S242034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

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

Real Parties in Interest

After a Decision of the Court of Appeal, Fourth Appellate District, Division One, Consolidated Case Nos. D069629 and D069630

CITY OF SAN DIEGO'S COMBINED ANSWER BRIEF ON THE MERITS TO THE OPENING BRIEFS OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD AND THE REAL PARTIES IN INTEREST UNIONS

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CITY OF SAN DIEGO

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Petitioner and Real Party in Interest City of San Diego (City) submits this Combined Answer Brief on the Merits in response to the Opening Brief filed by California Public Employment Relations Board (PERB) and the Opening Brief filed by San Diego Municipal Employees Association, Deputy City Attorneys Association, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters Local 145 (hereinafter referred to collectively as "Unions") which seek to reverse the Decision of the Court of Appeal, Fourth Appellate District, Division One, published in Case No. D069626 (consolidated with Case No. D069630), *Boling v. Public Employment Relations Board*, 10 Cal. App. 5th 853 (2017) (hereinafter referred to as "Opinion" or "Opn.").

I. INTRODUCTION

PERB's Decision, that a duly certified citizens' initiative could be deemed "impure" because of a public official's support was unprecedented. Never before had a State agency determined it had the power to rule on the validity of a citizens' initiative. In making its "purity" determination, PERB was presented with unique questions of law in numerous areas outside of its expertise. Accordingly, in reviewing PERB's Decision the Court of Appeal properly applied this Court's holding in *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1 (1998), that the deference given to an administrative agency's statutory interpretation is fundamentally situational, and because the issues to be decided were purely legal based on undisputed material facts, the appropriate standard of review was de novo as opposed to clearly erroneous. ***The Opinion correctly recognized that it is the judiciary – not PERB – that ultimately must decide the "purity" of a duly certified citizens' initiative.***

The Opinion also properly interpreted Government Code sections 3504.5 and 3505 in relation to the undisputed facts of the case. The Court of Appeal correctly determined PERB's attempts to nullify the Citizens' Pension Reform Initiative (CPRI) by finding Mayor Jerry Sanders ("Mayor" or "Sanders") was acting as an agent of the City when supporting a citizens' initiative was misguided and ignored fundamental principles governing the Charter amendment process and limitations set forth expressly in the City's Charter.

California's Constitution provides *only* two ways to propose amendments to the City's Charter. Either a proposal made through the citizens' initiative process, or a proposal by vote of the City's "governing body" – the City Council. There is no other method. It is undisputed that the Citizen Proponents[1] were not agents of Sanders or the City Council. It was further undisputed that the City Council did not propose the CPRI, and the City's Mayor does not have the power to unilaterally propose or decide to submit an initiative on behalf of the City, that authority rests solely with the City Council and is nondelegable. Furthermore, in the most public of settings, Sanders continuously stated he was acting as a private citizen.

PERB, in its appellate briefing, even admitted that Sanders had constitutional and statutory rights as a private citizen to take positions on matters of City employee compensation, including the CPRI. Yet, PERB and the Unions contend such rights were somehow lost due to alleged improper use of emails and public resources. However, no authority exists for nullifying Sanders' constitutional rights, an election, and denying the Citizen Proponents and the hundreds of thousands of petition signers and

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[1] "Citizen Proponents" refers to Petitioners and Real Parties in Interest, Catherine A. Boling, T.J. Zane, and Stephen B. Williams.

voters their reserved constitutional right to initiative due to any alleged violation.

A long line of cases clearly hold that citizens' initiatives are not subject to procedural requirements that might otherwise be imposed on government body action, like the meet-and-confer process of the Meyer-Milias-Brown Act (MMBA), regardless of the substantive law that might be involved. To hold otherwise would unconstitutionally limit the people's reserved initiative power and disenfranchise the very people who have the greatest stake in the City's fiscal responsibility. PERB and the Unions' attempt to expand the MMBA's meet-and-confer obligations to citizens' initiatives would unconstitutionally infringe upon First Amendment and statutory rights and would limit the people's reserved initiative power.

Accordingly, the City respectfully requests that this Court affirm the Court of Appeal's Opinion which correctly annulled PERB's Administrative Decision.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Competing Pension Reform Concepts

In early November 2010, Councilmember DeMaio released his "Roadmap to Recovery," which included a proposal to replace defined benefit pensions with a 401(k) style plan for all new hires and a freeze on pensionable pay for five years. (XVI AR 193:004103-94.)[2]

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[2] Citations to the Administrative Record (AR) include volume number, tab number, and page number. For example, XVI AR 193:004103-94, refers to Volume XVI, Tab 193, pages 4103 through 4194.

