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

Case No. D069630

CITY OF SAN DIEGO,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, DEPUTY CITY ATTORNEYS ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO, CATHERINE A. BOLING, T.J. ZANE, AND STEPHEN B. WILLIAMS,

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 CITY OF SAN DIEGO'S 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

BY: Ann M. Smith
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Real Parties in Interest San Diego Municipal Employees Association, Deputy City Attorneys Association, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (collectively "Unions") submit this joint responsive brief in support of PERB's Decision No. 2464-M and in opposition to City of San Diego's Petition for Writ of Extraordinary Relief. In addition to the evidence and arguments presented below, Unions also join in and adopt by reference all of PERB's Respondent's Brief in support of its Decision. (CRC rule 8.200(a)(5).)

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 using the legal fiction that its "Strong Mayor," who serves as Chief Executive Officer and Chief Labor Negotiator, can contemporaneously act as a "private citizen" for the purpose of avoiding the good faith meet and confer process the Act requires.

There is no dispute that the subject matter of the "Comprehensive Pension Reform Initiative" ("CPRI") – which became Proposition B on the June 2012 ballot – covers matters at the very heart of the employment (and representation) bargain – pensions and compensation. This initiative does exactly what Mayor Jerry Sanders said it would do when he made its passage

his primary objective during his last two years in office. CPRI does not simply "reform" pensions in the City of San Diego, it "transforms" them by eliminating traditional defined benefit pensions and replacing them with a 401(k)-style plan for all new City employees, except police, and "pays for" the transition by freezing the compensation of existing employees for five years.

There is also no dispute that Unions and represented employees were entirely excluded from the "transformation" which CPRI has imposed on them. Despite on-going successes at the bargaining table, Mayor Sanders made a firm policy determination to change these fundamental terms of City employment *in the City's interest* and to achieve these changes by citizens' initiative to avoid his Charter obligations to "share" governance with the City Council in order to by-pass the MMBA. The Mayor refused repeated demands to bargain; the City Council failed to intervene to perform the City's mandatory meet and confer duties; and the City Attorney confirmed the City's final, definitive flat refusal to bargain.

Enforcement of the MMBA in this case in furtherance of its important statewide objectives, poses no threat to First Amendment speech or petition rights. This case turns on *conduct* in violation of the MMBA. The act of *circulating* an initiative petition involves interactive communication but the initiative process itself is a method of enacting legislation not of "petitioning" the government. As co-legislators with Mayor Sanders, official proponents'

local initiative effort must be tested against the preemptive statewide obligations under the MMBA – and, where, as here, City government itself set the initiative in motion for MMBA avoidance purposes, the legislative effort must yield to the representational rights of City employees and Unions.

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.

PERB has ordered a remedy which is both restorative, compensatory and fully consistent with PERB's legislative mandate and established case law in the context of unilateral change cases. In its strenuous opposition to PERB's role in this case, the City has continued its strong partnership with the Boling Petitioners as official proponents of the CPRI, working as a legal tag-team to preserve the unilateral changes imposed on represented employees without bargaining.

While there is no question that initiative rights are important, the law is clear that these rights are *not* absolute. When a statewide interest of the type and quality reflected in the MMBA is at stake, these rights must yield – especially on the largely undisputed record before this Court for review which

demonstrates that the *City's* use of the initiative to by-pass the obligations of the MMBA is both an abuse of the local initiative power and 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.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statement of Facts

A. City's "Strong Mayor" Serves As Chief Executive Officer and Chief Labor Negotiator Under the MMBA

City Charter article XV establishes a "Strong Mayor Form of Government," defining roles and veto power for a "Strong Mayor" elected on a City-wide basis and a 9-member City Council elected by Districts. (XIII-3337:26-3338:16;XIV-3512:11-26;XVII-Ex.8:4492-4502;XVIII-Ex.23&24:4707-40;XXI-Ex.175:5532-47.)[1]

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[1] All citations are to the Administrative Record. The roman numeral is the volume number followed by the pages and lines of testimony or the exhibit number with relevant pages. Multiple page and line references for

The Mayor serves as the City's Chief Executive Officer, responsible for the day-to-day operations of the City functioning as a business, government, and employer. (XIII-3348:21-3349:8.) As the City's Chief Labor Negotiator, the Mayor is responsible for the State-mandated good faith meet and confer process with City's Unions over negotiable subjects defined under the State's Meyers-Milias-Brown Act (MMBA). (*Id.* 3349:17-3350:4.) The Mayor gives direction to his Negotiating Team and determines the City's bargaining objectives – what concessions, reforms, changes in terms and conditions of employment are important to achieve in his judgment. (*Id.* 3349:9-16*3349:25-3350:4*3350:8-20*3351:26-3352:3;XII-3191:9-3192:2*3192:16-3193:5*3193:12-18;XIV-3705:17-28.)

Under the City's Code of Ethics, no elected official may engage in any transaction which is "incompatible with the proper discharge of official duties" or "would tend to impair independence or action in the performance of such duties." (XVIII-Ex.15:4619.)

Before the present controversy, City Attorney Jan Goldsmith published a Memorandum of Law (MOL) in January 2009 addressing the respective roles of the Mayor and City Council on matters of meet and confer under the MMBA and the City's Employer-Employee Relations Policy, Council Policy

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testimony in the same volume are separated by an *. Where a volume has only one tab, the tab number is not included; the tab number is included where it aids in locating the cited material.

300-06. (XII:3191:9-3192:2*3192:16-3193:5;XVIII-Ex.17:4626-38;Ex.24:4727-8.) This MOL confirms that, as the City's elected chief executive officer, the Mayor gives controlling direction to the administrative service; recommends to the Council such measures and ordinances as deemed necessary or expedient; makes other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable; and has inherent authority and responsibility for labor negotiations because it is an administrative function of local government. It is the Mayor who must "ensure that the City's responsibilities under section 3500, subdivision (a) of the MMBA as they relate to communication with employees are met." (XVIII-Exh. 24:4721*4727-4728.)

This 2009 MOL also expressly acknowledges that, although the Mayor and City Council have a "shared duty" to comply with the "meet and confer" obligations set forth in Government Code section 3505, the Mayor's role is not merely an advisory function. The Mayor has a *duty* to negotiate with Unions in an attempt to reach an agreement for the Council's consideration and possible adoption." (*Id.* at 4728.)

B. Mayor Sanders Led the City's Meet-and-Confer Process With Unions To Achieve Charter Amendments, A New Pension Plan, and Compensation Reductions

In 2006, Mayor Sanders met and conferred with Unions regarding two ballot proposals designed to amend the City's Charter on negotiable subjects:

(1) authorizing bargaining unit work to be contracted out under a managed competition system; and (2) requiring a vote of the electorate to approve future increases in pension benefits. This meet and confer process "wrapped up before the August deadline (for Council) to put (these measures) on the ballot." (XIII-3345:3-20.)

In 2008, Mayor Sanders negotiated a new "hybrid" defined benefit/defined contribution pension plan with Unions which achieved his reform objectives to de-incentivize early retirements and reduce the City's pension costs. (XIV-3628:18-3630:4; XX-Ex.143:5354-56.)

Mayor Sanders led a press conference outside City Hall to announce the deal subject to City Council's action:

> We are all assembled here today to announce **that the unions and I as the City's lead negotiator have arrived at a tentative agreement regarding pension reform**. [...] This compromise helps us achieve the same underlying principles that I always thought were critical. . . shift(ing) risk away from taxpayers. [...] I think this is a very fair compromise for both taxpayers and future City employees. I want to end by thanking the unions and their representatives . . . for being willing to come and stay at the table until this compromise has been worked out. I think it's in the best interest of all parties that we arrived at this arrangement and **would urge the City Council to pass it unanimously once it's before them**. (XXI-Ex.161:5519[video clip].)

Before reaching this tentative agreement with Unions, Mayor Sanders had announced his intention to lead a voter initiative to get these pension reforms on the ballot. However, he changed course and returned to the bargaining table after the City Attorney's Office published a Memorandum of

Law (MOL) dated June 19, 2008, directed to the Mayor and City Council. (XIV-3627:8-25.) This 6/19/08 MOL concluded that the Mayor cannot "initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions" without meeting and conferring with the unions:

> [S]uch sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition; the City would have the same meet and confer obligations with its unions as [if he were proposing a ballot measure on behalf of the City]. (XVIII-Ex.23:4710.)

The Mayor submitted this tentative pension reform agreement to the City Council for "determination" under the MMBA and the Council approved it. The new negotiated pension plan became a term of a Council-approved Memorandum of Understanding (MOU), effective July 1, 2009, through June 30, 2011, which also included negotiated compensation reductions. (XII-3183:6-12;XIV-3518:9-3519:1.) This MOU also included the parties' agreement to "meet and confer if the City proposes to introduce ballot measures, which relate to or would impact wages, hours, working conditions or employee-employer relations." (XII-3184:3-3185:17;XIX-Ex.44a:4917.)

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C. From November 2010 Through January 2011, As Mayor Sanders Prepared to Lead Meet and Confer Over New MOUs and Retiree Health Benefits, He Announced and Promoted His Determination That Further Pension Reforms Were Needed and That He Would Accomplish Them By Initiative

In November 2010, without first inviting meet and confer with Unions as occurred in 2006 and in 2008 over his proposed pension reforms, Mayor Sanders used the City's website to announce his intent to place a pension initiative on the ballot.[2] (XVIII-Ex.25:4742-43; XIII-3307:10-3309:21.) With his Director of Communications' assistance, the Mayor's "home page" declared:

> "Mayor will push ballot measure to eliminate traditional pensions for new hires at City. [...] [The Mayor] will place an initiative on the ballot to eliminate traditional pensions and replace them for non-safety new hires with a 401(k) style plan. (XVIII-Ex.25:4742-43; XIII-3307:10-3309:21;XV-3911:8-24.)

With City Attorney Jan Goldsmith at his side, Mayor Sanders held a kick-off press conference on his 11th floor at City Hall to announce his pension reform plans. (XVIII-Ex.25:4747;XIII-3312:18-3313:12*3319:23-3320:12;XV-3914:13-16*3914:23-3915:27*3917:18-27;XIV-3533:17-3534:9.) He invited the City Attorney "because there would be legal issues involved in all of this and I think it was important for him to be there to guide us." (XIII-3319:23-3320:12.)

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[2] For the Court's convenience, Exhibits 25, 26 and 38 (totaling 6 pages), described in this Section C with citations to the AR, are included with Unions' Brief pursuant to CRC rule 8.204(d).

NBC San Diego news coverage of the Mayor's press conference included a photograph of the Mayor standing in front of the City seal to make his initiative announcement. Under the photograph, NBC wrote: "Mayor proposes to replace pensions with 401(k) retirement plans." (XVIII-Ex.27:4749; XIII-3313:13-3314:1.) The NBC news account also informed the public that "San Diego voters will soon be seeing signature gatherers for a ballot measure that would end guaranteed pensions for new City employees." (XVIII-Ex.27:4749; XIII-3314:6-27.) NBC quoted Mayor Sanders: "the notion that all public employees should have a richer retirement than the taxpayers they serve, while now enjoying comparable pay and great job security, is thoroughly outdated." (XIII-3314:28-3315:14.)

The Mayor's Office issued a news release – styled as a "Mayor Jerry Sanders Fact Sheet" – to announce his decision. (XVIII-Ex.26:4745-46; XIII-3307:23-3308:11*3310:28-3312:17; XV-3912:2-13.) Councilmember Kevin Faulconer disseminated the Mayor's press release by e-mail: "The Mayor and I announced today that we would craft a groundbreaking pension reform ballot measure and lead the signature gathering effort to place the measure before voters." (XXIII-Ex.188:5761-62; XV-3771:18-3772:26.)

On November 19, 2010, at 1:43 p.m., the Mayor sent an e-blast on the subject: "Rethinking City Government," from JerrySanders@sandiego.gov using the "Blue Hornet" mass email system to reach about three to five

thousand community leaders and "all sorts of people," announcing his policy decision and initiative plans:

> "Today Councilmember Kevin Faulconer joined me to announce our intention to craft language and gather signatures for a ballot initiative that will eliminate public pensions as we know them."

(XXIII-Ex.182:5747-49;XV-3907:10-3908:6*3908:15-21*3910:17-3911:7*3912:14-24*3913:9-14.)

The Mayor's pension initiative announcement in November 2010 followed a decision-making process between the Mayor and his staff in the Mayor's Office which culminated in his executive decision that the defined benefit pension plan for non-safety employees should be eliminated and replaced with a 401(k)-style pension concept, and that he "would promote and pursue this 401(k)-style pension concept as his focus during the last two years of his term in office." (XIII-3306:27-3307:9;XIV-3527:12-22*3531:18-28*3532:21-26;XV-3835:20-3836:2.) There was an expectation that the Mayor's staff would regard the pension reform measure as City business and within the scope of their official duties. (XIII-3321*3330-32;XV-3807:11-23*3957:6-15.)[3]

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[3] Neither Unions nor the City dispute the fact that Mayor Sanders was acting at all times for the *City's* benefit in connection with his pension reform initiative efforts. As PERB notes in its Decision, the City's policies restrict e-mail and internet use to "work-related" or other "purposes that benefit the City." (XI-186:3004.)

