Case No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO,
Respondent,

CITY OF SAN DIEGO,
Defendant/Real Party in Interest,

PUBLIC EMPLOYMENT RELATIONS BOARD (PERB),
Plaintiff/Real Party in Interest.

Petition from the Superior Court of the County of San Diego
The Honorable Luis R. Vargas, Judge
Department C-63, (619) 450-7063
Public Employment Relations Board (PERB) v. City of San Diego
Civil Case No. 37-2012-00092205-CU-MC-CTL

PETITION FOR WRIT OF MANDATE WITH IMMEDIATE RELIEF REQUESTED FROM CHALLENGED ORDER UNLAWFULLY INTERFERING WITH PERB'S JURISDICTION

Ann M. Smith, Esq. (SBN 120733)
Fern M. Steiner, Esq. (SBN 118588)
Tosdal, Smith, Steiner & Wax
401 West A Street, Suite 320
San Diego, CA 92101
Telephone: (619) 239-7200
Attorneys for Petitioner San Diego
Municipal Employees Association

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Ann M. Smith, Esq. (SBN 120733) Tosdal, Smith, Steiner & Wax 401 West A Street, Suite 320 San Diego, CA 92101 TELEPHONE NO.: 619-239-7200 FAX NO. *(Optional):* 619-239-6048 E-MAIL ADDRESS *(Optional):* asmith@tosdalsmith.com ATTORNEY FOR *(Name):* San Diego Municipal Employees Association	Superior Court Case Number: 37-2012-00092205-CU-MC-CTL ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION RESPONDENT/REAL PARTY IN INTEREST: SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain):*
(1) Deputy City Attorneys Association of San Diego	Pending Complaint before PERB re CPR Initiative
(2) AFSCME, Local 127, AFL-CIO	Pending Complaint before PERB re CPR Initiative
(3) Int'l Assoc. of Firefighters, Local 145	Pending Complaint before PERB re CPR Initiative
(4) Catherine April Boling	Pending Motion to Intervene
(5) T.J. Zane	Pending Motion to Intervene
(6) Stephen Williams	Pending Motion to Intervene

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 11, 2012

ANN M. SMITH
(TYPE OR PRINT NAME)

▶ Ann M. Smith
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488

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SUMMARY OF THE PETITION

Petitioner San Diego Municipal Employees Association (MEA) is a recognized exclusive bargaining representative under the state's Meyers-Milias-Brown Act (MMBA) for nearly 4,000 Professional, Technical, Supervisory, Administrative Support and Field Service employees of the City of San Diego (City). MEA seeks this Court's urgent intervention to reverse an Order entered by the Hon. Luis R. Vargas granting City's *ex parte* applications to stop administrative proceedings before the Public Employment Relations Board (PERB) on MEA's unfair practice charge related to the "Comprehensive Pension Reform" (CPR) Initiative.

Without any citation to statutory or case law and without explaining the court's rationale, this Order unlawfully interferes with PERB's legislatively-mandated exclusive initial jurisdiction to hear and determine the merits of MEA's unfair practice charge. It imposes a "stay" of indefinite duration on MEA's right to pursue timely, cost-effective administrative proceedings before the designated state agency with expertise in labor relations matters. In response to this challenged Order, Administrative Law Judge Donn Ginoza took the 4-day administrative hearing – set to begin on April 2, 2012 – off calendar and put MEA's unfair practice complaint "in abeyance until the stay is lifted."

This Petition does *not* seek pre-election relief related to this CPR Initiative which will be on the June ballot despite MEA's pending unfair practice charge. The Hon. William S. Dato denied PERB's application for pre-election injunctive relief in the matter on February 21, 2012, and this Petition does not challenge Judge Dato's order.

Nor does this Petition seek or require this Court to address or resolve the merits of MEA's unfair practice charge. Indeed, the opposite is true. Because the Superior Court does *not* have jurisdiction to hear and decide MEA's unfair practice charge, this Petition calls upon the Court to reverse the Superior Court's improper Order preventing MEA from being heard by the Administrative Law Judge who was assigned as the trier of fact in keeping with the statewide MMBA statutory scheme.

By granting the immediate relief this Petition seeks, this Court will restore PERB's proper jurisdiction to hear and determine MEA's unfair practice charge on the expedited basis the PERB Board directed, and will thereby assure that the limited resources of our Superior Courts are not spent on MMBA-related matters which the California Legislature removed from their jurisdiction as of July 1, 2001.

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PETITION FOR WRIT OF MANDATE; REQUEST FOR IMMEDIATE RELIEF

Under C. C. P. Section 1084 *et seq.*, the San Diego Municipal Employees Association (MEA) petitions this Court for a writ of mandate directed to Respondent San Diego County Superior Court as follows:

I. PETITIONER MEA'S BENEFICIAL INTEREST

MEA is the recognized exclusive bargaining representative for 4,000 employees of the City of San Diego (City) and the charging party in an unfair practice proceeding against the City in Case No. LA-CE-746-M, which is pending before the Public Employment Relations Board (PERB). MEA's unfair practice charge (UPC) alleges that the City has violated the MMBA by refusing to meet and confer over the contents of the CPR Initiative. MEA is the Real Party in Interest in *PERB v. City of San Diego,* Case No. 37-2012-00092205-CU-MC-CTL. (Petitioner's Exhibits, Vol. I, Tab Nos. 1-15)[1]

For purposes of this Petition, the Real Parties in Interest are the Defendant City and the Plaintiff PERB in the civil action below.

The Superior Court's Order granting City's *Ex Parte* Applications to Quash Subpoenas issued by the PERB Administrative Law Judge and to

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[1] Hereafter, all citations to Petitioner's Exhibits will be stated as "PE" followed by the Volume number(s) and then the Tab number(s).

Stay the Administrative Proceedings before PERB on MEA's unfair practice charge (UPC), Case No. LA-CE-746-M, prompts this Writ Petition. (PE 8, 92)[2] Both Plaintiff PERB and MEA (real party in interest below) opposed the relief the City sought by its *Ex Parte* applications.

As the charging party with the burden of proving that the MMBA was violated as alleged in its UPC, MEA is entitled to have the matter heard and decided on a timely basis in accordance with the statewide statutory scheme and in deference to PERB's exclusive initial jurisdiction.

Thus, as shown in this Petition, the Superior Court's Order has directly, specifically and irreparably harmed MEA's MMBA-protected rights for which it has no plain, speedy or adequate remedy at law.

II. MEA INVOKED PERB'S EXCLUSIVE INITIAL JURISDICTION UNDER THE MMBA BY FILING A VERIFIED UNFAIR PRACTICE CHARGE AND A REQUEST FOR INJUNCTIVE RELIEF IN ACCORDANCE WITH PERB'S REGULATIONS

A. A Public Employer's Duty to Bargain Over Proposed Charter Amendments Affecting Wages And Benefits Was Established Nearly Thirty Years Ago

The MMBA is a comprehensive statute governing labor relations for local governmental agencies and their employees. (Gov. Code, §§ 3500, *et seq.*) Its purpose is to strengthen the administration of employer-employee

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[2] See also the Reporter's Transcript at PE 8, 90 and the Minute Order confirming that the court had taken the matter under submission on March 23, 2012, at PE 8, 89.

relations – "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code § 3500.) Under the MMBA, Government Code section 3505, the governing body of a public agency – "*or such administrative officers or other representatives as may be properly designated by law* or by such governing body" – shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of a recognized employee organization and "shall consider fully" the employee organization's presentations "prior to arriving at a determination of policy or course of action." This is *not* a matter of the public agency's discretion but a mandatory obligation under the MMBA.

Almost thirty years ago, the California Supreme Court addressed the question of whether the "unchallenged constitutional power" of a charter city's *city council* to propose charter amendments "may be used to circumvent the legislatively designed methods of accomplishing the goals of the MMBA." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 597) The *Seal Beach* court ruled that, notwithstanding a city council's constitutional power to propose charter amendments, local governments must first satisfy the MMBA's "meet and

confer" requirements before using this power to propose charter amendments to the electorate on subjects within the scope of representation.

By analogy to the conclusion reached in *Seal Beach*, the "unchallenged constitutional power" related to *citizen initiatives* likewise "may *not* be used to circumvent . . . the MMBA." Where, as here, the City's Mayor, acting under a "Strong Mayor" form of governance, has used "surrogate" citizens – with the tacit approval of the City Council – for the express purpose of circumventing the *City's* obligations to meet and confer over proposed charter amendments which profoundly affect wages and pension benefits – a violation of the MMBA also occurs as it did in *Seal Beach*. In such a pretextual circumstance, the "unchallenged constitutional power" associated with *bona fide* citizen initiatives cannot apply with impunity if the MMBA is to have continued vitality as "pension reform" political agendas sweep the state. When it occurs, such a bold circumvention must be identified and declared unlawful.

B. As City's Charter-Mandated Chief Executive Officer and Chief Labor Negotiator, Mayor Sanders Is City's Agent Under the MMBA

The City of San Diego operates under a Charter establishing a "Strong Mayor" form of governance. Long *before* the current controversy erupted, the City Attorney's Office had issued a Memorandum of Law on January 26, 2009, explaining the proper balance between the "Strong

Mayor" and the City Council as legislative body when discharging their respective duties under the MMBA. (PE 9, 96, Exhibit 20). After noting that 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, the City Attorney's Office cautioned that the *City* is held to account when the Mayor violates the MMBA in connection with his distinct labor relations role under the Charter:

> Notwithstanding any distinctions 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. (PE 9, 96, Exhibit 20, p. 12, emphasis added.)

Indeed, this is precisely what occurred when PERB found that the *City* had violated the MMBA because of the unlawful actions of the (former) City Attorney in *San Diego Firefighters, Local 145, I.A.F.F. v. City of San Diego (Office of the City Attorney)* 2010 PERB Decision No. 2103-M [the City, through the City Attorney, had advocated a course of action in circumvention of the exclusive bargaining representative or had otherwise used his communications to commit an unfair labor practice].