On November 19, 2010, Sanders announced he would seek to place an initiative on the ballot to eliminate defined benefit pensions for all but safety (police, fire and lifeguard) new hires and offer a 401(k) style plan. (XVIII AR 195:004745-49.) Sanders and Councilmember Faulconer met with business leaders of the Lincoln Club, San Diego County Taxpayers Association (SDCTA) and Chamber of Commerce to describe their pension reform concept. However, they were "lukewarm" to the Sanders' concept and preferred DeMaio's plan. (XV AR 192:003801:25-3802:2.) They told Sanders his concept was not "tough enough" and did not save enough money, and they only wanted one initiative to go forward. (XIII AR 190:003481:2-22; XIV AR 191:003575:2-9.) On December 17, 2010, the SDCTA voted to adopt pension reform principles including a 401(k) plan for new hires. (XXIII AR 200:005769.)

On January 12, 2011, Sanders announced in his State of the City address that "acting as a private citizen" he would "soon bring to the voters an initiative to enact a 401(k) style plan that is similar to the private sector's and reflects the reality of our times." (XVIII AR 195:004823.) In early March 2011, the SDCTA and Lincoln Club determined that DeMaio's plan was more in line with their pension reform principles and they informed Sanders that they were going to move forward with or without his input or support. (XVI AR 191:003575:2-9.) A series of meetings ultimately took place between supporters of the competing proposals.

B. The Citizen Proponents Initiative – the CPRI

The CPRI was drafted not by attorneys paid for by the City, Sanders, or the campaign committee formed to support the Sanders' pension reform concept, but by a private law firm – Lounsbery Ferguson Altona & Peak – which was hired by the SDCTA. (XIII AR 190:003482:13-19; XV AR

192:003994:13-3995:11.) The CPRI (XIX AR 196:005013-21) differed in many key respects from Sanders' concept and contained many components Sanders expressly opposed. (XIII AR 190:003482:22-24.)

On April 4, 2011, the Citizen Proponents, the official proponents of the CPRI, whom PERB found were not agents of the City or Sanders (XI AR 186:003088-89), presented their notice of intention to circulate petitions to place the CPRI on the ballot. (XIX AR 196:005009, 5012.) Sanders did not run the campaign for the CPRI, it was run by the head of the Lincoln Club, Citizen Proponent T.J. Zane. (XIII AR 190:003491:21-3492:10; XI AR 186:003089.) Sanders did not attend any strategy sessions. (XIII AR 190:003491:26.) While he did enthusiastically support the CPRI and mentioned it in some speeches, no evidence showed he had any control over signature gathering or its ultimate passage.

On September 30, 2011, Citizen Proponent Zane delivered the petition sections and signatures to the City Clerk and attested they contained at least 94,346 valid signatures. (XVI AR 193:004065.) They were forwarded to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures, and on November 8, 2011, the SDROV certified the CPRI petition had received a "SUFFICIENT" number of valid signatures requiring it to be presented to the voters as a citizens' initiative. (XX AR 197:005164.)

On December 5, 2011, the City Council passed a resolution of intention (R-307155) to place the CPRI on the June 5, 2012 Presidential primary election ballot, as required by law. (XVI AR 193:004067-69.) And on January 30, 2012, fulfilling its ministerial duty under then Election Code section 9255(b)(2), the City Council enacted Ordinance O-20127 which placed the CPRI on the June 5, 2012 Presidential primary election ballot as

Proposition B. (XVI AR 193:004071-89.) The CPRI called for certain aspects of the proposed amendment to take effect beginning July 1, 2012. (XIX AR 196:005015 (proposed Charter section 70.2).) The CPRI was ultimately approved by 65.81% of the City's voters. (XVI AR 193:004094-96.)

C. The Unions Demand to the City to Meet-and-Confer *Over the CPRI*

On July 15, 2011, the San Diego Municipal Employees Association (SDMEA) wrote to Sanders demanding that the City had an obligation under the MMBA to meet-and-confer over the CPRI. (XIX AR 196:005109.) SDMEA's letter informed Sanders that they would treat the CPRI as his "opening proposal." (*Id.*) The City Attorney's Office responded that the City had no meet-and-confer obligations because there was no legal basis upon which the City Council could modify the CPRI if it qualified for the ballot, rather, the Council needed to comply with the Elections Code and place the CPRI on the ballot if it met the signature and procedural requirements set forth therein. However, the City did assure the Unions that if the CPRI did qualify for the ballot and was approved by the voters, the City would engage in the meet-and-confer process over any impacts identified by the Unions. (XX AR 197:005155.) Accordingly, the City declined the Unions' multiple requests to meet-and-confer over the CPRI. (*See* XX AR 197:005115-17, 5151-5155.)