Mayor Sanders' purpose in using an initiative to achieve his pension reform objectives *for the City* was to avoid the meet and confer process. He explained in a tape-recorded interview with *CityBeat* Magazine:

> "When you go out and signature gather and it costs a tremendous amount of money, it takes a tremendous amount of time and effort [...] But you do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through meet and confer and you don't know what's going to go on at that point." (XIII-3342:13-3343:2*3343:3-10*3343:28-3344:9*3344:10-3345:2*3345:21-3346:1*3359:26-3360:15;XX-Ex.91:5173-76[transcript];XXI-Ex.160:5517[audiotape].)

Mayor Sanders and key staff members participated in a number of meetings with the Mayor's friend and political campaign consultant Tom Shepard to discuss both policy and strategy for achieving the Mayor's pension reform agenda by initiative. (XIV-3668:26-3669:16*3670:28-3671:16*3671:17-3672:27;XV-3793:17-3794:19.)

In early December 2010, Mayor Sanders' City-paid staff began promoting his pension reform initiative efforts to the media and others. (XIII-3320:23-3322:2;XV-3922:21-3925:11*3989:26-3990:24;XVIII-Ex.30:4772;XXIII-Ex.258:5810-12;Ex.259:5923-24*5926.)

On December 7, 2010, Mayor Sanders announced that his Director of Policy and Deputy Chief of Staff Julie Dubick who "had shepherded several high-profile projects, including the Mayor's pension reform efforts," would be promoted to Chief of Staff to help him "implement the next phase of my

reform agenda, which I will unveil at my State of the City Address in January." (XIV-3633:18-27*3634:8-3635:7*3640:28-3641:3.)

Mayor Sanders built support for his pension reform initiative with key business groups and individuals, including the three individuals (Williams, Boling and Zane) who became the "official proponents," starting with a meeting which Mayor Sanders initiated and led on December 3, 2010, for which his City-paid Policy Advisor prepared an agenda. (XV-3918:7-3919:22*3920:6-3921:11*3921:27-28;XXIII-Ex.201:5806-08) Mayor Sanders also promoted his pension reform initiative plan before the Chamber of Commerce public policy committee and then the Chamber's full Board of Directors. (XV-:3797:14-3798:5*3798:22-3800:9*3925:12-3927:9;XVIII-Ex.31:4474;Ex.35:4786;XXIII-Ex.189-190:5764*5766.)

Mayor Sanders formed a campaign committee "San Diegans for Pension Reform," under FPPC rules to "push forward with financing and fund-raising" in connection with his idea for a 401(k) style pension initiative. (XIII-3378:3-14*3379:7-16*3409:23-3410:25*3411:13-19*3432:25-3433:9*3434:10-12*3434:18-3435:18*3437:28-3439:7*3440:22-28;XVIII-Ex.34:4782-84;XIX-Ex.45:4980-81;Ex.50:4990-5002.)

By letter dated December 21, 2010, the Board of the San Diego County Taxpayers Association (SDCTA) notified Mayor Sanders and City Councilmembers that it had voted to adopt a set of "Pension Reform

Principles" for inclusion within any reform proposal to be adopted by the City Council "through the legally required negotiating process" or by a "vote of the people." Among these principles was "[t]he creation of a 401(k)-type plan for new hires coupled with either Social Security or an equivalent modest defined benefit plan." (XXIII-Ex.191:5768-70.)

On January 7, 2011, the Mayor's Director of Communications sent an e-mail to Fox News: "We're eliminating employee pensions as we know them and putting in place a 401(k) plan like the private sector. My boss, San Diego Mayor Jerry Sanders is available any time to come on The Factor to talk about what he's doing here in San Diego and the greater national problem." (XIII-3329:5-18*3330:27-3331:10;XVIII-Ex.36:4788.)

On January 12, 2011, *Mayor* Sanders delivered his annual "State of the City" Address to the City Council at a regularly-scheduled meeting as required by City Charter, article XV, section 265. (XIV-3544:8-3545:1.) Standing at a podium bedecked with the City seal, Mayor Sanders announced his pension reform initiative plans:

> "A few months ago, Councilman Kevin Faulconer, the city attorney and I announced we would bring to voters an initiative that would end public pensions as we know them in San Diego and replace them with a 401(k) plan similar to what is used in the private sector. We are doing this in the public interest, but as private citizens, and we welcome to this effort anyone who shares our goal."

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(XII-3277:14-20*3284:12-17*3285:14-3286:21*3287:9-19*3288:19-22*3289:5-8;XIII-3336:26-3337:1*3338:24-3339:13*3341:25-3342:7*3346:14-3347:8;XVIII-Ex.39:4818-28;XIX-Ex.39a:4831-41.)

The Mayor's Office issued a "Mayor Jerry Sanders Fact Sheet" on January 12, 2011 headlined "Mayor lays out vigorous agenda for 2011" to recap the Mayor's State of the City Address and confirm his plans for the "next wave of pension reform." Calling it a "time of optimism and opportunity," the Mayor pledged to use a ballot initiative to eliminate traditional pensions and replace them with a 401(k) style plan. (XIII-3334:14-3336:6; XVIII-Ex.38:4816.)

D. Despite On-Going Meet-and-Confer With Unions Over Compensation Cuts and Retiree Health Concessions, Mayor Sanders Never Initiated Meet-and-Confer Related to His Determination That 401(k)-Style Pension Reform Was Needed

In January 2011, the Mayor prepared for a meet and confer process to begin with Unions in February over contract terms for the fiscal year to begin July 1, 2011. He determined what proposals to make to change terms and conditions of employment to improve the City's fiscal condition. (XIII-3352:25-3354:1.) Having identified the need for a significant reduction in the City's retiree health liability, Mayor Sanders also directed his Negotiating Team to initiate meet and confer aimed at reducing the City's unfunded retiree health liability. (*Id.* 3352:4-24;XIV-3521:5-3522:21.)

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However, having "decided that the citizens' initiative was the right way to go" to achieve 401(k)-style pension reform, (XIII-3354:15-21.), when Mayor Sanders met and conferred with Unions from February through April 2011 related to MOU terms, and from January through May 2011 related to retiree health benefits, he never directed his Negotiating Team to present any proposal at the bargaining table related to any subject matter he was putting forward publicly for a Charter amendment by ballot measure, including a 401(k) style pension plan for new hires, or a 5-year freeze on pensionable pay increases. (XIII-3354:2-21;XIV-3539:22-27.)

"[O]nce there was the decision to proceed under the initiative process," (the notion of bringing these pension reform ideas to the bargaining table with Unions) never came up," either before or after the historic deal was reached with Unions on retiree health benefits. (III, 40:13-41:8.)

E. Mayor Sanders "Negotiated" With Outside Third Persons Over His Initiative's Terms Before Holding A Press Conference To Announce The Filing of A Notice of Intent to Circulate

After his Charter-mandated State of the City Address, Mayor Sanders continued to promote and garner media attention for his pension reform initiative as he fine-tuned its terms using City-paid staff. (XIII-3382:1-3385:1;XV-3809:14-3810:11*3810:28-3811:10*3827:26-3828:14*3937:8-23*3939:6-7*3939:24-3941:28*3942:1-18*3948:9-3949:9*3949:17-3950:17*3951:26-28*3990:27-3991:13;XIX-Ex.46:4983-84;Ex.49:4986-

88;XXIII-Ex.195:5782-83*Ex.203-207:5814-30;Ex.260-261:5928-30.)

City's Chief Operating Officer Jay Goldstone, who served at Mayor Sanders' pleasure, assisted with the fiscal analysis to support the Mayor's initiative effort. (XIII-3408:19-3409:10*3409:23-3410:2*3411:13-19*3411:27-3412:9;XIV-3509:26-28*3545:2-3547:22*3548:10-15*3548:20-3549:22*3565:28-3566:19;XIX-Ex.49:4986-88.)

The *Union Tribune* accurately reported that, between January 1st and March 31st 2011, the Mayor's San Diegans for Pension Reform committee paid money to a law firm for legal research, opinions and advice related to a pension reform ballot measure. (XIII-3378:3-3381:28*3439:23-27*3441:17-27;XIX-Ex.45:4980-81*Ex.50:4990-5002.) The committee's treasurer gave updates to the Mayor's Deputy Chief of Staff who reviewed the committee's FPPC filings because she "was keeping tabs on the activities of the committee." (XV-3816:16-3817:6.)

Mayor Sanders' City-paid Director of Special Projects knew – "as a consumer of news and a consumer of information about what's going on in the City" – about the Mayor's activities related to his initiative proposal:

> "I think that everyone was aware the Mayor was working on this. [...] [I]t was the subject of conversation and news broadcasts [...] I think my neighbors were aware of it." (XIX-

189:3270:27-3271:4*3276:19-28*3281:3-3282:27*3295:20-3296:26.)

Mayor Sanders negotiated with supporters outside the City to achieve his goals for the City through a single initiative. (XIII-3376:7-21*3377:6-26*3396:24-3405:28*3408:4-14*3414:5-17*3415:5-8*3421:14-27*3422:10-3423:10*3423:21-3424:9* 3479:6-23*3480:12-3481:7* 3485:10-18*3487:3-5;XV-3821:8-21.) His key policy staff, including COO Goldstone, participated in these negotiations. (XIV-3568:2-3572:2*3572:12-3573:4* 3574:13-19*3575:2-11*3576:9-12*3676:14-3679:3;XV-3729:24-3730:1*3811:11-3812:20*3813:3-3814:13.)

The San Diego County Taxpayers Association retained attorney Ken Lounsbery to work on the measure. He filed disclosure forms under the City's Municipal Lobbying Ordinance revealing an $18,000 payment for lobbying efforts directed at Mayor Sanders, Councilmember Faulconer, City Attorney Jan Goldsmith, COO Jay Goldstone, and Mayor's Chief of Staff Julie Dubick, over a "municipal decision" described as the "revision of City employee pension proposals," with the "outcome" being sought "an amendment of the City Charter by election ballot."[4] (XIV-3682:16-3684:13;XV-3999:15-4000:3;XX-Ex.125-126:5256-67.)

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[4] Mr. Lounsbery is counsel for the *Boling et al.* Petitioners in D069626 and was also the only witness the City called to testify at the PERB hearing.

Mayor Sanders' Chief of Staff (Dubick), his COO (Goldstone), and the City Attorney (Goldsmith), all reviewed drafts to shape the text of the initiative being written to achieve the proponents' agreed-upon objectives. (XIV-3576:26-3578:13*3579:7-12*3582:19-3584:9*3585:22-3587:8*3588:12-23*3589:6-27*3590:20-3591:3*3680:21-25*3681:5-10*3681:16-3682:15*3684:23-3685:15*3685:27-3687:3*3693:21-3694:18; XV-3821:27-3822:13* 3822:26-3823:25*3824:3-17.)

Before announcing on April 5, 2011, that a deal was reached on his pension reform initiative, Mayor Sanders made sure the text of the initiative was right. (XIII-3430:17-3431:7*3482:13-17*3491:12-17;XIX-Ex.54: 5013-21.) He "got the pieces (he) really needed, which was a 401(k) and having police remain competitive so that we can hire and retain." (XIII-3423:21-3424:9).

The Notice of Intent to Circulate Petition was filed to coincide with a widely-covered press conference which Mayor Sanders led outside City Hall on the City Concourse on April 5, 2011.[5] Mayor Sanders' Director of Communications and a communications staff member were also present. (XIII-3395:28-3396:9*3396:27-3399:18*3415:5-22*3416:17-3417:2*3419:5-14*3428:28-3430:13*3431:14-3432:24;XIX-Ex.51:5004;Ex.52:5006-07;Ex.54:5013-21.)

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[5] The City's "Statement of Facts" in support of its Petition begins on April 4, 2011. (City's Opening Brief [COB] at 13-14.)

Having been introduced as "Mayor Jerry Sanders," he spoke under a "Pension Reform Now" banner: "We've made progress over the last few years in reforming our (pension) system. Today we're taking the next step and let me tell you it's a big one." Sanders was talking about the contents of the CPRI/Proposition B initiative. (XIII-3339:18-3340:5*3376:25-3377:5*3421:1-13*3431:8-13;XIX-Ex.57:5006-07*5013-21*5028-29 [Fox News: "Pension Reformers Unite Behind Compromise Plan"];XXI-Ex.169:5515[KUSI videoclip].) Councilmember Carl DeMaio stepped to the podium to say: "The biggest appreciation that I have today is for our Mayor." Turning to Sanders, he continued: "Mr. Mayor, it was your leadership that allowed us to reach the deal we have today." (*Ibid.*) The three "official" proponents (Boling, Zane and Williams) had no speaking roles at this press conference.

F. Having Concluded His "Negotiations" With *Outside* Third Persons Over A "Comprehensive Pension Reform Initiative," Mayor Sanders Presented City Council With Tentative Agreements Reached With City's Unions Over Continued Economic Concessions and A Reduction in Retiree Health Benefits

In early April 2011, after meeting and conferring with Unions, Mayor Sanders sought City Council's approval for his tentative agreement reached with MEA to extend its existing MOU through June 30, 2012, to continue in effect the same six percent (6%) compensation reduction begun on July 1, 2009, as well as other economic concessions. (XII-3185:18-3186:26*3187:25-3188:2;XIX-Ex.56:5023-26;Ex.60:5045-46.)