Moreover, months earlier, on June 19, 2008, the City Attorney's Office had issued another Memorandum of Law ("MOL") entitled "Pension Ballot Measure Questions." (PE 9, 96, Exhibit 5.) This Memorandum addressed the prospect of a *Mayoral*-sponsored "citizen initiative" in the following context: A bargaining impasse had arisen between the City and MEA related to the Mayor's proposed pension plan changes during the 2008 meet and confer process for a new Memorandum of Understanding. Pursuant to City's Employer-Employee Relations Policy, the City Council conducted an impasse hearing over the Mayor's Last, Best and Final Offer ("LBFO"). When the City Council failed to *impose* the Mayor's LBFO at the conclusion of the impasse hearing, Mayor Sanders reacted by suggesting that he would lead an initiative to accomplish the pension reform changes he sought at the ballot box. The City Attorney's 2008 Memorandum described the Mayor's rights and responsibilities as follows:

> While (the Mayor) 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. . . . The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors 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. (PE 9, 96, Exhibit 5, p. 9, emphasis added.)

C. MEA Made Repeated Requests for Meet and Confer Over the CPR Initiative – Citing Its Proven Track Record of Forging Appropriate Compromises On the Mayor's "Reform" Agenda

MEA's first request to the City to meet and confer over the CPR Initiative went unanswered. Although its second request drew a definitive rebuff, MEA persisted to no avail. (PE 9, 96, Exhibits 1A through 1H)

In making these requests, MEA reminded the Mayor and other City officials that MEA had a proven track record of finding appropriate compromises with the City over the "reform" agenda Mayor Sanders had outlined. MEA reminded the Mayor and other City officials of what the parties had actually accomplished by fulfilling rather than shirking their respective duties to meet and confer in good faith as the MMBA requires:

(1) MEA had successfully met and conferred with Mayor Sanders' negotiating team over his proposed Charter amendments in 2006 – leading to the passage of Propositions B and C related to pensions and managed competition.

(2) MEA had successfully met and conferred with Mayor Sanders' negotiators in 2008 to implement a new pension plan for employees hired after July 1, 2009 – and thus obviated the need for yet another expensive Charter amendment to accomplish the same goal.

(3) During the meet and confer process with the Mayor's negotiators in 2009, 2010, and again in 2011, MEA agreed to substantial compensation concessions which ultimately contributed to the Mayor's announcement in late February 2012 that "the City's decades-long structural budget deficit is history" and "is effectively resolved."

(4) While Mayor Sanders, Councilmembers DeMaio and Faulconer, the City Attorney, and the "official" ballot proponents held a press conference related to the CPR Initiative on the City Concourse in early April 2011 (described below), MEA was at the bargaining table with the Mayor's negotiators reaching a landmark compromise over the City's retiree health benefits and thereby achieving $714 million in savings to the City over the next 25 years – what Mayor Sanders himself described as "the largest cost-saving measure ever implemented by this City."

D. MEA Filed An Unfair Practice Charge And A Request For Injunctive Relief To Which The City Responded

On January 20, 2012, MEA invoked PERB's exclusive initial jurisdiction under Government Code section 3509 by filing a verified unfair practice charge (UPC) against Respondent City. (PE 9, 96)[3]

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[3] Pursuant to Evidence Code sections 452 and 459, Petitioner MEA has filed a contemporaneous Motion Requesting Judicial Notice of this and other PERB filings by MEA and City, as well as PERB's "official acts" in response to these filings, together with true and correct copies in Volumes 9 through 12, Tabs 96 through 134, and a [Proposed] Order. The *fact* of these filings – and PERB's official acts – is relevant to demonstrate why the Superior Court's Order being challenged by this Writ Petition is unlawful.

MEA's UPC was processed in accordance with PERB Regulations, section 32620.[4] PERB issued a letter to MEA and the City in response to this filing. (PE 9, 97)

The City filed an opposing position statement. (PE 11, 107)

On January 31, 2012, in compliance with Government Code section 3541.3 and PERB Regulations, section 32560, MEA filed a written injunctive relief request (IR request) with PERB. (PE 9, 98-99; 10, 100) MEA asked PERB to exercise its exclusive authority to apply to the San Diego County Superior Court to stop the City from putting the CPR Initiative on the June ballot (at considerable expense to the City), or thereafter on any subsequent ballot, *until* the City had fulfilled its MMBA-imposed obligation to meet and confer with MEA as the exclusive bargaining representative for nearly 4,000 City employees.

PERB Regulations, section 32450 *et seq.*, applied to MEA's injunctive relief request and how PERB processed it. (PE 10, 101) PERB's General Counsel was required to initiate an investigation and to make a recommendation to the PERB Board itself within 120 hours after receipt of this request. (*Id.*, § 32460.)

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[4] PERB's Regulations are set forth in California Code of Regulations, Title 8, and are referred to herein simply as "PERB Regulations" or "PR".

Also, in accordance with the regulations, PERB's General Counsel gave the City an opportunity to file a position statement which the City did. (PE 10, 102-106)

III. PERB'S EXERCISE OF ITS DISCRETION IN ISSUING AN ADMINISTRATIVE COMPLAINT AND IN GRANTING MEA'S REQUEST FOR INJUNCTIVE RELIEF WAS CONSISTENT WITH APPLICABLE LAW AND PRECEDENT

A. The Standards Which Guide PERB's Response to A Charging Party's Request for Injunctive Relief Are Three Decades Old

When exercising its exclusive jurisdiction to grant a charging party's request for injunctive relief, PERB considers whether there is reasonable cause to believe that the law has been violated and, if so, whether appropriate temporary relief is needed to halt an alleged unfair practice or to maintain the "status quo ante" so that PERB's eventual ability to provide a remedy effectuating the purposes of the MMBA is not undermined. The objective is to prevent irreparable detriment to a PERB constituent – whether *employer*, *employee*, or *union*. (Gov. Code § 3509, subd. (b), incorporating Gov. Code § 3541.3, subd. (j) by reference.)

In exercising its discretion in response to a charging party's injunctive relief request, the PERB Board is guided by the standards enunciated in *PERB v. Modesto City School Dist.* (1982) 136 Cal.App.3d 881, 895: (1) that there is "reasonable cause" to believe that an unfair practice has been committed, and (2) that injunctive relief is "just and

proper." PERB need only establish that the grounds on which it believes an unfair practice has been committed are neither insubstantial nor frivolous, and need not show a probability of success on the merits or establish that an unfair practice has in fact been committed. (*Id.* at 896.) When addressing a charging party's request for injunctive relief, *neither* PERB *nor the court* determine the ultimate merits of the unfair practice case. (*Ibid.*)

B. MEA's UPC and the City's Response Established "Reasonable Cause" For PERB To Believe That An Unfair Practice Has Been Committed With Regard to the CPR Initiative

In support of MEA's verified unfair practice charge and request for injunctive relief, MEA provided PERB with a detailed account of the City's conduct and activities giving rise to MEA's assertion that the City had violated the MMBA – in particular, the conduct of Mayor Jerry Sanders in developing, funding and sponsoring this CPR Initiative while using his official office, position, power and City-paid or City-provided resources. MEA submitted twenty-one (21) supporting exhibits. (PE 9, 96 & 98-99; 10, 100) These exhibits established a number of facts and admissions which are indisputable – and which, indeed, the City did not dispute or deny in its response. For example, Mayor Sanders had announced his intentions with regard to this pension reform initiative during the State of the City Public Address in January 2011, when he publicly declared: **"Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an**

initiative to enact a 401(k)-style plan that is similar to the private section's and reflects the reality of our times." (PE 9, 96, Exhibit 9.) Multiple media accounts thereafter document the Mayor's activities in connection with what he called "*his* legacy initiative." (PE 9, 96, Exhibit 6.) And Mayor Sanders openly explained to a *San Diego CityBeat* reporter that he *chose to go the citizen-initiative route in order to avoid negotiating with the unions that represent city employees*:

> "You do that so that you can get the ballot initiative on that you actually want. Otherwise, we'd have gone through meet-and-confer [negotiations], and you don't know what's gonna go on at that point through the meet-and-confer process." (PE 9, 96, Exhibit 2, *San Diego CityBeat*, 12/7/11)

MEA's supporting exhibits also included a photograph capturing Mayor Sanders as he stood at a podium on the City Concourse during business hours in early April last year to announce (as multiple media broadcast videoclips confirm) that "we" are taking the next step to reform the City's pension system and "it's a big one" which "transforms it into a national model." Mayor Sanders described the "compromise" *he* reached with Councilmember DeMaio to "craft one initiative." In turn, Councilmember DeMaio praised Mayor Sanders for his leadership in getting this CPR Initiative ready for the ballot.

The Mayor was surrounded at the podium by these Councilmembers, by City Attorney Jan Goldsmith, and *by the three other citizens who became*

the "official" ballot proponents. (PE 9, 96, Exhibit 1F, last page photo) These "official" proponents are self-described professional political activists who are in leadership positions with the activist Lincoln Club. As vocal supporters of the pension reforms contained in the Mayor's Initiative, these citizens hitched their "Charter reform" wagon to the Mayor's bright star. In so doing, they took advantage of the power, prestige and extensive visibility and resources associated with his elected office in order to give this CPR Initiative the credibility and free media attention it would not likely have gotten without him – and would certainly not have gotten if this initiative had been crafted and promoted by three regular "John" or "Jane Doe" San Diego residents who wanted to change the City's Charter.

In short, MEA's detailed factual UPC submittal to PERB, with twenty-one (21) supporting exhibits, constituted compelling evidence that the City's refusal to bargain over the CPR Initiative in response to MEA's repeated demands, was a violation of the MMBA because the device of a "citizens' initiative" was merely the pretextual means for the Mayor and other City officials to get *the City's* CPR Initiative on the ballot without having to meet and confer with MEA.

