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BEFORE THE

PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SAN DIEGO, Respondent.	CASE NO.: LA-CE-746-M **CONSOLIDATED REPLY BRIEF** OF CHARGING PARTIES SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, AFSCME LOCAL 127, AND SAN DIEGO CITY FIREFIGHTERS, IAFF LOCAL 145

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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, Charging Party, v. CITY OF SAN DIEGO, Respondent.	CASE NO.: LA-CE-755-M
SAN DIEGO CITY FIREFIGHTERS, IAFF LOCAL 145, Charging Party, v. CITY OF SAN DIEGO, Respondent.	CASE NO.: LA-CE-758-M

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I. INTRODUCTION

With the evidentiary hearing now over and the Opening Briefs on file, it is crystal clear what is at stake in this case – for City employees, for Charging Parties as their exclusive bargaining representatives, for PERB as California's expert public sector labor relations agency, and for the MMBA as a viable statewide collective bargaining law.

When the Secretary of State chaptered the Proposition B "Comprehensive Pension Reform" Charter amendments on July 20, 2012, the City of San Diego had succeeded in eliminating its nearly 90-year-old defined benefit pension plan and replacing it with a defined contribution plan for all new City employees, except police – while imposing the high transition costs associated with the plan closure on current employees by freezing their pensionable pay through 2018, redefining their base compensation for pension purposes, and taking bigger deductions from their paychecks to reduce the plan's unfunded liabilities.

Even more chilling than the scope of these hard-core changes in compensation and pensions, however, is the fact that the *City* achieved them – and now benefits from them – by a deliberate scheme designed to by-pass the City's recognized employee organizations in a stunning defiance of the state's four-decades-old MMBA which cannot stand.

The MMBA "opt-out" scheme at issue in this case did not happen by mistake but rather by design to avoid the *City's* obligations to meet and confer in good faith with the City's recognized employee organizations. It is an MMBA "opt-out" scheme which the City's elected "Strong" Mayor announced and led with the assistance of key City staff and a small group of willing and like-minded "citizen" allies; a scheme which the City's elected City Attorney blessed and joined; a scheme in which the City Council acquiesced by its official silence (with an unofficial "wink and nod") and by its failure to fulfill its own obligations as the "supervising" legislative body under the MMBA before these drastically-changed terms and conditions of employment were unilaterally imposed.

When Mayor Sanders joined his fellow proponent T. J. Zane to declare "victory" on election night, June 5, 2012, the City had defied both the spirit and the letter of the MMBA. Mayor Sanders played "private citizen" and the City Council played possum with the result that

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the City had conveniently "opted-out" of the pesky MMBA altogether; it had by-passed the City's recognized but bothersome exclusive bargaining representatives; it had tricked the voters into believing that, *thanks to Mayor Sanders who had initiated, crafted and promoted it*, Proposition B represented a credible and lawful policy decision which deserved their vote. After it passed – right on cue – the City touted the "will of the voters," demonized the City's unions for crying foul, and disparaged PERB for exercising its jurisdiction.

Having tried – and then tried again – to stop PERB from conducting a hearing in this case – and thus prevent Charging Parties from making the record which is now before it – the City has dealt with that record in its Opening Brief by ignoring 99% of it – preferring instead to address allegedly "false" allegations in MEA's Unfair Practice Charge (Exhibit 1) or the exhibits attached to it. What few pieces of testimonial or documentary evidence the City does "cherry-pick" from the record in support of its arguments do not tell the "whole truth" because the City omits *other* critical evidence on the same point – even testimony from the same witness being quoted.

Nor does the law fare any better than the facts in the City's hands. The City merely skims the surface of a host of important legal principles – offering a series of platitudes about initiative rights, together with overwrought notions about the First Amendment and "political activity" protections. The City's shallow analysis does not bear scrutiny in the context of this case. In truth, these important rights will be honored by PERB's rejection of the abuses which have occurred here "in their name."

The City finally faces accountability for its brazen defiance of the law. The continuing vitality of the MMBA depends upon the degree of this accountability. On the record of violations which is before it, PERB must impose a remedy which effectuates the purposes of the MMBA by unraveling the City's unlawful "opt-out" scheme and restoring the *status quo ante* such that the Charter amendments established by Proposition B may not lawfully be applied to represented City employees.

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II. LONG BEFORE THE CITY IMPLEMENTED ITS MMBA OPT-OUT SCHEME OVER PROPOSITION B, THE CITY ATTORNEY'S OFFICE HAD CORRECTLY AND PUBLICLY ADVISED THE MAYOR AND CITY COUNCIL THAT THIS SCHEME WOULD VIOLATE THE MMBA – AND IT DOES

The factual case against the City was proven over the course of four days of hearing in July 2012. The legal case against the City was made long before that by two Memoranda of Law issued by the City Attorney's Office.

In 2009, the City Attorney's Office correctly set forth the standard by which the City's compliance with the MMBA must be evaluated. (Exhibit 24) Because the City is a single employer, when determining whether the City has violated the MMBA by making a unilateral (and dramatic) change in terms and conditions of employment without a good faith meet-and-confer process under the MMBA, PERB will examine the conduct of both the Mayor and the City Council because each is a vital component of the City's "strong Mayor/strong Council" form of governance. Each is a statutory agent under Section 3505 of the MMBA: the Mayor in his capacity as Chief Executive Officer and Chief Labor Negotiator, and the City Council in its capacity as the City's legislative body.

In 2008, the City Attorney's Office correctly advised **that the City would be in violation of the MMBA if Mayor Sanders initiated or sponsored a "citizens' initiative" over pensions because, under PERB's *Inglewood* test, he is the City's authorized agent.**

Thus, when the law is applied to the facts of this case, there is no room for doubt.[1] The *City* has violated the MMBA by its failure and refusal to meet and confer in good faith before the unilateral changes embodied in Proposition B were imposed on represented City employees.

A. In A 2008 Memorandum, the City Attorney Acknowledged the *City's* Duty to Meet and Confer Over A Proposed Ballot Measure – Whether the City Council Proposed It, the Mayor Proposed It On Behalf of the City, or the Mayor Initiated Or Sponsored A Voter Petition Drive To Place It On the Ballot

By Memorandum dated June 19, 2008, addressed to the Honorable Mayor and Members

[1] In view of the detailed account of the evidence which is set forth in Charging Parties' 98-page Consolidated Opening Brief, Charging Parties will avoid any repetition of that evidence in this Reply Brief unless necessary to underscore a point of law.

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of the City Council on the subject of "Pension Ballot Measure Questions," the City Attorney answered five questions "all relating to placing a pension ballot measure to amend the City Charter, before the voters of San Diego." (Exhibit 23)

The answer to Question Number 1 established that the City Council, apart from the Mayor, has an absolute constitutional right under the California Constitution to propose a ballot measure amending the City Charter provisions related to pensions. However, citing *Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 59, the City Attorney advised that the City, through the City Council, must comply with the "meet-and-confer" requirement in Government Code section 3505 before placing its proposed amendment on the ballot. The City Attorney explained how the rights of the Council under the California Constitution, article XI, section 3, and the "spirit of the Strong Mayor form of government" would be harmonized when the Council fulfilled its meet-and-confer obligation:

> Generally speaking, the Mayor is the spokesperson for the City in labor relations with the labor unions and has authority to set the City's bargaining position so long as he acts reasonably and in the best interests of the City. . . . In order to harmonize the City Charter provision of Strong Mayor and the California Constitutional provision . . . the Mayor would act as the intermediary and conduit between the City Council and the labor organizations regarding the City Council's meet and confer obligations. Because the City Council, apart from the Mayor, has the right under the California Constitution to present its own ballot proposal to the voters to amend the City Charter, it would control the decisions related to the substance and language of its proposal, and not the Mayor. Procedurally, it would work as follows: After the City Council approves the language of a proposal for a pension ballot measure, it would request the Mayor present its proposal to the labor organizations, and return to the Council to report on the conduct of negotiations over the Council's proposal. The Council can also appoint a Council Member to sit as an observer at the negotiations. If agreement is reached with the labor organizations on the Council's proposal, it would be ratified by the parties. If not agreement is reached, the City will declare its final ballot proposal language and hold a hearing on its proposal. At the end of the hearing, the Council will vote whether to approve its ballot proposal and place it on the ballot. If there is a majority vote, the Council's proposal will be placed on the ballot. (Exhibit 23, Bates 518 and 522)

The answer to Question Number 2 established that the Mayor is empowered to propose, on behalf of the City, a ballot measure to amend the charter provisions related to pensions, and that the Mayor "is obligated to meet and confer with the labor organizations prior to bringing a final ballot proposal to the City Council." (Exhibit 23, Bates 518 and 524) The City Attorney explained the procedure:

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> If the parties reach agreement, the Council would be asked to ratify the language to be placed on the ballot. If the Mayor is not able to reach agreement with the unions, the Mayor would present his last, best, and final offer to the Council for its vote. If the Council votes in favor (of) the Mayor's last, best, and final proposal, it goes on the ballot. If the Council does not pass the Mayor's proposal, it does not go on the ballot. *Id.* at Bates 518.

With regard to the City Council's resolution of any impasse in the meet-and-confer process between the Mayor and the City's unions over the Mayor's ballot measure proposal, the City Attorney also answered a related Question Number Three to emphasize that the City Council could not lawfully waive or unilaterally change this impasse procedure set forth in Council Policy 300-06.[2] *Id.* at Bates 519.

Question Number 4 in this 2008 Memorandum asks: "Can the Mayor initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any, are the meet and confer requirements under the California Government Codes and how would those be fulfilled? (Exhibit 23, Bates 517) In its "short answer," the City Attorney's Office wrote:

> The Mayor does not give up his constitutional rights upon becoming elected. He has the right to initiate or sponsor a voter petition drive. However, such 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 set forth in number two, above." (Exhibit 23, Bates 519)

The City Attorney's Office elaborated:

> "The Mayor has the same rights as a citizen with respect to elections and propositions. However, those rights are restricted as noted below. While he does have the right to initiate or sponsor a voter petition drive (see Government Code section 3203), such sponsorship is legally considered as acting with apparent governmental authority, and will require the Mayor to meet-and-confer with the labor organizations over a voter initiative pension ballot measure that he sponsors. In *Inglewood Teachers Association v. Public Employment Relations Board*, 227 Cal.App.3d 767 (1991), the Court approved the PERB decision to apply a case by case approach on the basis of whether agency employees could reasonably believe that an individual had apparent authority to act on behalf of the agency.
>
> The *Inglewood Teachers Association* Court noted that under Civil Code section 2316, ostensible or apparent authority is that which "a principle, intentionally or

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[2] Council Policy 300-06 is Exhibit 17.

> by want of ordinary care, causes or allows a third person to believe the agent possesses."
>
> The City Charter itself under the Strong Mayor provisions, grants the Mayor the authority to represent the City regarding labor issues and labor negotiations, including employee pensions. In addition, as noted above, the Council has confirmed this authority in Council Policy 300-6, providing for the Mayor to present and negotiate his proposals on behalf of the City with the labor unions. Since the Strong Mayor Amendment was added, the City Council has repeatedly acknowledged the Mayor's authority as the City's spokesperson on labor negotiations by enforcing Council Policy 300-6. In some instances, this included his authority to negotiate on behalf of the City over his ballot proposals to amend the charter. The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he supports or initiates, including a voter-initiative. The City, therefore, would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment. (Exhibit 23, Bates 525)

In support of its analysis, the City Attorney's Office cited specific examples of when and how the City Council had affirmed the Mayor's authority in such matters. (*Id.* at Bates 525, footnote 9.)

Finally, the City Attorney's Office answered Question Number Five: "Can a citizen residing in the City of San Diego, initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? The answer, of course, was that such a Charter amendment proposal can be brought by citizens using the initiative process. As to the meet-and-confer obligations of the MMBA:

> Since this is voter-initiated, **rather than under the imprimatur of the City**, Government Code sections 3500 *et seq.* is not applicable. The obligation to meet-and-confer is only involved when there is a proposal by a public agency or union representing the public employees of the agency, not a private citizen. (*Id.* at Bates 526, emphasis added)

Faced with this 2008 Memorandum – and the virtual roadmap it provides for correctly concluding that the City has violated the MMBA in this case – the City merely dismisses it in a footnote:

> To the extent that memorandum (Exhibit 23) stated that the meet and confer requirement attaches to a citizens' initiative proposed by the Mayor, **it has no legal support whatsoever**, as evidenced by City's argument herein. (City's Opening Brief, page 8, footnote 2, emphasis added)

Having offered no specific factual or legal analysis to displace or replace it, the City then scorns the 2008 Memorandum for good measure: "Neither the current City Attorney nor the Mayor give any credence to the "Aguirre memo." When asked if he recalled telling an interviewer that he

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"considered Mr. Aguirre's memorandum to have been only worth the paper it was on and that it was written on toilet paper," Mr. (sic) Sanders responded: "That's very probably . . . I don't recall exactly, but it sounds like something I might have said." (*Ibid.*)

B. Under PERB's "Agency" Test, Both the Mayor and the City Council Are The *City's* Authorized Agents

The 2008 Memorandum issued by City Attorney's Office correctly cited and applied PERB's *Inglewood* "agency" test in reaching the conclusion that the City would be obligated to meet-and-confer under the MMBA whether Mayor Sanders proposed a ballot measure to amend the Charter on pensions directly on behalf of the City by submittal to the City Council or indirectly on behalf of the City by a voter petition drive on an initiative. (Exhibit 23, Bates 525) This 2008 Memorandum also acknowledged that a true voter-initiated Charter amendment would not bear "**the imprimatur of the City.**" (Exhibit 23, Bates 526)

As PERB is well aware, the *Inglewood* case arose under the Educational Employment Relations Act (EERA), Government Code sections 3540, et seq., when the Inglewood Teachers Association alleged that the District, through the conduct a school principal, had violated section 3543.5 by discriminating and retaliating against employees who engaged in protected activities. The ALJ concluded – and the PERB Board agreed – that the District did violate the Act when its principal (1) unilaterally changed the past practice for removal of teachers from extra-duty assignments, (2) dismissed coaches from such assignments, and (3) threatened a teacher with future retaliation for her exercise of union activities. However, the PERB Board disagreed with the ALJ's conclusion that the District had also violated the Act when this principal filed a civil lawsuit against the Association and some of its members – finding instead that, on this issue, the school principal was not acting within the scope of his authority.

In *Inglewood Teachers Association v. Public Employment Relations Board* (1991) 227 Cal.App.3d 767, the Court of Appeal agreed with PERB's determinations and found no contradiction in PERB's conclusion that the District was liable for the principal's unfair labor practice in threatening a teacher on school property in front of students because the more reasonable inference was that he "clearly acted as a principal rather than as an individual" in

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doing so. *Id.* at 782. In contrast, the Court of Appeal agreed with PERB that the District could not be held liable for the principal's action in filing a lawsuit against nine District teachers, the Inglewood Teachers Association, two Association staff persons, as well as the California Teachers Association because the principal sought damages for *himself* based on allegations of libel and slander, intentional infliction of emotional distress, fraud, interference with contract, and conspiracy. He did not file this lawsuit to vindicate any *District* right or to further the *District*'s interests. As the Court of Appeal noted, there was also no "indication of past instances in which (the principal) pursued legal action on behalf of the District from which his authority to pursue the action against the teachers and the Association might be implied." *Id.* at 781. Moreover, "in order to prove that the District condoned or ratified the lawsuit, the Association had to prove that the District had knowledge of the lawsuit. . . . Since the Association did not prove that the District knew of the details of the lawsuit, there was no reason for the District to disavow the suit." *Id.* at 783.

Finally, the Court of Appeal approved PERB's decision to determine the existence of agency on a case-by-case approach on the basis of whether the employees could reasonably believe that the supervisor was acting within the scope of his or her employment when the supervisor committed an unfair labor practice. *Id.* at 780.

In *Chula Vista Elementary Education Association v. Chula Vista Elementary School District* (2004) PERB Decision No. 1647, at page 10, PERB reiterated the *Inglewood* rule: "Apparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question," citing *Compton Unified School District* (2003) PERB Decision No. 1518 at page 5 [the principal knew of the bargaining unit member's threatening conduct and failed to repudiate it; the test for apparent or ostensible authority is "whether the perception of agency is reasonable under the circumstances."]

In *Laborers Local No. 270 v. City of Monterey*, (2005) PERB Decision No. 1766-M, when rejecting the City's argument that *the City* had taken no unlawful action to interfere with representational rights because it was the *City Council* allegedly acting as a "neutral body" which took the offending action, PERB explained:

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> As the City concedes in its answer, the City attorney prosecuting the disciplinary action against (the union member) initiated the arguments upon which the City Council relied in excluding (his chosen representative) And the City Council did not act as a totally independent entity in this matter. The Council is a component of the City government and acts on behalf of the City under authority of applicable laws and regulations. In this instance, its decisions in (union member's) hearing were binding on the City. Moreover, an agency relationship exists where the principal grants an agent the express authority to perform a contested act or the alleged agent had the ostensible authority to do so. (Inglewood Unified School District (1990) PERB Decision No. 792.) Under this standard, it is fair to characterize the City Council as an agent of the City and to hold the City responsible for its actions. *Id.* at page 21.