Also in early April 2011, the Mayor signed a tentative agreement with San Diego City Firefighters Local 145 for a one-year extension of its MOU through June 30, 2012. (XIII-3473:7-13;XXI-Ex.174:5525-30.) In response to Mayor Sanders' pension reform bargaining demands, Local 145 agreed to reduce the defined benefit pension formula applicable to future new firefighters from the existing "3%-at-age-50" to a less favorable "3%-at-age-55." (*Id.* 5526.) Having procured this concession, Mayor Sanders informed Firefighters' Union President Frank DeClercq late on April 4, 2011 – before the Mayor's CPRI-related press conference the next day – that, in order to make a deal on his initiative, he agreed to include future firefighters in a 401(k)-style pension plan to replace a defined service and disability retirement benefit. (XIII-3473:14-3474:7.)

On May 6, 2011, the Mayor's Office issued a "Mayor Jerry Sanders Fact Sheet" announcing: "City labor unions reach historic deal on retiree healthcare benefits," and the Mayor conducted a news conference to publicize the deal. (XIII-3425:4-24*3426:5-13;XIV-3522:22-3523:10;XIX-Ex.62:5049-52;Ex.63:5054-55.) According to the Mayor, his Negotiating Team reached a tentative agreement "where no one was quite satisfied but everybody compromised," and it would be submitted to the City Council for action. (XIII-3425:4-21*3426:8-13;XIV-3522:22-3523:10;XIX-Ex.63.)

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On May 13, 2011, Mayor Sanders announced that the City Council had taken the first step to approve this historic tentative agreement implementing the Mayor's reform objectives, (XIX-Ex.65:5063-64;XIV-3523:11-16), followed by the Council's final approval. (XIV-3523:17-22;XIX-Ex.66:5066-72;Ex.67:5074-5104.)

However, at no time during the meet-and-confer process which Mayor Sanders led from January 2011 through tentative agreements reached in April on MOU extensions and in May on retiree health benefits, did the Mayor bring to the bargaining table any of the pension reform proposals he was talking about for an initiative. (XIV-3712:18-24.)

G. Persistent Union Demands to Bargain – Directed to Mayor Sanders and City Council – Were Met With A Flat Refusal From the City Attorney On Behalf of The *City*

By letter to Mayor Sanders dated July 15, 2011, MEA wrote that, despite the Mayor's having "bargained" with others inside and outside the City regarding the contents of his much-publicized "Pension Reform" Ballot Initiative, he had thus far ignored his bargaining obligations under State Law as the City's Strong Mayor and Chief Labor Negotiator, and had disregarded MEA's rights and disrespected MEA's demonstrated track record of engaging in good faith negotiations to find common ground on shared challenges. MEA explained:

> The contents of your Ballot Initiative clearly fall within the scope of MEA's representation [...]. Indeed, some of the subject

> matter [...] directly relates to matters on which MEA and the City have recently bargained and [...] reached agreements memorialized in MEA's MOU, Council Resolutions and Ordinances. [...] Please advise how you propose to proceed with this mandatory meet and confer process and when. In preparation, and unless advised to the contrary, MEA will treat the Ballot Initiative, as presently written, as your opening proposal on the covered subject matter. (XIX-Ex.72:5109-10,emphasis added.)

When no response arrived, MEA sent a second written demand on August 10th. (XIX-Ex.75:5112.)

By letter a few days later, City Attorney Goldsmith asserted that "the City's duty to meet and confer has not been triggered in relation to the CPR Initiative" because, assuming the proponents of the CPR Initiative obtain the requisite number of signatures and meet all other legal requirements, there will be "no determination of policy or course of action by the City Council within the meaning of the MMBA." (XX-Ex.76:5115-5117.)

MEA responded by letter dated September 9, 2011, renewing its demand for good faith meet and confer with Mayor Sanders as the City's CEO with the authority to give controlling direction to the administrative service of the City and to make recommendations to the City Council concerning the affairs of the City. (XX-Ex.78:5123-6.) MEA cited relevant Memoranda of Law issued by the City Attorney's Office in June 2008 and in January 2009:

> Mayor Sanders has clearly made a determination of policy *for this City* related to mandatory subjects of bargaining – and then promoted this determination using the power of his office as Mayor as well as its resources. [...] The conclusion is

> inescapable that Mayor Sanders made a deliberate decision to attempt to dodge the City's obligations under the MMBA by using the pretense that this is a "citizens' initiative" when it is, in fact, this *City's* initiative acting by and through its chief executive officer and lead labor negotiator, Mayor Sanders. (XX-Ex.78:5124-5.)

MEA's 9/9/11 letter concludes with separate bargaining demands "by copy of this letter" to Mayor Sanders as the *City's* chief executive officer and "by copy of this letter" to the City Council "to seek independent legal advice related to the *City's* obligations under the MMBA in the matter of Mayor Sanders' 'legacy' pension reform initiative *and* related to the duties and *rights* of the entire City Council in this policy-setting matter from which the Mayor has excluded them." (XX-Ex.78:5126.)

MEA wrote again to City Attorney Goldsmith on September 16, 2011, reiterating the *City's* on-going violation of the MMBA. (XX-Ex.82:5142-9.) By letters dated September 12, 2011, and September 19, 2011, City Attorney Goldsmith and then Deputy City Attorney Joan Dawson reiterated the *City's* refusal to bargain. (XX-Ex.79:5128-5133; Ex.83:5151-5155.)

By letter dated October 5, 2011, addressed to DCA Dawson, copied to Mayor and City Council, MEA made a fifth attempt to gain the City's compliance with the MMBA, stating in pertinent part:

> A proper legal analysis cannot begin and end with the fact that the *City Council* is *not* proposing this ballot initiative. This fact has never been in dispute. But the City Council is *not* empowered to act as the City's Chief Labor Negotiator under the Charter's Strong Mayor Form of Governance – the Mayor is; the

> City Council does not initiate the MMBA-mandated meet and confer process with this City's recognized employee organizations–the Mayor does; the City Council does not direct the activities of this City's Human Resources or Labor Relations Office–the Mayor does; the City Council does not employ outside labor counsel to conduct the required meet and confer processes in accordance with law– the Mayor does. The City Council's ability to fulfill its proper role on behalf of all residents across eight Council districts when influencing the Mayor's bargaining positions and/or in resolving any impasse at the bargaining table between the Mayor and this City's unions *depends* upon the Mayor's good faith fulfillment of his Charter-mandated role as Chief Negotiator. Where he fails to do so – as occurred here – he undermines the proper balance of power and shared governance established by the City Charter. [...] [T]his letter will serve as MEA's final, heartfelt demand that the *City* comply with the MMBA [...] (XX-Ex.87:5157-62.)

In response to the demand of Deputy City Attorneys' Association to meet and confer over the Mayor's initiative, the City's Human Resources Director Scott Chadwick explained that "based on the advice of the City Attorney, the Mayor was taking the position that there would be no meeting and conferring and it was not required." (XV-4016:7-4017:23.) It was stipulated that the City did not meet and confer with San Diego City Firefighters Local 145 or AFSCME Local 127 in response to their demands. (XV-3856:1-9*15-17;XXIII-Ex.251-255:5907-18.)

Mayor Sanders had *no* discussion with anyone in his office or in the City Attorney's Office about initiating meet and confer to bring the CPRI subject matter or his reform objectives to the bargaining table to discuss with Unions. (XIII-3459:3-13.) He never asked the City Council to consider, in

whole or in part, the subject matter covered by this initiative. (XIII-3465:23-3466:3.) Nor was this subject matter ever presented to any labor organization for meet and confer purposes. (XIII-3465:11-22;XV- 3853:26-3854:5.)

Mayor Sanders understood from the City Attorney and his office – and it was "settled" in his mind – that "not only did (he) have no duty to meet and confer but (he) could not meet and confer about this pension reform initiative" because it was a "citizens' initiative" and "not his." (XIII-3456:12-24*3457:9-24*3458:23-3459:2*3459:14-25*3460:9-24*3465:2-10.) He and his staff proceeded on the basis of this advice but would have changed course if instructed to do so by the City Attorney. (XIV-3619:23-3620:14*3703:11-19;XV-3837:16-3839:10*3845:22-3846:16.)

However, when MEA's demands to bargain were arriving from July through October 2011, the City Attorney's Office made no inquiries of the Mayor or his staff regarding their activities to-date related to the pension reform initiative. (XIII-3461:17-22*3461:26-3462:1;XV-3843:9-15.)

When *CityBeat* Magazine confronted Mayor Sanders in 2011 with the opinion issued by the City Attorney's Office in 2008 establishing the City's duty to meet and confer over any Mayoral-sponsored voter initiative, he was dismissive – describing this legal opinion when Mr. Aguirre was in office as "only being worth the paper it was written on and that paper was toilet paper." (XXI-Ex.160:5517[audiotape];Ex.91:5173-76[transcript of interview].)

H. The City Council Never Initiated Or Directed the Mayor To Initiate A Meet and Confer Process Despite Councilmembers' Receipt of Unions' Written Demands

Despite actual knowledge as early as August 16, 2011, that bargaining demands were being repeatedly made – including demands made to the *City Council* to act as a body (XX,197:5115-5117*5123-5126*5128-5133*5142-5149*5151-5155*5157-5162), the Council failed and – through the City Attorney – flatly refused to meet-and-confer over the Mayor's determination to change negotiable subjects by initiative to avoid the MMBA.

I. With Notice of Unions' Unfair Practice Charge, The City Council Declined To Exercise Its Discretion To Delay the Prop B Vote Until the November General Election

On January 19, 2012, MEA filed and served an Unfair Practice Charge (UPC) with PERB over the City's refusal to bargain. (I-1:2-229.)

Despite Unions' demands to bargain and this UPC, the City Council declined to exercise its discretion under Elections Code section 9255 to delay the vote on Prop B until the November election[6] to permit a good faith meet and confer process on these negotiable subjects to take place.

On January 30, 2012, the City Council enacted Ordinance O-20127, placing the CPRI on the June 5, 2012 ballot as Proposition B. (XVI-193:4071-89.) By doing so, the City Council fulfilled the Mayor's campaign promises

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[6] See *Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 6 [statute governing initiatives to amend city charters does not require initiative to be placed on the ballot at the next election.]

in 2011, that this "most complete pension reform measure in San Diego history" would be headed for the "**June 2012** ballot." (XV-3971:19-3972:9; XX-Ex.89:5168; XXIII-Ex.197:5798; emphasis added.)

The *Boling* Proponents chose Mayor Sanders, Council President *Pro Tem* Kevin Faulconer and Councilmember Carl DeMaio to sign the "Argument in Favor" of Prop B and to be identified as such. (XX-Ex.98:5193.) Of the three "official" proponents, only Boling signed the argument. The San Diego County Taxpayers Association was listed as "endorser." In the sample ballot mailed to every registered voter, Mayor Sanders assured voters that "YES on Proposition B" would be "the long-term solution to San Diego's pension problems," meaning "more City money for priorities like: fixing potholes and street repairs, maintaining infrastructure, restoring library hours, and re-opening park and recreation facilities." (*Ibid.*)

J. Before the Prop B Vote in June 2012, Mayor Sanders Announced That Unions' Economic Concessions Had Eliminated the City's Structural Budget Deficit

In early 2012, the Mayor's Office announced an end to the City's decade-long structural budget deficit in a series of "Mayor Jerry Sanders Fact Sheets," with a Mayoral press conference also on February 23, 2012 (XX-Ex.127:5269-70*Ex.128:5272-73;Ex.131:5278-79;XIV-3524:20-27.) The Mayor explained that this achievement was due in part to employees' compensation concessions at the bargaining table and other negotiated reforms

related to managed competition, a new pension plan, and retiree health. (XIII-3467:2-3468:6.)

II. Procedural History

A. Further PERB Proceedings Before A "Stay" Was Ordered

On January 31, 2012, MEA filed and served a request that PERB initiate an action for injunctive relief in response to MEA's UPC. (II,4-6: 245-379.) The City opposed MEA's request. (II,7-11:380-549.)

On February 8, 2012, the City filed its Initial Position Statement in response to MEA's UPC. (III,12:550-569.)

On February 10, 2012, PERB's Office of General Counsel issued a complaint against the City based on MEA's UPC, (Case No. LA-CE-746-M; III,13:571-73), alleging that the City had violated Government Code sections 3503, 3505, 3506, and California Code of Regulations section 32603.

On February 14, 2012, PERB exercised its authority under Government Code section 3541.3, subdivision (j), by filing a verified complaint against the City (SDSC Case No. 37-2012-00092205-CU-MC-CTL), seeking temporary and permanent injunctive relief to preserve the *status quo* until PERB's administrative process related to MEA's UPC was complete. The City opposed the requested relief.

On February 21, 2012, the Superior Court denied injunctive relief on the ground that a pre-election challenge to an initiative measure is disfavored

unless the "invalidity of the proposed measure is clear beyond a doubt," citing *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 151.

City answered the MEA-related Complaint on March 2, 2012, (III,29:841-845), and filed a Motion to Disqualify PERB Board and Staff of PERB OGC the same day. (III, 30:846-848; IV,31-32:849-932.)