Moreover, in anticipation of a First Amendment argument, MEA cited the relevant case law in its original UPC filing which interprets free speech rights in the context of the collective bargaining statutes

administered by PERB. Because many unfair practices involve or include speech – oral or written – any First Amendment argument, taken to its logical extreme, would result in a virtual nullification of the MMBA. Thus, under the MMBA, an employer's speech is *not* protected if it is used as a means for violating the MMBA. In *Rio Hondo Community College District*, PERB Decision No. 128 (1980), PERB held that an employer has the right to "express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate," but may not engage in negotiations over matters within the scope of representation with persons or groups other than the exclusive representative. Employer speech that goes beyond mere expression of opinion or communications of existing facts, but instead advocates or solicits a course of action, is not subject to free speech protections. *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S *(CalTrans)*.

In this case, the Mayor and other elected City officials circumvented the City's meet and confer obligations and advocated a specific course of action. There is no free speech protection for the Mayor's conduct in "advocat[ing] a course of action in circumvention of the exclusive representative." As to the "official" ballot proponents who voluntarily became the Mayor's surrogates in getting *his legacy* CPR Initiative on the

ballot, they cannot now protest that their "rights" remain unencumbered by the MMBA-related consequences of the Mayor's specific and direct involvement in crafting and sponsoring this initiative. In any event, the responsibility to harmonize the free speech rights of City's agents with the City's bargaining obligations under the MMBA has been vested by the legislature in PERB as a function of its exclusive initial jurisdiction to determine whether an unfair practice has been committed as alleged in MEA's UPC.

C. City's Position Statement In Response to MEA's UPC Did Not Dispute the Facts Alleged But Argued That the Mayor's Conduct Was Irrelevant

In response to MEA's UPC and IR request, the City Attorney's Office staunchly defended the citizens' initiative process in general while dismissing the notion that the Mayor Sanders' conduct as an agent of the City had any relevancy at all. (PE 10, 102-106; 11, 107) In stark contrast to the Memorandum of Law issued by the City Attorney's Office in January 2009 (described above), the City Attorney argued to PERB that the Mayor's conduct in relation to the CPR Initiative is of no legal consequence under the MMBA because, in determining whether the *City* violated the MMBA in relation to the CPR Initiative, PERB should consider *only* the official actions of the City Council acting as the City's "governing body."

In fact, the City Attorney argued that, if the Mayor did in fact use City-paid

time and resources to support this CPR Initiative as alleged in MEA's UPC, this conduct might be an ethics violation for the City's Ethics Commission to address but it is otherwise meaningless.[5]

Moreover, the City's response side-stepped both Memoranda of Law previously issued by the City Attorney's Office in 2008 and in 2009 – which MEA had cited and included as exhibits in support of its UPC and IR request – by asserting that these Memoranda express irrelevant legal advice.

Finally, citing the approximately 116,000 signatures which had been gathered to qualify the CPR Initiative for the June ballot, the City declared that PERB had no jurisdiction to question the CPR Initiative's pedigree because the City is legally precluded from changing, altering, or otherwise modifying it and has a ministerial duty to put this *"private citizens'* initiative" on the ballot in accordance with City's Municipal Code.

Thus, the City's response did *not* deny or challenge the accuracy of MEA's allegations regarding the Mayor's specific activities *as Mayor* in proposing, authoring, funding and promoting this CPR Initiative and using the power, prestige and resources of his public office to do so. The City's response also did not deny that the Mayor had used the "official" ballot proponents to get *"his legacy"* CPR Initiative on the ballot without having

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[5] On the other hand, Mayor Sanders has repeatedly asserted that he was told all along that "what he was doing was legal."

to meet and confer with MEA and the City's other unions over a matter which is indisputably within the scope of representation under the MMBA.

Instead, the City argued that there was 'no evidence" to support MEA's UPC and that the *Seal Beach* case precedent was inapplicable because there had been no "official action" taken by the San Diego City Council acting "as a body" other than the performance of its ministerial duty to put this *citizen's initiative* on the ballot. Expressing great umbrage on behalf of the "official" (but complicit) ballot proponents, the City argued, in essence, that PERB must ignore the evidence of pretext and "circumvention," and accept the City's conclusory characterization of this CPR Initiative as a *bona fide* "private citizens' initiative."

D. In Response To MEA's Verified UPC and Injunctive Relief Request And the City's Rebuttal Position Statements, PERB Issued A Complaint And Agreed to Seek Injunctive Relief

Having received and considered the City's response to MEA's UPC and IR request, PERB issued a Complaint and a Notice of Informal Conference. (PE 11, 109-110) Issuance of the Complaint meant that MEA's UPC was sufficient to establish a prima facie case under PERB Regulations, sections 32620(b)(4), (b)(7) and 32640(a).

Upon receipt of the General Counsel's report, the Board was *required* to "determine whether to seek injunctive relief." (*Id.*, § 32465.)

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The Board granted MEA's request that PERB seek injunctive relief in the Superior Court, and, in accordance with PERB Regulations, section 32147, the Board also directed that MEA's UPC matter be expedited – meaning that the matter "shall be given priority and decided on an expedited basis." (PE 11, 108 & 111)

IV. THE HON. WILLIAM S. DATO DENIED PERB'S REQUEST FOR PRE-ELECTION INJUNCTIVE RELIEF ON FEBRUARY 21, 2012

With prior notice to the City, on February 14, 2012, PERB filed its Complaint for Injunctive Relief and Verified Petition for Writ of Mandate in the San Diego County Superior Court in the matter of PERB v. City of San Diego (Real Party in Interest San Diego Municipal Employees Association), Case No. 37-2012-00092205-CU-MC-CTL. The case was assigned to the Hon. William S. Dato in Department C-67. (PE 1, 1-7)

PERB filed an *Ex Parte* Application on February 15, 2012, seeking A Temporary Restraining Order and Order to Show Cause Regarding A Preliminary Injunction, Memorandum of Points and Authorities, and Declaration of PERB's Deputy General Counsel Wendi L. Ross In Support of *Ex Parte* Application with Supporting Exhibits A through M. (PE 1, 8-12; 2, 13; 3, 14)

PERB argued in support of its application for injunctive relief that, in the absence of an order preventing the City from placing the CPR

Initiative on the June ballot, PERB's ability to use its remedial authority to provide meaningful relief under the MMBA would be substantially undermined if the *alleged* violation of the MMBA set forth in MEA's UPC was established. Under these circumstances, there would be irreparable harm to MEA as the recognized bargaining representative for City employees in the Professional, Supervisory, Technical and Administrative Support and Field Service bargaining units, and to the current and future employees in those units. As real party in interest in PERB's injunctive relief action, MEA filed a Joinder in PERB's *Ex Parte* Application on February 16, 2012. (PE 3, 15)

The City opposed PERB's TRO application. (PE 3, 17-28) The City also filed a Cross-Complaint against PERB for injunctive relief. (PE 3, 29-30) Counsel for the ballot initiative proponents Catherine A. Boling, T. J. Zane, and Stephen B. Williams notified Judge Dato by letter that they sought to intervene and exercise a peremptory challenge. (PE 3, 16; 4, 33)

On February 21, 2012, the Hon. William S. Dato denied PERB's request for injunctive relief on the ground that a pre-election remedy was not appropriate under *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, because this case "does not fit neatly within any of the three categories" identified by the California Supreme Court. Judge Dato concluded, however: "plainly this is not a situation

where the challenge is going to become moot after the election if the initiative is adopted, and under either of the other two categories, there is a clear preference for post-election review." Judge Dato also noted that, as PERB had candidly conceded in its papers citing the *Stanislaus Area Farm Economy* case, the Court "should short cut the normal initiative procedure only when the invalidity of the proposed measure is clear beyond doubt. Here, in my view, there is no case direct(ly) on point clearly establishing the invalidity of this initiative and there is no compelling reason to review this matter before the election. **If the initiative passes, its validity can be considered at that point, in *quo warranto* proceedings and the appropriateness of preliminary injunction relief can be addressed at that point in time."** (PE 4, 31 at 4:12-6:18, emphasis added; see also Minute Order, PE 4, 32)

During the hearing on PERB's TRO on February 21, 2012, the City Attorney acknowledged his understanding that Judge Dato's denial of a temporary restraining order and deferral of a preliminary injunction hearing until after the June 5th election was *not* a ruling that this administrative hearing on MEA's UPC must also be delayed. The City Attorney stated:

> We will be back. We do – the point made by counsel having to do with administrative proceedings, we have filed a cross-complaint. We are seeking a stay of those administrative proceedings. . . . *That's another issue at another time.* (PE 4, 31 at 13:12-18)

Yet, the same day, Assistant City Attorney Donald Worley transmitted a copy of City's Cross-Complaint against PERB, with a cover letter to PERB's Regional Attorney Valerie Pike Racho in which he stated that:

> "Any (PERB) action to schedule hearings or a trial before June 5, 2012 would be inconsistent with Judge Dato's comments this morning. Our office would then seek equitable protection. I urge you to hold off. We are objecting to PERB hearing this. And, regardless of whether that is appropriate, we object to a hearing before June 5, 2012." (PE 11, 112)

V. PERB ISSUED A FORMAL NOTICE ON 2/28/12 SETTING AN ADMINISTRATIVE HEARING ON MEA'S UPC FOR APRIL 2ND THROUGH APRIL 5th

Based on the PERB Board's issuance of a directive on February 10, 2012, that the proceedings related to MEA's UPC be given priority and conducted on an expedited basis in accordance with PERB Regulations, section 32147, PERB conducted a telephonic scheduling conference with the parties on February 23, 2012.

Thereafter, on February 28, 2012, notwithstanding the City's objection to any administrative hearing on MEA's UPC being scheduled before the June election, ALJ Donn Ginoza issued a Formal Notice of Hearing for April 2nd through 5th, 2012. (PE 11, 114)

VI. CITY FILED AN ANSWER TO PERB'S COMPLAINT AND A MOTION WITH ALJ GINOZA TO DISQUALIFY PERB

On March 1, 2012, the City filed its Answer to the PERB Complaint in accordance with PERB Regulation 32644. (PE 11, 115)

In this Verified Answer, Executive Assistant City Attorney Andrew Jones, acting as agent and attorney for Respondent City, *denied* each and every allegation in Paragraphs 3, 4, 6, 7 and 8 of the Complaint and raised twelve affirmative defenses. Among the allegations the City *denied* are the following:

> 3. From approximately April 2011 to date, Respondent, through its agents, including chief labor negotiator San Diego City Mayor Jerry Sanders, has co-authored, developed, sponsored, promoted, funded, and implemented a pension reform initiative, referred to as the "Comprehensive Pension Reform Initiative for San Diego" (CPR Initiative).
>
> 4. Commencing on or about August 16, 2011, Respondent, through its agent San Diego City Attorney Jan I. Goldsmith, has refused to meet and confer with Charging Party regarding the provisions of the CPR Initiative that impact wages and retirement benefits for bargaining unit members. (PE 11, 115)

In view of these factual disputes, the Administrative Law Judge's ability to make findings as to the *actual* facts and apply the law to *those* facts will depend upon a full evidentiary hearing.