C. The *City* Is The "Public Agency" Covered By the MMBA

In a 21-page Memorandum of Law which pre-dated this controversy, the City Attorney's Office explained to the Mayor and City Council on January 26, 2009:

> Notwithstanding any distinction in the Charter's roles for the Council, the Mayor, the Civil Service Commission, and other City officials or representatives, the City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. *See* Charter § 1. The City itself is the public agency covered by the MMBA. 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. (Exhibit 24 at Bates 538, emphasis added)

For purposes of the meet-and-confer duty, Section 3505 of the MMBA inclusively encompasses "[t]he governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." Section 3505's terms thus apply expressly to the Mayor and the City Council, as well as all City agents, officials, and representatives designated to act on their behalf. The MMMBA imposes mandatory duties on them as statutory agents, including the duty to meet and confer in good faith with representatives of recognized employee organizations.

Because it defines its coverage broadly, Section 3505 does not permit the "opt-out" scheme at issue here where the Mayor purports to act as a "private citizen" to avoid the MMBA and the City Council lets him – all for the purpose of changing terms and conditions of employment for represented employees without good faith meet-and-confer.

More than three decades ago, in *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, the California Supreme Court concluded that the county's decisions as to the division of authority and allocation of governmental functions in labor matters

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"does not excuse noncompliance with section 3505." *Id.* at 64. The court rejected a city's attempt to carve out and insulate its civil service commission from the reach of the MMBA's meet and confer requirements, concluding that the commission is a representative designated by the county within the meaning of Section 3505. *Id.* at 63-64.

D. Under the MMBA and By Charter Mandate, the City's Mayor and Its City Council Have Shared Labor Relations Duties and Both Failed to Fulfill Them

In this same 2009 Memorandum, the City Attorney's Office addressed the impact of PERB's decision in *AFSCME Local 127 & San Diego Municipal Employees Association v. City of San Diego* (2008) PERB No. HO-U-946-M, 32 PERC 146, before detailing the respective roles of the Mayor and City Council under the MMBA in view of the City's Strong Mayor Form of Governance:

> Under the City Charter, the City Council and Mayor both perform roles in labor negotiations. To enter into a memorandum of understanding with the City, represented employee organizations must receive approval of both the Mayor and the City Council. If the Mayor vetoes a resolution to determine a labor dispute or approve a labor agreement, the City Council has the final ability to authorize the action through reconsideration and an override of the mayoral veto.
>
> . . . [T]he City's position at the bargaining table should be established by the Mayor, with approval by the City Council, because the Council has ultimate authority to set salaries and to approve a memorandum of understanding between the City and the labor organizations that represent designated employees. The Mayor serves as the City's chief executive office and has the authority to give controlling direction to the administrative service of the City and to make recommendations to the Council concerning the affairs of the City. . . .
>
> The Mayor retains the authority to veto actions of the City Council regarding resolution of an impasse, approval of a memorandum of understanding, and introduction of a salary ordinance. The Mayor's veto may be overridden by the City Council. Both the Council and the Mayor have a duty to comply with state law principles of good faith bargaining in exercising these powers. (Exhibit 24, page 18, emphasis added)

1. The Mayor Is the City's Actual Agent With Authority Over Labor Relations and A Duty to Comply With the MMBA

The City's "Strong Mayor" is, by Charter mandate, its highest and most influential official – elected on a Citywide basis unlike his City Council colleagues who are elected by district. The City Attorney's 2009 Memorandum of Law described the scope of the Mayor's actual agency which is established by law in Article XV of the City Charter:

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> . . . the Mayor assumes all of the authority, power, and responsibilities formally conferred upon the City Manager, as described in Articles V, VII, and IX of the Charter . . . The Mayor has additional authority and responsibilities, including serving as the chief executive officer of the City . . . recommending to the Council such measures and ordinances as he or she may deem necessary or expedient . . . and making such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable . . . Under this authority, the Mayor assumes the responsibility of labor negotiations, which is an administrative function of local government . . . Inherent within the authority of the Mayor as the elected head of the executive and administrative service is the responsibility of representing the City in labor negotiations with the City's recognized employee organizations. However, it is a shared duty with the City Council. . . . It is the duty of the Mayor "to prepare and submit to the Council the annual budget estimate," and "to see that the ordinances of the City *and the laws of the State are enforced.*" . . . It is a duty of the Mayor to ensure that the City's responsibilities under MMBA as they relate to communication with employees are met. . . . The administrative duties of the Mayor include the work of meeting and conferring with the City's represented employee organizations. (Exhibit 24, pages 3 & 9-10)

Accordingly, under Section 3505, the City's Mayor *is* the public agency's administrative officer "properly designated by law or by such governing body." In this capacity, Mayor Sanders had the *duty*, not the *option*, to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment, and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

As one of the two governance prongs in the City's "strong Mayor/strong Council" form of government, Mayor Sanders acts on behalf of the City under authority of applicable laws and regulations; he is the City's actual agent with actual or apparent authority to speak and act on its behalf in matters of labor relations and employment policies. *Laborers Local No. 270 v. City of Monterey*, (2005) PERB Decision No. 1766-M; *Chula Vista Elementary School District* (2004) PERB Decision No. 1647; *Inglewood Teachers Ass'n v. PERB* (1991) 227 Cal.App.3d 767, 781.

2. The City's Theory That A Public Employer's Actual Agent Is Free to "Opt-Out" of His Agency Role To Avoid the MMBA Is Inimical to the Legislative Scheme

The City agrees in its Opening Brief that, under the City Charter and the "strong mayor" form of government, the Mayor serves as lead negotiator of a team, and establishes the City's initial beginning position at the bargaining table. (City's Opening Brief, 17:24-26) However, the City denies that Mayor Sanders was the City's agent when he made the decision – *as Mayor* –

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to lead a citizens' initiative to make *transformative* changes by Charter amendment to the compensation and pensions of represented City employees while avoiding the obligations of the MMBA. According to the City, Mayor Sanders was *not the City's agent* when this decision was made – nor when he implemented it by getting his initiative formulated, qualified for the ballot, and passed at the polls – because he *simply choose not to be* – even while acting as Mayor. Indeed, the City's position is so remarkable and untenable under the MMBA statutory scheme that Charging Parties repeat the City's argument here lest the reader believe it has been exaggerated for the sake of advocacy:

> . . . [N]o case supports the proposition that, just because the Mayor has a role in the meet and confer process, he necessarily is acting in that role, or has actual or ostensible authority whenever he proposes a pension reform concept or gets behind a citizens' initiative for pension reform. . . . Yes, the Mayor can also violate MMBA if he fails to bargain in good faith, *when he is engaged in the meet and confer process*, which is when he is formulating City's positions for presentation to, and ultimate approval by the City Council. Hence, the City Attorney opined (on) January 24, 2009, (sic) that '[i]n 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.'" (City's Opening Brief, 20:16-21:4, emphasis in original)

This analysis, in fact, includes the City's *only* reference to the 21-page Memorandum of Law issued by the City Attorney's Office on January 26, 2009, to give the Mayor and City Council specific advice related to the *City's* MMBA obligations. (Exhibit 24) This grossly under-stated reference to the substance of this Memorandum is clearly the City's futile attempt at "damage control" because the City Attorney's 2009 Memorandum, together with the earlier 2008 Memorandum, provide a virtual roadmap for establishing the City's liability.

But the City doubles down on its misguided approach by declaring that the MMBA's meet-and-confer requirement is not "somehow portable – something the Mayor carries on his back like a knapsack." Instead, the City argues, the Mayor is free to detach this MMBA requirement "when he is totally outside his role as labor negotiator and is talking about pension reform concepts or supporting a citizens' initiative which has crystallized into a concrete ballot measure." (City's Opening Brief, 21:9-13)

The correct analysis, of course, does not turn on "*when* (the Mayor) is engaged in the meet and confer process," as the City asserts; it turns on "what" the subject matter is. If it is

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subject matter otherwise within the scope of representation – as the City admits Proposition B is – the Mayor did not have a lawful choice to dodge the MMBA by deciding, as he did here, *to avoid* the meet and confer process rather than become engaged in it – or, as the City puts it, to detach the MMBA knapsack. If he didn't want to carry the knapsack, he should not have become the City's Mayor.

The evidence is irrefutable – indeed it was admitted during the hearing – that Mayor Sanders made the decision *as Mayor* to by-pass the recognized employee organizations and achieve "historic" pension reform for the *City* by negotiating instead with fellow proponents over the terms of a ballot initiative. Mayor Sanders was only empowered to make this decision *as Mayor* – not as a private citizen – and this decision was a *per se* violation of the MMBA.

Meet and confer under the MMBA is not optional. Governing bodies and their agents must give employee organizations notice of actions relating to the scope of representation and must meet and confer in good faith. *Int'l. Fed. of Prof. And Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1305. The California Supreme Court has described Section 3505 as the "centerpiece of the MMBA" [*Voters for Responsible Retirement v. Board of Supervisors of Trinity County,* 8 Cal.4th at 780] and has declared that the MMBA's "principal means" for achieving its statutory purpose is "imposing on public agencies" the obligation to meet and confer in good faith [*Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, 536-37]. "[W]here the MMBA sets a standard, local divergence is not allowed." *Int'l. Fed. of Prof. And Technical Engineers, supra*, 79 Cal.App.4th at 1302 (MMBA established specific, mandatory, mechanism for resolving disputes over assignment of professional employees to a bargaining unit).

The MMBA simply does not permit the Mayor or the City Council to "opt out" of the City's meet and confer obligations over the mandatory subject of pensions. The City's claim that it could refuse to meet and confer by "choosing" the initiative path – if accepted – would render not just meet-and-confer rights but *all* representation rights under the MMBA ineffective and meaningless. *See Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882, 890, hearing denied (1978) (county's adoption of rule refusing meet and confer

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with supervisory unit "would deny supervisory employees all representation rights and as such is patently inconsistent with the MMB Act."). Thus, under the City's theory, the MMBA itself would become optional rather than mandatory and the legislative purpose in promoting the statewide interest in a uniform public sector labor law would be defeated.

3. The City Council Is the City's Actual Agent With A Supervising Role Over the Meet-And-Confer Process

In its 2009 Memorandum, the City Attorney's Office also repeatedly underscored the fact that the Mayor *and City Council* shared the City's labor relations duties. In pertinent part, the City Council's role is described as follows:

> . . . Inherent within the authority of the Mayor as the elected head of the executive and administrative service is the responsibility of representing the City in labor negotiations with the City's recognized employee organizations. However, it is a shared duty with the City Council. . . It is also a duty of the Council to ensure legislative decisions are made in compliance with all relevant law, including the MMBA and the Charter. . . . The Council also plays a critical role in negotiations under the MMBA. Government Code section 3505.1 provides that the governing body may approve or disapprove any tentative agreement emerging from the meet and confer process. On the other hand, Government Code section 3505 "mandates that the same governing body conduct or supervise the meet and confer process leading up to the agreement." *Voters for Responsible Retirement,* 8 Cal.4th at 763. The California Supreme Court explained: "The governing body's role in collective bargaining negotiations is further reinforced by Government Code section 54957.6, which provides an exception to the open meeting provisions of the Brown Act when a governing body consults "with the local agency's designated representatives . . . This statute, by permitting the governing body to meet in secret with its negotiating team during collective bargaining, underscores the Legislature's intent to assign the governing body the central role of directing the meet and confer process so as to achieve binding labor-management agreements." (Exhibit 24, page 10, including footnote 2)

As the City's legislative body, its City Council is indisputably a statutory agent for the City under Section 3505. See also *Laborers Local No. 270 v. City of Monterey*, (2005) PERB Decision No. 1766-M. The MMBA makes multiple, specific references to the public agency's governing body when defining the contours of a public agency's obligations under the Act. (See, for example, Sections 3504.5, 3505, 3505.1 and 3508.) Indeed, the City admits in its Opening Brief that the City's governing body has the central role in directing the collective bargaining negotiations under the MMBA. (City's Opening Brief, 18:1-15)

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4. The City's Theory That the City Council Is Free To "Opt-Out" of Its MMBA Duties and Acquiesce In the Agency's Violation of the MMBA Is Contrary to the Legislative Scheme

After correctly stating that the City Council is "mandated" under Section 3505 as the City's governing body to "conduct or supervise" the meet-and-confer process, and having acknowledged the Legislature's intent to assign the central role of directing the meet and confer process to is as the governing body, (City's Opening Brief, 18:1-15), the City offers a simple *non-sequitur*: "Proposition B cannot be considered a City-sponsored initiative because the City Council did not authorize it as a City proposal." (City's Opening Brief, 17:20-23) In fact, the City asserts, "there is no evidence that the City Council initiated Proposition B . . . ever supported it . . . (or) authorized the Mayor to support it." (City's Opening Brief, 18:17-19:7)

Thus, under its strong mayor form of governance, the *City's* "opt-out theory" directly implicates both the Mayor and the City Council in a strategy designed to avoid the MMBA with impunity. On the Mayor's part, of course, was his decision, as a statutory agent under Section 3505, to circumvent the City Council, by-pass the exclusive bargaining representatives, and avoid the City's meet and confer obligations by using an initiative process – with the assistance of key City staff, the support of the City Attorney, and the participation of a few willing "citizen" allies. On the City Council's part, was this body's official acquiescence in the Mayor's determination of policy and course of action without any good faith meet-and-confer process.

Based on the actions of one statutory agent and the inaction of the other, the *City* has achieved the desired result of changing terms and conditions of employment without a good faith meet and confer process. And the *City* argues that it had *no duty* to meet and confer (1) since the Mayor allegedly made his decision – while serving as Mayor – but *acting* as a "private citizen" not *as Mayor*; and (2) since the City Council allegedly had no involvement in any determination of policy or course of action. In short, the Mayor played private citizen and the City Council played possum.

As shown above and in Charging parties' Opening Brief, the City's theory that Mayor Sanders can lawfully choose to act as a "private citizen" while serving as the City's elected Mayor, CEO and Chief Labor Negotiator – for the purpose of by-passing the City's recognized

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employee organizations – is factually preposterous and legally repugnant to the letter and the spirit of the MMBA. Notwithstanding the self-serving scorn the Mayor and the current elected City Attorney heap upon it, the City Attorney's Office hit the nail on the head in its 2008 Memorandum. (Exhibit 23)

Nor does the City's related theory fare any better – that the City Council can lawfully acquiesce in the Mayor's "determination of policy and course of action" and then defend against an unfair practice charge, as it does here, on the grounds that the City Council could not have violated the MMBA because it *did nothing*.

Again, the City Attorney's Office itself provided the correct answer in its 2009 Memorandum before this new MMBA-avoidance scheme was born: *both the Mayor and the City Council have respective roles but a shared duty to comply with the* MMBA. Compliance means *taking action* to fulfill the City's duty to meet-and-confer in good faith under Section 3505 *before* the public agency makes a determination of policy or course of action.

Thus, when the City Council acquiesced in the Mayor's determination of policy and course of action – without meeting and conferring as the MMBA required – the *City Council did, in fact, make a determination* of policy and course of action within the meaning of the MMBA by failing to act to initiate or direct the Mayor to initiate a meet and confer process as required.

The Mayor's *actions* and the City Council's *inaction* led inexorably to the result which the *City* has now achieved – a unilateral change in terms and conditions of employment without a meet and confer process under the MMBA. In other words, the City Council's failure to act to fulfill the City's obligations under the MMBA was an unfair practice because the City Council's "central role in directing and managing the meet and confer process," *required it to act* to assure that the *City* was fulfilling rather than dodging its duties under the MMBA.

Moreover, while the City argues that, under Charter section 11.1, "the Council may not delegate its legislative power or responsibility to set public policy to the Mayor or anyone else," (City's Opening Brief, 19:15-16), this is exactly what the City Council *did do*. In his role as a ballot proponent, Mayor Sanders parlayed the executive and veto power which the Charter assigned to him as Mayor into unrestrained *legislative power* and the City Council allowed him

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to do it. However, the City Council did not have a lawful option to acquiesce in this manner because the MMBA required the *City* – and it as the *City Council* – to fulfill its duty to meet and confer. Once the City Council acquiesced in the Mayor's MMBA-avoidance scheme, both prongs of the *City's strong Mayor/strong Council form of government* – and both statutory agents under Section 3505 – had thus failed to perform their affirmative duties under the MMBA and the violation was complete.

E. Both the Mayor and the City Council Persisted In Their Wrongful Conduct Despite Multiple, Specific, Direct Appeals for Compliance With the MMBA

As the record demonstrates, Charging Party MEA persisted in its demand for meet and confer by sending multiple letters to the Mayor, to the City Attorney, and to each City Councilmember, describing the factual details fueling its demand that the *City* fulfill its duty under the MMBA – and rebutting the notion that the CPRI was a "genuine" citizens' initiative. These letters repeatedly and expressly appealed to the Mayor *and to City Councilmembers* to take action to fulfill their respective duties under the MMBA – and to the City Attorney to set aside his personal support for the initiative and protect the *City* from liability for violating the MMBA.

Notably, despite three separate response letters denying MEA's demand for meet and confer – two from City Attorney Jan Goldsmith and one from his Deputy City Attorney Joan Dawson – Mayor Sanders never responded on his own behalf. In their responses on behalf of the *City*, neither Mr. Goldsmith nor Ms. Dawson ever directly denied or disputed MEA's factual assertions about the Mayor's conduct vis-a-vis *his* initiative.

The specificity contained in these multiple letters serves to underscore the fact that the Mayor *and the City Council* were on notice regarding the course of conduct with which MEA took issue and what MEA wanted the City to do to fix it. Significant portions of this critical exchange bear repeating here to demonstrate that, under PERB's *Inglewood* agency test, the *City* violated the MMBA. Having turned a deaf ear to every fact, every legal argument, and every heartfelt appeal for compliance with the law, the City showed no regard for the MMBA and deserves no leniency now.