On March 5, 2012, official proponents Catherine A. Boling, T. J. Zane and Stephen B. Williams (*Boling* Proponents/Petitioners in D069626) filed a civil complaint (Case No. 37-2012-00093347-CU-MC-CTL) against PERB and five individually-named Board Members for injunctive relief to halt all administrative actions related to CPRI, actual damages and attorneys' fees.

Three other City employee unions, DCAA, Firefighters Local 145, and AFSCME Local 127, also filed UPCs, substantially repeating the allegations of the MEA UPC. (III,15:579-89;22:608-13; IV,33:934-41.) PERB's Office of the General Counsel issued complaints in these three additional unfair practice cases in March. (III,27:833-836; V,48:1177-1184; 62:1405-1408.) The four unfair practice complaints were consolidated for hearing. (VII,99:1910-1914.)

B. City Achieved A "Stay" of PERB Hearing On UPCs Until MEA's Writ Was Granted

On March 27, 2012, the Superior Court issued a Minute Order in SDSC Case No. 37-2012-00092205, granting the City's request to stay PERB's

administrative hearing scheduled for April 2-5, 2012, and to quash all subpoenas. A status conference was set for June 22, 2012. (V,61:1404.)

On March 28, 2012, PERB ALJ Donn Ginoza issued a letter to the parties placing the hearing on Unions' UPCs in abeyance in response to this Minute Order. (V,61:1401.)

On April 11, 2012, MEA filed a petition for writ of mandate (D061724) seeking immediate relief from this stay. On May 4, 2012, an Order to Show Cause issued, followed by oral argument on June 13, 2012. The City opposed MEA's Writ on the grounds that the requirement to exhaust administrative remedies was excused due to (1) futility; (2) PERB's lack of jurisdiction; and (3) the inadequacy of the administrative remedy.

On June 7, 2012, 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 MEA's pending Writ Case D061724.

After oral argument on the MEA Writ 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 and directing the respondent superior court to enter a new order denying the City's motion to stay the PERB proceedings. On June 28, 2012, the City filed a petition for rehearing which this Court denied on July 3, 2012.

C. City and Boling Petitioners Worked As Legal Tag-Team to Prevent PERB Hearing

On June 22, 2012, the Boling Petitioners (Boling, Zane and Williams) filed a Petition for Review (S203478) in response to this Court's summary denial of the *City's* Writ Petition D062090 invoking this Court's original jurisdiction. They 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 25, 2012, the Supreme Court requested Answers from PERB and Unions 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, the City filed a new Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate

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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.

D. The Proceedings Before PERB Included Numerous Motions, A 4-Day Hearing, City's and Unions' Opening and Closing Briefs, ALJ's Proposed Decision, City's Exceptions, Unions' Response to Exceptions, Boling Petitioners' Informational Brief and Unions' Response

PERB's ALJ Donn Ginoza heard and decided various City Motions which Unions opposed: (1) to disqualify PERB Board and Staff of PERB OGC; (2) to dismiss the unfair practice complaints; (3) to continue the hearing; and (4) to revoke eight subpoenas or, in the alternative, obtain a protective order to limit the scope of testimony and document production. (VII,85-87:1819-1830*105:1931-1933; VIII,121:2106-2109* 125:2129:2132.) After ALJ Ginoza issued his order denying the City's Motion to Disqualify, City Attorney Goldsmith wrote to tell him why his ruling was wrong. (VII,88:1831-1839.)

Unions' UPCs proceeded to a 4-day hearing in Glendale, California, on July 17, 18, 20, and 23, 2012, before ALJ Ginoza. (Transcripts: July 17*XII-189:3127-3299; July 18*XIII-190:3300-3501; July 20*XIV-191:3502-3718;

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July 23*XV-192:3719-4056; City's Exhibits XVI,193:4057-4226; Unions' Exhibits XVII-XXIV,194-201:4227-6132.)

When the hearing opened, counsel for subpoenaed "third party witnesses" filed a "Memorandum of Points and Authorities Re Subpoenas Duces Tecum and Personal Rights." (VIII-134:2206-2211.)

The City's post-hearing Motion to Dismiss or For Non-Suit was denied. (VIII,142:2255-2270*143:2271-2274.)

Post-hearing opening briefs were filed and exchanged in September 2012, followed by closing briefs in October. (VIII,147:2302-13;IX,148: 2314-2423*150:2428-2474*152:2479-2565* 155:2570-2606.)

On February 11, 2013, ALJ Ginoza issued a Proposed Decision. (X,157:2613-2682.) On March 6, 2013, City filed a Statement of Exceptions with brief in support. (X,159:2683-2724.) The same day, the three Boling Proponents filed a Petition for Authorization to File a Brief In Support of City's Exceptions. (X,161-162:2730-2775.) Unions responded to City's Statement of Exceptions. (X,167:2776-2782*175:2817-2881.)

On September 20, 2013, PERB granted the Boling Proponents' Petition under PERB Regulations 32210 as "non-party interested individuals," to file an informational brief addressing "the right of citizens to prepare and circulate a citizens' initiative measure by the authority of the California Constitution

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Article XI, section 5, without the impediment of the constraints imposed by the Meyers-Milias-Brown Act." (X,178:2894-97.)

On October 10, 2013, Boling Proponents filed their Informational Brief. (XI,180:2898-2927.) On November 1, 2013, Unions filed their Consolidated Response. (XI,181:2928-2957.)

On August 21, 2014, City submitted an *ex parte* letter brief to PERB re Notice of Recent Supreme Court Decision in *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, arguing that it should determine the outcome in this matter. (XI,184:2970-2974.) Unions filed a letter of objection in response. (XI,185:2975-2977.)

E. The Board's Decision and Order

On December 29, 2015, and, thereafter by *errata* issued on December 30, 2015, and January 6, 2016, the PERB Board's Decision No. 2464-M affirmed and adopted the ALJ's Proposed Decision with modifications. (XI,186-188:2978-3126.)

In its 61-page Decision, PERB concluded that the ALJ's findings of facts (with two exceptions) are supported by the record and the Board adopted them as findings of the Board itself. (*Id.* 2982-86.) The Board found that the ALJ's legal conclusions are well-reasoned and in accordance with applicable law and affirmed the proposed decision and remedy as modified. (*Id.* 2982.) PERB concluded on the entire record that the City violated the MMBA and

PERB Regulations because it breached its duty to meet and confer in good faith in violation of Government Code section 3505 and PERB Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001 et seq.), when it failed and refused to meet and confer over the Mayor's proposal for pension reform. By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603(a), and denied Unions their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b). PERB ordered the City, its governing board and representatives to (1) cease and desist from specified conduct; (2) take certain affirmative actions designed to effectuate the policies of the MMBA; and (3) post a Notice to Employees re same. (XI,186:3039-43.)

F. City's and Boling Petitioners' Petitions for Writ of Extraordinary Review

On January 25, 2016, the City filed a Petition for Writ of Extraordinary Relief, D069630, asking this Court to vacate PERB Decision No. 2464-M, and ordering PERB to dismiss the four UPCs it adjudicated in their entirety. On the same day, the Boling Petitioners filed their Petition for Writ of Extraordinary Relief, D069626, asking this Court for the precise same relief.

On May 9, 2016, the City and the Boling Petitioners filed their Opening Briefs. On June 13, 2016, the Boling Petitioners filed a second brief "in

support of City's Petition for Writ of Extraordinary Relief," and, on the same day, the City filed a Joinder in the Boling Petitioners' Opening Brief.

STANDARD OF REVIEW

"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; *San Diego Municipal Employees Association v. The Superior Court (City)* (2012) 206 Cal.App.4th 1447, 1463; *County of Los Angeles* (2013) 56 Cal.4th 905, 922; *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, 804.)

Although it is ultimately the duty of the reviewing court to construe the meaning of the statutes at issue (*Cumero v. PERB* (1989) 49 Cal.3d 575, 587), PERB's interpretation of the MMBA falls squarely within PERB's legislatively designated field of expertise. (*San Diego Housing Commission, supra*, 246 Cal.App.4th at 12; *San Diego Municipal Employees Association, supra*, at 1458, 1464.) When construing a statute, courts must choose the construction most closely fitting the Legislature's apparent intent, with a view to promoting, not defeating the statute's general purpose. (*San Diego Housing Commission, supra*, at 18.)

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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 determinations deference and its "interpretation will generally be followed unless it is clearly erroneous." (*San Diego Housing Commission, supra*, at 12; *San Mateo City School Dist. v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 856; *Banning Teachers Assn. v. PERB, supra,* 44 Cal.3d at 804.) When PERB construes a labor relations act "in light of constitutional standards," the same level of deference applies as with any other PERB determination. (*Cumero, supra*, 49 Cal.3d at 583, 586-587; *PERB v. Superior Court* (1993) 13 Cal.App.4th 1816, 1828.)

"[T]he findings of the Board with respect to questions of fact, including ultimate facts, if supported by substantial evidence in the record considered as a whole, shall be conclusive," and courts may not re-weigh the evidence. (Gov. Code § 3509.5, subd. (b); *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767, 781.) "[A] reviewing court may not substitute its judgment for that of the Board." (*Regents of the University of California v. PERB* (1986) 41 Cal.3d 601,617.)

It is PERB's factual findings which are under review *not* allegations in a pre-complaint unfair practice charge, and certainly not the City's self-serving recital of the Unions' "five" so-called "primary" allegations. (COB62-63.) The

City's unsupported assertion that PERB's "factual findings which impact constitutional rights should not be entitled to deference," (COB21), contradicts the controlling mandate of Government Code section 3509.5.

ARGUMENT

I. PERB Concluded That the City Was Obligated to Meet and Confer Over 401(k)-Style Pension Reform But Failed and Refused To Do So

The City does not dispute that implementation of the "transformative" changes in employee pensions and compensation required by the CPRI/Prop B City Charter amendments, would have been mandatory negotiable subjects of bargaining under Government Code section 3504, requiring meet and confer under section 3505, *if the City* had "made a determination of policy or course of action" with regard to them. However, the City contends that the *City* never made such a determination; its *citizens* did by initiative – with Mayor Sanders joining them as a *private citizen.* According to the City, nothing Mayor Sanders did – and nothing the City Council failed to do – with regard to this "determination of policy or course of action," nor the City's flat refusal to bargain regarding it, is legally significant under the MMBA in the context of this "citizens' initiative."

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A. Mayor Sanders' Charter-Mandated Duties Made Him A Statutory Agent Under the MMBA With Actual or Apparent Authority to Determine Policy Affecting Terms and Conditions of Employment for Represented Employees

Concluding that ALJ Ginoza's findings of fact are supported by the record, PERB adopted his legal conclusion that Mayor Sanders acted as the City's statutory agent under the MMBA and had actual and apparent authority to bind the City by his actions in violation of the MMBA. (XI-186:2982-86*2988-3001.) PERB notes that the City has never disputed the factual finding that Mayor Sanders *believed himself to be acting on behalf of the City.* (*Id.* 2994.)

The City argues that no duty to meet and confer was ever triggered because "an act of the Mayor is not an act of the City under the MMBA," and only those "policy determinations" made by the City Council have any legal consequences under the MMBA's "meet-and-confer" obligation. (COB37.) This argument contradicts both the City Charter *and* the opinion of the City Attorney's Office issued before the present controversy erupted.

The City Attorney's 2009 MOL confirmed that, as the elected head of the executive and administrative service, the Mayor has inherent authority and responsibility for meeting and conferring with the City's recognized employee organizations (citing Gov. C. § 3500(a)), and for ensuring that the City meets its MMBA-related responsibilities to employees. (XVIII-Exh.24:4721*4727-28.) This MOL also cautioned:

> "[N]otwithstanding any distinctions in the Charter's roles for the Council, the Mayor, the Civil Service Commission, and other City officials or representatives, the City itself is the public agency covered by the MMBA and it is considered a single employer under the MMBA because employees of the City are employees of the municipal corporation. In determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City. (*Id.* 4730.)

This MOL further acknowledged PERB's conclusion in *City of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M (2010), that the City had violated the MMBA because the City Attorney's duties under the City Charter did not "authorize (him) to disregard the state collective bargaining statute." (*Id.* at Sl.op. 14.) This holding applies *a fortiori* to the Mayor, who is empowered by the City Charter to represent the City regarding labor issues.

It is the City, as a municipal corporation, which functions as principal in the agency relationship with its Strong Mayor – *not* the City Council – and through its *Charter*, the City confers its authorization on him to act and speak on behalf of the City.

1. In 2008, the City Attorney's Office Acknowledged the *City's* Duty to Meet and Confer If Mayor Sanders Initiated Or Sponsored A Voter Petition Drive to Amend the City Charter On Negotiable Subjects

The City's argument also contradicts the City Attorney's 2008 MOL emphasizing that, notwithstanding any constitutional rights the Mayor retains as a private citizen, the effect of the "Strong Mayor" Charter provisions would

be to trigger the City's obligation to meet and confer if the Mayor "initiates or sponsors a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions."

> [S]uch sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions [...] [T]he City would have the same meet and confer obligations with its unions as [if he were proposing a ballot measure on behalf of the City]. (XVIII-Ex.23:4710.)