On the same day, March 1, 2012, the City filed a motion with ALJ Ginoza under PERB Regulations, sections 32190 and 32155, seeking to disqualify "PERB Board and Staff of PERB Office of General Counsel" from taking any further action on MEA's UPC on the ground of alleged "bias" because PERB had sought injunctive relief. (PE 11, 116-118)

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VII. MEANWHILE THE CITY "WAITED" FOR A NEW JUDGE BEFORE SEEKING A STAY OF THE PERB PROCEEDINGS

Despite having informed Judge Dato on February 21, 2012, during the TRO hearing, that the City "would be back" to seek a stay of PERB's proceedings – and having asserted the same intent directly to PERB by letter the same day, the City did not do so. (See PE 4, 31 at 13:12-18 and PE 11, 112)

Instead, the City waited while the ballot proponents attempted to exercise a 170.6 peremptory challenge to Judge Dato. In fact, their counsel mailed a letter with the fully-executed challenge directly to Judge Dato on February 16, 2012, and then appeared at the TRO hearing on February 21, 2012, with an expectation that their unscheduled *ex parte* application to intervene would be heard by *another* Judge. (PE 3, 16)

When this did not happen, (PE 4, 32), the parties appeared again before Judge Dato on February 23, 2012, on the ballot proponents' scheduled *ex parte* application to intervene. (PE 4, 33) Assistant City Attorney Donald Worley informed the court that the City supported their motion to intervene and urged the earliest possible decision in the matter because, he said, the City was considering additional actions in the case in which the ballot initiative proponents may wish to participate – such as a demurrer *and a motion to stay the administrative proceedings* "because our cross-complaint in this case alleges that (PERB) cannot give us a fair and

impartial trial now that they've made a decision in support of the union to file this injunctive action." (PE 4, 34 at 6:14-7:1.)

Nevertheless, the City's hope for a new judge to hear its motion for a stay was thwarted because Judge Dato set the ballot proponents' motion to intervene for April 20, 2012, and declined to act on their 170.6 challenge until (and unless) they became parties to the case. (PE 4, 35)

Moreover, at the same hearing, in light of Assistant City Attorney Donald Worley's letter to PERB dated February 21, 2012, stating that "any (PERB) action to schedule hearings or a trial before June 5, 2012 would be inconsistent with Judge Dato's comments this morning (at the TRO hearing)," MEA's counsel told Judge Dato that "there was some confusion" arising from his denial of PERB's TRO application as to whether he intended to stop PERB from moving forward with the administrative proceedings on MEA's UPC. PERB's counsel agreed and noted that PERB intended "to proceed on the administrative side." In response, **Judge Dato stated: "Well certainly it was not my intent to be commenting on the administrative procedures when we dealt with the issue of a temporary restraining order on Tuesday."** (PE 4, 34 at 2:17-3:24, emphasis added.)

Having stated its intent to seek a stay of PERB's proceedings during its appearances before Judge Dato on February 21st and again on February 23rd, the City stalled.

On March 1, 2012, the *Boling* et al. ballot proponents filed their Motion to Intervene in Judge Dato's department, together with another peremptory challenge. (PE 4, 36-37) This motion was set for hearing on April 20, 2012, per Judge Dato's determination at the *ex parte* hearing.

Then on March 5, 2012, the *Boling* ballot proponents filed (but did not immediately serve) a "Verified Complaint For Temporary Restraining Order; Preliminary and Permanent Injunction to Prevent Government Waste and Interference With Civil Rights In the Electoral Process; Declaratory Relief; and Damages, Case No. 37-2012-00093347-CU-MC-CTL, against PERB and all PERB Board Members in their "individual and in their official capacities." (PE 4, 38-44) This new *Boling* action was assigned to the Hon. Timothy Taylor.

On March 11, 2012, PERB filed an *Ex Parte* Application for an Order Shortening Time to Hear A Motion to Quash Discovery Requests Or, In the Alternative, For A Protective Order; And Request for Immediate Stay of All Discovery, with a hearing date set for March 13, 2012, before the Hon. William S. Dato. (PE 4, 45) In support of its Application, PERB filed Points and Authorities and the Declaration of PERB Regional Attorney Ellen Wu with Exhibits A through U. (PE 4, 46-47; 5, 48) This application was directed at City's written discovery and notices of taking the depositions of all PERB Board Members and PERB's General Counsel.

Even with this third *ex parte* appearance in the case scheduled before Judge Dato for March 13, 2012, the City took no action to seek a stay of PERB's administrative proceedings from Judge Dato.

In response to PERB's discovery-related *ex parte* application, Judge Dato stayed all pending discovery in the injunctive relief case until after the June election and set a status conference on Friday, June 15, 2012 – directing PERB to file a status conference statement by June 11th of five pages or less related to outstanding issues for determination and the City to file a responsive brief of similar length by June 13, 2012. A Clerk's note on this Minute Order stated: "Motion for intervention is scheduled for April 20, 2012, with an outstanding Code of Civ. Proc., section 170.6 is confirmed." (PE 5, 54) See also Retorter's Transcript for this *ex parte* hearing on March 13, 2012. (PE 5, 53)

The mystery surrounding the City's delay in not seeking a stay of PERB's administrative proceedings from Judge Dato was finally resolved when, on March 13, 2012, **the City** and the *Boling* plaintiffs filed *Ex Parte* Applications For A Stay of Administrative Proceedings Before PERB in the new *Boling* action, to be heard **by Judge Taylor** on March 15, 2012. (PE 5, 49-50 and 55-62)

On March 14, 2012, PERB filed its Preliminary Opposition to these *Ex Parte* Applications urging Judge Taylor to deny them in their entirety or,

in the alternative, to set them for hearing on noticed motion to afford PERB a full and fair opportunity to brief the issues raised in its preliminary opposition. (PE 5, 63) On March 15, 2012, MEA filed its Opposition And Joinder In PERB's Preliminary Opposition to both *Ex Parte* Applications. (PE 5, 64)

In his Minute Order following the *ex parte* hearing on March 15, 2012, Judge Taylor denied both the City's and the *Boling* Plaintiffs' *ex parte* applications without prejudice. After noting that the related case, 2012-00092205, raising many of the same issues and involving most of the same parties, was presently pending before Judge Dato – "who had held a hearing in his case as recently as March 13th, and has another scheduled for April 20th, Judge Taylor deemed that transfer to Judge Dato was appropriate to **"avoid the appearance of forum shopping** as well as the possibility of inconsistent rulings." (PE 5, 65)

On March 20, 2012, after Judge Taylor had transferred the *Boling* action, Case No. 2012-00093347 to Judge Dato as a related case to *PERB v. City of San Diego*, Case No. 2012-00092205, Judge Dato granted the *Boling* Plaintiffs' peremptory challenge and transferred both cases to the presiding judge for reassignment. (PE 6, 70) Both cases were reassigned to the Hon. Luis R. Vargas. (PE 6, 71)

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VIII. ALJ GINOZA DENIED CITY'S MOTION TO DISQUALIFY PERB AND THE CITY FILED THREE ADDITIONAL MOTIONS WHICH WERE PENDING BEFORE ALJ GINOZA WHEN THE CITY SOUGHT THE *EX PARTE* STAY ORDER AT ISSUE HERE

On March 14, 2012, pursuant to PERB Regulations, section 32190, subd. (b), MEA filed its Opposition to City's Motion to Disqualify PERB Board and Staff of PERB Office of General Counsel. (PE 11, 120)

On March 21, 2012, City filed its Request for Continuance of Formal Hearing with ALJ Donn Ginoza. In this Request, City sought a continuance of the 4-day administrative hearing set to begin on April 2, 2012. (PE 11, 121-124) Also on March 21, 2012, the City filed its Motion to Revoke Subpoenas with ALJ Donn Ginoza. (PE 12, 125) In this Motion, City sought revocation of all nine (9) subpoenas duces tecum which ALJ Ginoza had issued at MEA's request pursuant to PERB Regulations, section 32150, and which had been personally served on each witness on March 13, 2012. (PE 11, 119)

On March 22, 2012, shortly after 12 noon, Administrative Law Judge Ginoza faxed his Order Denying City's Motion to Disqualify PERB ALJ to counsel for Charging Party MEA and Respondent City. (PE 12, 126) This order was made under PERB Regulation 32155, subd. (d), on a finding that the motion lacked good cause. (PE 12, 126)

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On March 22, 2012, ALJ Ginoza faxed a letter to MEA's counsel, with a copy to City's counsel, setting the close of business on Monday, March 26, 2012, as the deadline for any position statement MEA wished to file regarding City's Request for Continuance of Hearing and Motion to Revoke Subpoenas. (PE 12, 127)

On March 22, 2012, City filed its Motion to Dismiss the PERB Complaint with ALJ Ginoza. (PE 12, 128)

On March 23, 2012, ALJ Ginoza faxed a letter to MEA's counsel, with a copy to City's counsel, setting the close of business on Tuesday, March 27, 2012, as the deadline for any position statement MEA wished to file regarding City's Motion to Dismiss Complaint. (PE 12, 129)

IX. WITH CITY'S MOTIONS FOR A CONTINUANCE AND TO REVOKE SUBPOENAS HAVING JUST BEEN FILED WITH ALJ GINOZA ON MARCH 21, 2012, THE CITY BROUGHT ITS ELEVENTH HOUR *EX PARTE* APPLICATION IN THE SUPERIOR COURT FOR A STAY AND TO QUASH PERB'S SUBPOENAS

Having stalled since February 21, 2012 – while waiting for a judge other than Judge Dato to hear its *ex parte* application for a stay – and having tried but failed to get this relief from Judge Taylor on March 15, 2012, in the *Boling* action – the City gave notice on March 21, 2012, of its eleventh-hour *ex parte* applications to stay the PERB administrative proceedings and to quash all PERB's subpoenas to be heard by Judge Luis R. Vargas on March 23, 2012, at 1:30 p.m.