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1. The City's Responses Ignored the Mayor's Challenged Conduct But Never Denied It

MEA's first demand letter dated July 15, 2011, was addressed to Mayor Sanders and copied to City Attorney Jan Goldsmith and the City's Human Resources Director Scott Chadwick. (Exhibit 72) When this letter went unanswered, MEA's second letter dated August 10, 2011, was likewise addressed to Mayor Sanders and copied to the same two additional recipients. (Exhibit 75) However, the City Attorney's response dated August 16, 2011, which denied MEA's request for meet and confer, was copied to the Mayor, to all members of the City Council, to the City's Chief Operating Officer Jay Goldstone, and the City's Human Resources Director. (Exhibit 76) In pertinent part, he wrote:

> This response assumes that your July 15 Demand is referring to a citizen initiative proposing an amendment to the San Diego Charter, entitled "Comprehensive Pension Reform Initiative for San Diego" (CPR Initiative). The CPR Initiative was filed on April 4, 2011, with the Office of the City Clerk, by three San Diego residents: Catherine A. Boling, TJ Zane, and Stephen B. Williams. . . . It is the City's position, however, that the City's duty to meet and confer has not been triggered in relation to the CPR Initiative. . . . The City Council has no authority, within the meaning of the MMBA, specifically California Government Code section 3505, to make "a determination of policy or course of action," when presented with a Charter amendment proposed by citizen initiative. . . . Assuming the proponents of the CPR Initiative obtain the requisite number of signatures on their petition 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, triggering a duty to meet and confer in the act of placing the citizen initiative on the ballot. (Exhibit 76, Bates 806-808)

MEA's third demand to meet and confer followed on September 9, 2011. This renewed demand – and the reasons for it – were addressed to City Attorney Jan Goldsmith in response to his refusal letter dated August 16, 2011, with copies sent to Mayor Sanders **as well as to each City Councilmember**. (Exhibit 78) In this renewed demand for meet and confer, MEA wrote in pertinent part:

> . . .[Y]our letter studiously avoids any reference to *Mayor* Sanders' undeniable and much-publicized activities related to the pension reform initiative he hopes will be "his legacy as mayor." . . . 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. He is universally acclaimed as one of the initiative's "chief proponents." He has repeatedly declared in oral and written statements to the public that "taxpayers simply can't afford to keep paying the staggering pension costs of city workers year after year, decade after decade," and that "this ballot measure will restore *us* to fiscal sanity, creating a system in which city workers

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> receive retirement benefits no better and no worse than the average taxpayer footing the bill. He has reinforced these comments with grandiose reassurances that this initiative is a "legally defensible" measure which "won't just fix the pension system, but will transform it into a national model" while "permanently fixing the city's budget woes." . . . 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. But his attempt fails under the law as the Office of the City Attorney has previously acknowledged on two separate occasions. . . .[Citation to and quotations from Memorandum of Law dated January 26, 2009 (Exhibit 24), and Memorandum dated June 19, 2008 (Exhibit 23) are omitted.] . . .
>
> By copy of this letter to Mayor Sanders, MEA makes its third request to the *City's* chief executive office to begin a good faith meet and confer process related to this pension reform initiative.
>
> **By copy of this letter to all elected member of the City Council, MEA urges the 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.** (Exhibit 78, Bates 812-815, bold emphasis added; underlining in original)

City Attorney Jan Goldsmith responded, in part, by letter dated September 12, 2011, while also referring to a further response forthcoming from his Deputy City Attorney Joan Dawson. Mr. Goldsmith copied the Mayor and City Councilmembers, as well as the Mayior's Chief of Staff, the City's Chief Operating Officer, the City's Human Resources Director, the Independent Budget Analyst, and several other attorneys in his office. In pertinent part, City Attorney Goldsmith defended *himself* as follows:

> I have not relinquished my First Amendment right to speak out on public policy issues. I have repeatedly used discretion in doing so, but I won't give up my basis right as it is a personal right I enjoy as an American. I did briefly speak out on this issue, but I have not been involved in any campaign effort. That is not a legal limitation; it was a self-imposed limitation based upon my own discretion. (Exhibit 79, Bates 816)

MEA's counsel responded to Mr. Goldsmith, with copies sent to the same list of recipients as Mr. Goldsmith had copied, including Mayor Sanders and each member of the City Council. Before correcting multiple inaccuracies in his letter, MEA's counsel wrote:

> Since you do not address the substantive issues I raised related to the *City's* failure to fulfill its responsibilities under the MMBA due to Mayor Sanders' open and obvious activities *as Mayor* in support of his *legacy* ballot initiative, I will continue to await the forthcoming letter you mention from Deputy City Attorney Joan Dawson. Of particular interest will be the degree to which her analysis is at

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odds with the prior published opinions of the Office of the City Attorney which I cited in support of MEA's continuing demand that Mayor Sanders initiate a good faith meet and confer process with MEA over *his* ballot initiative.

. . . [Y]our point that no "meet and confer" is required over a citizens' initiative before being placed on the ballot, ignores the substantive premise of my letter demanding that Mayor Sanders meet and confer with MEA in his capacity as City's CEO and Chief Labor Negotiator over *his legacy ballot initiative.* The notion that this is a *citizens' initiative* is pure fiction. The prior opinions published by the City Attorney's Office – which I cited and quoted in my letter of September 9, 2011 – support the demand for meet and confer which MEA has repeatedly made to Mayor Sanders to no avail. Thus, even if you personally support this ballot initiative in the exercise of your basic First Amendment rights as an American – as you proclaim – this does not excuse the failure of your office to protect the *City* from the liability it incurs when the *Mayor* violates the MMBA.

. . . This is the crux of the matter and the primary reason why the *City* is in violation of the MMBA. Because Mayor Sanders serves as the City's chief executive officer 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, he has a duty to honor MEA's rights under the MEA as exclusive bargaining representative for 4,000 City employees *and* to honor the City Council's rights under both the Charter and the MMBA when determining policies affecting the future of this City. (Exhibit 82, Bates 827-829, emphasis in original)

Deputy City Attorney Joan Dawson's promised letter followed on September 19, 2011. She writes, in pertinent part:

This letter is in further response to your multiple letters to City of San Diego (City) officials regarding . . . "the MEA Demands."

You apparently contend that because Mayor Sanders has publicly spoken in support of the CPR Initiative and has taken other reported actions in furtherance of the CPR Initiative, the CPR Initiative is a proposal of the City's governing body, within the meaning of the California Constitution and applicable statutory and case law. Your contention ignores the actual language of the CPR Initiative, submitted to the Office of the City Clerk, dated April 4, 2011. The CPR Initiative was submitted by three citizens; Jerry Sanders is not one of them. . . .

You also rely on analysis in a June 19, 2008, memorandum authored by City Attorney Michael Aguirre (Aguirre Memo).[3] . . . The Aguirre Memo was presented to the City Council when Mayor Sanders was requesting that the City Council propose a ballot measure to amend the Charter related to pension reform. There is nothing in the City Council record from the Rules Committee meeting on June 25, 2008, to indicate that the Mayor was contemplating a citizen initiative to amend the Charter. It was contemplated the Mayor's proposal would be submitted to voters as a City Council proposal, under the Constitution and

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[3] This is Exhibit 23.

applicable Elections Code provisions.[4] Further, regarding your reliance on the Aguirre Memo, it is this Office's view that the Aguirre Memo is overly broad and incomplete in its analysis, where it relies on the *Inglewood Teachers Association v. Public Employment Relations Board (Inglewood)*, 227 Cal.App.3d 767 (1991), to conclude that the Mayor's "sponsorship is legally considered as acting with apparent governmental authority, and will require the Mayor to meet-and-confer with the labor organizations over a voter initiative pension ballot measure that he sponsors." . . . Just as there was no evidence presented by the union in the *Inglewood* case to demonstrate that the (school) principal was acting under the authority of the school district in filing his lawsuit, there is no evidence here that the City Council is proposing the CPR Initiative, or authorizing the Mayor to propose or sponsor it . . . You present no evidence that the Mayor has gone to the City Council, as a body, to place the CPR Initiative on the ballot. . . . (Exhibit 83, Bates 835-837 and 839)[5]

2. MEA Made A Final But Futile Appeal For Compliance

Despite the obvious futility of its persistence, MEA tried one more time to appeal to the *City* to obey the law applicable to it as a single employer and as the covered public agency under the MMBA. In this final letter dated October 5, 2011, addressed to Deputy City Attorney Dawson – and copied to the Mayor, all Councilmembers, City's Chief Operating Officer, Human Resources Director, Independent Budget Analyst, and two Assistant City Attorneys – MEA stated, in pertinent part:

> . . . [I]n repeating Mr. Goldsmith's prior rejection of "the MEA Demands" by his letters dated August 16th and September 12th, you have likewise placed a mistaken focus on the fact that the *City Council* is *not* proposing this ballot initiative and did not act "as a body" to authorize the Mayor to use the resources and power of his office to sponsor it. You argue that, as a result, the *City's* admitted MMBA obligations to meet and confer have never been triggered with regard to it and that the *City Council* will play a strictly ministerial role in placing Mayor Sanders' *legacy* pension reform initiative on the ballot . . . Your office's passive acceptance of the sham which has occurred here means that the *City* continues to violate the important statewide labor policies embodied in the MMBA.
>
> 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

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[4] This is factually incorrect as this Memorandum was issued in response to Mayor Sanders' threat to initiate or sponsor a "citizens' initiative." (Testimony of City's Human Resources Director Scott Chadwick. I, 131:4-23; 132:24-135:12; 138:5-28.)

[5] In its footnote dismissal of the 2008 Memorandum issued by the City Attorney's Office, this is the paragraph to which the City refers when it wrote: "Note also the extensive critique of the memo in Exhibit 83." (City's Opening Brief, page 8, footnote 2.)

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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 process 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.

Indeed, your office explained this proper balance in a Memorandum of Law issued on January 26, 2009. . . . As your office acknowledged . . .: "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."

. . . [T]he legal point made in the *Inglewood* case emphasizing the need for a case-by-case analysis when determining issues of authority and agency is sound. And the result of the *fact* inquiry in *Inglewood* does not save the City from the consequences of Mayor Sanders' actions and activities *as Mayor* with regard to this initiative.

In contrast to the facts here demonstrating Mayor Sanders' abuse of his power as Chief Executive Officer and Chief Labor negotiator – in defiance of this City's Charter-mandated governance structure – the school principal in the *Inglewood* case . . . was acting on his own behalf, not on behalf of his District; he was acting in furtherance of his personal interests, not the District's interests. Under these unique factual circumstances, the actions of the school principal were not deemed to be the actions of the *District* for purposes of prosecuting an unfair labor practice charge *against the District* because the principal was *not* acting as the District's agent or within the scope of his customary authority as a school principal. That is not this case. . . .

While all of MEA's prior requests have clearly fallen on deaf ears, this letter will serve as MEA's final, heartfelt demand that the *City* comply with the MMBA by engaging in a timely, good faith meet and confer process related to the Mayor's legacy pension reform ballot initiative and that the City Council fulfill its proper role under the Charter with regard to such meet and confer rather than being confined to the ministerial "rubber-stamping" role the Mayor has in mind for them. (Exhibit 87, Bates 855-856 and 858-859, emphasis in original)

F. After MEA's Final Demand Letter In Early October 2011, the Mayor and City Council Remained Undaunted And Undeterred

MEA's "final, heartfelt demand," of course was to no avail. Mayor Sanders remained unrepentant – spelling out his purpose in no uncertain terms during a taped interview with the *San Diego City Beat* magazine on December 2, 2011 – and using the royal "we" when referring to both the City and his fellow ballot proponents:

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> . . . 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. Uh and 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 then through the meet and confer process. (Exhibit 91 – transcript; Exhibit 160 – copy of audiotape)

For its part, the City Council was on cruise control headed to unilateral implementation of the Mayor's policy determination on employee compensation and pensions without directing the Mayor to engage in a good faith meet-and-confer process or doing so itself. Rather than exercise its own legislative power to fulfill the City's obligations under the MMBA, the City Council consigned itself to a "ministerial" role and became the Mayor's "rubber stamp."

On December 5, 2011, the City Council adopted Resolution R-307155, "declaring an intention to submit to the voters a Charter amendment measure titled "Amendments to the San Diego City Charter Affecting Retirement Benefits" and directing the City Attorney to prepare an ordinance calling a special election to place the measure on the ballot." (Exhibit 92) Ironically, this Resolution stated on its face that it was "not subject to veto by the Mayor." (Exhibit 92, page 2) This is the Council action to which Mayor Sanders referred in his remarks to a civic leadership group on December 8, 2011. (Exhibit 218, page 3; IV, 257:14-27)

On January 30, 2012, the City Council enacted Ordinance O-20127, "submitting to the qualified voters of the City of San Diego at the municipal special election consolidated with the statewide primary election to be held on June 5, 2012, one proposition amending the San Diego Charter by amending Article VII to add sections 70.1 and 70.2; amending Article IX to add sections 140, 141.1, 141.2, 141.3, 141.4, 150 and 151; and amending Article IX to amend section 143.1, all relating to retirement benefits." (City's Exhibit E, page 1)

In this Ordinance, the City Council "ordained" that the "following" Comprehensive Pension Reform for San Diego Proposition be submitted to the voters on June 5, 2012, with the full text then set forth in the next 15 pages of the Ordinance. (City's Exhibit E, pages 3-17) The City Council also approved the text of the actual question to be posed to voters on the ballot – calling for a "yes" or "no" vote – as follows:

> **PROPOSITION ____. Amends City Charter Regarding Retirement Benefits.** Should the Charter be amended to: direct City negotiators to seek limits on a City

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> employees' compensation used to calculate pension benefits; eliminate defined benefit pensions for all new City Officials and employees, except police officers, substituting a defined contribution 401(k)-type plan; requires substantially equal pension contributions from the City and employees; and eliminate, if permissible, a vote of employees or retirees to change their benefits? (City's Exhibit E, page 18, emphasis in original)

This Ordinance, like the December Resolution, stated on its face that it was "not subject to veto by the Mayor." (City's Exhibit E, page 19)

Also on January 30, 2012, the City Council adopted Resolution R-307249, "directing the City Attorney to prepare a ballot title and summary; directing the City Attorney to prepare an impartial analysis and to retain outside counsel to assist in the preparation; and directing the Mayor, Independent Budget Analyst and City Auditor to prepare a fiscal impact analysis; all regarding a proposition amending the San Diego Charter relating to retirement benefits."[6] (Exhibit 97, page 1) This Resolution stated on its face that it was "not subject to veto by the Mayor." (Exhibit 97, page 2)

G. The "Official" Ballot Proponents Heeded the Mayor's Call During His State of the City Address and Became the City's Agents In Furthering the Plan to *Transform* City Employee Pensions Without Meet-And-Confer

Having made a policy decision related to the City's future pension plan for new hires – and having determined that an amendment to the City's Charter was the means to accomplish this momentous change, Mayor Sanders published an announcement about his plans on the City's website on November 19, 2010. Accompanied by a picture of Mayor Sanders and the City Seal, the Mayor's home page touted:

> "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. . . .

---

[6] COO Goldstone is "not sure" if Mayor Sanders formally delegated this role to him or if "it was maybe implied that (he) would be involved as his representative in (his) capacity as COO and CFO." (III, 101:20-23) Having been involved in the fiscal analysis related to the Mayor's initiative and then the analysis related to the combined single initiative that the Mayor was a proponent of, once the initiative qualified for the ballot, COO Goldstone became one of the City officials who had to do an "impartial fiscal analysis for the ballot." (III, 94:26-95:12) Although the City Auditor did not agree with the fiscal impact analysis, the process was set up so that it need not be "unanimous" and if two out of the three agreed, majority would rule. (III, 104:17-105:11)

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> (the Mayor) and Councilmember Kevin Faulconer "will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot." (Exhibit 25; II, 7:10-9:21)

The Mayor's Office issued a News Release to announce the Mayor's decision and his intentions (Exhibit 26); the Mayor held a kick-off press conference on the 11th floor of City Hall to promote his plan – with the City Attorney, the City's COO and the City's COO all in official attendance. (Exhibit 26) An e-blast e-mail message from JerrySanders@sandiego.gov arrived in the in-boxes of three to five thousand community leaders and community members to "announce our intention to craft language and gather signatures for a ballot initiative that will eliminate public pensions as we know them." (Exhibits 198 and 182; IV, 191:17-192:7; 193:14-24; 194:9-14)

Mayor Sanders' campaign to build support for his initiative plan with downtown business leaders – with help from key Mayoral staff members – began in earnest in December 2010. (Exhibits 30-31; 35-36; 189-190; 201-202; 258-259) He formed a campaign committee to raise money. (Exhibits 45 & 34) On January 12, 2011, Mayor sanders stood at a podium bedecked with the City seal to deliver his State of the City address. The official copy of this speech also bears the City seal. (Exhibit 39a) Replete with the royal "we," Mayor Sanders offered a major *City* policy speech (using his City-paid speech writer) while outlining his course of action for how to achieve it:

> **After two years of working with our unions**, we expect to cut our retiree health care costs significantly, providing further savings for taxpayers.
>
> Out city attorney has outlined a legal way to negotiate future compensation so we reduce long-term liabilities. Friday, I'll join him and Council leadership to announce details.
>
> And **we** are rethinking pensions even further.
>
> Councilman Kevin Faulconer, the city attorney and I will bring to voters an initiative to enact a 401(k)-style plan that is similar to the private sector's and reflects the reality of our times.
>
> **We are acting in the public interest**, but as private citizens. **And we welcome to our effort anyone who shares our goals.**
>
> Within government circles, this is a radical idea. It challenges the notion that public employees should be treated better in retirement than the taxpayers who foot the bill.
>
> But I'm no radical. I'm a realist. And enough is enough.

