brown Act, Government Code section 3500, *et seq.* (See BOB 25.) A recent *quo warranto* case involving the MMBA, which Boling Petitioners do not cite, is *Bakersfield Police Officers Association* (2012) 95 Ops.Cal.Atty.Gen. 31, where the Attorney General authorized the Bakersfield Police Officers' 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.)

Thus, as this Court already recognized in *San Diego Municipal Employees Association*, when challenging the validity of Prop B as applied to

the City employees they represent, Unions did not have the option to bypass PERB – which is precisely why MEA pursued and achieved writ relief in this Court in *San Diego Municipal Employees Association* to assure that Unions' right to a hearing before PERB would occur in a timely fashion.

Finally, Boling Petitioners are wrong when asserting that voter-approved initiatives can *only* be invalidated by means of a *quo warranto* proceeding. There are multiple instances in the case law where appellate courts have exercised their jurisdiction outside the *quo warranto* setting to render a post-election declaration of invalidity related to a local initiative. Indeed, one need look no further than the decision in *Howard Jarvis Taxpayers Assn. v. City of San Diego* (4th DCA, Div. 1, 2004) 120 Cal.App.4th 374, declaring the invalidity of two ballot measures proposing to amend the City Charter – one, a citizens' initiative (garnering 54.4% of the vote) and the other, a competing City Council-sponsored measure (garnering 50.3%).

V. Boling Petitioners Are Bound By the Same Standard of Review Applicable to the City

The Boling Petitioners' challenge to PERB's findings with respect to questions of fact, including ultimate facts, shall be conclusive if supported by substantial evidence in the record considered as a whole, and courts may neither re-weigh the evidence nor substitute its judgment for that of the Board on review. (Gov. C. § 3509.5, subd. (b); *Regents of the University of California v. PERB* (1986) 41 Cal.3d 601, 617.)

Moreover, "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.'" (*San Diego Housing Commission v. PERB (SEIU Local 221)* (2016) 246 Cal.App.4th 1, 12.) Since PERB's primary responsibility is to determine the scope of the statutory duty to bargain and to resolve charges of unfair refusal to bargain, a reviewing court owes PERB's legal determination deference and its "interpretation will generally be followed unless it is clearly erroneous." (*Ibid; San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, 856.)

Finally, when PERB construes a labor relations act "in light of constitutional standards," as it did here, the same level of deference applies as with any other PERB determination. (*Cumero v. PERB* (1989) 49 Cal.3d 575, 587; *PERB v. Superior Court* (1983) 13 Cal.App.4th 1816, 1828.)

VI. The Boling Petition Presents No Colorable Basis For This Court to Determine That PERB Erred When Concluding That the City Violated the MMBA and That Traditional Restorative and Compensatory Remedies Within the Limits of PERB's Quasi-Judicial Power Are Appropriate

With this standard of review in mind, it is readily apparent that the central defect in the Boling Petition is its failure to address PERB's findings of fact or legal determinations by specific reference to the *City's* undisputed conduct when scrutinized under the MMBA itself or by reference to the

judicial and administrative case law interpreting and applying it since its enactment in 1968. (See BOB 11-12.) It is not enough for the Boling Petitioners to criticize evidence it alleges was "improperly admitted," (BOB 15), or questions it alleges should not have been asked (*Ibid*); or an "improper (hearing) scope" only "refocused" when its attorney testified. (BOB 49.) They must show why and how PERB's findings of fact, including ultimate facts, related to the *City's* conduct evaluated under the MMBA statutory scheme, are not supported "by substantial evidence in the record considered as a whole."

Having failed to do so, the Boling Petitioners do not show that PERB's Decision No. 2464-M is "clearly erroneous" and must be vacated and set aside. Nor have the Boling Petitioners raised any specific challenge to the restorative and compensatory remedies imposed by PERB in accordance with well-established case law when a unilateral change in negotiable subjects occurs in violation of the MMBA.

VII. The Boling Petitioners Overstate The Case For the Exercise of Local Initiative Powers When A Matter of Statewide Interest Is Adversely Impacted

The Boling Petitioners join the City in overstating the case for local initiative rights under California's Constitution. There is no doubt that these rights are important but they are *not* absolute. Any exercise of "home rule" constitutional power over *municipal affairs*, remains subject to preemptive

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state law. (Cal. Const., art. XI, § 5(a); *Howard Jarvis Taxpayers Assn. v. City of San Diego, supra,* 120 Cal. App. 4th 374, 385.)

Whatever disagreements may exist regarding the scope of the phrase "municipal affairs," there is unanimous agreement that "local legislation may not conflict with statutes such as the MMBA which are intended to regulate the entire field of labor relations of affected public employees throughout the state." (*San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500, citing *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295.)

As City Attorney Goldsmith's 2009 Memorandum of Law acknowledges: "the duty to bargain in good faith established by the MMBA is a matter of statewide concern and overriding legislative policy, and nothing that is or is not in a city's charter can supersede that duty." (XVIII-Ex. 24: 4723.)