On **March 22, 2012** – barely 24 hours before the hearing – the City served PERB and MEA with an avalanche of paper in support of two *ex parte* applications. These papers included twenty-three (23) pages of Points and Authorities peppered with assertions of fact and multiple legal theories. (PE 6, 72-82; 7, 83; and 8, 84)

X. JUDGE VARGAS *GRANTED* THE CITY THE RELIEF IT SOUGHT ON ITS *EX PARTE* APPLICATIONS – WITH NO NOTICED MOTION EVEN ON SHORTENED TIME

On the morning of the *ex parte* hearing, PERB filed its Preliminary Opposition to Defendant City's Ex Parte Applications. (PE 8, 85) Also, on the same morning, MEA filed and served its Opposition and Joinder in PERB's opposition. (PE 8, 86) In addition, MEA filed and served its Opposition to City's *Ex Parte* Application to Quash The Subpoenas Issued By PERB Administrative Law Judge. (PE 8, 87)

In support of its Opposition, MEA attached as Exhibit 1 a copy of City's Motion to Revoke Subpoenas which City had just filed with ALJ Donn Ginoza on March 21, 2012, and which was *then pending before him for decision* (together with City's Request for A Continuance of Formal Hearing). (PE 8, 87, Exhibits 1 & 2)

At the start of the *ex parte* hearing in Department C-63 on March 23, 2012, Judge Vargas accepted the City's Reply Brief asserting that PERB's complaint for injunctive relief "clearly demonstrates that it took an

adversarial position against the City and lost any semblance of a 'quasi-judicial' body," and further that, having been unsuccessful in getting a TRO, it had "hastily turned to using its administrative powers to harass the City and order what it could not get the Court to order." (PE 8, 88).

In its "Preliminary Opposition," to which MEA filed its Joinder, PERB specifically asked the Court to set the matter for hearing on a noticed motion and afford PERB a full and fair opportunity to brief the issues and make additional legal arguments regarding the relief the City was improperly seeking on an *ex parte* basis. (PE 8, 85)

Judge Vargas heard the oral arguments of counsel for the City, PERB and MEA and then took the matter under submission. (PE 8, 90) See also the Reporter's Transcript of this *ex parte* proceeding. (PE 8, 89)

While the matter remained under submission, MEA met the *expedited deadlines* ALJ Ginoza had set for MEA's position statements related to City's three pending motions filed on March 21st and 22nd – (1) Request for a Continuance; (2) Motion to Revoke Subpoenas; and (3) Motion to Dismiss Complaint. MEA filed its Oppositions to the first two motions on Monday, March 26, 2012, and filed its Opposition to City's third motion on Tuesday, March 27, 2012. (PE 12, 130-132)

Then on March 27, 2012, Judge Vargas granted outright the precise relief the City had requested in its *ex parte* application. (PE 8, 92) Once

Judge Vargas' unexplained indefinite stay of PERB's proceedings was issued, ALJ Ginoza gave notice to the parties that the 4-day administrative hearing set since February 28, 2012, to begin on **April 2nd** was now off calendar and MEA's UPC placed "in abeyance until the stay is lifted." (PE 12, 134) He did not rule on any of City's three pending motions.

XI. JUDGE VARGAS SHOULD HAVE DENIED CITY'S *EX PARTE* APPLICATIONS ON DUE PROCESS GROUNDS AND BECAUSE THEY LACKED LEGAL MERIT

In view of the 24-hour notice and the scope of the City's filing, MEA had no fair opportunity to prevent the Superior Court from granting the City's *ex parte* applications and thus acting in excess of its own jurisdiction in response to the City's erroneous assertions of fact and law.

Although Judge Vargas' Order cites no statutory or case law and offers no rationale for the court's imposition of this indefinite stay, MEA must assume that the Superior Court granted the City's requested *ex parte* relief for the reasons the City argued in its **15-page** Memorandum of Points and Authorities wherein the City concluded:

> As a result of this litigation, the ability of the City to present its defenses through the administrative process is futile, and the only equitable remedy is to **stay the administrative proceedings and resolve all issues in this Court.** (PE 6, 73)

Apart from this unfair denial of due process – the Order entered at the City's urging is a clear and unlawful affront to PERB's legislatively-mandated exclusive initial jurisdiction.

As demonstrated in this Petition and in the Supporting Memorandum of Points and Authorities below, neither PERB nor MEA "conferred" jurisdiction on the Superior Court to decide MEA's UPC on its merits – as the City argued – nor *can* any party confer subject matter jurisdiction in defiance of a legislative mandate, whether by consent, waiver or estoppel. *Summers v. Superior Court* (1959) 53 Cal.2d 295, 298.

The City argued that, *because* PERB sought injunctive relief in furtherance of its specifically-enumerated powers, PERB had demonstrated a fatal "bias" against the City, had "already made a decision in this case," and "should not now pretend it can be fair, neutral, and impartial in any administrative proceedings on these issues." The result, according to the City, was threefold: (1) it was excused from exhausting the MMBA-imposed administrative remedy; (2) MEA was deprived of the legislatively-mandated administrative forum; and (3) PERB was ousted from its role in determining the matter.

The City's arguments were profoundly misguided based on the actual facts, the statutory scheme, PERB Regulations, and applicable case law and Judge Vargas should have rejected them outright based on PERB's and MEA's Preliminary Opposition. To the extent any uncertainty remained due to the pressure of the City's eleventh-hour applications, Judge Vargas should have insisted that the matters be addressed on properly

noticed motions so that the smoke in the courtroom could clear and he most assuredly could have gotten it right.

XII. MEA HAS NO PLAIN, SPEEDY, OR ADEQUATE REMEDY AT LAW

As the Charging Party with an unfair practice complaint set for an administrative hearing before ALJ Ginoza on April 2, 2012 – and as the real party in interest with regard to PERB's application below for injunctive relief – MEA is the entity actually and specifically aggrieved by this Order.

Without having given MEA the benefit of a properly noticed motion (even on shortened time), the Hon. Luis R. Vargas granted City's *ex parte* application outright and imposed this indefinite Order – stopping all PERB administrative proceedings and denying MEA the opportunity to present its case to ALJ Ginoza on April 2, 2012, based on the Notice of Formal Hearing issued on February 28, 2012. This Order means that MEA has now lost its right to proceed before PERB as the quasi-judicial administrative agency established by Government Code section 3541 to promote harmonious and cooperative labor relations between California's public sector employers and their employees.

In fact, there is no denying that this Order *punishes* MEA for having exercised its rights in accordance with statutory law and in compliance with PERB Regulations. If MEA had not made a request for injunctive relief – or if the PERB Board itself had denied MEA's request – MEA's unfair

practice charge would have proceeded to an expedited administrative hearing on the dates scheduled (April 2 through 5) – unless, of course, Administrative Law Judge Ginoza had exercised his proper authority by granting the City's Request for Continuance *which was pending before him* when the City sought and was granted the Order on *ex parte* application which is at issue in this Writ Petition. [6] (PE 11, 121-123)

MEA urges this Court to take immediate action to "stay" the effect of this unlawful Order so that PERB may resume its proceedings on MEA's UPC in accordance with its exclusive initial jurisdiction under Government Code section 3509, and on the expedited basis directed by the PERB Board on February 10, 2012. (PE 11, 108) In the absence of this Court's immediate action, MEA has no other adequate remedy to reverse the Superior Court's unlawful Order which will remain in effect for an indefinite period and, in fact, may never be lifted – assuming as MEA must – that it was entered for the erroneous reasons the City argued.

XIII. MEA WILL SUFFER IRREPARABLE INJURY UNLESS IMMEDIATE RELIEF IS GRANTED

When the blinders so often associated with the City's ever-contentious pension issues are removed, the gravity of the Superior Court's

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[6] PERB Regulations, § 32205 states: "A request for a continuance shall be granted only under unusual circumstances and if the other party will not be prejudiced thereby."

interference with PERB's legislatively-mandated exclusive initial jurisdiction is crystal clear. The Superior Court does *not* have the authority to adjudicate the merits of MEA's UPC because it was relieved of this role and its attendant cost burdens more than a decade ago when the MMBA vested exclusive initial jurisdiction in PERB as the expert public sector labor relations agency. (See Gov. Code, § 3509, subd. (b); *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597.)

Thus, while PERB's efforts to secure pre-election relief for the purpose of preserving its ability to provide MEA with an appropriate remedy effectuating the purposes of the MMBA *after* an administrative proceeding takes place, the Superior Court's Order at issue here does more than deny this remedial protection. This Order does actual and concrete ***harm*** to the MMBA-related rights of MEA and represented employees by depriving them of timely, cost-effective access to the legislatively-mandated administrative forum in which they are entitled to be heard on MEA's UPC.

Since *no* final disposition of the Superior Court action can or will be legally feasible until the assigned Administrative Law Judge hears the evidence and decides whether a violation of the MMBA occurred as MEA alleges, the Superior Court's unlawful interference with PERB's proceedings means that the City has parlayed the Superior Court's denial of pre-election relief into a denial of MEA's right to *any* relief before PERB.

Moreover, whether or not this CPR Initiative passes (though the published polling predicts passage), the parties will be no closer to a PERB determination as to whether or not the MMBA was violated in the first place. Even if the ballot initiative fails, the issues raised in MEA's UPC will *not* become moot because, as pension reform efforts dominate the political landscape in California, the legality of the City's refusal to meet and confer under the MMBA will remain a matter of grave importance for MEA-represented employees as well as public employers and public employees around the state – all of whom depend upon PERB's expertise in determining whether the MMBA is violated under the facts presented here.