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> It's clear that public employee pensions, which once brought order to government, are now a destabilizing force. They undermine public confidence, put assets at risk, and disrupt our ability to forecast costs.
>
> . . . I'm thinking about the taxpayers in 25 years, and the kind of city they'll inherit. It should be a city where retirement costs are fair, affordable and predictable. A city where taxpayers aren't on the hook every time the stock market plunges. A city where the phrase "unfunded liability" is a relic of the past. . . . Whether radical or sensible, this reform is essential. (Exhibit 39a, pages 6-7, emphasis added)

Mayor Sanders explained at the hearing that he felt "it was (his) obligation to tell the public what (he) felt were the answers and the solutions to some of these issues. . . . and to tell them at the same time what (he) intended to do about them." (II, 46:14-47:8)

The Mayor's Office issued a News Release after the State of the City address to confirm Mayor Sanders' plans for the "next wave of pension reform." The headline – "Mayor lays out vigorous agenda for 2011 " – was followed with the news that Mayor Sanders was calling it a "time of optimism and opportunity," while pledging to use a ballot initiative to eliminate traditional pensions and replace them with a 401(k) style plan. (Exhibit 38)

Under Civil Code section 2299, an agency is actual when the agent is really employed by the principal (the *City*) – as Mayor Sanders was. Under Civil Code section 2315, an agent has such authority as the principal (the *City*), actually or ostensibly, confers upon him. This is the measure of the agent's authority.

Civil Code section 2316 states that 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. Under section 2317, ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

The evidence is irrefutable that Mayor Sanders was the City's actual agent as its elected Mayor, CEO and Chief Labor Negotiator and, further, that, when deciding, announcing and implementing his plans with regard to the alleged citizen initiative implicated in this case, he was acting as the City's authorized agent under Section 3505 of the MMBA and within the meaning of PERB's *Inglewood* agency test. Every publicized account related to this initiative referred to *Mayor* Sanders as its crafter, its primary backer, or its author; his City-paid staff referred to it as

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"his initiative." His Director of Special Projects candidly agreed: "I think that everyone was aware that the Mayor was working on this and it was the subject of conversation and news broadcasts, and you know, I think my neighbors were aware of it." (I, 149:19-28; 168:20-169:26) Every member of the City Council knew what Mayor Sanders was doing and saying – and MEA's multiple letters copied directly to them left no room for a head-in-the-sand approach. They did nothing and said nothing to disavow his authority to make this policy determination and course of action *for the City* and to do so in a manner which clearly violated the MMBA.

In response, the City argues that Mayor Sanders could not have had "actual or apparent authority to act for the City when he proposed to sponsor an initiative on pension reform *as a private citizen.*" Such circular reasoning does nothing to overcome the well-reasoned, contrary conclusion set forth in the 2008 Memorandum issued by the City Attorney's Office. (Exhibit 23) Indeed, the City presses on with the assertion that the "facts which came out in the evidentiary hearing show that the heart of the union claims . . . are (sic) demonstrably false," because:

> Proposition B was not the Mayor's concept for pension reform. The Mayor was not the 'father' of Proposition B, nor its author. Its authors were attorneys hired by the SDCTA, whose members enthusiastically embraced the concepts of a competing measure, not the Mayor's. The Mayor did not, as falsely alleged (MEA, Ex. 1, 0006), 'spearhead' the entire Proposition B project."[7] (City's Opening Brief, 2:13-22, emphasis in original)

The City later undermines this approach by stating: "After an agreement was reached on the terms of what became Proposition B, the Mayor held a press conference. (Ex. 159)" (City's Opening Brief, 30:18-19, emphasis added) Thus, it is undisputed that Mayor Sanders *agreed* on the initiative terms which accompanied the Notice of Intent filed on April 4, 2011, and which he announced at his press conference on April 5, 2011. Any arguable differences between the Mayor's original initiative design and the terms of the *final* initiative is of no legal consequence.

Nevertheless, in their Opening Brief at pages 91-93, Charging Parties have already dissected and refuted the City's unsupported argument that the **agreed-upon** initiative was not the *Mayor's initiative*. Indeed, Mayor Sanders himself refuted the City's point:

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[7] *Merriam-Webster's* defines "spearhead" as a leading element, force, or influence in an undertaking or development.

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> I think we had difficult negotiations, and I think we came up with something that I think is important for the City in the long run. I don't have to like every piece of it, but I felt that I had gotten the pieces that I really needed, which was a 401(k) and having police remain competitive so that we can hire and retain. . . . I don't know that you're ever satisfied in a negotiation. I think negotiations always leave you feeling I could have done this or I wished I'd have got this. I guess the way I felt was that one ballot initiative was moving forward. I felt it was an extremely important ballot initiative, and that's the reason I supported it. (II, 123:21-124:9)

1. A Special Agent Represents Another In A Particular Transaction

Civil Code section 2295 defines an "agent" as one who represents another, called the principal, in dealings with third persons. Such representation is called agency. Under section 2297, an agent for a particular act or transaction is called a special agent, while all others are general agents.

Whether an agency exists is a question of fact. *Wolf v. Price* (1966) 244 Cal.App.2d 165, 172. Existence of agency is generally question of fact to be determined on consideration of all evidence rather than any specific testimony as to the fact of agency. *Brokaw v. Black-Foxe Military Institute* (1951) 37 Cal.2d 274, 278. An agency may be implied by the conduct of the parties. *Ramey v. Myers* (1952) 111 Cal.App.2d 679, 685; *Travelers Indem. Co. v. Royal Indem. Co.* (1969) 275 Cal.App.2d 554, 562. Agencies may be proved by acts as well as by words. *Zander v. Texaco, Inc.* (1968) 259 Cal.App.2d 793, 799. To establish actual or ostensible authority of an agent, the principal's consent need not be express. *Kelley v. R.F. Jones Co.* (1969) 272 Cal.App.2d 113, 120. Agency may be proven by circumstantial evidence. *Whittaker v. Otto* (1961) 188 Cal.App.2d 619, 623; *People v. Frangadakis* (1960) 184 Cal.App.2d 540, 549; *Burgess v. Security-First Nat. Bank* (1941) 44 Cal.App.2d 808, 819.

2. The Three "Official" Ballot Proponents Were the Mayor's/City's Special Subagents Under Applicable Legal Standards

Elections Code section 9202 provides that at least one but not more than three proponents may file a Notice of Intention to circulate an initiative petition. Mayor Sanders confirmed that the three signatories were among the "principal people" involved in the negotiations which led to the single initiative announced at his press conference. (Exhibit 54; II, 96:27-99:18)

Mayor Sanders knew when he was having this press conference on April 5, 2011, that "they" were filing or had filed this notice of intent with the City Clerk related to the initiative

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effort being announced. (Exhibit 54; II, 128:28-130:13) Mayor Sanders had not read the actual final text of the proposed Charter amendment "first line to last line" but he had been briefed and he knew what the "primary substance of it was," and certainly the "points (he) thought were important." (Exhibit 54, Bates 691-699; II, 130:17-131:7) When Mayor Sanders stood up in front of the cameras on April 5, 2011, to say he had reached a deal – and that it was big deal and would be a national model – he was talking about the contents of this initiative. (Exhibit 54; II, 131:8-13)

At this press conference, Mayor Sanders, Councilmembers DeMaio and Faulconer, and the other people in attendance "announced that (they) had reached an agreement on a single ballot initiative." (II, 96:4-9) Councilmember Carl DeMaio took to the podium to say: "The biggest appreciation that I have today is for our Mayor." Then, turning to him: "Mr. Mayor, it was your leadership that allowed us to reach the deal we have today." (Exhibit 159, KUSI videoclip)

Mayor Sanders agrees that the "proponents of dueling ballot measures to curtail San Diego City pensions reached a compromise Monday to combine forces behind a single initiative for the June 2012 ballot." (Exhibit 52; II, 119:25-120:5) The *Union Tribune* accurately reported the Mayor's declaration that the measure would create a national model and that:

> "We worked with a coalition of concerned citizens and the result is a legally defensible measure that will save taxpayers hundreds of millions of dollars that can be used to enhance vital City services for decades to come." (Exhibit 52; II, 121:1-13; *See also* 113:23-114:4)

Although he was not one of the three official proponents who signed the Notice of Intent to Circulate Charter Amendment Initiative Petition, Mayor Sanders agrees that, during the negotiations that resulted in this initiative, he didn't get everything he wanted but he "got many things (he) wanted," and that he was "an enthusiastic proponent of this initiative." (II, 188:23-189:3) Mayor Sanders publicly asserted that this pension reform ballot initiative was the most important initiative in the City's history. (IV, 226:4-14)

Once Mayor Sanders reached agreement with the others, the only discussion he had about how it would go forward and be put on the ballot was to say that it would be a signature process.

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He was asked and did agree that T. J. Zane (a signatory on the Notice of Intent) could run the ballot initiative from the Lincoln Club. (II, 191:21-192:10) The signature-gathering process was exactly what the Mayor had announced on November 19, 2010, and, in fact, he agrees that the process for this Comprehensive Pension Reform Initiative began with this announcement and ended with the passage of this initiative at the polls on June 5, 2012. (II, 188:9-22)

The irrefutable evidence shows that the three "official" proponents were acting as the Mayor's/City's agents to further the plan the Mayor had announced on the City's website on November 19, 2010 – and repeated in multiple official communications thereafter – "to lead the signature-gathering effort to place the (pension reform) initiative on the ballot." The fact that the Elections Code assigns special handling and filing duties to these "official" proponents does not alter their status as the Mayor's/City's agents in achieving Charter amendments on compensation and pensions while avoiding the meet-and-confer obligations of the MMBA. The City asserts that the use of the term "agents" to describe the nature of the relationship between the Mayor and the "official" ballot proponents is "disparaging language." (City's Opening Brief, 5:9-20) However, regardless of who feels "disparaged" by the term, it is the legal nature of the voluntary relationship they forged.

3. The City's Assertion That the Three Proponents Were "Three Private Citizens Acting On Their Own Accord" Is Utterly Discredited By the Action Record

The City argues that the three individuals who signed the Notice of Intent were nothing other "than three private citizens **acting on their own accord**." (City's Opening Brief, 1:22-26, emphasis added) Based on his factually implausible "conclusion," the City cuts to the chase in declaring that "Proposition B is conclusively a genuine citizens' initiative." (City's Opening Brief, 1:26-27, emphasis in original; see also 7:6-10)

But these three "official" proponents were clearly *not* acting "on their own accord." They were acting as the Mayor's special agents in fulfilling the purely mechanical act of filing the Notice of Intent. The contents of the proposed initiative represented an *agreement* which the Mayor had negotiated, reviewed and approved *before* it was filed and before he announced it at his press conference on April 5, 2011. He authorized the official proponents to file what they

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did, when they did. They did not exercise any independent discretion with regard to this filing which was in furtherance of the agreed-upon plan the Mayor had first announced on November 19, 2010 – a plan to craft an initiative (which he did) and bring it to the voters for their signatures to get it on the ballot (which he did).

The names and identities of the "official" ballot proponents were of no consequence to the initiative campaign. The media did not refer to this initiative as the "Zane-Boling-Williams' initiative." Nor did they ever call it the "Lincoln Club initiative," or the "SDCTA initiative." It was understood to be the *Mayor's initiative*. He was uniformly and repeatedly described as its "crafter" or one of its "crafters." It was even described as his "legacy." He himself said it was the "most important initiative in the City's history." The e-blast letters to Chamber members was over *his* signature as "Mayor Jerry Sanders." (Exhibits 80 and 197) It was not a letter from Boling or Zane or Williams. It was Mayor Sanders who called and led the press conferences; he went to the TV and radio stations and to the *Union-Tribune* Editorial Board to promote his initiative cause. The local and national media contacted his Office – his Director of Communications for comments and "quotes."

4. The City's Assertion That the "Official" Proponents Were Not the Mayor's Agents Because He *Didn't Ask* Them To Be Is Contrary To Applicable Law

The City asserts that Charging Parties failed to prove that the official ballot proponents were agents of the Mayor/City because the Mayor "expressly denied that he asked any of the three individuals to bring forth the Notice of Intent, and that testimony was un-rebutted." (City's Opening Brief, 5:26-6:2) Yet a closer look at the actual exchange between City's counsel and the Mayor on this issue is quite revealing and supports the legal agency conclusion:

Q. Let me ask you this. Did you ask April Boling to sign the intent of notice to circulate the petition?
A. No.
Q. Did you ask Mr. Zane to do that?
A. No.
Q. Did you ask Mr. Williams to do that?
A. No.
Q. You did not consider them when you say your people, right?
A. Well, it's just I didn't ask them. I wasn't asked about that and I didn't ask anybody. (II, 186:11-21)

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Thus, even in response to a *leading* question designed to give the Mayor the opportunity to "disown" these official proponents – indeed, a question suggesting that the "correct" answer would be that these three official proponents were *not* "his people" – Mayor Sanders did not "disown" them or distance himself from them at all.

The truth is that they were not only his fellow proponents on an agreed-upon initiative but his agents in filing the Notice of Intent which permitted the signature-gathering to begin. It was, as Mayor Sanders himself said: "the route **we were going**." (II, 42:22-43:2, emphasis added) In fact, his objective in leading this initiative was to give the citizens "an opportunity to weigh in **by giving their signature** to put it on the ballot." (II, 59:15-25, emphasis added) He was motivated, in part, to avoid the meet and confer process by his concern over "their" signature-gathering effort:

> Because I didn't want this to go out for a year and not give **us a chance to collect signatures** . . . and I also believe that the 401(k) style system was critically important to the City and its financial stability and its long-term viability for the City. I felt that it was important enough to take directly to the voters and allow the voters to voice their opinion by signing petitions to put that on the ballot. And that's the reason I chose that. (II, 44:22-45:2, emphasis added)

The City further asserts that the ALJ deprived the City of the "opportunity for *closure* on this important and central issue" when he sustained Charging Parties' objection to this question posed to Mayor Sanders: "And they were not agents of the City in your judgment?" (City's Opening Brief, 6:3-5, citing II, 186:22-26, emphasis added)[8] However, the City goes on to acknowledge that, even if the Mayor's answer had been allowed, it would *not* have brought "closure" on this issue because a "principal's belief as to the existence of an agency relationship"

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[8] The City also erroneously asserts that Mayor Sanders' "opinion testimony" regarding agency should have been allowed as permissible "lay opinion" under Evidence Code section 800, which limits such testimony "to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (2) Helpful to a clear understanding of his testimony." The City made no such showing at the hearing – and makes none in its Opening Brief – relying instead on the unexplained assertion that "the testimony at issue here meets these criteria." (City's Opening Brief, 6:20-25) Nor does Evidence Code section 805, on which the City also relies, support the admissibility of Mayor Sanders' "lay opinion" about the status of the official ballot proponents as agents of the City because it applies only to "testimony in the form of an opinion that is otherwise admissible."

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is one factor which may be considered but is *not determinative*. (City's Opening Brief, 6:17-20) Indeed, the cases on which the City relies make this clear. *The K. King and The G. Shuler Corp. v. King* (1968) 259 Cal.App. 2d 383, 394 ["belief of the parties that a principal agent or a master servant relationship was created is only one of many factors in making a determination of the legal status or relationship"]; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45 [same].

Thus, even if PERB assumes, for the sake of argument, that Mayor Sanders' presumptive "yes" answer had been allowed over objection, it would be ineffective in changing the legal consequences of the undisputed evidence in establishing that the three "official" proponents who signed and filed the Notice of Intent did so in furtherance of the initiative plan which Mayor Sanders had been spearheading since his original announcement on the City's website on November 19, 2010.

H. Mayor Sanders and the City Council Allowed the Voters To Believe That "The City" Was Doing the Talking About This Pension Reform Initiative

When explaining the "information interest" associated with ballot initiatives, the court in *Chula Vista Citizens for Jobs and Fair Competition v. Norris, et al. and State of California, Intervenor* (2012) WL 987294 (S.D. Cal.) – on which the City relies – noted that voters need to know "who is doing the talking" during a ballot initiative election in order to evaluate the various messages competing for their attention – especially because ballot-measure language is typically confusing and the long-term policy ramifications of the ballot measure are often unknown. *Id.* at pages 19-20. "The identity of the source is helpful in evaluating ideas." *Id.* at page 20.

These points underscore the reality in this case that, it was not the "official" proponents whose identities were of any consequence in this initiative process – it was Mayor Sanders' name, position, credibility, visibility, and media access as the City's *Mayor* – with presumed expertise about the City's problems and likely effective solutions – which "spoke volumes."

The San Diego Municipal Codes section 27.0513 authorizes the City Council, by resolution, to authorize itself or individual members, including the Mayor, to sign a ballot argument in support of or in opposition to any *measure* placed on the ballot. They may exercise this authority by one of three options: (1) designating the Mayor to sign the argument on behalf

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of the Mayor and City Council; (2) designating the Mayor and individual members of the City Council to sign the argument; or, (3) designating individual members of the City Council to sign the argument. No such authorization was given here.