As PERB concluded, this 2008 MOL accurately describes the City's duty to bargain based on Mayor Sanders' conduct. (XI-186:3037.) And, as PERB noted, this 2008 MOL was never repudiated. (*Id.* 3036.) Nor was it superseded. (*Compare* 2009 MOL expressly superseding two previous opinions of "this Office" on other subjects. (XVIII-Ex.24:4720,fn. 1.)

B. PERB's Determination By Application of Common Law Agency Principles That the *City* Violated the MMBA By the Mayor's Conduct When Making A Policy Decision *For the City* to Change Negotiable Subjects By A Voter Initiative and When Acting To Implement This Determination Without Meet-and-Confer, Is Unassailable On This Record

PERB applies common law principles when determining the existence of agency. (*Regents of the University of California*, (2005) PERB Decision No. 1771-H at p. 3, n. 2.) Labor boards routinely apply these common law principles with reference to the broad, remedial purposes of the statutes they

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administer, rather than a more rigid application when an employer's responsibility to third parties is at issue. (XI-186:2993.)

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. C.§2316.) The Civil Code also makes a principal responsible to third parties for the wrongful acts of an agent in transacting the principal's business, regardless of whether the acts were authorized or ratified by the principal. (*Id.* §§2330,2338.) An agent's authority necessarily includes the degree of discretion authorized or ratified by the principal for the agent to carry out the purposes of the agency in accordance with the interests of the principal. Where an agent's discretion is broad, so, too, is the principal's liability for the wrongful conduct of its agent. (*Superior Farming Co. v. ALRB* (1984) 151 Cal.App.3d 110, 117; *Johnson v. Monson* (1920) 183 Cal.149, 150-151; *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 312.)(XI-186:2991.)

Apparent authority may also be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question. (Civ. C.§ 2317.) Applying a "reasonable person" or "objective" standard, PERB concluded that members of the public, including City employees, would reasonably conclude that the Mayor was pursuing pension reform in his capacity as an elected official and the City's CEO, based on his statutorily-defined role under the Charter and his contemporaneous and

prior dealings with Unions on pension matters, some in the form of proposed ballot initiatives. (XI-186:2996-7)

Moreover, an employer's high-ranking officials, particularly those whose duties include labor relations or collective bargaining, are presumed to speak and act on behalf of the employer such that their words and conduct may be imputed to the employer in unfair practice cases. (XI-186:2997-3001.)

Nor is the City's liability dependent on whether the City Council *expressly* authorized Mayor Sanders to pursue a pension reform ballot measure as the City argues. The Charter does not require Council's express authorization for the Mayor to present proposals and seek tentative agreements with Unions on negotiable subjects. It is only for purposes of reconciling the "shared duties" under the City's Strong Mayor Form of Governance to assure compliance with the MMBA's good faith meet and confer requirements and with the MMBA-required impasse resolution procedure set forth in Council Policy 300-06, that the City Attorney's Office has *recommended* that the "City's position at the bargaining table should be established by the Mayor, with approval by the City Council." This protocol is intended to *foster* "the core principle of the decisional law related to the MMBA (which) is the duty to bargain in good faith."[7] (XVIII-Exh.24:4726-4730*4733*4736-9.) The

[7] The MMBA itself provides that a public agency's representatives will reach tentative agreements "which will not be binding," and present them to the governing body "for determination." (Gov. C.§3505.1.) While a governing body has no duty to accept an agreement negotiated by its

City may not now use this protocol as a sword to defeat represented employees' MMBA rights.

As PERB concluded, making the City's liability dependent on whether the City Council had *expressly* authorized Mayor Sanders, its statutory agent in collective bargaining matters, to pursue a pension reform ballot measure would undermine the principle of bilateral negotiations by exploiting the "problematic nature of the relationship between the MMBA and the local [initiative-referendum] power," (*Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 782). On this factual record, "the MMBA's meet-and-confer provisions must be construed to require the City to provide notice and opportunity to bargain over the Mayor's pension reform initiative before accepting the benefits of a unilaterally-imposed new policy." (XI-186:2993-4.)

C. PERB's Determination That the *City* Violated the MMBA When the City Council Failed and Refused to Meet and Confer and, By Its Inaction, Ratified the Mayor's Conduct In Making A Unilateral Policy Decision *For the City* to Change Negotiable Subjects By A Voter Initiative, Is Also Unassailable On This Record

PERB concluded that the City Council had knowledge of the Mayor's conduct and, by its action and inaction, and, by accepting the benefits of Prop B, thereby ratified his conduct. (XI-186:3001-5.) PERB cited cases in support

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representatives, the MMBA reflects a "preference for negotiated employment terms." (*Valencia v. County of Sonoma* (2007) 158 Cal.App.4th 644, 649.)

of the well-established labor law principal that where a party ratifies the conduct of another, the party adopting such conduct also accepts responsibility for any unfair practices implicated by that conduct. (*Id.* 3002.)

Acts that are within the scope of an agent's authority are subject to subsequent ratification even when not expressly authorized in advance. Ratification may be express or implied. (Civ. C. § 2307, 2310; *Compton Unified School District* (2003) PERB Decision No. 1518, p. 5; *Chula Vista, supra,* PERB Decision No. 1647, pp. 8-11; *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942.) (XI-186:3002.) As the City Attorney's January 2009 MOL acknowledges, the Mayor's inherent authority as the elected head of the executive and administrative service to represent the City in labor negotiations with Unions is a "shared duty with the City Council," and it is the Council's "duty to ensure legislative decisions are made in compliance with all relevant law, including the MMBA and the Charter." (XVIII-Exh. 24:4721*4727-8.)

The City Council had learned directly from Mayor Sanders when he delivered his Charter-mandated State of the City Address at a *City Council* session in early January 2011, and by subsequent media accounts, that he had made a firm policy determination *in the City's interest* to change negotiable subjects by means of an initiative. The Council was well aware that the Mayor was using the visibility and prestige of his Office as Mayor to implement this policy determination and was on notice of the potential legal consequences of

Mayor Sanders' conduct because of the City Attorney's 2008 legal memorandum. The Council also knew that demands to bargain were being made and met with repeated refusals.

PERB did not hold that the City Council should have ordered the Mayor to cease "his promotion of the initiative," as the City argues. (COB61.) There were *other actions* the City Council could have taken to satisfy the *City's* obligations under the MMBA and to remedy or mitigate the Mayor's unlawful actions. Indeed, the City Attorney's 2008 MOL explained that the City Council has its own unfettered, constitutional right under article XI, section 3 to present a potential competing ballot measure on the same negotiable subjects after meeting and conferring with Unions – with the Mayor, as spokesperson for the City in labor relations with Unions, acting "as the intermediary and conduit between the City Council and Unions regarding the City Council's meet and confer obligations," with the Council, not the Mayor, controlling the decisions related to the substance and language of its proposal. (XVIII-Ex.23:4713.) As PERB concluded:

> The unions' interest in bargaining with the Mayor without implicating the rights of the citizen proponents is not difficult to ascertain. [Unions] could have hoped for a compromise proposal with the Mayor, possibly through intervention of the City Council. Even assuming [CPRI] would have succeeded on its own, a compromise solution of any derivation would have resulted in the presentation of a competing initiative measure,

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> possibly giving the electorate a more moderate option for addressing pension costs.[8] (XI-186:3034-3035*3091, fn. 19.)

Yet, even after receiving specific written bargaining demands directed *to the City Council as a body*, the Council still failed to fulfill its "shared duty" to assure the *City*'s compliance with the MMBA, allowing the City Attorney to convey a flat refusal to bargain on its behalf. PERB concluded:

> [T]he City Council, like the Mayor, relied on the advice of (City Attorney) Goldsmith that no meet-and-confer obligation arose because Prop B was a purely "private" citizens' initiative. The City Council failed to disavow the conduct of its bargaining representative and may therefore be held responsible for the Mayor's conduct. (XI-186:3004-5.)

Having taken no action to supervise, repudiate or otherwise cure the Mayor's conduct, the Council allowed him to devote the last two years of his term to changing negotiable subjects *for the City* by initiative and to believe that no conflict existed between his duties as the City's CEO and spokesperson in collective bargaining and his rights as a private citizen. (XI-186:3003-5.) By not directing the Mayor to meet and confer with Unions regarding pension reform when he first announced his determination that 401(k) pension reform was needed, or in response to union demands for meet and confer, and by not fulfilling its own duty to meet and confer over a ballot measure on these

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[8] The City Council put a competing Charter amendment measure on the ballot in March 2002 in response to a citizens' initiative. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374.)

negotiable subjects, the City Council ratified the Mayor's unlawful scheme to bypass the unions.

II. Enforcement of the MMBA Against the City On This Record Does Not Offend the First Amendment

The City asserts that the "First Amendment of the U. S. Constitution preempts the MMBA's meet-and-confer process," (COB22), and that PERB's Decision and Order "nullifies the effects of Prop B premised solely on Constitutionally protected activity of the Mayor, as well as other City elected officials and staff." (COB26-27.)

The City invokes the "preemption doctrine" without legal analysis or support in case law and, on this deficiency alone, the argument should be rejected. The First Amendment is not a federal congressional act which "occupies the field" being regulated by the State of California when it enacted the MMBA in 1968 as a comprehensive, uniform set of rules regulating the collective bargaining relationship between local public agencies and recognized employee organizations representing their employees.

The City also invokes provocative terms about "wholesale" or "blanket restrictions" and "invalid prior restraints" but offers no legal analysis directed at the particularized conduct or speech of its former Mayor or other third persons examined with the proper level of scrutiny required in any First Amendment case. The City supports its overwrought assertions with

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indisputable but irrelevant generalizations about free speech rights which, as the cases hold, are *not* absolute.

A. The Gravamen of This MMBA Case Is *Conduct* Not "Core Political Speech"

It is Mayor Sanders' *conduct* which violated the MMBA when he made a unilateral policy determination, in the *City's* interest as its Strong Mayor, CEO and Chief Labor Negotiator, to change negotiable subjects by means of a voter initiative; he bargained with others inside and outside the City about those changes while refusing to bargain with recognized exclusive bargaining representations.

This conduct, together with the City Council's inaction, form the gravamen of the MMBA violation in this case.

Notably, the City's Statement of Facts in its Opening Brief *begins* on April 4, 2011, with the filing of the Notice of Intent. (COB13.) The City *never* addresses the Mayor's actual conduct beginning with his press conference on the 11th floor of City Hall on November 19, 2010. In support of its Petition, the City either re-characterizes the Mayor's conduct as "bringing an initiative as a private citizen and announcing it," "supporting someone else's initiative," or "advocating for an initiative petition," (COB24*30), in disregard of the undisputed factual record.[9] The City then

[9] The City invokes the inapposite example of Governor Brown who was both "impetus" and "aggressive campaigner" for the 2012 Sales and Income Tax Increase Initiative. (COB 58, fn. 5.) This statewide initiative

erroneously bundles all of Mayor Sanders' "actions alleged in this case" into the category of "political speech" deserving the "highest level of protection," citing *Meyer v. Grant* (1988) 486 U. S. 414, 422. (COB24.)

However, in *Meyer*, the court determined that a state's prohibition on paying petition circulators imposes an unjustified burden on political expression because the *circulation* of an initiative petition is "core political speech." Circulation necessarily involves communication concerning the desire for political change, the nature and merits of the proposal and why its advocates support it. (*Id.* at 421-422, emphasis added.)

In contrast, the initiative process itself is a method of enacting legislation. (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769.) As "legislators," those involved in the initiative process have no First Amendment right to use official powers or governmental mechanics for expressive purposes or to convey a message. (*Nevada Commission on Ethics v. Carrigan* (2011) 131 S. Ct. 2343, 2351.) There is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is the first step in an act of law-making and it is *not* core political speech. (*Angle v. Miller* (9th Cir. 2012) 673 F.3d 1122, 1132, citing *Meyer v. Grant* (1988) 486 U. S. 414, 424-25). Much like a legislator who begins the traditional legislative process

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did not involve negotiable subjects of bargaining within the scope of employees'/State Unions' representational rights under the State Employer-Employee Relations Act (SEERA, Gov. C. § 3512 et seq.)

by placing a bill in the hopper, the official proponents seek to wield legislative power. (*Chula Vista Citizens for Jobs & Fair Competition v. Norris* (2015) 782 F.3d 520, 530, citing *Widders, supra.*)

Nor does the act of casting a ballot or signing a petition serve an expressive purpose because it does not involve any "interactive communication." (*Meyer v. Grant* (1988) 486 U. S. at 422.) In *Doe v. Reed* (2010) 561 U. S. 186, the court applied exacting scrutiny when upholding a law requiring the disclosure of initiative petition signatories because states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process. (*Id.* at 195.) In his concurring opinion, Justice Scalia expressed doubt "whether signing a petition [. . .] fits within 'the freedom of speech' at all." (*Id.* at 219.)

Finally, the City cites *League of Women Voters v. Countywide Criminal. Justice Coordination Comm.* (1988) 203 Cal. App.3d 529, 555-56, to assert that the Mayor was "free to join a citizens' group supporting the legislative goals expressed in [a] proposed initiative" and had the "right to advocate qualification and passage of the initiative." (COB25.) But *League of Women Voters* does not authorize the Mayor's or the City's conduct in violation of the MMBA.