Furthermore, this Order not only does actual and direct harm to MEA's MMBA-related rights, but it was entered in the midst of the City Attorney's hostile, public attack on PERB which intensifies the harm and thus the need for this Court's immediate intervention.

When MEA filed its UPC and the PERB Board directed PERB's General Counsel to seek injunctive relief in response to MEA's request, City Attorney Jan Goldsmith responded with a level of vitriol unbecoming his office as City Attorney.[7] On February 15, 2012, in his capacity as *City's*

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[7] Mr. Goldsmith's remarks which impugned the integrity of PERB's General Counsel as well as of PERB as a quasi-judicial state agency, violated the duty lawyers owe in proceedings before the Court to "refrain from impugning the integrity of the judicial system, its proceedings, or its members." (Super. Ct., San Diego County, local Rules, Rule (I).)

attorney in the matter, he took to the radio airwaves at KFMB 760AM calling PERB "a Mickey Mouse Star Chamber;" he accused PERB's General Counsel of misusing her authority to help her "union friends." He called PERB's argument in this case "absurd, ridiculous and nonsense." When asked by the radio host what PERB does on a daily basis, City Attorney Goldsmith responded: "I think what they do more than anything else is sit down and have coffee with the labor unions. They are owned and operated by labor unions. As is most of Sacramento by the way." (PE 12, 130, Exhibit 2.)

Days later, City Attorney Goldsmith's "opinion" piece was published in the *San Diego Union-Tribune*. He made a full frontal attack on PERB – describing it as "a Sacramento bureaucracy" which had launched an unprecedented "assault" on the citizen initiative process; he summed up PERB's involvement in this matter this way: "Labor unions, vowing to fight by all means, sought help from a former labor activist now serving as general counsel of PERB." (PE 12, 130, Exhibit 3.)

Accordingly, the Superior Court's Order – granted on City's *ex parte* applications – interfering with PERB's clear and unequivocal exclusive initial jurisdiction over MEA's UPC, arrives in the midst of the City's very public conduct in defiance of the MMBA *and* the City Attorney's very public expressions of contempt for PERB as this state's expert labor

relations agency. By disrespecting PERB's lawful jurisdiction, the Superior Court's Order exacerbates this atmosphere of hostility towards PERB and the MMBA within the San Diego community – all to MEA's immediate detriment and to the detriment of the City employees MEA represents.

These circumstances give rise to a legitimate concern among MEA-represented employees that, as pension reform issues sweep the state, the City's open defiance of the MMBA and its contemptuous behavior toward PERB will permanently undermine PERB's credibility and its vital role in administering the state's public sector labor laws – not only to their detriment as City of San Diego employees but also to the detriment of all public employees in California whose public employers are more likely to copy the City's brazen course of conduct if it goes unchecked or even succeeds. In this manner, this City's highly-politicized pension issues will ignite a movement undermining the effectiveness of this state's public sector bargaining laws in promoting labor peace and of this state's expert labor relations agency in contributing to that peace by hearing and determining unfair practice disputes – whether they are initiated by public employers, employees *or* unions – in accordance with uniform standards and principles of law.

Finally, although the City acknowledges that, if the CPR Initiative passes on June 5, 2012, it will be obligated to meet and confer over its

implementation (but *not* its contents), the likelihood that the City will engage in *good faith* bargaining with MEA in that post-election context is gravely diminished by the prevailing hostile, anti-PERB environment if there has been no determination regarding the City's refusal to bargain over the initiative's sweeping "pension reform" contents in alleged violation of the MMBA.

Under all the relevant circumstances, MEA will in fact be doubly prejudiced by delay in that its original unfair practice charge will not get a timely hearing before ALJ Ginoza as the statutory scheme contemplates – or any hearing at all – *and* MEA-represented employees must watch helplessly as their employer openly mocks the state agency whose purpose is to foster harmonious labor relations in the public sector and the Superior Court appears to condone it.

MEA is entitled to have this matter determined on an expedited basis as the PERB Board has already directed and *only* this Court can now make that happen by reversing the Superior Court's unlawful Order.

XIV. RELIEF REQUESTED

Petitioner MEA requests this Court to grant the following relief:

1. That a peremptory writ of mandate be issued directing the Respondent Superior Court to vacate its Order entered on March 27, 2012, so that PERB's administrative proceedings in the matter of MEA's unfair

practice charge and PERB's Complaint may continue forthwith in accordance with PERB's exclusive initial jurisdiction under Government Code section 3509;

2. That an alternative writ of mandate issue with an order to show cause to this Court why the Respondent Superior Court should not be compelled to vacate its Order entered on March 27, 2012, staying PERB's administrative proceedings until further order of the Court;

3. **That an order issue staying the effects of the Order entered on March 27, 2012, until the final order of this Court, so that irreparable harm to MEA may be avoided in the interim;**

4. For costs of this Writ; and,

5. For other and further relief as this Court deems just and proper.

Dated: April 11, 2012 TOSDAL, SMITH, STEINER & WAX

By: _____
Ann M. Smith
Attorneys for San Diego
Municipal Employees Association

VERIFICATION

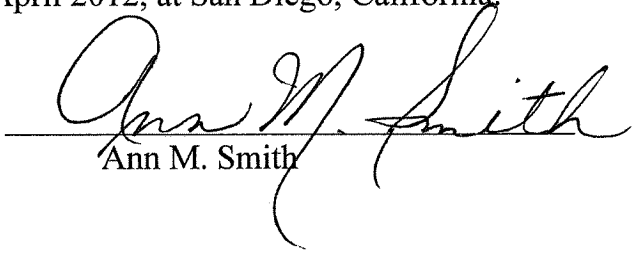
I, Ann M. Smith, declare:

1. I am counsel for MEA in this case.

2. I have read the foregoing Petition. All facts alleged in the Petition are true and correct of my own personal knowledge or are known to me by my review of the applicable legal papers.

3. I make this verification on behalf of MEA because I am counsel for MEA and, by reason of my training, experience and involvement in the applicable legal proceedings, I am more familiar with the facts stated in this petition than would be other representatives of MEA.

I declare under penalty of perjury that the foregoing is true and correct. Executed this11th day of April 2012, at San Diego, California.



Ann M. Smith

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

I. PERB RESPONDED TO MEA'S UPC AND REQUEST FOR INJUNCTIVE RELIEF IN ACCORD WITH ITS DECADES-OLD ROLE AS A QUASI-JUDICIAL AGENCY

A brief overview of PERB's general role as a quasi-judicial state agency will help sharpen the focus on what went wrong in the Superior Court and why immediate action is needed to stay the challenged Order.

A. PERB Is Vested With Exclusive Initial Jurisdiction To Apply Its Expertise And Specialized Knowledge In Determining If The MMBA Was Violated And, If So, What The Appropriate Remedy Should Be

PERB is a quasi-judicial administrative agency created for the purpose, among other things, of promoting harmonious and cooperative labor relations between California's public sector employers and their employees. The California legislature's view that expanding governance of public employer-employee relations was an "advantageous" and "desirable state policy" led to PERB's establishment. (Gov. Code §§ 3540 *et seq.*)

Effective July 1, 2001, recognizing "the valuable administrative remedies afforded by PERB," the legislature vested PERB with exclusive initial jurisdiction to interpret and administer the MMBA and to resolve unfair labor practice charges which may be filed by public employers or employees. (Sen. Bill 1296 [2008 Reg. Sess.] ch. 712 § 1(a) and (d); Gov. Code, § 3509.)

Under Government Code sections 3509 *et seq.*, the MMBA provides a comprehensive administrative procedure for investigating, hearing, and deciding charges of unfair practices against public agency employers. As an expert quasi-judicial agency, PERB administers the MMBA with broad authority – analogous to that of the National Labor Relations Board -- to interpret the MMBA in the interest of bringing "expertise and uniformity to the delicate task of stabilizing labor relations" in California. (*San Diego Teachers Assn. v. Superior* Court (1979) 24 Cal.3d 1, 2; *City and County of San Francisco v. Int'l Union of Operating Engineers Local* 139 (2007) 151 Cal.App.4th 938, 943-944.)

When the Legislature conferred exclusive initial jurisdiction on PERB to hear and decide MMBA-related unfair practice charges (except as to peace officers), the jurisdiction of the Superior Courts under the MMBA was permanently altered. Indeed, Government Code section 3509, subdivision (b) states:

> A complaint alleging any violation of [MMBA] . . . shall be processed as an unfair practice charge by the board. *The initial determination as to whether the charge of unfair practice is justified* and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, *shall be a matter within the* ***exclusive jurisdiction of the board***. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter. (Emphasis added.)

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The California Supreme Court has repeatedly affirmed that PERB – as the expert public sector labor relations agency – is vested with authority to determine whether a party's conduct constitutes a failure to bargain in good faith. (*City of San Jose, supra*, 49 Cal.4th at 606; *San Diego Teachers Assn. v. Superior Court of San Diego County* (1979) 24 Cal.3d 1, 12-14.)

California and federal courts have long held that the expertise and specialized knowledge of quasi-judicial labor agencies and the need for judicial uniformity in labor relations entitle those agencies, such as PERB, to great deference. (See *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, 856 [superseded on other grounds by Ed. Code, § 45113.]

B. PERB Processes Unfair Practice Charges And Determines Whether A Complaint Will Issue Based On Uniform Regulations Applicable To All Charging Parties And Respondents

When an unfair practice charge is filed with PERB – whether by an employer, an employee or an employee organization – it is assigned to a Board agent in the General Counsel's office for processing. (PR § 32620.) The Board agent must investigate the charge to determine whether the facts as alleged state a prima facie case, and whether the charging party is capable of providing admissible evidence in support of the allegations. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; see also, Gov. C., §§ 3514.5, 3541.5, and 3563.2; PR § 32620(b)(5).) The Board agent *must* issue an unfair practice

complaint if the charge or evidence is sufficient to establish a prima facie case. (PR §§ 32620(b)(4), (b)(7) and 32640(a); see also *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 460.) Before the Board agent completes the investigation of the charge, he or she must give the respondent an opportunity to state its position. (PR § 32620(b)(4).)