Elections Code section 9282, subdivision (a), provides that, for measures placed on the ballot by petition, the persons filing an initiative petition may file a written argument in favor. The "Argument in Favor of Proposition B" appeared in the sample ballot transmitted as official matter to every voter. Only one of the five signatories, April Boling, was an "official" proponent of the initiative measure. The names which figured prominently in the "Argument In Favor" were, instead, Mayor Sanders, Council President *Pro Tem* Kevin Faulconer and Councilmember Carl DeMaio – all for the purpose and effect of giving the argument in favor of this Proposition the *City*'s imprimatur. In pertinent part, the "Argument In Favor" stated:

> A YES vote for Proposition B, the Comprehensive Pension Reform initiative, is the long-term solution to San Diego's pension problems.
>
> The City's pension costs are projected tp increase by more than $100 million over the next 10 years if we don't take action now.
>
> Proposition B is expected to save nearly $1 billion, which means more City money for priorities like:
>
> - Fixing potholes and street repairs
> - Maintaining infrastructure
> - Restoring library hours
> - Re-opening park and recreation facilities . . .
>
> YES on Proposition B:
>
> - Requires City employees pay their fair share
> - Caps the cost to San Diego taxpayers
> - Stops "pension spiking"
>
> Strongly endorsed by the non-partisan, independent, San Diego County Taxpayers Association. www.realpensionreform.com
>
> Lani Lutar, President & CEO, San Diego County Taxpayers Asociation
> April Boling, Former Chair, Pension Reform Committee
>
> Kevin Faulconer, Council President Pro Tem
> Carl DeMaio, Councilmember
>
> Mayor Jerry Sanders

(Exhibit 98 at Bates 889)

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The City's scheme to *transform* compensation and pensions for City employees by a "citizens' initiative" to by-pass the City's exclusive bargaining representatives not only defied the state's public sector collective bargaining law, it disrespected the importance of governmental impartiality in electoral matters by having *government* – through the City's Mayor and two Councilmembers – give added credence to the "Argument In Favor" of Proposition B and to the assertion that **1 billion dollars would become available to meet the City's "priorities."**[9]

In *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, the court agreed that the City's statement of a ballot question offended the principle of governmental impartiality when it asked voters if an Ordinance, a zoning modification and a Development Agreement should be enacted to "allow and regulate card room gaming . . .in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access." *Id.* at 1225-1226. The court emphasized:

> Government action which may tend to influence the outcome of an election operates in an area protected by the guarantee of equal protection and freedom of speech. . . . A fundamental precept of this nation's democratic electoral process is

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[9] City's COO Goldstone acknowledges that he saw and heard this reference to a "billion dollars" in savings. (III, 109:19-26) Over the City Auditor's objections, he and the City's Independent Budget Analyst (who reports to the City Council) agreed on the final fiscal impact analysis to be published with the official ballot materials. (Exhibit 98, Bates 887-888; III, 105:24-106:1) The analysis showed that, by closing the defined benefit plan and creating a 401(k)-style plan for all new hires except police officers, the City would incur a greater cost than if the status quo had remained in effect; over a 30-year period, there would be a *net increase cost* to the City of $13 million, which, once adjusted for inflation, would be $56 million of additional cost in present value. Despite this, the first point in the analysis sent to each voter declares that the City would save $963 million over 30 years – or $581 million when you adjust for inflation. This "savings" would come about *if* pensionable salaries were frozen for several years (through 2018) – though they are not required to be – because the City's actuarially required contributions to the pension plan would be smaller if salary increases the pension system "assumed" would occur were not, in fact, provided. (III, 107:2-22; 108:24-109:13; compare Exhibit 98, Bates 887-888) After presenting the $963 million savings forecast *first*, there is a note at the very end of the analysis which warns that the ballot measure is estimated to result in increased cost to the City of $54.1 million for fiscal years 2014 through 2016, largely due to the change in the unfunded actuarial liability (UAL) payment schedule. (Exhibit 98, Bates 888, emphasis added; III, 106:2-25) This will, in fact, be an immediate short-term cost increase and consequent adverse impact on the City's budget. (III, 106:26-107:1, emphasis added) The fiscal impact analysis goes on to caution that these costs will be greater and could continue over a longer period of time if salary freezes are not implemented.

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that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. *Id.* at 1227.

When he signed the "Argument In Favor" of Proposition B, Mayor Sanders **vouched for Proposition B *as Mayor* and as the City's authorized agent, and he** took one more step in the journey which he started *as Mayor* when he announced this initiative on the City's website on November 19, 2010.

III. THERE IS NO FIRST AMENDMENT PROTECTION FOR THE CITY'S CONDUCT IN VIOLATION OF THE MMBA

The City uses broad brush strokes to cover all of Mayor Sanders' conduct and speech with the paint of the First Amendment. This effort fails not merely for its lack of specificity but also for its substantive lack of merit.

A. The Act of Proposing An Initiative Is Not Protected By the First Amendment Because It Does Not Involve Core Political Speech

The City defends itself against these unfair practice charges by invoking the alleged First Amendment rights of the Mayor and individual Council members to (1) "engage in direct democracy by initiative;" (2) "*act privately to petition their government for redress*;" and (3) "express their views on a matter of public concern," of which a "textbook example" is "whether or not to amend the City Charter to reform the City's pension system."[10] (City's Opening Brief, 15:24-25; 15:28-16:4; and 6:18-23, emphasis in original) On this basis, the City concludes that "imposing a meet and confer requirement on such activity impermissibly impinges on that (First Amendment) right," and "their First Amendment activities did not transform the citizens' initiative into a Council-adopted or City-sponsored proposition, such that their activities must be curtailed to satisfy the MMBA. (*Id.* at 15:24-25 and 16:18-23)

Yet these assertions are contradicted by the very case the City cited for a different proposition but fails to mention during its First Amendment analysis. The court in *Chula Vista Citizens for Jobs and Fair Competition v. Norris, et al. and State of California, Intervenor*

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[10] In support of these assertions, the City cites the United States Supreme Court's decisions in *Pickering v. Board of Education* (1968) 391 U.S. 563, *Connick v. Meyers* (1983) 461 U.S. 138, and *Borough of Duryea, Penn. v. Guarnieri* (2011) 131 S. Ct. 2488. (City's Opening Brief, p. 16)

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(2012) ___F. Supp.2d___, WL 987294 (S.D. Cal.), emphasized that there is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is *not* core political speech. *Id.* at page 10 (citing *Angle v. Miller* (9th Cir. 2012) 673 F. 3d 1122, which, in turn, cites *Meyer v. Grant* (1988) 486 U. S. 414, 424-25). Instead, the act of proposing a ballot measure is the first step in an act of law-making. . . . An initiative petition is a legislative document. *Id.* at page 12. "Serving in the position of an official ballot initiative proponent is not pure speech. It is a legislative act." *Id.* at page 13. The *Pickering* "balancing test" is never triggered.

Thus, the act of proposing an initiative is *not* an act which implicates freedom of speech or freedom to petition government as the City argues.[11] It is the first step in an act of *law-making* by citizens *for their government.* When proposing this ballot initiative, Mayor Sanders was not engaged in constitutionally-protected speech on a "matters of public concern" related to employee compensation and pensions; nor was he exercising a constitutionally-protected right to *petition* City government on these matters. He was *legislating* for City government – and doing so while he was also duty-bound by Charter and under the MMBA to address and resolve these same matters in his role as the head of that government. He simply chose an unprotected and unlawful means for accomplishing his Mayoral goals for the *City* by using this ballot initiative to avoid the duties imposed on him and on the City under the MMBA.

B. There Is No First Amendment Right to By-Pass the Exclusive Bargaining Representatives in Violation of the MMBA

The City acknowledges that "a City official is not entirely immunized by the First Amendment from violations of the MMBA." (City's Opening Brief, 17:6-7) And the City also concedes that the PERB cases which limit free expression in the labor relations context . . . all relate to expression *directed at employees which constitute threats or otherwise impinge on their*

[11] California's Constitution, Article I, Section 3, subsection (a), states that the "people have the right to instruct their representatives, *petition government* for redress of grievances, and assemble freely to consult for the common good." Though mis-cited, this is presumably the City's reference in its Opening Brief at page 9, lines 24-25.

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representational rights."[12] (City's Opening Brief, 17:7-15, emphasis in original) Yet, having recognized PERB's precedents which actually establish the City's *per se* violation of the MMBA in this case, the City reaches a nonsensical but self-serving conclusion:

> There is no evidence that the Mayor's communications were other than to the public at large, and thus within the protected zone of commenting on public issues. No court or PERB case renders his alleged activities unprotected by the First Amendment, and placing the burden of a meet and confer requirement on his Constitutional rights, when no law has ever done so before, impinges on those rights." (*Id.* at 17:15-19)

To the contrary, the evidence establishes that, consistent with PERB precedent, the speech in furtherance of the conduct at issue in this case impinges on representational rights and is *not* protected. Moreover, PERB had recent occasion to apply its precedents when finding against the City in *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M. Indeed, the PERB Board observed that the City "mischaracterizes or overlooks pertinent findings from each of [the PERB] cases," (*Id.* at page 10), and, in particular, "relies heavily on selective findings in *Rio Hondo.*" (*Id.* at page 11). Based on its precedent in *Rio Hondo Community College District* (1980) PERB Decision No. 128, PERB rejected the City's "First Amendment" defense in *Office of the City Attorney* – as it should be rejected here – stating:

> However, the crux of the Board's analysis in *Rio Hondo* is that protected employer communications are founded upon the expression of views, arguments, or opinions, but are not unlimited. The Board stated, "the employer's right to freely express its views, arguments or opinions is impliedly established by the fact that the employer is prohibited only from engaging in negotiations with persons or groups other than the exclusive representative." (*Id.*; emphasis in original) Further, as stated previously herein, protected speech is afforded the employer "provided the communication is not used as a means of violating the Act." (*Id.*) *Office of the City Attorney* at p. 11-12.

Moreover, PERB's decision in *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S, also supports a rejection of the City's erstwhile "First Amendment" defense. In *Department of Transportation*, 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.

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[12] The City cites *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M; *Rio Hondo Community College District* (1980) PERB Decision No. 128; and *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S.

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Finally, to the extent that the City is suggesting that speech which "otherwise impinges on representational rights," is *only* unlawful if it is "directed *at* employees," rather than being directed to third persons to their detriment, this is simply a misstatement of the law.

The evidence established, without contradiction, that the Mayor's speech involved impermissible negotiations with third persons for the purpose of avoiding the MMBA-mandated negotiations with Charging Parties as exclusive bargaining representatives; the Mayor's speech undeniably involved communications used as a means to violate the MMBA.

The speech at issue in this case was intended to and did impinge on Charging Parties' representational rights and on City employees' rights to be represented in a good faith meet and confer process prior to any lawful implementation of changes in their compensation and pension benefits. This speech finds no protection under the First Amendment or in PERB's precedents.

IV. WHETHER OR NOT THE MAYOR VIOLATED OR COMPLIED WITH *OTHER LAWS* DOES NOT EXCUSE THE CITY'S VIOLATIONS OF THE MMBA WHICH OCCURRED HERE

In its Opening Brief, the City serves up a virtual smorgasbord of Election Law, Campaign Finance Law, and Political Activity Law to assert or imply (1) that if the Mayor complied with *these laws* then the City could not, by definition, have violated the MMBA; and (2) that one or more of these laws preempt the MMBA. Such a nonsensical argument is tantamount to a kidnapper defending against a Penal Code violation on the ground that he was obeying the posted speed limit while transporting his victim. PERB rejected this approach in *City of Monterey*, PERB Decision No. 1766-M (2005), when concluding that alleged compliance with the Brown Act does not "legalize" an unlawful restriction on rights guaranteed by the MMBA. Indeed, in the *City of Monterey* case, PERB noted that, the California Supreme Court:

> in a slightly different context, has observed that section 3508 provides "the right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on *any grounds other than those set forth in this section.*" (*Id. at* page 13, italics in original.)

A. Government Code Protections Related to "Political Activities" Do Not Legitimize Conduct Which Violates the MMBA

The City argues that "the Mayor's activities in supporting a citizens' initiative were expressly authorized by statutory and case law and fully within his First Amendment rights" –

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adding that he "can legally solicit and receive political funds to promote a ballot measure on working conditions or retirement." (City's Opening Brief, 13:7-10) Indeed, the City goes even further in arguing that Government Code section 3209 – relating to the right to solicit or receive political funds or contributions to promote the passage or defeat of a ballot measure – preempts the MMBA and relieves the Mayor and other City officials from their duties under the Act. The City writes:

> More importantly, Government Code section 3209 strongly suggests that public official support activities, including fund raising, for a ballot measure *regarding retirement and working conditions* may not be impeded in any way, except by local regulations on use of City time. Certainly, grafting a meet and confer requirement on such activity would seriously impede the rights of public officials recognized and protected in Government Code sections 3203 and 3209. (City's Opening Brief, 14:24-28, emphasis in original)

The absurdity of the result the City urges, reveals the fallacy of the City's argument. If the City's entire *government* can "opt-out" of the MMBA by the scheme used here – and do so with impunity by recitation of *other laws* it arguably did *not* violate – the MMBA will be effectively vitiated.

But a closer look at the actual Government Code provisions on which the City relies, shows that this is a clearly preposterous notion unsupported by *any* authority, including the very provisions the City cites. Government Code section 3201 introduces the provisions on which the City relies and states the legislative finding "that political activities of public employees are of significant statewide concern," such that "the provisions of this chapter shall supersede all provisions **on this subject** in the general law of this state or . . . any city . . . **charter** except as provided in Section 3207." (Gov't C. § 3201, emphasis added)

Government Code section 3203 prohibits restrictions on the political activities of any officer or employee of a state or local agency, except as otherwise provided in this chapter. Thus, Government Code section 3207 permits a City Charter or the governing body of any local agency to prohibit or restrict (1) officers and employees from engaging in political activity during working hours; and (2) political activities on the premises of the local agency.

Government Code section 3209, which relates to the solicitation or receipt of funds to promote passage or defeat of ballot measures, states:

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> **Nothing in this chapter prevents** an officer or employee of a state or local agency from soliciting or receiving political funds or contributions to promote the passage or defeat of a ballot measure which would affect the rate of pay, hours of work, retirement, civil service, or other working conditions of officers or employees of such state or local agency, *except that a state or local agency may prohibit or limit such activities by its employees during their working hours and may prohibit or limit entry into governmental offices for such purposes during working hours.* (Gov. C. § 3209, emphasis added)

While "nothing in this chapter prevents" the general activities described, *nothing in this chapter* preempts the MMBA either – as the City argues. The fact that a City Charter may not lawfully prohibit certain political activities in contravention of the statewide interest codified in Chapter 9.5 of the Government Code, does not mean that the *City* can violate the provisions of Chapter 10 of the Government Code, sections 3500, *et seq*. which codify the Meyers-Milias-Brown Act.[13]

Moreover, nothing in Chapter 9.5 authorizes the conduct at issue in this case. Under section 3207, a local agency may lawfully prohibit and limit political activities which take place during working hours or on the agency's premises. Such restraints are permissible because they serve the legitimate governmental interest in keeping the activities of individual officers or employees *separate* from the public entity itself. Toward this end, for example, Government Code section 3206 expressly prohibits participation in political activities while in uniform:

> No officer or employee of a local agency shall participate in political activities of any kind while in uniform.[14]

Yet *no such separation occurred here* where Mayor Sanders used his Office and his City-paid Mayoral staff to further his initiative cause as the *City*'s authorized agent. Mayor Sanders conducted the entire course of conduct at issue in this case while in the "uniform" of his Office – i.e., wearing the title of "Mayor."

Moreover, the cases which City cites as having fueled the protections set forth in Chapter 9.5, demonstrate that a public employee's rights may be permissibly limited and restrained, and

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[13] Even if the *general* protections in Chapter 9.5 were deemed to be inconsistent with the *particular* restraints arising under the MMBA in Chapter 10 (which they are *not*), under rules of statutory construction, the "particular are paramount" to the general. (C.C.P. § 1859.)

[14] Section 3206 was first added to Chapter 9.5 as Section 3204.5 by Stats 1963 ch 2000 § 1.

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that Chapter 9.5 prohibits a public employer's broad proscription against an employee's political activities on penalty of losing his or her public employment when no legitimate governmental interest is at stake.

In *Kinnear v. City and County of San Francisco* (1964) 61 Cal.2d 341, 342, the plaintiff held a permanent civil service position as a deputy in the sheriff's department. When he filed a declaration of his candidacy for election to the office of Sheriff, he was notified by the Civil Service Commission the same day that, as a result of his filing for office, his position was automatically forfeited under the City Charter. The *Kinnear* court concluded that this Charter provision was unconstitutional for over-breadth even if it could be constitutionally drawn "to deal with the particular factual situation in this case, i.e., one in which a person runs for office against his own superior." *Id.* at 343.

Likewise, in *Fort v. Civil Service Commission of the County of Alameda* (1964) 61 Cal.2d 331, the Medical Director of the County's Center for Treatment and Education on Alcoholism, a position within the county's classified civil service system, spent six (6) hours of his own time serving as Chairman of a Speakers' Bureau for the Contra Costa committee to reelect Governor Brown. The Board of Supervisors dismissed him on the basis that this activity constituted taking part in the political management and affairs in a political campaign or election in violation of the County Charter. The Civil Service Commission affirmed the Board's action after a hearing.