In *League,* a diverse group of government officials and employees involved in the criminal justice system acted with express authorization of the

Los Angeles County Board of Supervisors when using public funds to develop a "Speedy Trial Initiative" and to find a willing proponent. The *League* court rejected the claim they had violated campaign financing law, (Gov.C.§81002), because their use of public funds to develop and draft a proposed initiative was not partisan campaign activity seeking to persuade voters but a proper exercise of legislative authority. (*League of Women Voters* at 550.)

As PERB correctly concluded, *League of Women Voters* did not involve "[t]he determination of a policy to change terms and conditions of employment," which would be constrained by the MMBA's section 3505 duty to meet and confer." (XI-186:3094-5.)

B. Any First Amendment Rights Available to Mayor Sanders, Other City Officials and Staff Do Not "Preempt" the MMBA or Excuse the City's Violations

The MMBA is not a content-based restriction on speech. It establishes the rights of public employees to "form, join, and participate in the activities of employee organizations . . . for the purpose of representation in all matters of employer-employee relations." (Gov.C.§3501.) It is a public sector collective bargaining law which requires employers to meet and confer in good faith with employee representatives and "endeavor to reach agreement" on "all matters relating to employment conditions and employer-employee relations." (Gov.C.§§3504-3505; *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 630["good faith" requires a genuine desire to each

agreement"].) It is designed to foster communication, dispute resolution, and *agreements* between public employees and local public agencies by means of uniform rules and regulations applicable throughout the State.

In furtherance of these important statewide interests, enforcement of the MMBA to regulate conduct may properly burden speech rights without offending the First Amendment. (*Cumero v. PERB* (1989) 49 Cal.3d 575.) PERB correctly held that the First Amendment does not immunize the City from liability for the conduct at issue in this case because employer speech is not "protected" when it is "used as a means of violating the Act." (*Rio Hondo Community College District* (1980) PERB Decision No. 128; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M.) Speech which violates the Act is sanctioned for the protection of employees not to punish employers. (*Id.*, citing *Antelope Valley Community College Dist.* (1979) PERB Decision No. 97.) In *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S, PERB made clear that:

> employer speech that goes beyond mere expression of opinion or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections.

The City acknowledges that "its officials are not entirely immunized by the First Amendment from potential violations of the MMBA." (COB at 26.) However, the City contends that no MMBA violation occurred because Mayor Sanders directed his communications in support of his pension reform

initiative to the public, not to represented employees and, therefore, he did not "impinge on their representational rights" by "advocating a course of action in circumvention of their right to exclusive representation." (*Ibid.*) But, of course, as PERB concluded, this is exactly why his conduct violated the MMBA. Bilateralism in the bargaining relationship is predicated on face-to-face, give-and-take at the bargaining table and the duty to bargain in good faith includes the "concomitant obligation to meet and confer with no others in derogation of the authority of the exclusive representative. The principle of bilateralism prohibits the employer from engaging in practices that reward it for bypassing the exclusive representative. Such practices constitute direct interference with the employees' right to be represented by their chosen representative. (XI-186:3092.)

As the City concedes, only the City Council has the constitutional right to put a proposed Charter amendment before the voters for approval, and, where negotiable subjects are affected, only after a good faith meet and confer as required under *Seal Beach*. What the City asks this Court to approve is a judicial override of the MMBA giving the *City* a perpetual MMBA "opt-out" scheme using the alleged First Amendment right of its Mayor to act as a "private citizen" in order to bypass the City Council and thus its *Seal Beach*

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obligation.[10] This Court should not indulge the City in such a scoff-law approach.

C. Neither the First Amendment Nor Other State Laws "Expressly Sanctioned" Mayor Sanders' Conduct

Re-characterizing the Mayor's conduct as "supporting someone else's private initiative," the City argues that the First Amendment expressly sanctions this conduct and thus it "cannot constitute a violation of the MMBA." (COB30.) The City cites cases which protect public officials and employees from loss of public employment when they speak on matters of public concern. (*Pickering v. Board of Education* (1968) 391 U. S. 563 [public school teacher fired in violation of First Amendment after writing a critical letter about school administration to a local newspaper]; *Connick v. Myers* (1983) 461 U. S. 138 [firing of Assistant District Attorney upheld because her workplace speech related to a matter of personal not public concern.])

Pickering established a "balancing test" because First Amendment rights in the public employment context are *not* absolute. As an employer, government has an interest in promoting the efficiency of the public services it performs through its employees and thus may regulate the speech of its employees to a greater degree than it may restrict the speech of citizens

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[10] Otherwise, it is highly doubtful that the *City* has standing to assert the constitutional free-speech rights of third persons as grounds to attack enforcement of the MMBA against it. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095.)

generally. (*Pickering* at 568.) "The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." (*Connick* at 146-147.)

Notably, there is *no* First Amendment protection for government employees – thus the *Pickering* balancing test is not even triggered – "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421.) "(These) employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Ibid.*) Whether an employee's duties are purely clerical or encompassed a "confidential or policymaking role," is also relevant to the First Amendment analysis. (*Rankin v. McPherson* (1987) 483 U. S. 378, 380.) Although *Borough of Duryea, Penn. v. Guarnieri* (2011) 564 U.S. 379, 386-387, notes that a citizen is "not deprived of [these] fundamental [First Amendment] rights by virtue of working for the government," the court hastens to add that a citizen "must accept certain limitations on his or her freedom," citing *Garcetti v. Ceballos* (2006) 547 U. S. 410, 418, because "restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest."

Nor did other *state* laws for the protection of public officials or employees "expressly authorize" Mayor Sanders and the *City* to act "unimpeded by the MMBA," as the City argues. (COB30*52-53.) As PERB concluded, the Mayor's choice of a citizens' initiative as a vehicle to implement his policy determination is "not privileged (under any other law) because it amounts to bypassing of the unions." (XI-186:3094-5.)

Government Code section 3203 generally prohibits restrictions on the political activities of any officer or employee of a state or local agency, "except as otherwise provided in this chapter (9.5)."[11] However, political activities may be prohibited or restricted during working hours or on the premises of the local agency. (§3207.) Public officers or employees may not be barred from soliciting or receiving political funds or contributions to promote passage or defeat of ballot measure affecting their rate of pay, hours of work, retirement, civil service, or other working conditions of officers or employees of such state or local agency," unless done during working hours while in governmental offices. (§3209, added in 1965.) Participation in political activities of any kind is banned "while in uniform." (§3206.)

These *general* protections against termination are not inconsistent with the *particular* restraints on conduct arising under the MMBA. If they were,

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[11] Chapter 9.5 was *not* added to the Government Code in 1976 as the City erroneously contends. The current section 3209 was added to Chapter 9.5 in 1965 not in 1976, as City asserts. (COB50.)

under rules of statutory construction, the "particular" would be "paramount" to the general in any event. (C.C.P. §1859.)

Moreover, the two cases the City cites defeat its argument. In *Fort v. Civil Service Commission of the County of Alameda* (1964) 61 Cal.2d 331, the court concluded that a County Charter provision requiring dismissal of its Medical Director for spending six (6) hours of his own time serving as Chairman of a Speakers' Bureau for a committee to re-elect Governor Brown, was an unconstitutional abridgement of fundamental rights. (*Id.* at 334.) The *Fort* court acknowledged that "no one can reasonably deny the need to limit some political activities," however, the county charter provision at issue was not "narrowly drawn" to protect the efficiency and integrity of the public service, noting:

> [T]he more remote the connection between a particular activity and the performance of official duty the more difficult it is to justify restriction on the ground that there is a compelling public need. (*Id.* at 338.)

In *Bagley v. Washington Township Hospital District* (1966) 65 Cal.2d 499, a hospital district terminated a nurse's aide in reliance on former Government Code section 3205 after she participated in a recall campaign against certain district directors while off-duty and without any mention to potential voters of her employment by the district. The *Bagley* court struck down former section 3205 because "the sweep of the restrictions imposed extends beyond the area of permissible limitation." (*Id.* at 511.)

Mayor Sanders, of course, did *not* suffer the loss of his City-paid position. The City seeks to use the First Amendment and *other* state laws – not as a shield to protect the former Mayor against a wrongful loss of his public employment – but as a sword *for itself* to defeat the rights of public employees under the MMBA. The argument lacks merit.

III. The Rights of Citizens To Legislate By Local Initiative Are Important But Not Absolute And, If They Remain Viable At All In The MMBA Context, They Must Be Balanced Against the Strong Statewide Interest In Enforcement of Its Uniform Public Sector Collective Bargaining Law

The San Diego City Charter section 223 allows the San Diego electorate to propose amendments to the City Charter by initiative in the same manner allowed by the State Constitution for local initiative actions. These initiative powers may be exercised under procedures the Legislature has provided. (CA Const., art. II, section 8(a); Elections C. §§ 9200, *et seq.*) Article XI, section 3(b) provides: "The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body."

Relying on undeniable general statements regarding the importance of initiative rights under California's Constitution, the City argues that citizens' constitutional right to amend a local Charter by initiative in order to change otherwise negotiable subjects affecting represented public employees is absolute and preempts the MMBA. (COB30.)

However, the City ignores the key limitation on *local* initiatives at issue in this case. They are subject to the pre-emptive force of general legislation on matters of statewide importance. *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal. 4th 765, 779. This limitation on local initiative powers is itself dictated by the California Constitution. (*Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 692-3.) While courts must be mindful of their "solemn duty to jealously guard the initiative power," they guard this power with "both sword and shield," because they "must not only protect against interference with its proper exercise, but [] must strike down efforts to exploit the power for an improper purpose." (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 786.)

A. The State May Permissibly Limit or Displace Local Initiative/Referendum Rights In Furtherance of Statewide Interests

Initiatives and referenda, as mechanisms of direct democracy, are not compelled by the Federal Constitution. It is up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action. (*Chula Vista Citizens* at 535, citing *Doe v. Reed* (2010) 561 U.S. 186, 212 (Sotomayor, J., concurring).)

Courts have invalidated local initiative measures when they were beyond the power of the electorate to enact. (*See, e.g., Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 500 ["*COST*"] [voter-

sponsored local initiative barred because Legislature delegated discretionary authority over regional transportation corridors to city council alone]; *L.I.F.E. Committee v. City of Lodi* (1989) 213 Cal.App.3d 1139, 1145-46 [voter-approved initiative ordinance invalid because annexation of land into the city was a matter of statewide concern over which Legislature had delegated authority exclusively to local agencies]; *Citizens for Responsible Behavior v. Superior Court* (1992) 1 Cal.App.4th 1013, 1022-24 [writ denied over City Council's refusal to put otherwise qualifying initiative on the ballot related to homosexuality and AIDS which was substantively invalid and beyond the power of the electorate to enact]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 465, 474-79 [ballot initiative invalidated after approval by 58% of voters because Legislature had delegated decisions on airport expansion – matters of statewide concern – exclusively to local governing bodies]; *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1392-94 [portions of ordinance proposed by initiative struck down because pre-empted by state law.].)

The *COST* Supreme Court (45 Cal.3d 491) recognized that, in matters of statewide concern, there are two means by which the Legislature can restrict or prohibit outright local legislative action, whether by the legislative body or by initiative and referendum:

> In matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control. If

> the state chooses instead to grant some measure of local control and autonomy, it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum. *Id.* at 511.

"The state's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body." (*COST* at 511-12.) (*See also Pettye v. City and County of San Francisco* (2004) 118 Cal. App. 4th 233, 246 ["The point is that the state/local dichotomy is one of degree. Our inquiry is whether a statutory scheme that contemplates spheres of local decision-making under a statewide scheme also reflects an intention that only the representatives of the people, but not the people themselves, can make those decisions."].)

In *District Election etc. Committee v. O'Connor* (1978) 78 Cal.App.3d 261, 267, 269-70, 273-274, a local charter provision allowing a citizens' initiative to qualify for the ballot with fewer signatures than required by the State Government Code was preempted because "the charter amendment process, like labor relations, is a statewide concern," citing *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276.

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B. In Furtherance of Statewide Objectives, The MMBA Is Intended to Foster Communication, Dispute Resolution and *Agreement* Between Local Public Agencies and Recognized Employee Organizations

In 1961, California became "one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment." (*Glendale City Employees Ass'n v. City of Glendale* (1975)15 Cal. 3d 328, 332.) In 1968, the Legislature enacted the Meyers-Milias-Brown Act ("MMBA") to foster *agreement* not just communication. (*Id.* at 336.) The "centerpiece" of the MMBA is the duty of local public agencies to meet and confer in good faith contained in section 3505. (*Voters for a Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal. 4th 765, 780 [*Trinity County*]; *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1456-7.). "Though the process is not binding, it requires that the parties seriously 'attempt to resolve differences and reach a common ground.'" (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 61-62.) Its aim is to resolve disputes regarding wages, hours, and other terms and conditions of employment through negotiation and binding agreements. (*Trinity County*, 8 Cal. 4th at 782.)

The MMBA is intended "to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between

employees and the public agencies by which they are employed." (*San Diego Housing Comm., supra*, at 18.)