Moreover, the constitutional right to initiative and referendum guaranteed under article II, section 11, is also *not* absolute in the MMBA context. Citizens' rights to amend a local city charter by ballot measure derive from the exact same source in the constitution as the rights a City Council has to place such a ballot measure before the electorate. Thus, either the City Council votes to put a measure before the voters or an official proponent

circulates a petition to do it. In either case, the Council or the official proponent fills a legislative role in the process of amending the Charter.

Seal Beach teaches, as explained in detail in Unions' Brief in Opposition to City's Petition, that the constitutional right of the City Council to propose a ballot measure to change negotiable subjects is restricted by the obligation to comply with the MMBA. Here, Mayor Sanders sought to by-pass the Council – and thus by-pass the *Seal Beach* meet and confer obligations of the MMBA – by *acting* as if he were any other "private citizen" while contemporaneously fulfilling his Charter-mandated roles as elected Chief Executive Officer and Chief Labor Negotiator. As PERB concluded, allowing the Mayor to become proponent-in-chief of a citizens' initiative intended to change negotiable subjects – but designed to function as an MMBA by-pass scheme – is repugnant to the purpose and objectives of the Act.

Abundant case law – cited in Unions' Brief in Opposition to City's Petition – establishes that *local* initiative and referendum rights are limited or barred entirely, despite their constitutional pedigree, when the Legislature determines that a matter of statewide importance is at stake. Certain state laws which regulate land use, zoning or planning do *not* reflect a sufficiently strong *statewide*, as opposed to local interest, and thus do not displace or limit the power of local initiative. However, other laws of statewide interest *do* and the MMBA must be among them – certainly where the local initiative power has

been patently abused by the *City* in a manner antithetical to the MMBA's purposes and objectives.

Furthermore, by their dismissive assertion that "collective bargaining is not a constitutional right, but a subject for state law," (BOB 42), the Boling Petitioners display their misunderstanding of how the *constitution* itself elevates matters of statewide interest to constitutional protection such that they are not subservient to local initiative or referendum powers. As our Supreme Court cautioned in *Galvin v. Board of Supervisor* (1925) 195 Cal. 686, the initiative amendment to the constitution in 1911 must be interpreted "in harmony with the other provisions of the organic law of this state of which it has become a part," because "to construe it otherwise would be to break down and destroy the barriers and limitations which the constitution, read as a whole, has cast about legislation, both state and local." The *Galvin* court notes that the constitution's grant of power to the legislature to enact general and uniform laws itself constitutes a limitation upon the power of local pubic entities, whether acting through their regularly legislative body or attempting to act directly through initiative legislation. (*Id.* at 692-3.)

Outside the MMBA context, the will of the voters can be set aside in furtherance of the State's important interest in regulating the integrity of the elective franchise. Proof of offenses against that franchise, as defined in the Elections Code, empower our courts to annul a successful candidate's election

notwithstanding the fact that the number of unqualified voters fraudulently registered or the number of votes unlawfully solicited are too few to have changed the outcome of the election. (*Bradley v. Perrodin* (2003) 1006 Cal.App.4th 1153, 1167.) The lesson is not difficult to ascertain. The *state's* interest in discouraging unlawful conduct is more important than the will of the voters expressed in any one election.

VIII. This Record Presents Compelling Grounds For A Finding of MMBA Preemption Over This Local Initiative Because the *City* Used It As An MMBA Opt-Out Scheme

As PERB emphasized, restoration of the prior *status quo* in necessary to affirm the principle of bilateralism in negotiations, which is the "centerpiece" of the MMBA (*Voters for Responsible Retirement, supra*, 8 Cal.4th at 780), and to vindicate the authority of the exclusive bargaining representative in the eyes of the employees. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51, p. 5.) (XI-186:3019.) While the Boling Petitioners and the City mock the notion that the Prop B citizens' initiative could be viewed as "impure" for any legally-significant purpose in this MMBA context, the undisputed facts establish that Mayor Sanders became erstwhile co-legislators with official proponents – and they with him – for the purpose of altering City employees' terms and conditions of employment by Charter amendment and without a meet and confer process under the MMBA.

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As PERB concluded, the fact that third parties beyond the Board's jurisdiction, have benefitted by the City's unlawful conduct, does not preclude PERB from ordering a remedy to effectuate the state's policies and purposes even when that remedy affects third parties even when those third parties were exercising constitutionally-protected rights. (*Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712; *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, 1137-38.) (XI-186:3026-3028.)