The *Fort* court concluded that this Charter provision was an unconstitutional abridgement of fundamental rights – noting that, while it was "true that the Charter provision did not directly prohibit a person from engaging in the proscribed activities, he may do so only at the penalty of losing his employment and its attendant benefits." *Id.* at 334. The *Fort* court acknowledged that "no one can reasonably deny the need to limit some political activities," however:

> . . .[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 to protect the efficiency and integrity of the public service. . . . [W]e are satisfied that, in the light of the principles applicable to freedom of speech and the related First Amendment rights, no sound basis has been shown for upholding a county provision having the breadth of the one before us . . . which is not narrowly drawn but is framed in sweeping and uncertain terms that except only the right to vote and to express opinions "privately." *Id.* at 338.

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Finally, it is the decision in *Bagley v. Washington Township Hospital District* (1966) 65 Cal.2d 499, which sheds light on the legislative amendment to Chapter 9.5 to add Section 3209 (formerly 3206) in 1965.[15] Section 3209 is the section related to ballot measures which the City argues has a preemptive effect on the MMBA. In *Bagley*, the hospital district terminated the employment of a nurse's aide who participated in a campaign to recall certain of the district's directors. She had confined her activities on behalf of the recall campaign to her off-duty hours and, in seeking to influence interested citizens to vote for th recall, she did not advise them of her employment by the district. Her district employer terminated her in reliance on former Government Code section 3205 which provided: "No officer or employee whose position is not exempt from the operation of a civil service personnel or merit system of a local agency shall take part in any campaign for or against any candidate, except himself, for an office of such local agency, or for or against any ballot measure relating to the recall of any elected official of the local agency."

In striking down former Government Code section 3205, as well as the district's directive related to it – and the termination predicted upon them, the *Bagley* court concluded that "the sweep of the restrictions imposed extends beyond the area of permissible limitation." *Id.* at 511. The *Bagley* court emphasized:

> By extending its ban to "any ballot measure pertaining to the district" the directive embraces matters other than campaigns against an employee's "own superior." Indeed, in its present form, the directive, like the restriction struck down in *Fort*, would include "even . . . measures which would directly and personally affect the employee such as one relating to his own salary or working conditions. (Citation omitted.) The overbreadth of the statute lies in the wide swath of its prohibition of employee participation in a number and variety of elections. *Id.* at 509.

Neither the provisions of Chapter 9.5 nor these cases stand for the proposition which the City proffers – that an elected Mayor may use the "rights" set forth in Chapter 9.5 as a sword to violate other public employees' rights rather than as a shield to protect himself against

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[15] Former Chapter 9.5 also entitled "Political Activities of Public Employees", consisting of §§ 3201-3206, was added by Stats 1963 ch 2000 § 1 and repealed by Stats 1976 ch 1422 § 1. Former § 3206, similar to present § 3209, was added by Stats 1965 ch 16 § 1, effective March 9, 1965, and repealed by Stats 1976 ch 1422 § 1.]

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unreasonable local restrictions on political activities which might cost him his job.

As the elected head of City's government and the Chief Executive Officer of a municipal corporation – with duties clearly established under the city's Charter and the MMBA – Mayor Sanders may not invoke any "rights" under Chapter 9.5 of the Government Code to sanction his violation of the state's public sector collective bargaining law. Nor may the *City,* as the covered public entity under the MMBA, invoke Chapter 9.5 as a virtual grant of immunity for its violations of the **Act.**

B. Campaign Finance Laws Offer No Immunity for the City's Violations of the MMBA

Finally, the City invokes yet another section of the Government Code which regulates campaign financing as a means to immunize the unlawful conduct which occurred in this case in violation of the MMBA. This argument does not survive scrutiny for the same reason: even if the conduct at issue in this case did not *also* violate the Political Reform Act, Government Code section 81002, this does not mean that the conduct *complied* with the MMBA.

Citing *League of Women Voters v. Countywide Criminal. Justice Coordination Comm.* (1988) 203 Cal. App.3d 529, the City asserts that "the Mayor and Council members may draft an initiative ballot measure and seek private citizens to carry it forward; these are perfectly legal activities for public officials and are not campaign activities." (City's Opening Brief, 15:1-2)

Notably, the government actors in the *League of Women Voters* case did not assert that they were acting as "private citizens" while using public resources. In contrast to this case, the Los Angeles County Board of Supervisors established a Countywide Criminal Justice Coordination Committee which included the Los Angeles County sheriff, district attorney, public defender, County's chief administrative officer, superintendent of schools, director of community development; director of data processing and clerk; the mayor, city attorney, president of the city council, City's chief administrative officer, the Los Angeles Chief of Police, the presiding and supervising judges of the criminal and juvenile divisions of the Los Angeles Superior Court; the chairmen of the Municipal Courts Judges Association and the Municipal Court Presiding Judges Association, the U. S. Attorney for the central district, and four representatives of smaller cities

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or police departments in the County. The Committee formed a legislative subcommittee to study a proposal to implement certain procedural changes in the criminal justice system, and, toward this end, to explore the initiative process as a way to achieve the reforms. The reforms being discussed related to jury size and required votes to convict. None of these reforms implicated wages, hours and working conditions of the employees of the City, the County, the schools or the Courts. The resulting "Speedy Trial" Initiative failed to qualify for the ballot.

The League of Women Voters contended that the this Committee had unlawfully expended public funds in connection with this "Speedy Trial" Initiative in violation of the Political Reform Act, Government Code section 81002. The *League of Women Voters* court disagreed, holding that the Committee's use of public funds in developing this "Speedy Trial Initiative" and in finding a willing proponent did not violate campaign finance law because this course of conduct was not "campaigning." The court concluded that the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority." *League of Women Voters* at 550.

According to the City, if the actions of the Mayor or any Councilmen in this case did *not* violate campaign finance laws, then these same actions "cannot render Proposition B anything less than a true citizens' initiative." (*Id.* at 8-9 and 22-23) This argument, as stated, is a *non-sequitur*. Presumably, the City's actual point is that, *if* Mayor Sanders did not violate California's campaign finance laws, then neither he nor the City could have violated the MMBA either. In any event, the City's argument lacks merit for all the same reasons already stated.

V. THE CITY'S "ACCRUAL" HYPOTHETICALS AND "WHAT IF" SCENARIOS MISSTATE *BOTH* THE MMBA AND ELECTIONS LAW

Before offering a series of "hypothetical" questions with incorrect answers, the City asserts that Charging Parties have not offered a "convincing scenario to show how the Mayor's meeting and conferring on Proposition B with the unions would lead to any result that is compatible with the citizens' right to exercise direct democracy through initiative. . . . When did

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the meet and confer obligation accrue, and how should it have been carried out?" (City's Opening Brief, 34:4-8) [16]

A. The Obligation to Meet and Confer Accrues Before the Public Entity Determines Policy or Course of Action On Matters Within the Scope of Representation

The City's attempt to focus on a single moment where the duty to bargain "accrued" ignores the body of law demonstrating that an unlawful failure to meet-and-confer usually, as it did here, involves a course of conduct beginning with the public agency's *decision to propose* changes on matters within the scope of representation and ending with the unilateral implementation of those changes.

The meet-and-confer obligation accrues *before* the public agency proposes changes on matters within the scope of representation. Government Code section 3504.5 requires the City to give "reasonable written notice" to a recognized employee organization of any *proposed* legislative action "directly relating to matters within the scope of representation." Section 3505 further requires the City to "meet and confer in good faith" with representatives of the Union over mandatory negotiable matters, and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." Thus, under the MMBA, the *City's* meet-and-confer obligation *accrued* before the Mayor and City Council, as the City's statutory agents under Section 3505, made a determination of policy or course of action related to matters within the scope of representation. Section 3505 defines "meet and confer in good faith" as both parties having "the mutual obligation personally to meet and confer" and "to continue for a reasonable period of time in order to exchange freely information, opinions, and proposals and to endeavor to reach agreement on matters within the scope of representation . . ."

When a public agency fails to meet-and-confer, the unlawful course of conduct is *completed* when a unilateral change is made to matters within the scope of representation. An

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[16] Ironically, the correct answers to these hypothetical questions can be found within the 2008 and the 2009 Memoranda issued by the City Attorney's Office itself. (Exhibit 23 and 24)

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unfair practice for a failure or refusal to meet and confer is complete and the conduct becomes actionable when changes in terms and conditions of employment are unilaterally implemented without having met and conferred in good faith. *See Lucia Mar Unified School Dist.* (2001) PERB Decision No. 1440 (holding that statute of limitations on failure to meet-and-confer in good faith began to run when school board voted to contract out services).

In *Vernon Fire Fighters, Local 2312, IAFF v. City of Vernon* (1980) 107 Cal.App.3d 802, the court made clear that an employer's entire course of conduct in failing to meet-and-confer in good faith is unlawful. In *Vernon*, the city council adopted a resolution forbidding city employees from using city facilities to wash personal vehicles and barring city employees from using any tools, equipment, or city facilities for personal benefit. *Id.* at 806, n.1. The City adopted the resolution without any prior notice to or meeting-and-conferring with the city's firefighters union. *Id.* at 811. The union filed a writ of mandate claiming the resolution was adopted in violation of the MMBA; the trial court granted the writ, but invalidated the resolution only to the extent that it prohibited firefighters from using city facilities to wash their personal vehicles while not on duty. *Id.* at 806. The court of appeal reversed on the issue of remedy, agreeing with the union that "the entire order, being the result of unilateral actions undertaken by the City is void, for procedural violation of section 3505 of the MMBA." *Id.* at 824.

In reaching this conclusion, the court emphasized that the city's duty to bargain began before it proposed any change related to terms and conditions of employment. "[S]ection 3504.5, Government Code, requires the City to give 'reasonable written notice' to the Union, of any *proposed* legislative action 'directly relating to matters within the scope of representation.'" *Id.* at 822 (emphasis in original). The court noted that the legislature specifically intended this meet-and-confer requirement to mean an obligation to meet-and-confer "*prior to arriving at a determination of policy or course of action,*" as expressly stated in Section 3505. *Id.* at 823, n.21 (emphasis in original). When a public agency fails to comply with this initial duty to notify the union of a proposed change and then takes action without meeting-and-conferring in good faith, its entire course of conduct violates both the letter and spirit of the MMBA:

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> The rule in California is well-settled: a city's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith. The courts have not been reluctant to intervene when a public agency has taken unilateral action without bargaining at all. In such situations, courts have been quite zealous in condemning the unilateral action and in granting appropriate relief. . . . [T]he employer's *fait accompli* thereafter makes impossible the give and take that are the essence of labor negotiations. . . Moreover, to allow another construction would be at direct odds with the purpose of the MMBA, which is to promote full communication between public employers and their employees. *Id.* at 823 (internal citations and quotations omitted).

Indeed, the City Attorney's Memorandum of Law issued on January 26, 2009, answers the very question the City is unable or unwilling to answer correctly in its Opening Brief. This Memorandum states:

> The core principle of the decisional law related to the MMBA is the duty to bargain in good faith. An employer fails to bargain in good faith by changing matters within the scope of representation without first giving the exclusive representative notice and opportunity to bargain to impasse. . . . *Public Employment Relations Bd. v. Modesto City Sch. Dist.* (1982) 136 Cal.App.3d 881, 900 (following *NLRB v. Katz* (1962) 369 U. S. 736, 745). . . . "An employer cannot change matters within the scope of representation without first providing the exclusive representative notice and opportunity to negotiate. *Modesto City Sch. Dist.*, 136 Cal.App.3d at 900. (Exhibit 24, page 15)

Accordingly, the City's unlawful course of conduct began *before* November 19, 2010, when Mayor Sanders announced his unilateral decision to pursue an initiative as a means of *transforming* the City's compensation and pension policies – without a prior good faith meet and confer process – and continued through the months which followed when the City, through its Mayor and City Council, persisted in this unlawful course of action and refused multiple specific demands to meet and confer. The unfair practice was *complete* when the City declared that the Charter amendments embodied in Proposition B – having been passed by the voters and chaptered by the Secretary of State on July 20, 2012 – are now in effect to unilaterally and indisputably change compensation, pensions and other terms and conditions of employment for represented employees. As decided in *Vernon*, this unilateral change in matters within the scope of representation is void in its entirety.

B. The City Misstates the Evidence to *Imply* That There Was A Waiver of Bargaining Rights

Although the City does not directly challenge these unfair practice charges as untimely or overtly assert that Charging Parties waived their bargaining rights, there is an inference to this

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effect which deserves rebuttal in an abundance of caution.[17]

In raising the "accrual" hypotheticals, the City asserts that:

> . . . [T]he Mayor's intention to bring forward an initiative for the ballot was very public from November 19, 2010. The Mayor and his staff at that time in late 2010 had a meeting with employee representatives, including Michael Zucchet of MEA. (Dubick, Vol. III, p. 207, ll. 25-27) . . . Zucchet did not demand to meet and confer then, and there is no evidence that he did so at any time thereafter. The Mayor further made his intentions clear in public at the State of the City speech in January 2011. . . . There is no evidence of any union demand made after the speech. (City's Opening Brief, 34:7-17)

First, it is well established that a waiver of the statutory right to bargain must be clear and unmistakable. *Lucia Mar Unified School Dist.* (2001) PERB Decision No. 1440; *Amador Valley Joint Union High School Dist.* (1978) PERB Decision No. 74. Silence does not constitute a clear and unmistakable waiver. *Amador Valley*, p. 9.

Yet, apart from the lack of any legal support for the City's implied assertion of a waiver "by silence," the actual testimony in the record – when faithfully recounted – utterly defeats the City's cowardly approach on this issue.

Mayor Sanders' Chief of Staff Julie Dubick testified that she "believes" that she attended a meeting the Mayor had with various labor leaders around November 2010. (III, 207:19-24) Her recollection is that Michael Zucchet from MEA was present. (III, 207:25-27) She believes that other unions, other than MEA, were represented at that meeting but she is "unable to identify them right now." (III, 209:2-5) She does not know "one way or the other" whether anyone from Firefighters Local 145 was there. (III, 211:7-14) Mayor Sanders did not describe the details of his proposed initiative at this meeting. (III, 207:28-208:2) "To the best of her recollection, it was a discussion about another step in pension reform, including a possible 401(k)-style plan." (III, 208:3-15) "To the best of her recollection," she doesn't "think" that Mr. Zucchet made any

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[17] Having admitted the deliberateness of its MMBA-avoidance scheme – vividly documented in the *City's* intransigent responses to MEA's multiple written requests for meet and confer from July through October 2011, (Section II-D, subsections 1-2, *supra* at pages 17-26), the City nevertheless implies more than once in its Opening Brief – and with great irony – that Charging Parties were somehow remiss in not having reacted to the City's failure to meet and confer by making a demand for meet and confer *sooner* than they did. (See, for example, City's Opening Brief, page 24, lines 1 through 7, and page 35, lines 12-16.)

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demand during that meeting that the Mayor meet and confer on the issue of his "proposal to establish a 401(k) plan." (III, 209:6-13) However, Ms. Dubick made clear that, at this meeting, "Mayor Sanders was not putting forward a proposal for purposes of meeting and conferring with MEA." (III, 210:14-17)

Mayor Sanders' Deputy Chief of Staff Aimee Faucett testified that the Mayor "did meet with several labor groups, organizations, and leaders to discuss his plans" related to the concept of a 401(k) style plan for certain new hires. (IV, 77:2-8) However, she confirms that this was "not for purposes of meeting and conferring." It was instead "to announce his intention to put the concept on the ballot through a private citizen initiative," and he never formulated and presented a proposal through the meet and confer process." (IV, 77:2-18)

After a break, Ms. Faucett offered additional information related to her recollection of meetings allegedly held in "the first part of 2011, possibly December 2010," between the Mayor and (she believes) Councilmember Faulconer, with representatives from MEA, POA, and Local 145 relating to the initiative. (IV, 77:23-78:4; 78:26-79:12)

Q. And when did that meeting take place?
A. I believe it possibly could have been in December. I don't recall specifically when. . . .
Q. Where was it?
A. . . . I don't remember. It could have been at the Hecht Solberg office. It may have been – Maybe it was at Wells Fargo offices . . .
Q. And your testimony is that you were there?
A. I believe I – Yes, I was.
Q. Okay. And who was there representing the San Diego Municipal Employees Association?
A. Mr. Zucchet.
Q. And what was the subject matter?
A. The initiative that the Mayor and Councilmember Faulconer were considering bringing forward to the voters.
Q. And was this the meeting where they – where the Mayor announced his intention to do so?
A. I don't recall the exact phrasing . . . but the – it was implied that his intention was to bring an initiative forward regarding 401(k). (IV, 99:7-100:9) . . .
Q. Now, is your testimony that that meeting, as you're recalling it, was an invitation to MEA to meet and confer on the subject?
A. No.
Q. No, it was not?
A. No.
Q. Did you ever see any proposal from Mayor Sanders for presentation to MEA as a bargaining proposal related to his pension reform initiative ideas?
A. No.
Q. Now, is that the only meeting that you recall that you believe a representative

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from MEA attended?
A. I believe so.
Q. And was that meeting at the point in time where Mayor Sanders had already had his press conference and announced his intention to bring forward a ballot initiative?
A. I think so. (IV, 100:12-28)

On re-direct by City's counsel, Ms. Faucett confirmed that the Mayor described a "concept" in this meeting – a 401(k) to exclude public safety – but not the contents of any proposed initiative. (IV, 151:4-9) When asked if MEA's Zucchet said anything in the meeting about any requirement of the Mayor to engage in meet and confer "over that proposal," she responded: "I do not recall." (IV, 151:10-13)

No proposals concerning the Mayor's initiative were made to Firefighters Local 145 either. (IV, 133:23-28) In fact, the firefighters weren't even included in the initiative as of December 2010 – they were only included after the Mayor's negotiations with Councilmember DeMaio and the other business groups. (IV, 134:1-6) There was no draft of the Mayor's initiative available in December 2010, and there was nothing presented to any labor organization for meet and confer purposes related to the Mayor's initiative. (IV, 134:26-135:5)

C. The City Misstates Election Law to Argue That It Was "Powerless To Affect Any Change In Proposition B"

Leaving aside the fact of the City's continuing but unfulfilled duties under the MMBA, the City also misstates the initiative statutory scheme set forth in the Elections Code. The City asserts that, when MEA's first demand to meet and confer arrived on July 15, 2011, the signature-gathering process was in progress and "the Mayor and City Council were powerless to affect any change in Proposition B, and any meet and confer process would have been meaningless." (City's Opening Brief, 35:12-17, emphasis in original) And the City argues that it had no lawful option other than to perform its ministerial duty to place the CPRI on the ballot as a duly-certified initiative, citing *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149. (City's Opening Brief, 9:28-10:4)

Despite its preference for the Elections Code over the MMBA, the City is wrong again. Although the *Save Stanislaus* court held that a local government may not *unilaterally* decide to prevent a duly qualified initiative from being presented to the electorate, the court noted that the

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governmental body has standing to file a petition for writ of mandate to seek a court order removing the initiative measure from the ballot. *Ibid.* (See also, *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 786 [City Attorney's case for declaratory relief was plainly made to be relieved of statutory duties related to citizen's proposed initiatives because, despite importance of initiative power, "we guard this power with both a sword and a shield."] Needless to say, notwithstanding the legal cloud which hovered over this initiative, the City did not seek either declaratory relief or a petition for writ of mandate before putting it on the June 2012 ballot with the City's imprimatur.