C. The MMBA Is Directed At the Substantive Quality of Representational and Collective Bargaining Rights and Duties

Courts have "consistently held that the Legislature intended the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employees and employers." (*Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal. 4th 525, 539.) The City asserts, without citation in support, that "meet-and-confer" under the MMBA is merely a procedural process. (COB43.) On this basis, the City argues that imposing MMBA-related "procedural prerequisites applicable to legislative bodies," on citizens' initiatives would impose "an impermissible burden on the electors' constitutional power." (COB43-49.) In support, the City cites cases addressing the intersection between initiative rights and CEQA, zoning and planning laws and concludes that MMBA "procedural requirements" must suffer the same fate. However, the case law dictates otherwise.

In *COST, supra*, 45 Cal.3d at 511, the court noted that public hearing requirements in zoning law do not evince an intent by the Legislature to bar initiative and referendum because "municipal zoning and land use regulations [are] municipal affair[s]," and therefore the Legislature has less authority to restrict local action. Zoning and planning are primarily matters of local rather than statewide concern. (*DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 782

["We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state."]; *Associated Home Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal 4th.352, 363 [same].)

The *DeVita, supra,* court noted that when the Legislature enacted state law with respect to zoning, it declared an intention "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." (9 Cal.4th at 782 [quoting Gov't Code § 65800]). State planning law similarly expresses an intent to impose only "minimal regulation on what remains essentially locally determined land use decisions." (*Id.*) Against this backdrop, the court in *DeVita* found there was "no clear indication" that the Legislature intended the procedural requirements set forth in state planning law – specifically, the requirements that a general plan amendment be prepared by a planning agency and reviewed by a planning commission, and that the planning agency consult with other agencies and with the public at large – to bar the amendment of a general plan by initiative. (*Id.* at 785-86.) "Since the Legislature did not consider these statutory procedures of sufficient statewide importance to impose on charter cities, it is highly doubtful that it intended to give them precedence over the constitutional right to initiative." (*Id.* at 785.)

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In contrast, the statewide interest embodied in the MMBA is of sufficient strength that the Legislature expressly declared its applicability to charter cities. (Gov.C.§3501, subd.(c); *Seal Beach*, 36 Cal. 3d at 597.) Rather than reflecting a legislative intent to impose "minimal regulation" as is true in the areas of zoning and planning, the MMBA is one of multiple statutory schemes designed to assure substantive duties are imposed and substantive rights are conferred on a uniform basis across all public sectors in the State. Indeed, to effectuate the State's purposes and objectives, the Legislature entrusted MMBA administration and enforcement to PERB to assure an expert and uniform interpretation and application throughout the State .

Accordingly, PERB correctly rejected the City's contention that *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, and other CEQA cases arising in the context of a citizens ballot initiative, are "dispositive" of the issues presented in this case, finding that they offer little, if any guidance for the issues here. (XI-186:3013-3017.) "The City does not explain how a written report (under CEQA) would serve as an effective substitute for the essentially *bilateral* process of meeting and conferring between representatives of the City and employee organizations." (*Id.* 3016.)

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D. The Supreme Court Has Twice Determined How the MMBA Impacts *Constitutional* Rights Related to Initiative and Referendum

The state Supreme Court has twice looked at the intersection between *local* ballot measures and the MMBA and in both cases found that *constitutional* rights of initiative (exercised by a governing body) and of referendum (exercised by the electorate) must necessarily yield to the MMBA. *People ex. rel Seal Beach Police Officers Ass'n v. City of Seal Beach* (1984) 36 Cal. 3d 591 (*Seal Beach*), and *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal. 4th 765 (*Trinity County*).

1. The California Supreme Court Has Restricted the Constitutional Initiative Rights of Governing Bodies In Furtherance of the MMBA's Statewide Objectives

Before *Seal Beach* was decided in 1984, *San Francisco Firefighters v. Bd. of Supervisors* (1979) 96 Cal.App.3d 538, was the "state of the law" related to Article XI, § 3(b) rights – holding that a charter city's constitutional right to propose charter amendments in the public interest is "absolute" and "untrammeled" and "shall not be the product of bargaining and compromise between the public entity's representatives and others." (*Id.* at 548.)

The *Seal Beach* court overruled *San Francisco Firefighters* because the constitutional right to propose charter amendments is *not* absolute. "[I]t is a truism that few legal rights are so absolute and untrammeled that they can never be subjected to peaceful coexistence with other rules." (*Seal Beach,* 36

Cal. 3d at 598 [internal quotations omitted].) "Fair labor practices, uniform throughout the state" are a matter of statewide concern. (*Id.* at 600.) The "meet-and-confer requirement [of the MMBA] is an essential component for regulating the city's employment practices." (*Id.* at 601.) Concluding that a governing body's article XI, § 3(b) constitutional rights must yield to the important statewide objectives of the MMBA, the *Seal Beach* court ordered the vote on three charter amendments set aside and the *status quo ante* restored until the good faith meet and confer requirements of the MMBA could be satisfied. (*Id.* at 594-95.)

The City argues that PERB's Decision and Order impermissibly renders "the (State) Constitution subservient to the MMBA," and that the "constitutional rights" of *citizens* to legislate by local initiative must be treated as superior to the constitutional rights of governing bodies. However, citizen initiative rights *derive from the same constitutional source* and there is no colorable basis for treating citizens' rights as absolute when *Seal Beach* has already held that article XI, § 3(b) constitutional rights must be reconciled with and, if necessary, yield to the statewide objectives of the MMBA.

2. The California Supreme Court Has Barred Citizens' Constitutional Referendum Rights To Give Effect to the Statewide Objectives of the MMBA

The Supreme Court's decision in *Trinity County, supra*, 8 Cal. 4th 765, dispels any notion that citizens have greater constitutional rights than

governing bodies when the MMBA's important statewide objectives are implicated. *Trinity County* addressed the tension between the constitutional right of citizens to challenge County ordinances by referendum (Cal. Const. art. II, §§ 9 and 11) and the MMBA. At issue was whether Government Code section 25123(e), which requires ordinances adopting memoranda of understanding between a county and an employee organization to take immediate effect, could operate to bar a challenge to such ordinances through referendum.

Noting "that the MMBA embodies a statutory scheme in an area of statewide concern and that its meet-and-confer requirement is the "centerpiece of the MMBA," the court found a "problematic" relationship between the MMBA and the local referendum power which justifies a restriction on citizens' referendum rights, notwithstanding their constitutional underpinnings and despite the court's obligation to resolve all doubts in favor of the exercise of the referendum right. (8 Cal. 4th at 780-782.)

Trinity County held that the Legislature has the authority to restrict the constitutionally-guaranteed right to local referendum through "its power to enact general laws of statewide importance that override local legislation." (*Id.* at 779.) Since the purpose of the MMBA is to foster agreements over terms and conditions of employment through collective bargaining, this objective would be fatally undermined if voters retain the power to propose

and enact legislation unilaterally setting those terms and conditions. (*Id.* at 782-83.) The *Trinity County* court concluded that "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to curtail the local right of referendum." (*Id.* at 784.)

As PERB concluded, where local control implicates matters of statewide concern, it must be harmonized with the general laws of the state (*Seal Beach*) and, where a genuine conflict exists, the constitutional right of local initiative is preempted by the general laws affecting statewide concerns. (*Voters for Responsible Retirement, supra,* 8 Cal.4th 765; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 869-870.) (XI-186:3008-17.) A charter city cannot expand its power to affect statewide matters simply by acting through its electorate rather than through traditional legislative means. (XI:3012.)

There is simply *no* authority for the proposition urged by the City that the MMBA is superseded by the use of the City's local initiative process in a way which allows the *City* to circumvent its meet and confer obligation as it did here. (XI-186:3008.) As the analysis in *COST, supra*, 45 Cal.3d 491 demonstrates, any arguments regarding the *general* right to initiative do not alter the legal principle that local initiatives which conflict with general legislation on a matter of a statewide concern are *invalid.* Whether or not *every*

citizens' initiative which seeks to impact negotiable subjects under the MMBA would be preempted by application of *Trinity County* and other precedents, the conclusion is inescapable that this one must be. (XI-186:3013.)

Finally, 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.)

IV. PERB's Order Imposing Traditional Compensatory and Restorative Remedies On the City In This Unilateral Change Case Is An Appropriate Exercise of Its Administrative Authority

A. The Board Is Empowered To Remedy Wrongdoing In A Manner Designed to Effectuate the Policies and Purposes of the MMBA

An administrative agency's remedial orders under MMBA section 3509 will not be disturbed by a reviewing court "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Elec. & Power Co. v. NLRB* (1943) 319 U. S. 533, 540; *Santa Monica Community College Dist. v. PERB* (1980) 112 Cal.App.3d 684; *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1987) 192 Cal.App.3d 874.

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When an employer unilaterally changes negotiable subjects without bargaining, the standard remedy is to order the employer to rescind the new or changed policy, to bargain with the exclusive representative upon request, and to make affected employees whole for any losses incurred as a result of the unlawful conduct. (*Cal. State Employees' Assn. v. PERB* (1996) 51 Cal.App.4th 923, 946.)(XI-186:3018-3020.)

B. Since PERB's Remedial Authority Does Not Extend to Overturning A Municipal Election, Its Make-Whole Order Assures That City's MMBA Violation Does Not Go Unremedied While Prop B Remains In Effect

PERB acknowledges that its remedial power as an administrative agency – as distinct from this Court's power – does not extend to the invalidation of a municipal election. (XI-186:3020-3023.)

However, this does not mean that PERB is powerless to impose any meaningful remedy. Recognizing that it cannot itself order *full* restorative relief – a return to the *status quo* before the failure and refusal to meet and confer occurred, PERB has carefully and thoughtfully crafted a remedy to assure that the City's violation of the MMBA does not go entirely unremedied while Prop B remains in effect pending *court* action to invalidate it. (*Id.* 3023-26.) PERB has directed the City, at Unions' option, to join in and/or reimburse Unions for legal fees and costs for bringing a *quo warranto* or other civil action aimed at overturning Prop B on the basis of PERB's determination that Prop B is an unlawful exercise of local initiative power on the factual record

here.[12] PERB has also imposed its traditional "make whole" remedy in this context by ordering the City to make current and former bargaining unit employees "whole" for the value of any lost compensation, including pension benefits, plus interest, until Proposition B is rescinded or the City and Unions agree otherwise.

PERB has *not* awarded fees and costs to Unions because of any alleged bad faith, as the City argues; nor does PERB's order offend the separation of powers doctrine as the City contends without citation to authority. (COB68.) It is intended to satisfy the restorative principle of its traditional remedy and to vindicate Unions' authority as the exclusive representatives of City employees, and to assure that the City, as the offending party, bears the costs of pursuing complete relief in the courts. This result is consistent with PERB's authority where a remedial measure is subject to the jurisdiction of another tribunal. PERB has previously ordered an offending party to join, initiate, or reimburse costs for such litigation as necessary to return the parties to their respective positions before the unlawful conduct occurred. (*Omnitrans* (2009) PERB Dec. No. 2030-M, Sl.op. at 33; *County of Joaquin (Health Care Services*) (2003) PERB Dec. No. 1524-M, Sl.op. at 2-3. (XI-186:3024-5.)

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[12] Under Code of Civil Procedure section 811, the City may initiate a *quo warranto* action without first seeking permission of the Attorney General.

Importantly, *the City does not contest PERB's traditional broad remedial authority* in a unilateral change case to order both restoration of the prior *status quo* and compensatory make-whole relief, including back pay and benefits with interest, for all employees who have suffered loss as a result of the unlawful conduct addressed in PERB's Decision 2464-M. Rather, the City argues that the mere fact that CPRI qualified for the ballot and the voters passed it as Prop B, renders the City powerless to effect a remedy, and therefore renders PERB powerless to order the City to take any remedial action, either directly or indirectly. The City maintains that it cannot comply with PERB's remedial order – "even if it wished to" – because to do so in any respect would effectively nullify the effects of Proposition B, which the City argues it "must" adopt. (COB68.) The City relies entirely on *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171, for this proposition. proposition. *Domar Electric* does not support the City's argument. *Domar Electric* did not raise an issue of a superseding constitutional principle or preemptive state law. By contrast, this case centers on the City's violation of the MMBA, a law of state-wide importance vis-à-vis even a city charter. (Gov. C. § 3501, subd. (c).) *Domar Electric*, therefore, does not support the proposition urged by the City that a city charter provision cannot be invalidated or undermined when it is shown, as here, that it was enacted in violation of a preemptive state law. *Domar Electric* does not support the City's

argument that, if PERB does not take the step of invalidating Proposition B as applied to employees covered by Decision 2464-M, it cannot issue a remedy requiring the City to take steps within its power designed to vindicate preemptive state law. Indeed, the City's apparent argument that, if PERB is not going to overturn Proposition B, then PERB cannot fashion any remedy that affects Proposition B at all, effectively criticizes PERB for its restraint.

Moreover, the City assured the Superior Court in 2012 when opposing PERB's injunctive relief requests to delay the vote on Prop B and then to delay its implementation, that PERB had the remedial power "to place employees back in the position they were in prior to the unfair labor practice – ordering those employees to be provided the City's defined benefit retirement plan subject, of course, to judicial review." (XXI-Ex.158:5513:1-5.)

V. This Court Has the Power to Invalidate Prop B As Applied To Represented Employees In Order to Provide Full Relief for the MMBA Violations Which Occurred

Since PERB has now exercised its exclusive jurisdiction as the expert administrator of California's statewide public sector collective bargaining law, making factual findings and legal determinations in light of constitutional standards as contemplated in *San Diego Municipal Employees Assn.* (2012) 206 Cal.App.4th 1447, this Court must, on the record before it, deny the City's Petition and affirm PERB's Decision and Order.