Where there is a material factual dispute, the charging party's allegations must be accepted as true and the matter must be resolved through the administrative process. (*County of Inyo* (2005) PERB Decision No. 1783-M.) In processing a charge, the Board agent does not make credibility determinations, and if the respondent's witnesses contradict the charging party's facts, resolution of the conflict must be left to an Administrative Law Judge who will make a determination after a formal hearing. (See *Golden Plains USD* (2002) PERB Decision No. 1489.)

Nor does the Board agent judge the merits of the dispute. (*Service Employees International Union, Local 221 (Meredith)*(2008) PERB Decision No. 1982 [a Board agent's determination that the charging party has alleged sufficient facts to state a *prima facie* case giving "cause" for the issuance of a complaint, is not a determination that an unfair practice has been committed].)

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C. PERB's General Counsel Has No Role In Prosecuting An Unfair Practice Charge Once A Complaint Has Issued

The General Counsel's office does *not* prosecute the PERB complaint; that obligation rests solely with the charging party (here MEA) who must prove an unfair practice complaint by a preponderance of the evidence. (PR § 32178.) The formal hearing is conducted in accordance with the procedures set forth in the PERB Regulations governing the conduct of the hearing generally. (PR § 32180.) The General Counsel's office does not advise the ALJ in his or her decision-making process, and does not advise the PERB Board itself if the ALJ's decision is appealed to the Board.

During the formal hearing before the ALJ, both the charging party and the respondent have the right to call, examine, and cross-examine witnesses, and to introduce documentary and other evidence on the issues. (PR § 32180) To that end, and because there is generally no pre-hearing discovery, both parties have the right to issuance of administrative subpoenas and to ask the Board to seek court enforcement of same if necessary. (PR § 32150.) If a party believes the evidence sought by the subpoena is irrelevant, or that the subpoena is otherwise invalid, the proper procedure for raising and resolving these issues is to file a written motion with the ALJ to revoke or limit the subpoena. (PR § 32150(d).)

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D. PERB Has Authority To Seek Injunctive Relief When Necessary To Preserve Its Remedial Powers

Recognizing that after-the-fact remedies are not always adequate, the Legislature has expressly *authorized PERB* to seek injunctive relief prior to an administrative hearing. In fact, a charging party may *not* seek such injunctive relief because it is within PERB's exclusive jurisdiction to do so upon a proper showing under PERB Regulations, sections 32450-32470. Thus, among the remedies available to PERB when exercising its exclusive initial jurisdiction under the MMBA is the specifically-enumerated power to seek injunctive relief and to take any other action as the board deems necessary to discharge its powers and duties. (Gov. Code, §§ 3509, subd. (a) and 3541.3, subds. (j) and (n); PR § 32450.)

II. THERE IS NO LAWFUL BASIS FOR THE SUPERIOR COURT TO INTERFERE WITH PERB'S EXCLUSIVE INITIAL JURISDICTION TO HEAR AND DECIDE MEA'S UNFAIR PRACTICE CHARGE UNDER GOVERNMENT CODE SECTION 3509

Not only was the Superior Court's grant of City's requested *ex parte* relief a denial of MEA's due process rights *before* the Superior Court, it represents a denial of MEA's due process rights to proceed to hearing on its unfair practice charge before the assigned Administrative Law Judge. This Order is profoundly wrong and must not stand.

The City asserted (1) that the Superior Court has inherent authority to stay PERB's proceedings; (2) that the City is excused from exhausting its

administrative remedies before PERB because exhaustion would be futile since PERB has already made a decision in this case; (3) that, having exercised its power to seek injunctive relief, PERB "should not now pretend it can be fair, neutral, and impartial in any administrative proceedings on these issues;" (4) that, by filing its Civil Complaint for injunctive relief, PERB has submitted to the jurisdiction of the Superior Court "to resolve any legal or factual issues, via an evidentiary hearing if need be;" (5) that PERB has no jurisdiction to resolve constitutional and legal issues related to elections matters; and (6) that multiple, duplicative proceedings will likely result in inconsistent and conflicting rulings. (PE 6, 72-82; 7, 83; 8; 84)

A. Neither PERB Nor MEA Did – Or Lawfully *Could* – Transfer PERB's Exclusive Initial Jurisdiction Over the Subject Matter of MEA's UPC to the Superior Court By Consent, Waiver or Estoppel

As a matter of law, PERB's proper exercise of its discretion in seeking injunctive relief in accordance with its enumerated powers under Government Code sections 3509 and 3541.2, subd. (j) and (n), and in accordance with the two-prong test approved in *PERB v. Modesto City School Dist.* (1982) 136 Cal.App.3d 881, 895 – in order to preserve its ability to provide an eventual remedy effectuating the purposes of the MMBA *if it is determined* that the MMBA was violated – did *not* and could *not* alter its jurisdiction to determine in the first instance whether the MMBA has, in fact, been violated.

The legislative mandate set forth in Government Code section 3509, subdivision (b), which establishes PERB's *exclusive initial jurisdiction* to determine MEA's UPC is clear and unequivocal. The City *never even cited* this statutory law in its 15-page Memorandum in support of its *ex parte* application. (PE 6, 73) There is no risk – as the City argues – that "duplicative proceedings will likely result in inconsistent and conflicting rulings" because *only* PERB (not the Superior Court) has jurisdiction to determine if the MMBA was violated as alleged in MEA's UPC and City's remedy, if it disagrees with that determination, will be by extraordinary writ to the Court of Appeal.

Moreover, the City's notion that, by filing its civil complaint for injunctive relief, PERB has "submitted to the jurisdiction of the Superior Court to resolve any legal or factual issues, via an evidentiary hearing" is profoundly wrong.

PERB's legitimate effort to seek injunctive relief in furtherance of its remedial powers *was neither PERB's nor MEA's consent* to vest the Superior Court with jurisdiction to determine the merits of MEA's UPC in derogation of the express provisions of Government Code section 3509, subdivision (b), establishing PERB's exclusive initial jurisdiction to hear the UPC and decide if the MMBA was violated.

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In any event, contrary to the City's assertion, jurisdiction over subject matter cannot be conferred by consent, waiver or estoppel. *Summers v. Superior Court* (1959) 53 Cal.2d 295, 298. As a matter of law, PERB's civil filing to seek injunctive relief in response to MEA's request cannot confer jurisdiction on the Superior Court to hear and decide whether the MMBA was violated as alleged in MEA's UPC because the legislature vested PERB with the exclusive initial jurisdiction to make this determination. Nor does the Superior Court have "inherent authority" to expand its own jurisdiction, as the City urges, in direct derogation of the legislatively-established jurisdiction of a state agency such as PERB.

B. The City's "Futility" Argument Is Not Supported By the Facts or By Applicable Law

1. PERB's Exercise of Its Enumerated Power to Seek Injunctive Relief Did *Not* And Could *Not* Provide A Lawful Basis to Excuse City From Exhausting Its Administrative Remedy Before PERB

The City's "futility" argument was based on a fundamental mischaracterization of PERB's *actual* quasi-judicial role in handling unfair practice charges, requests for injunctive relief, and administrative hearings under the MMBA (as well as the other state bargaining laws entrusted to it), as explained in this Petition and Supporting Memorandum. By ignoring what PERB does and how it is done in response to *any* charge or request for injunctive relief – whether from a covered employer, employee, *or* union –

the City painted a distorted picture in support of its "futility" argument which was never subjected to proper scrutiny because Judge Vargas granted the City's requested relief outright.

Allegations of bias must be more than mere conclusions, opinions, or rumors, and must be stated with particularity. (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330.) As the courts have noted, something more than a generalized assertion of or an "appearance of" bias is required before an administrative decision-maker will be disqualified. (*Andrews v. ALRB* (1981) 28 Cal.3d 781, 792-794.) Generally, bias is demonstrated by a showing that the adjudicator has a financial interest in the outcome of the case (see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025), or harbored actual prejudice against a particular party sufficient to impair the decision-maker's impartiality (*Andrews, supra*, at 792.) In the absence of such information, the adjudicator is presumed to be impartial (*Withrow v. Larkin* (1975) 421 U. S. 35, 47.) Bias in the sense of "a crystallized point of view about issues, law, or policy" will not suffice. (*Andrews, supra*, at 790.)

The City failed to set forth any evidence showing that the scheduled formal hearing before ALJ Donn Ginoza – set to begin on April 2nd – was tainted in any way by "bias" on the part of ALJ Ginoza or otherwise. The City did *not* inform Judge Vargas that ALJ Ginoza had denied its Motion to

Disqualify PERB – nor did Judge Vargas insist that the City's allegations of bias be stated with particularity. The City's broad brush strokes about the "bias" allegedly demonstrated by PERB's initiation of injunctive relief proceedings – notwithstanding its express enumerated power to do so in furtherance of its ability to provide a remedy effectuating the purposes of the MMBA – were enough to carry the day.

2. The Superior Court's Order Disregards the ALJ's Denial of City's Motion to Disqualify Which Was Heard On Proper Notice to MEA With An Opportunity to File An Opposition

Indeed, the day *before* the hearing on City's *ex parte* application on March **22**, 2012, ALJ Ginoza denied the City's Motion to Disqualify PERB on finding that it lacked good cause under PERB Regulations, section 32155, subd. (d), because "Respondent (City) has failed to present substantial evidence that PERB's Division of Administrative Law is insufficiently separated from the Board or the General Counsel's Office," or that he, as hearing officer, was "subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage." (PE 12, 126)

3. There Has Been No PERB Determination That the City Violated the MMBA And City Has No Grounds to Disqualify PERB Board Members

Despite the City's oft-repeated assertions to the contrary, *no determination on the merits of MEA's UPC has yet been made*. Only after a

full evidentiary hearing before ALJ Ginoza – in which MEA bears the burden of proving its UPC – will a determination be made in the form of a proposed decision. It is ALJ Ginoza who will hear the testimony of the witnesses, make an assessment of each witness' credibility, and review the admissible documentary evidence before applying the law to the facts as he finds them to be. No member of the PERB Board itself participates in the administrative hearing or makes any determinations related to the evidence presented. Either MEA or the City may take exceptions to ALJ Ginoza's proposed decision by an appeal to the PERB Board.