Moreover, the City is also wrong in its assertion that the Mayor and City Council were "powerless" to affect any change *in Proposition B itself.* While the City offers a smorgasbord of Elections Code sections in support of its arguments (including section 9607, 9608, and 9609), the City never mentions Elections Code section 9604 entitled: "Withdrawal of initiative or referendum measure prior to filing of petition." Section 9604 *expressly* authorizes *any person* to "engage in good faith bargaining between competing interests to secure legislative approval of matters embraced in a . . . local initiative [measure]." Section 9604 further authorizes the proponents of a local initiative measure, as a result of such negotiations, to withdraw the measure "at any time prior to filing the petition with the appropriate elections official."

Thus, based on the roles assigned to each by the City Charter and by Section 3505 of the MMBA, if the Mayor and City Council had fulfilled their respective statutory duties related to the compensation and pension reform policy determinations being made in Proposition B, such a good faith meet and confer process might have led to the invocation of the Section 9604 procedure and thus to the withdrawal of Proposition B; in the alternative, such a good faith meet and confer process might have led to other forms of compensation or pension "reform" suitable for legislative adoption or for submittal to the voters as a Council-proposed ballot measure amending the City Charter – and, in either case, done in compliance with the MMBA.[18]

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[18] Indeed, the 2008 Memorandum issued by the City Attorney's Office outlined all of these alternatives and the methods for achieving them. (Exhibit 23)

VI. THE CITY IS RIGHT IN ASSERTING THAT INITIATIVE RIGHTS ARE INCOMPATIBLE WITH THE MMBA BUT IT IS THE MMBA WHICH CONTROLS – ESPECIALLY WHERE THE "CITIZENS' INITIATIVE" IS A PRETEXT FOR *CITY* ACTION IN VIOLATION OF THE MMBA

A. When Invoking Initiative Rights To Club the MMBA Into Submission, the City Ignores Its Language, History, Context and Purpose

The California Supreme Court has consistently held that the uniform regulation of public employee labor relations embodied in the MMBA is a matter of state-wide concern and that provisions of the California Constitution granting local control to cities and counties which interfere with the MMBA are preempted. *See County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287 ("[I]n [*Seal Beach*], we held that a charter city is subject to the meet-and-confer requirements of the Meyers-Milias-Brown Act (Gov.Code, § 3500 et seq.)."); *Voters for Responsible Retirement v Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 781 ("It is indisputable that the procedures set forth in the MMBA are a matter of statewide concern, and are preemptive of contradictory local labor-management procedures.); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (constitutional power of a charter city's governing body to propose charter amendments may not be used to circumvent the legislatively designed methods of accomplishing goals of MMBA); *Baggett v. Gates* (1982) 32 Cal.3d 128 (Public Safety Officers' Procedural Bill of Rights Act applies to chartered cities regardless of home rule provisions of state constitution); *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-95 (labor relations embodied in various state statutes are matters of statewide concern which govern where local regulation by charter cities contravenes state law).

Not only is a public agency's obligation to meet and confer broadly defined by the express terms of the MMBA, but case law also affirms that the mandatory duty rests with the governing body and cannot be supplanted by any outside person, entity, or process.

In *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335, the California Supreme Court held that, under the MMBA, the public agency charged with meeting and conferring must also reduce any agreement to writing and must present it to the governing body, which, upon a determination of approval, must treat the agreement as binding.

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The Court emphasized that the Legislature designed the MMBA to resolve labor disputes and that a statute which permitted the parties to repudiate parts of the statutory process whenever they choose would undermine the purpose of the statute to guarantee effective communication between public employers and their employees' representatives. *Id.* at 336.

In *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, the Court re-emphasized the role and responsibility of the *governing body* to effectuate the MMBA's collective bargaining process – holding that there is no room for interjection of a citizens' referendum process into collective bargaining. To allow a bifurcation of authority between negotiators – the governing body, and decision-makers – the voters, in such an instance would undermine the bargaining process established by the MMBA and would sanction a kind of bad faith bargaining. 8 Cal.4th at 792-93. The Court noted "the Legislature's intent [in the MMBA] to assign the governing body the central role of directing the meet and confer process so as to achieve binding labor-management agreements." *Id.* at n.5.

In *County of Riverside*, the Court invalidated a state law requiring counties to submit to binding arbitration over economic issues unresolved by the meet and confer process between counties and unions representing law enforcement officers or fire fighters. The Court held that the statute was invalid because it "permits a body other than the county's governing body to establish local salaries." 30 Cal.4th at 289.

There is no authority for the proposition urged by the City here – that the governing body may cede or abdicate its authority to meet and confer and allow an alternative body, *some*body, or a process to set terms and conditions of employment within the scope of representation.

B. Through the MMBA, the Legislature Delegated Authority Over Terms and Conditions of Employment Exclusively to the Governing Bodies of Public Agencies

The centerpiece of the City's argument is that the CPRI, as an initiative, is somehow beyond reproach. In fact, the City calls it "untouchable." (City's Opening Brief, 22:12-13) But while the City cites general statements in case law about the constitutional right of initiative, it ignores the key limitation on *local* initiatives at issue in this case: local initiatives are subject to the pre-emptive force of general legislation on matters of statewide importance. *Voters for*

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Responsible Retirement v. Bd. of Supervisors of Trinity County (1994) 8 Cal. 4th 765, 779. State legislation on matters of statewide concern prevails over local enactments, even local charter city enactments on what are traditionally municipal affairs. The Supreme Court has "repeatedly rejected" the proposition that "state legislation on matters of statewide concern may prevail over local enactments only to the extent that state law does not invade the sphere of municipal affairs." *Committee of Seven Thousand v. Superior Court* ("*COST*") (1988) 45 Cal. 3d 491, 510. "If a state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, then the state law applies to charter cities." *Id.* (internal quotations and citations omitted).

In *COST*, the Supreme Court affirmed an order barring the City of Irvine, a charter city, from holding an election on a voter-sponsored initiative which would have required the city to receive voter approval before imposing or collecting any taxes to finance regional transportation corridors. *Id.* at 495-98. The city council had previously conditionally approved the city's participation in a highway funding arrangement authorized by state law. *Id.* at 496-97. The initiative petition was signed by 19% of the electorate – sufficient to qualify it for the ballot – and was filed with the city clerk. *Id.* at 498. Before the city took any action on the petition, two city residents petitioned for a writ of mandate to prohibit the city from placing the initiative on the ballot; the petitioners argued that the initiative was invalid, in part, because it addressed a matter of statewide concern on which the Legislature had delegated discretionary authority to the city council alone. *Id.* The superior court granted the writ of mandate, commanding the city council to refuse to adopt the initiative, refuse to put it on the ballot, and refrain from spending any public funds or otherwise acting to implement or place the initiative on the ballot. *Id.* at 499. The individual proponents of the initiative and the committee established to promote the initiative challenged the superior court ruling by filing a petition for writ of mandate in the court of appeal. *Id.* The court of appeal held the initiative "invalid because it conflicts with state law on a matter of statewide concern." *Id.* at 500. The Supreme Court affirmed.

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The *COST* Supreme Court recognized that, in matters of statewide concern, there are two means by which the Legislature can restrict or outright prohibit 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." *Id.* at 511-12.

Applying those principles to the case before it, the task for the court was to determine whether, in passing the law at issue, the Legislature intended to delegate authority exclusively to the city council and thus bar the use of voter-sponsored initiatives and referenda. *Id.* at 500-01. The court identified two main factors for answering "the question whether a statutory reference to action by a local legislative body indicates a legislative intent to preclude action on the same subject by the electorate." *Id.* at 501. References to a local legislative body support the inference that the Legislature intended "to preclude action by initiative or referendum." *Id.* Further, the "intent to exclude ballot measures is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair." *Id.* In statutes which contain only a generic reference to the local legislative body – i.e., to the "governing body" or "legislative body" rather than "city council" or "board of supervisors," the court held that the state/local concern issue was generally determinative of whether the Legislature intended to permit the use of initiative and referendum. *Id.* at 503-04. The *COST* court distinguished a case in which it had found that public hearing requirements in zoning law did not evince an intent by the Legislature to bar initiative and referendum on the basis that "municipal zoning and land use regulations [are] municipal affair[s]," and therefore the Legislature had less authority to restrict local action. *Id.* at 511.

Applying the *COST* analysis to the MMBA leads to the conclusion that the Legislature intended, through enactment of the MMBA, to delegate action affecting terms and conditions of

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employment to local legislative bodies and to bar the use of initiative and referendum on such matters (except in the limited circumstance at issue in *Seal Beach*.) It is beyond dispute that the MMBA addresses an area of statewide concern – public sector labor relations. The question, then, is whether the meet-and-confer requirements of the MMBA reflect the intent of the legislature that only the governing body of a public agency can act on matters within the scope of representation.

The MMBA forbids public agencies from making unilateral changes in terms and conditions of employment without bargaining to impasse with the relevant employee associations. *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal. App. 4th 82, 99. The duty to bargain is delegated by the Legislature through the MMBA exclusively to the "governing body" or designated representative of the governing body. Gov't Code § 3505. Thus, under the MMBA, changes to terms and conditions of employment can occur only after meeting and conferring, and only the governing body or its designated representatives can meet and confer. Under the *COST* analysis, the framework of the MMBA leads to a strong inference that the Legislature intended to restrict any action by the electorate on terms and conditions of employment which does not allow for meeting-and-conferring by the governing body.

Cases analyzing the interplay between the MMBA and the initiative and referendum processes support the inference that the Legislature intended to bar action on employee terms and conditions taken directly by the electorate. As argued extensively in the Charging Parties' Opening Brief, the Supreme Court's decisions in *Seal Beach* and *Trinity County* demonstrate that the MMBA would be undermined if voters could take direct action on matters within the scope of representation. Such direct voter action is inconsistent with the Legislative intent and purpose when enacting a comprehensive legislative scheme to govern public sector labor relations and to foster both communication and agreement. "The existence of a pervasive system of regulation is significant as evidence of a legislative intent to delegate exclusively to a local legislative body and as evidence that the matter is indeed one of statewide concern." *COST*, 45 Cal. 3d at 512.

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In *Seal Beach*, the Supreme Court held that a charter city must meet-and-confer before putting a council-sponsored initiative on the ballot to amend certain terms and conditions of employment. 36 Cal. 3d at 601. The court recognized that the "meet-and-confer requirement [of the MMBA] is an essential component for regulating the city's employment practices." *Id.* The court held that the city's right to propose charter amendments was not absolute, but instead had to be harmonized with state law such as the MMBA. *Id.* at 598-600. The Court held that the right of a charter city to propose charter amendments was limited by the MMBA even though it recognized that a charter city's power to put charter amendments on the ballot derives from the state constitution. *Id.* at 594-95.

In *Trinity County*, the Court found there to be a "problematic" relationship between the MMBA and the local referendum power. 8 Cal. 4th at 782. As it had in *Seal Beach*, the Court recognized that, although the substance of compensation for employees of charter cities is a municipal affair not subject to general state laws, the state can impose a process by which disputes over employment issues are resolved. *Id.* at 781. It found that the dispute resolution process mandated by the MMBA would be undermined by making memoranda of understanding subject to referendum:

> If the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum. . . . Stated differently, the effectiveness of the collective bargaining process rests in large part upon the fact that the public body that approves the MOU under section 3505.1 – i.e., the governing body – is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined.

Id. at 782 (emphasis added). The Court concluded that "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment includes the power to exclusively delegate negotiating authority to the [legislative body], and therefore the power to curtail the local right of referendum." *Id.* at 784.

In *Seal Beach*, the Court debunked the city's argument that its constitutional right to propose charter amendments was absolute and overrode the MMBA's duty to meet and confer,

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holding that the constitutional power of a charter city's governing body to propose charter amendments may not be used to circumvent the statewide goals of the MMBA. The City here relies heavily on a footnote in *Seal Beach* which notes that the case "does not involve the question whether the meet and confer requirement was intended to apply to charter amendments proposed by initiative." 36 Cal. 3d at n.8. Reading this footnote alone, the City argues that the California Supreme Court "declined" in *Seal Beach* to apply the meet and confer requirement to a citizen's initiative [City's Opening Brief at p. 1]; that, as a result, *Seal Beach* "is not precedent in this case and does not control the legal analysis here" [City's Opening Brief at p. 8]; and even that *Seal Beach* "cast[s] doubt that the meet and confer requirement ever attaches to citizens' initiatives" [City's Opening Brief at p. 22]. However, *Seal Beach*, and particularly footnote 8, does not support such a speculative conclusion.

In fact, just the opposite is true: an analysis of the discussion to which footnote 8 is attached does not require speculation or reading tea leaves to compel the conclusion that the Supreme Court *did* direct what the outcome of a case involving a citizens' initiative would be – the very outcome which Charging Parties urge here – that the MMBA, as a law of statewide concern, prevails over the local initiative process in this case where the initiative process conflicts with the MMBA's meet and confer requirements.

Footnote 8 appears as part of a discussion of Seal Beach's contention that any regulation that affected its right to propose charter amendments was invalid. 36 Cal.3d at 598. Relying on *District Election etc. Committee v. O'Connor* (1978) 78 Cal.App.3d 261, the Court rejected Seal Beach's argument, stating, "Thus [based on *District Election*], the argument that the procedure for putting charter amendments on the ballot is sacrosanct and immune to legislative control has already been rejected." 36 Cal.3d at 599. The *Seal Beach* court continued,

> We agree with the holding in *District Election*, which makes this an a fortiori case: in *District Election* there was an actual conflict between a state statute . . . and the relevant charter provision concerning the number of signatures required to put an amendment on the ballot through the initiative process. Section 3505 is, of course, far less intrusive. Cities function both as employers and as democratic organs of government. The meet-and-confer requirement is an essential component of the state's legislative scheme for regulating the city's employment practices. By contrast, the burden on the city's democratic functions is minimal. *Ibid.*

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A reading of *District Election* makes clear what the Supreme Court meant in *Seal Beach*. *District Election* decided the question whether local charter requirements for the number of signatures needed to qualify a citizens' initiative prevailed over the higher signature requirement of the Government Code. The Court came down squarely in favor of the preemptive effect of state law:

> We hold for the reasons hereinafter discussed that the regulation of the charter amendment process is a matter of statewide concern governed exclusively by general laws which supersede conflicting provisions in a city and county charter. Accordingly, we conclude that the provisions of the charter . . ., insofar as they purport to authorize and establish different procedures regulating charter amendments by the initiative process are invalid . . . 78 Cal.App.3d at 267.

Thus, *District Election*, like this case, pitted a local charter entity's constitutional authority to amend its charter by initiative against a state statutory provision. The Court in *District Election* reached its result invalidating charter initiative process provisions through a lengthy review of the evolution of the home rule provisions of the California Constitution. The Court observed that, historically, charter provisions of home rule cities governed on specific local subjects "and other areas of internal affairs *not otherwise preempted by general laws of statewide concern* or expressly excepted therefrom . . . [citations omitted] . . . *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 32 Cal.Rptr. 830, 384 P.2d 158 [labor relations deemed a matter of statewide concern]." 78 Cal.App.3d at 269-70; emphasis added. The Court found that constitutional revisions over the years did not change the basic constitutional allocation of powers from the State to the local charter entity and did not contemplate nor effect any change in the preemptive effect of general laws of statewide concern over local home rule. *Id.* at 268-72. Then, in the course of reaching its conclusion that the charter amendment process is a statewide concern preempting conflicting local charter amendment procedures, the Court cited *Professional Fire Fighters, Inc. v. City of Los Angeles*, as an example of labor relations as a matter of statewide concern, twice more. 78 Cal.App.3d at 273, 274.