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However, since the *Boling* Petitioners, as the official proponents of CPRI/Prop B, are also now before this Court – having filed their own Petition for Writ of Extraordinary Relief (D069626), as well as a brief in support of the City's Petition – this Court may order the relief needed to effectuate the purposes of the MMBA by declaring that, under the factual circumstances conclusively established before PERB, Prop B is an invalid exercise of local initiative power when applied to those City employees represented by Unions covered by PERB Decision No. 2464-M.

Such an exercise of this Court's power would be consistent with established authorities invalidating citizen initiatives *after* a vote (see cases cited in Section III, A above), just as this court did by declaratory relief in *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374. Moreover, when the City opposed the writ leading to this Court's decision in *San Diego Municipal Employees Assn., supra,* the City urged this Court to take original jurisdiction over the matter to "speedily resolve the basic legal issue in this case because it [. . .] does not depend on the resolution of disputed facts." (*Id.* at 1463, fn. 6; see also City's Petition D062090, filed 6/7/12.) After a full hearing, the City has largely conceded the undisputed evidence which supports PERB's findings. Where the City argues for a different "interpretation" of certain facts, PERB considered and rejected these

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arguments as inconsistent with substantial evidence in the record considered as a whole under § 3509.5, subd. (b). (See, e.g., XI-186:3029-3034.)

Unions urge this Court to exercise its jurisdiction to provide complete relief to them and the employees they represent. On the record before this Court, such an "as-applied" invalidation order is needed to remedy the failure and flat refusal to bargain which occurred here and is fully consistent with California Supreme Court precedent in MMBA-related cases limiting or barring the constitutional right of local initiative or referendum (*Seal Beach* and *Trinity County*).

Such an "as-applied" invalidation order would also eliminate any remaining uncertainty for all parties and avoid the need for an additional, protracted and costly new *quo warranto* civil proceeding – only to return to this Court for review or appeal.

CONCLUSION

No case law supports the rhetoric of "absolutes" which the City offers in support of its Petition – not as to the First Amendment and not as to local initiatives which offend the core purpose and objectives of the State's MMBA. The official proponents will decry even a partial invalidation of Prop B which thus limits its application to employees who are unrepresented or not represented by Unions here. But their legislative efforts in the matter must be

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balanced against the wholesale denial of representational rights guaranteed by the State to *all* public employees serving their local communities.

Moreover, as this record undeniably shows, represented City employees and their Unions did not set this MMBA-versus-local-initiative contest in motion; nor is PERB to be blamed for enforcing the State's law on a uniform basis in light of clear judicial precedents. Only the *City* is at fault for the necessary limitations which must be placed on the Prop B legislative efforts to protect representational rights guaranteed by the State. Apart from their on-going efforts and successes to improve the City's finances *at the bargaining table* – Unions made *repeated* efforts to gain the City's compliance with the MMBA over the proposed transformative pension and compensation changes at issue – all to no avail.

Unions respectfully urge this Court to dismiss the City's Petition, affirm PERB's Decision and Order, and provide the parties full relief by exercising its judicial power to declare Prop B invalid as applied to current and future City employees represented by Unions whose unfair practice complaints were adjudicated by PERB Decision No. 2464-M.

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

BY: Ann M. Smith
ANN M. SMITH
Attorneys for Real Party in Interest
San Diego Municipal Employees
Association

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

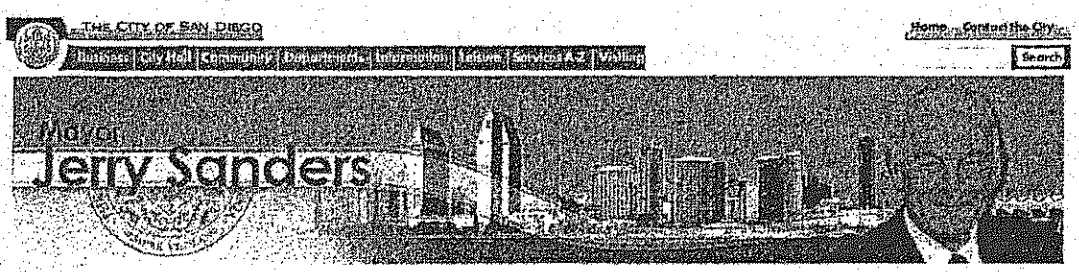
I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect 11), contains 17,855 words.

Dated: July 13, 2016

Ann M. Smith
ANN M. SMITH

EXHIBIT 25

AR:XVIII:4742-43



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Mayor Will Push Ballot Measure to Eliminate Traditional Pensions for New Hires at City

As part of his aggressive agenda to streamline city operations, increase accountability and reduce pension costs, Mayor Jerry Sanders today outlined his strategy for eliminating the city's $73 million structural deficit by the time he leaves office in 2012.

The mayor also announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector.

The bold move is part of a major re-thinking of city government Sanders said must occur if San Diego is to provide citizens adequate services, end its structural deficit and be financially sound for future generations.

"Eliminating traditional pensions is a radical idea in municipal government, but we must acknowledge that we cannot sustain the current defined-benefit system, which was designed in another era for completely different circumstances,' Sanders said. 'Public employees are now paid salaries comparable to those in the private sector, and there's simply no reason they should enjoy a far richer retirement benefit than everyone else."

Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot.

"This move is in the best interest of both the public and our employees. An unaffordable pension system is not a benefit to anyone,' Faulconer said. 'A 401(K) system makes sense for employers everywhere, and city government should be no different.'

Sanders also said his administration will re-think how the city provides services to the public, in order to eliminate the structural deficit before he leaves office, as well as minimize cuts to public safety in the coming budget year. Ideas the mayor discussed include:

- Restructuring city government, merging departments to eliminate redundancies and potentially eliminating functions that are not critical to city operations.
- Eliminating free trash collection for 18,000 homes on private streets and businesses for which the city is not obligated to provide free pickup, for a savings of $1.2 million.
- Exploring potential revenue streams by considering franchising operations at the city's golf courses, airports and other Enterprise Fund assets.
- Using stimulus funds and state grants to replace street light bulbs with long-lasting energy-efficient bulbs for an immediate savings in both energy and maintenance personnel costs.
- Identifying non-critical processes that can be eliminated, such as community plan updates.

Mayor Sanders also reconfirmed his commitment to completing the reforms that were conditions of Proposition D on the November 2010 ballot. Though the revenue-and-reform initiative failed, the mayor said the reforms all were fiscally prudent steps the city should implement.

P.E.R.B.
EXHIBIT NO. 25
I.D. ✓ REC'D. ✓
96

Exhibit 8

The competitive bidding strategy for the city's information technology services is set to go before the City Council on Dec. 6. Consultants estimate the city could realize savings of up to $10 million once the strategy is fully implemented.

The mayor said the city's landfill bid process is entering the final stages, with final negotiations set to begin in February.

Managed competition is also moving ahead, with preliminary statements of work for Fleet Services and Publishing coming before the City Council in early December and January.

Items that require meet-and-confer, such as reducing the city's retiree health care liability, are currently in negotiations and on track to have a deal by April, in time to implement changes in the next budget.

These reform measures are not expected to deliver substantial savings in the coming fiscal year, but many will be realized in 2013 and beyond, Sanders said.

Over the next few months, we'll dedicate ourselves to pursuing any and all ideas in order to permanently solve San Diego's structural budget deficit by the time I leave office," Sanders said. "I've never stopped moving toward that goal, and when obstacles rise in my path, I'll seek a way to go around, over or through them."

Since taking office in 2006, Mayor Sanders has taken aggressive action to reform city government. He instituted a top-down restructuring of every city department, eliminated more than 1,400 positions, implemented compensation reductions for city employees and created a less costly pension system. To date, Sanders' reform measures have produced a taxpayer savings of more than $180 million a year.

EXHIBIT 26

AR:XVIII:4745-46

Stevens, Caroline

From: Laing, Rachel
Sent: Friday, November 19, 2010 10:45 AM
To: Laing, Rachel
Subject: MEDIA ALERT: Mayor Announces Plans to Eliminate Traditional Pensions
Attachments: Fact Sheet-111910-CityBudgetPension.pdf

FOR IMMEDIATE RELEASE
Contact:
Nov. 19, 2010
(619) 301-2884 or

Darren Pudgil

Rachel Laing

(619) 929-7946

MAYOR JERRY SANDERS
FACT SHEET

MAYOR WILL PUSH BALLOT MEASURE TO ELIMINATE TRADITIONAL PENSIONS FOR NEW HIRES AT CITY

Employee retirement system would be similar to private-sector 401(K) programs

As part of his aggressive agenda to streamline city operations, increase accountability and reduce pension costs, Mayor Jerry Sanders today outlined his strategy for eliminating the city's $73 million structural deficit by the time he leaves office in 2012.

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P.E.R.B.
CP EXHIBIT NO. 26
I.D. ✓ REC'D. ✓

Exhibit 7

CP_000550
004745

Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot.

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Over the next few months, we'll dedicate ourselves to pursuing any and all ideas in order to permanently solve San Diego's structural budget deficit by the time I leave office," Sanders said. "I've never stopped moving toward that goal, and when obstacles rise in my path, I'll seek a way to go around, over or through them."

Since taking office in 2005, Mayor Sanders has taken aggressive action to reform city government. He instituted a top-down restructuring of every city department, eliminated more than 1,400 positions, implemented compensation reductions for city employees and created a less costly pension system. To date, Sanders' reform measures have produced a taxpayer savings of more than $180 million a year.

Sent: Fri Nov 19 06:46:56 2010
Subject: MEDIA ADVISORY: MAYOR ANNOUNCES NEXT STEPS ON CITY BUDGET

*** MEDIA ADVISORY ***

MAYOR ANNOUNCES NEXT STEPS ON BUDGET
Mayor Jerry Sanders will lay out his strategy to minimize service cuts in the coming fiscal year, eliminate the structural budget deficit and continue reforms to the city's pension system.

WHEN:
TODAY - Friday, Nov. 19
10 a.m.

WHERE:
Mayor's Office Conference Room
City Hall, 11th floor

WHO:
Mayor Jerry Sanders
Councilmember Kevin Faulconer
City Attorney Jan Goldsmith
Jay Goldstone, Chief Operating Officer
Mary Lewis, Chief Financial Officer

Contact: Rachel Laing
(619) 929-7946

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EXHIBIT 38

AR:XVIII:4816

FOR IMMEDIATE RELEASE
Jan. 12, 2011

Contact: Darren Pudgil
(619) 301-2884

MAYOR JERRY SANDERS
FACT SHEET

MAYOR LAYS OUT VIGOROUS AGENDA FOR 2011

Upbeat on Creating Vibrant Economy; Solving City's Structural Deficit

Vows to Expand Pension Reform, Compete-Out More City Services, Merge Departments, and Invest in Job-Generating Civic Projects

Balboa Theatre -- Calling this a "time of optimism and opportunity," Mayor Jerry Sanders pledged in his State of the City address tonight to eliminate the city's decades-old structural deficit by the time he leaves office through a series of new reform measures and cost-cutting, and to work aggressively to create a vibrant regional economy by expanding emerging industries like clean-tech and by building job-generating projects like the Convention Center expansion.

"This is no time to think small," said Mayor Sanders. "Great cities are built with great ambitions – and with great effort. I see this as a great time for San Diego, a time of optimism and opportunity," said the mayor. "My last day in office will be as busy as my first, and this will be a time of achievement and progress."

Next Wave of Pension Reform

On pension reform, the mayor vowed to push forward his ballot initiative to replace pensions with a 401k-type plan for most new city hires. *Forbes* magazine has called Sanders' proposal "the only sensible way to prevent state and local governments from being financially ruined over and over again." The ballot initiative next year will build on the mayor's earlier pension reforms, which are projected to save $400 million over the next 30 years. The mayor is also working with City Attorney Jan Goldsmith to reduce pension costs for current employees. He is expected to announce more details in a news conference on Friday.

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P.E.R.B.
CP EXHIBIT NO. 38
ID. ✓ REC'D. ✓

Exhibit 10

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

Case No. D069630

CITY OF SAN DIEGO,
Petitioner,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, DEPUTY CITY ATTORNEYS ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO, CATHERINE A. BOLING, T.J. ZANE, AND STEPHEN B. WILLIAMS,

Real Parties in Interest.

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 CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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

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
Jan I. Goldsmith, Esq. Walter Chung, Esq. M. Travis Phelps, Esq. Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101 Telephone: 619-533-5800 Fax: 619-533-5856 Email: jgoldsmith@sandiego.gov; wchung@sandiego.gov; mphelps@sandiego.gov (Attorneys for Petitioner City of San Diego)	First Class Mail & E-mail
Kenneth H. Lounsbery, Esq. James P. Lough, Esq. Alena Shamos, Esq. Lounsbery Ferguson Altona & Peak 960 Canterbury Place, Suite 300 Escondido, California 92025 Telephone: 760-743-1201 Fax: 760-743-9926 Email: khl@lfap.com; aso@lfap.com (Attorneys for Real Parties Catherine A. Boling, T.J. Zane, and Stephen B. Williams)	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