Moreover, as to the PERB Board itself, the City's contention that the Board's exercise of the power vested in it by the legislature under Government Code section 3541.3 and PERB Regulations, sections 32450 *et seq.* – taken in full compliance with its legislative mission – mandates disqualification of the PERB Board is profoundly wrong. Having sufficiently demonstrated its reasonable belief that an unfair labor practice *may have* occurred, and that injunctive relief was necessary to prevent further frustration of the MMBA by maintaining the *status quo* pending an administrative hearing, PERB acted within the scope of its exclusive jurisdiction. (*PERB v. Modesto City School Dist., supra*, 136 Cal.App. at 896, 902-903.)

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In any event, the City's allegations in its Motion to Disqualify – which related to disqualification of the PERB Board itself – will not ripen until and unless the Administrative Law Judge issues a decision which prompts the City to appeal to the Board. At that point, if at all, the provisions of PERB Regulations, section 32155, subd. (e) through (g) would apply with regard to any Board Member recusal/disqualification.

If the City eventually demands the recusal/disqualification of any PERB Board Member who participated in the decision to approve MEA's injunctive relief request, and that Member declines, the City "may include the matter of claimed disqualification in a writ of extraordinary relief filed pursuant to Government Code section 3509.5 . . . seeking judicial review of the Board's decision on the merits." (PR § 32155(g) and (h).) Moreover, the doctrine of exhaustion of administrative remedies precludes a judicial remedy until the administrative agency has reached a final decision. (See *PERB v. Superior Court* (1993) 13 Cal.App.4th 1816, 1825; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597.)

C. PERB Does *Not* Lose Jurisdiction Over MEA's ULP Solely Because the State Constitution and Elections Code Related to "Citizens' Initiatives" May Be Implicated

The MMBA, Government Code section 3509 provides that the "initial determination as to whether the charge of unfair practice is justified *and, if so, the appropriate remedy necessary to effectuate the purposes of*

this chapter, shall be a matter within the exclusive jurisdiction of the board." (emphasis added). Section 3510 requires the provisions of the MMBA to be interpreted and applied by PERB "in a manner consistent with and in accordance with judicial interpretations of this chapter." Thus, PERB must determine in the first instance how, if at all, the "no circumvention" principle related to charter amendments – which was established in the *Seal Beach* case – should be applied to the facts here. Although the City argues that *Seal Beach* is irrelevant to the fact pattern presented in MEA's UPC, this does *not* alter or undermine PERB's exclusive initial jurisdiction to decide if *Seal Beach* applies and, if so, how it applies based on a full factual record developed in an administrative hearing as the statutory scheme requires.

Extensive case law confirms that PERB not only has the right but the duty to perform its statutory mandate of investigating, adjudicating, and remedying unfair practices, even when doing so requires PERB to harmonize the statutes under its jurisdiction with other statutory and constitutional provisions. *See State of California (State Personnel Bd.)*, PERB Decision No. 1491-S at p. 10 (2002); *County of Sacramento*, PERB Decision No. 2045-M at p. 3 (2009).

Even when an alleged unfair practice implicates a statutory scheme that explicitly supersedes "the general law of the state," "PERB is charged

with the exclusive initial jurisdiction to consider the alleged unfair practice while harmonizing the purposes of [the bargaining statute] with those of [the implicated statutory provisions]." *Wilmar Union Elementary School Dist.*, PERB Decision No. 1371 at p. 12-14. As recognized by the California Supreme Court:

> The inquiry is properly not which statutory scheme prevails [over the other], but rather how each can be harmonized to give them reasonable and full effect. Each agency operates under different statutory schemes, but not to defeat each other's authority. . . . PERB . . . has been given a [specialized and focused] task: to protect both employees and [public employers] from violations of the organizational and collective bargaining rights guaranteed by [collective bargaining statutes]. . . . [T]he legislature evidently thought it important to assign the task of investigating potential violations of [the bargaining statutes] to an agency which possesses and can further develop specialized expertise in the labor relations field.

Pacific Legal Found. v. Brown (1981) 29 Cal. 3d. 168, 197-98 (internal quotations and citations omitted).

PERB also maintains jurisdiction over the unfair practice charge at issue here despite the City's contention that the constitutional rights of citizens to propose ballot initiatives are implicated. PERB has authority to interpret the statutes under its jurisdiction in light of constitutional standards. *Cumero v. PERB* (1989) 49 Cal. 3d 575, 583. "The mere fact that constitutional rights may be implicated or have some bearing on this dispute does not in and of itself divest PERB of jurisdiction to consider [an

alleged violation of a statute under PERB's jurisdiction]." *Wilmar Union Elementary School Dist., supra*, at p. 15.

The key inquiry in this case is whether the City violated its meet and confer obligations under the MMBA based on the conduct alleged in the Complaint. This is a question within the *exclusive* initial jurisdiction of PERB. As established case law confirms, PERB has the power to answer this question while harmonizing the MMBA with the Election Code and the California Constitution.

Furthermore, *only PERB* can determine, in the first instance, whether the MMBA has been violated. If PERB were to decline jurisdiction to resolve the alleged unfair practice, PERB would be relinquishing its statutory responsibilities under the MMBA; such an action "would conflict with legal principles requiring exhaustion of administrative remedies and PERB's preemptive jurisdiction." *State of California (State Personnel Board)*, PERB Decision No. 1491a-S at p. 5 (2002)

III. CONCLUSION

The City induced the Superior Court to enter an Order which exceeds its lawful jurisdiction and does irreparable harm to MEA's MMBA-protected interests. For the reasons set forth in this Petition, MEA

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respectfully urges this Court to step in on an urgent basis and undo the harm that is being done.

Dated: April 11, 2012

TOSDAL, SMITH, STEINER & WAX

By: Ann M. Smith

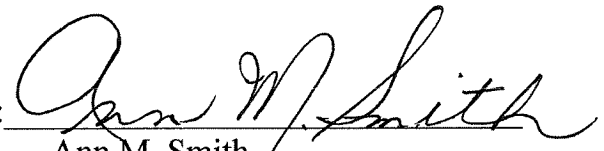
Ann M. Smith
Attorneys for Petitioner San Diego Municipal Employees Association

CERTIFICATE OF WORD COUNT

The text of this Petition and Supporting Memorandum of Points and Authorities consists of 13,537 words, as counted by the computer word processing system used to generate these materials.

Dated: April 11, 2012

TOSDAL, SMITH, STEINER & WAX

By: 

Ann M. Smith
Attorneys for Petitioner San Diego Municipal Employees Association

DECLARATION OF COUNSEL IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND REQUEST FOR IMMEDIATE RELIEF

I, Ann M. Smith, declare:

1. I am attorney licensed to practice law in the State of California and the attorney for the San Diego Municipal Employees Association.

2. The documents which are contained in Petitioner's Exhibits Volumes 1 through 12 in support of this Petition and Request for Immediate Relief are true and correct copies of the originals or of the copies which were filed or served.

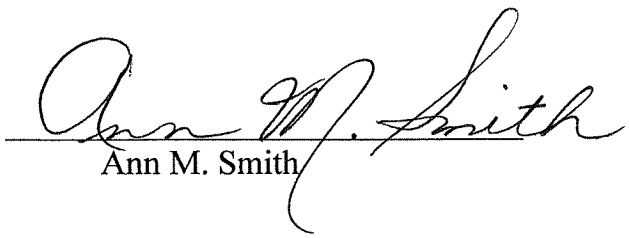
3. In compliance with Rules 56(c)(1)(B) and (C), Petitioners' Exhibits contain all of the documents which were submitted to the trial court in connection with the challenged Order filed on March 27, 2012, as well as those additional documents which I believe to be necessary for this Court's complete understanding of the case with regard to the Order under review, including those documents constituting the administrative record before PERB which are contained in Volumes 9 through 12, together with my Request for Judicial Notice.

4. The Order from which this Petition seeks relief was entered on March 27, 2012, *granting* City's *Ex parte* Applications to Quash Subpoenas issued by the PERB Administrative Law Judge and to Stay the Administrative Proceedings before the PERB Board on Unfair Practice

Charge No. LA-CE-746-M. The Minute Order states that the "stay will remain in effect until further order of this court," and sets a Status Conference concerning the Stay of Proceedings on June 22, 2012, at 1:30. (PE 8, 92)

5. When this Order was issued, PERB ALJ Donn Ginoza gave notice to the parties that he had taken the 4-day administrative hearing on MEA's UPC set to begin on April 2, 2012, off calendar and put MEA's unfair practice complaint "in abeyance until the stay is lifted." (PE 12, 134)

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 11th day of April 2012 in San Diego, California.



Ann M. Smith

Re: San Diego Municipal Employees Association v. Superior Court of the State of California, County of San Diego
Court of Appeal Case No.: _____

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West "A" Street, Suite 320, San Diego, California, 92101.

On April 11, 2012, I served the within document described as:

PETITION FOR WRIT OF MANDATE WITH IMMEDIATE RELIEF REQUESTED FROM CHALLENGED ORDER UNLAWFULLY INTERFERING WITH PERB'S JURISDICTION

via the method indicated:

Party	Method of Service
Hon. Luis R. Vargas San Diego Superior Court Department C-63 330 West Broadway San Diego, CA 92101 Telephone: (619) 450-7063	First Class Mail
Donald Worley, Esq. Office of the City Attorney 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: 619-236-6220 Fax: 619-236-7215 (Attorneys for City of San Diego)	Personal Service via DLS Attorney Service

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M. Suzanne Murphy, Esq.
Wendi Ross, Esq.
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4174
Telephone: 916-322-3198
Fax: 916-327-6377
(Attorneys for State of California,
Public Employment Relations Board)

UPS Overnight Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 11, 2012, at San Diego, California.

Elizabeth Diaz