It is clear then that, when the Supreme Court in *Seal Beach* relied on *District Election* – a case involving the preemptive effect of state laws of statewide concern over conflicting charter provisions for citizens' initiatives – the Supreme Court was forecasting that the *District Election*

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result must govern here as well. When the *Seal Beach* Supreme Court said that the holding in *District Election* made *Seal Beach* – involving an indirect conflict between the statewide concerns of the MMBA and a local charter amendment – "an *a fortiori* case," the Supreme Court meant that the decision on the initiative question in *District Election* already governed and required the result in *Seal Beach* which was MMBA preemption over the Seal Beach charter amendments.[19] Thus, *District Election* also resolved the issue raised by the City in this case.

The City argues here that a citizens' initiative enjoys greater constitutional protection than charter amendments proposed by a governing body. However, *District Election* directly holds that charter provisions that purport to authorize and establish different procedures regulating charter amendments by the initiative process are nonetheless invalid where they conflict with general law of statewide concern. When *Seal Beach* and *District Election* are read together, it is clear that footnote 8 does not imply, as the City argues, that a different result would obtain in a case involving charter amendments proposed by initiative (which would, of course, be a result contrary to the Court's "a fortiori" conclusion). Rather, footnote 8 serves the rest of the *Seal Beach* court's discussion that the *Seal Beach* facts do not even rise to the level of the greater conflict decided by the Court in *District Election* – that between charter provisions for amendment of the charter by citizen initiative and conflicting state law. Footnote 8 says that the decision in *Seal Beach* is subsumed within, and required a fortiori by, the holding in *District Election*. Together, *District Election* and *Seal Beach* fully support the conclusion that the meet and confer requirements of the MMBA, as a law of statewide concern, prevail over conflicting or interfering charter amendments proposed by citizen initiative.[20]

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[19] *A fortiori* means: "With stronger reason; much more. A term used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another, which is included in it, or analogous to it, and which is less improbable, unusual, or surprising, must also exist." *Black's Law Dictionary*, abridged Sixth Edition.

[20] *District Election* was relied on by *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004)120 Cal.App.4th 374, 387-89, review denied (2004). In its Opening Brief, the City cites both *Howard Jarvis Taxpayers Assn.* and *District Election* for general principles. (City's Opening Brief, p. 9) Unfortunately, though, the City has not undertaken a full analysis of either case. Notably, *Howard Jarvis Taxpayers Assn.* relies in part on the Supreme Court's approval of *District Election* in *Seal Beach*. 120 Cal.App.4th at 388.

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Moreover, as observed by the Court in *Seal Beach*, the burden on the City's democratic functions here is similarly minimal: There is no right in the MMBA for any person or entity *other than the City* to engage in labor relations with City employees. Nor is there any provision in the MMBA for labor relations by referendum or initiative because there is no direct role for citizens in Section 3505. If the citizens are unhappy with the employment practices established by the governing body they elected, the citizens can elect others.

Furthermore, if the *Seal Beach* court had intended in its footnote 8 to reserve the question of whether the meet and confer requirement was intended to apply to charter amendments proposed by initiative, neither *Glendale City Employees' Assn.* nine years earlier nor *Trinity County* ten years later would have been decided as they were. As discussed above, both cases emphasize the language of Section 3505 that the *governing body* alone is ultimately responsible for both meeting and conferring and approving agreements. Neither Section 3505 nor the court's interpretation of the MMBA leaves room for the voters to intrude into collective bargaining by means of the initiative process.

The clear weight of authority is that the MMBA supersedes contrary local regulation in the various situations where the issue has come before the Supreme Court. 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.

The City has no argument for why the CPRI triumphs over the mandates of the MMBA. The City does not even acknowledge the limitations placed on local initiatives by statewide legislation, and thus has no argument for how the *COST* analysis applies in the current context. The City instead relies on general statements regarding the constitutional right to initiative. However, as the Supreme Court noted in *Seal Beach*, "[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." 36 Cal. 3d at 598 (internal quotations omitted). Indeed, there is a measure of *deja vu* in what the City argues here when one is reminded what the "state of the law" had been for several years before *Seal Beach* was decided in 1984. The *Seal Beach* court rejected the holding in *San*

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Francisco Fire Fighters, Local 798 v. Bd. of Supervisors (1979) 94 Cal. App. 3d 842, which concluded that the constitutional right of a charter city and county to propose a charter amendment to the electorate was beyond the reach of the MMBA:

> We discern in the state's Constitution, article XI, section 3, a clear purpose that when a county's, or city's, governing body shall find it to be in the public interest to propose a specific charter amendment for adoption by the electorate, it shall have the absolute and untrammeled right and duty to do so. Just as clearly appears a corollary intent that such charter amendment proposals, or the decision whether they be made at all, shall not be the product of bargaining and compromise between the public entity's representatives, and others. *Id.* at 548.

The Court in *Seal Beach* reached the opposite conclusion, finding that the Legislature intended, through the MMBA, to allow charter cities to propose charter amendments on matters within the scope of representation only after meeting-and-conferring with employee organizations. 36 Cal. 3d at 598-99. Likewise, the right of citizens to propose and adopt charter amendments is not absolute and untrammeled. Like all local action, citizens' initiatives are subject to the preclusive force of general legislation on matters of statewide concern. As the *COST* analysis 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.*

In *COST*, there was no dispute that a sufficient number of citizens had signed the initiative petition to qualify the measure for the ballot, yet the court ordered that the measure be kept from the voters because it was invalid as conflicting with state law. 45 Cal. 3d at 496-99. In *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal. App. 4th 465, 477-78, the court invalidated an initiative on airport expansion which had already been approved by 58% of the electorate on the grounds that the Legislature had delegated decisions on airport expansion – a matter of statewide concern – exclusively to local governing bodies. *See also L.I.F.E. Committee v. City of Lodi* (1989) 213 Cal. App. 3d 1139 [initiative ordinance, already approved by voters, dealing with annexation of land into city, ruled invalid because annexation is a matter of statewide concern over which Legislature has delegated authority exclusively to local agencies). *Seal Beach* involved three charter amendments submitted to *and adopted by* the voters. 36 Cal. 3d at 594-95. The city's general constitutional authority to

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propose charter amendments was not disputed, and there was no argument that any procedures under the Elections Code had not been followed; the sole deficiency in the charter amendments was the city's failure to meet-and-confer as required by the MMBA.

Indeed, in the very case cited by the City for the general proposition that "California courts have long protected the right of the citizenry under the California Constitution to directly initiate change through initiative, referendum and recall" – *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal. App. 4th 1372, 1392-94 – portions of the ordinance proposed by initiative were struck down as being pre-empted by state law.

The MMBA is general legislation on an issue – public sector labor relations – of statewide concern. Since the MMBA requires that changes in terms and conditions of employment be preceded by meeting-and-conferring, and delegates the duty to meet-and-confer to governing bodies, the Legislature clearly intended to restrict the power of initiative and referendum with respect to matters within the scope of representation.

C. Diverting From the Procedures Mandated by the MMBA Undermines the Substantive Rights and Obligations Created by the MMBA

As anticipated in the Charging Parties' Opening Brief, the City relies on cases interpreting the interplay between zoning law and CEQA and the initiative process to claim that the meet-and-confer requirement of the MMBA is merely a procedural requirement on legislative bodies with no effect on citizens' initiatives. The City asserts, without an argument in support, that "no one can argue [that the procedural requirements of CEQA and other laws] are less important than the procedural requirements of the MMBA." (City's Opening Brief, 13:1-6)

As *COST* makes clear, the proper inquiry is not the relative importance of the requirements, but whether the Legislature intended them to bar contrary action by the local electorate. The cases cited by the City all contain discussion regarding why the procedural requirements at issue should not be read as barring initiatives. However, as shown in the Charging Parties' Opening Brief, applying the same analysis to the MMBA shows that the Legislature *must have* intended the MMBA to preclude local initiatives on matters within the scope of bargaining; otherwise, the purposes of the MMBA would be undermined.

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The City's characterization of the MMBA as nothing more than a set of procedures applicable to legislative bodies is entirely inconsistent with how the courts have consistently interpreted the MMBA. While the *Seal Beach* court recognized that the procedures mandated by the MMBA do not require particular substantive outcomes on matters of local concern like employee compensation, this does not mean that the MMBA is all procedure and no substance. "[W]e have consistently held that the Legislature intended in 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 "principle means for [accomplishing the MMBA's stated purpose of providing a reasonable method of resolving disputes over terms and conditions of employment] is by imposing on public agencies the obligation to 'meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations." *Id.* at 536-37 (quoting Gov't Code § 3505). Because public sector labor relations is a matter of statewide concern, the Legislature has the power to bar any local action – whether by legislative body or the electorate – that undermines the substantive rights and obligations granted to and conferred on public agencies and public employees by the MMBA.

Another key distinction between the MMBA and the procedural requirements cited by the City is the question of whether the purposes of the procedural requirements can be fulfilled by the initiative process itself. This inquiry is relevant to the key question of whether the Legislature intended those requirements to bar the use of initiative and referendum. In *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165, 190, the Supreme Court noted that, when a citizen-sponsored initiative has some environmental impact, voters are likely to carefully consider for themselves the environmental impact of the initiative:

> Voters who are advised that an initiative has been placed on the ballot by the city council will assume that the city council has done so only after itself making a study 14 and thoroughly considering the potential environmental impact of the measure. For that reason a pre-election [environmental impact report] should be prepared and considered by the city council before the council decides to place a council-generated initiative on the ballot. By contrast, voters have no reason to assume that the impact of a voter-sponsored initiative has been subjected to the same scrutiny and, therefore, will consider the potential environmental impacts more carefully in deciding whether to support or oppose the initiative.

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Similarly, public hearing requirements, like those contained in state zoning and planning laws, have their purpose achieved by the initiative process itself:

> Obviously, when the governing body votes on a general plan amendment, the expression of public opinion on the amendment must come before the vote. When the people exercise their right of initiative, then public input occurs in the act of proposing and circulating the initiative itself, and at the ballot box.

DeVita v. County of Napa (1995) 9 Cal. 4th 763, 786. As the City itself acknowledges, the MMBA and the initiative process are incompatible. Other than in the *Seal Beach* context – where the public agency meets-and-confers with the employee organizations before submitting a measure to the voters – there is no way for the substantive purposes of the MMBA to be achieved when matters within the scope of representation are altered through the initiative process.

For these reasons, the incompatibility between the MMBA and the local initiative process must be resolved in favor of the MMBA because, as state legislation on matters of statewide concern, it must prevail.

D. The Preemptive Effect of the MMBA Is Even More Compelling Where, As Here, the "Citizens" Initiative Is Really the *City*'s Initiative

In their Opening Brief, Charging Parties have chronicled the events which took this "citizens initiative" from concept to completion. (See Section IV, pages 8 through 51)

The Mayor, his Chief of Staff, Deputy Chief of Staff, Director of Communications, Press Relations Staff, the City's Chief Operating Office and even the City Attorney played critical roles in the development, the fiscal analysis, the negotiations, and the drafting. Mayor Sanders admits that the concept was born in his Office in November 2010 when he and his staff determined what he would do *as Mayor* during his last two years in Office. Mayor Sanders used the City's website, the City seal, City-paid staff, and the State of the City address to announce and promote *his* initiative intentions – declaring that he would (1) push a ballot measure to eliminate traditional pensions and replace them with a 401(k) style plan for non-safety new hires; (2) craft the ballot initiative language; and (3) lead the signature-gathering effort to place the initiative on the ballot." (Exhibit 25; II, 7:10-9:21) He used his Mayoral Office in every sense of the word – both its physical premises at City Hall as well as its visibility and credibility in the community and with the media; he used the City's expert *human* resources in his Office; he used his official

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title and position – in short his "bully pulpit" – to make a compelling case to the voters that, *as Mayor*, he considered his initiative to be the most important in the City's history.[21] He signed the "argument in favor" of Proposition B to tell the voters on behalf of the City that a "yes" vote would mean "money for priorities like fixing potholes and street repairs, maintaining infrastructure, restoring library hours, and re-opening park and recreation facilities."

Any argument for a *true* citizens' initiative to prevail over the statewide statutory scheme embodied in the MMBA crumples under the weight of the entire factual record in this case which shows that Proposition B was a *City-sponsored* initiative for the purpose of avoiding the obligations of the MMBA while making dramatic changes in public employee compensation and pensions intended to serve as a "national model." As the court in *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 786, emphasized:

> [W]e are mindful of "our solemn duty to jealously guard the initiative power" . . . But we guard this power with both sword and shield. We must not only protect against interference with its proper exercise, but must strike down efforts to exploit the power for an improper purpose.

VII. ONLY A MAKE-WHOLE REMEDY WILL EFFECTUATE THE PURPOSES OF THE MMBA BY RESTORING THE STATUS QUO ANTE

PERB must apply its expertise in determining what remedy will effectuate the purposes of the MMBA. The meet-and-confer requirements are key provisions of the Act. (*IAFF, Local 230* v. City of San Jose (2011) 195 Cal.App.4th 1179, 1210).

PERB needs no reminder of the important, substantive rights which the MMBA guarantees to public employees and their exclusive bargaining representatives. The need for vigilance in protecting these rights is heightened in times of political unrest when the tyranny of

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[21] The notion that City-paid Mayoral staff members also acted "as private citizens" when carrying out their regular and customary duties related to the Mayor's initiative does not pass legal muster – or even the proverbial "smell" test. *Compare*, for example, the testimony of the Mayor's Chief of Staff Julie Dubick related to the "private citizen" and "volunteer" concepts (III, 151:7-152:1; 185:13-28; 186:5-187:3; 189:4-7); the testimony of the Mayor's Deputy Chief of Staff Aimee Faucett (IV, 88:11-23 ["I don't recall having a conversation regarding choice."]); and the testimony of Mayor's Director of Communications Darren Pudgil who did not ask for "volunteers," but "just gave assignments in due course of what people would normally be expected to do." (IV, 238:6-15)

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the majority threatens the rights of the minority; in this case, represented public employees who serve the residents of the City of San Diego are just such a beleaguered minority.

A. The City Has Acknowledged PERB's Authority to Order A "Make-Whole" Remedy In This Case

Conspicuously missing from the City's Opening Brief is any acknowledgment – or attempted disavowal – of its prior judicial admission related to PERB's remedial powers in this case. When arguing in the San Diego County Superior Court to defeat PERB's motion for a post-election preliminary injunction to delay implementation of Proposition B before PERB's proceedings have been concluded, the City wrote:

> PERB has the power to place employees back in the position they were in prior to the unfair labor practice. Once PERB concludes that new hires should not have been subject to CPRI, it could order those employees to be provided the City's defined benefit retirement plan subject, of course, to judicial review. (Exhibit 158, Bates 1324, lines 1-5)

Moreover, by application of the *Vernon* rule discussed above in Section IV, Proposition B is the result of unilateral actions undertaken by the City and, thus, is void *ab initio* due to the procedural violation of section 3505 of the MMBA." *Vernon Fire Fighters, Local 2312, IAFF v. City of Vernon* (1980) 107 Cal.App.3d 802, 824.

B. The City Is Vigorously Representing the "Official" Ballot Proponents In These Proceedings

The three "official" ballot proponents were free to apply for joinder as parties to the administrative hearing under PERB Regulations section 32164, but did not do so. The City has made the "initiative case" for them in the strongest terms. These three individuals made a deliberate – and a voluntary – decision to join Mayor Sanders' efforts to *transform* City employee compensation and pensions at the ballot box rather than at the bargaining table. They were not only his willing allies in this effort but, as shown above, they became his agents – and thus the City's agents – in the eyes of the law. They hitched their wagon to his high-profile star as the City's Mayor and their "cause" must succeed or fail as does his and the City's.

Thus, the City's argument that PERB cannot, in fairness, fashion a remedy to effectuate the purposes of the MMBA as between the Charging Parties and Respondent City due to the non-participation of persons who acted in concert with the City, lacks any merit.

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VIII. CONCLUSION

Charging Parties have shown why a true citizens' initiative on matters within the scope of representation would be incompatible with the state's legislative policies embodied in the MMBA statutory scheme. Yet, ultimately, this case does not require PERB to reconcile the rights of citizens involved in such a true citizens' initiative with the rights of public employees under the MMBA. The initiative process, as implemented here, with the undeniable and pervasive involvement of the City's Mayor – while acting as the City's authorized agent in his capacity as the City's Chief Executive Officer and its Chief Labor Negotiator and while serving as the City's statutory agent under Section 3505 of the MMBA, cannot stand as a means to sanction the City's MMBA "opt-out" scheme.

Charging Parties urge PERB to find in their favor on the unfair practice complaints before it and to order the make-whole remedy required to effectuate the purposes of the Act and to conform to the *Vernon* rule making unilateral changes implemented without a good faith meet-and-confer process void *ab initio*.

Dated: October 4, 2012

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PROOF OF SERVICE

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Tosdal, Smith, Steiner & Wax, 401 West A Street, Suite 320, San Diego, California 92101.

On October 4, 2012 (Date), I served the Consolidated Reply Brief of Charging Parties (describe document(s)) San Diego Municipal Employees Association, AFSCME Local 127, and San Diego City Firefighters, IAFF Local 145 on the parties listed below (include name, address and, where applicable, fax number) by (check the applicable method or methods): **[X] Email only.**

☐ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;

☐ personal delivery;

☐ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 4, 2012, at San Diego, California.

ELIZABETH DIAZ
(Type or print name)

(Signature)