While the Boling Petitioners prefer to characterize the facts as showing that the Mayor simply "supported" their initiative, they fail to address the Mayor's conduct beginning in November 2010 under the MMBA "unilateral change" rubric. As PERB also noted, even at the formative stages, before the language of CPRI had been hammered out, Mayor Sanders' participation in the discussion was considered important enough that "meetings were scheduled, cancelled and re-scheduled to accommodate his schedule." (XI-186:3033.) In fact, the whole ballot measure endeavor was placed on hold for several weeks to allow for a compromise between Mayor Sanders and Councilmember DeMaio. (*Ibid.*) "The Mayor's participation and support were apparently important enough to the initiative's success that they were willing to wait for a compromise with the Mayor if it meant having his public support. (*Ibid.*)

Thus, the official proponents, who played no public role in the matter, took full advantage of the governmental power, prestige, visibility, and

credibility which their co-legislator *Mayor Jerry Sanders* brought to their common legislative cause. They also took advantage of the legal, financial and operational expertise he and his key staff brought to bear. Even as Mayor Sanders served as the *City*'s Chief Executive Officer and Chief Labor Negotiator, he became CPRI proponent-in-chief. Every time he spoke publicly about the need for this initiative, whether inside or outside City Hall, on the City Concourse, on TV or in another setting, he was introduced as "Mayor Jerry Sanders." (XIII-3363:3-18.) Every media account related to this initiative – and there were many – referred to Mayor Sanders as its crafter or one of its crafters. No media account ever referred to the actual signatories on the Notice of Intent to Circulate – T. J. Zane, April Boling, or Steve Williams – as the crafters or, for that matter, even as the proponents. This was *the Mayor's* initiative and he proudly laid claim to it before and after it passed without disagreement from the official proponents.

Even after unfair practices charges had been filed, complaints had been issued, and injunctive relief had been sought to preserve the status quo to permit good faith meet and confer, the official proponents wanted Mayor Jerry Sanders and two Councilmembers to sign the "Argument in Favor" of Prop B so that every registered voter would receive the Mayor's written promise that a "yes" vote would bring "more City money for priorities like: fixing potholes and street repairs, maintaining infrastructure, restoring library hours, and re-

opening park and recreation facilities." (XX-Ex.98:5193.) The San Diego County Taxpayers Association is identified to every registered voter as an "endorser" of Prop B.

As the court in *Chula Vista Citizens for Jobs and Fair Competition v. Norris* (2015) 782 F. 3d 520, 540, emphasized "voters act as legislators in the ballot-measure context" and they "have an interest in knowing who is lobbying for their vote." In fact:

> Knowing which interested parties back or oppose a ballot measure is critical, especially when on considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. (*Id.* at 539-540.)

Having failed and flatly refused to meet and confer in recognition of the important substantive representational rights afforded to its employees under state law – and despite success after success at the bargaining table – Mayor Sanders threw the weight of his elected office behind the initiative he set in motion on the 11th floor of City Hall on November 19, 2010. In no sense of the word was the *City* "impartial" while its citizens decided whether to change negotiable subjects by Charter amendment.

Indeed, the court in *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, put the matter plainly when a zoning modification ordinance to "allow and regulate card room gaming" was before the voters. The City of Albany's statement of the ballot question offended the

"principle of governmental impartiality" because the City told voters that a "yes" vote would "provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access." (*Id.* at 1225-1226.) The court emphasized:

> Government action which may tend to influence the outcome of an election operates in an area protected by the guarantee of equal protection and freedom of speech. [...] A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. (*Id.* at 1227.)

Thus, as the official proponents, Boling Petitioners, "took the benefit" of this high-profile partnership with City government to accomplish mutual goals to change terms and conditions of employment by Charter amendment without meet and confer under the MMBA. Now they "must bear the burden." (See Civil C.§ 3521.) The *City's* participation in and influence over this local initiative through its elected Mayor, while failing and refusing to bargain over the negotiable subjects it addressed, taints the outcome of this local legislative effort. The result cannot be reconciled with the statewide objectives of the

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MMBA and thus, on the undisputed factual record here, this Prop B initiative effort must yield to those objectives.

Dated: July 13, 2016 SMITH, STEINER, VANDERPOOL & WAX

BY: Ann M. Smith
ANN M. SMITH
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Association

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 5,383 words.

Dated: July 13, 2016

ANN M. SMITH

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

Case No. D069626

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,
Petitioner,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents,

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

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

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

On July 13, 2016, I served the within document described as:

BRIEF OF REAL PARTIES IN INTEREST UNIONS IN OPPOSITION TO PETITIONERS CATHERINE A. BOLING, T.J. ZANE; AND STEPHEN B. WILLIAMS' PETITION FOR WRIT OF EXTRAORDINARY RELIEF

on the interested parties in this action via the method indicated:

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Party	Method of Service
Jose Felix De La Torre, Esq. Wendi Lynn Ross, Esq. Public Employment Relations Board 1031 18th Street Sacramento, CA 95811 Telephone: 916-322-8231 Fax: 916-327-7960 Email: PERBLitigation@perb.ca.gov (Attorneys for Respondent Public Employment Relations Board)	First Class Mail & E-mail
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[X] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. The envelope or package was placed in the mail at San Diego, California.

[X] **(BY ELECTRONIC SERVICE (E-MAIL))** I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) to the electronic service address(es) listed above on the date indicated. I did not receive within a reasonable period of time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 13, 2016, at San Diego, California.

ELIZABETH DIAZ