The Unions never requested that the City meet-and-confer over a competing ballot measure. Rather, the Unions' multiple demands claimed the City was obligated to meet-and-confer over the CPRI because they alleged "the notion that [the CPRI] is a citizens' initiative is pure fiction," and insisted the CPRI was the "City's initiative." (XX AR 197:005143.)

D. Unfair Labor Practice Charges and Initiation of PERB Action

On January 19, 2012, SDMEA filed an Unfair Practice Charge (UPC) with PERB over the City's refusal to bargain over the CPRI because the City claimed it was a "citizens' initiative" and not the "City's initiative." SDMEA's UPC stated the City rejected "each of MEA's several demands for meet and confer over the CPR Ballot Initiative, . . ." (I AR 1:000011.) It made no allegation that the City refused any request to meet-and-confer over a potential competing ballot measure. Three other City employee unions, the DCAA, Firefighters Local 145, and AFSCME Local 127, also filed UPCs with PERB, and embraced the allegations of the SDMEA UPC. Shortly after the UPCs were filed, PERB filed administrative complaints contending the City's alleged MMBA violation was its denial of the Unions' requests to meet-and-confer over the CPRI before placing it on the ballot. (III AR 13:000572-3; III AR 27:000836; V AR 48:001181; and V AR 62:001408.)

On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (II AR 4:000246-249.) PERB then filed a superior court action seeking to enjoin the City from placing the CPRI on the ballot, but was rejected. *San Diego Municipal Employees Ass'n. v. Superior Court*, 206 Cal. App. 4th 1447, 1452-53 (2012). After PERB administrative hearings were scheduled, the City sought a stay in superior court. After the trial court granted the City's stay, SDMEA pursued writ relief. *Id.* at 1454-55. The Court of Appeal concluded the stay was improper and it was vacated. The Court of Appeal returned the case to PERB jurisdiction solely on the basis of SDMEA UPC's claim that the CPRI was not a true citizen-sponsored initiative but was instead a "sham"

device employed by the City using "strawmen" to circumvent the MMBA. *Id.* at 1460, 1463; *see also* Opn. at p. 42, n. 33.

E. PERB's Decision

A PERB Administrative Law Judge (ALJ) conducted four days of administrative hearings in July 2012. (VIII AR 147:002303-13; IX AR 148:002315-423; 150:002428-74.) On February 11, 2013, the ALJ issued his Proposed Decision finding the City violated the MMBA by failing to meet-and-confer with the Unions over the CPRI. (X AR 157:002613-75.)

On December 29, 2015, PERB issued its Decision affirming and adopting the ALJ's Proposed Decision with minor modifications. (XI AR 186:002979-3103.) It abandoned the "sham"/"strawman" theory, finding the Citizen Proponents were not agents of Sanders or the City as the Unions alleged. Instead, it concluded the City violated the MMBA when it refused to meet-and-confer over the CPRI, based on theories of statutory agency and common law agency principles. (XI AR 186:003005.)

Specifically, PERB found that: (1) under the City's Strong Mayor form of governance and common law principles of agency, Mayor Sanders was a statutory agent of the City with actual authority to speak for and bind the City with respect to initial proposals in collective bargaining with the unions; (2) under common law principles of agency, the Mayor acted with actual and apparent authority when publicly announcing and supporting Proposition B; and (3) the City Council had knowledge of the Mayor's conduct, by its action and inaction, and, by accepting the benefits of Proposition B, thereby ratified his conduct. (XI AR 186:003005.)

PERB Ordered the City to cease and desist from: (1) Refusing to meet and confer with the Unions before adopting ballot measures affecting

employee pension benefits and other negotiable subjects; (2) Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing; and (3) Denying the Unions their right to represent employees in their employment relations with the City. (XI AR 188:003122.)

PERB also ordered the City to take the following, among other, affirmative actions: (1) Upon request, meet-and-confer with the Unions before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects; (2) Upon request by the Unions, join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before the adoption of Proposition B; and (3) Make current and former bargaining-unit employees whole for the value of any and all lost compensation, including but not limited to pension benefits, offset by the value of new benefits required from the City under Proposition B, plus interest at the rate of seven (7) percent per annum until Proposition B is no longer in effect or until the City and Unions agree otherwise. (XI AR 188:003122-23.)

The PERB Decision admitted it did not purport to resolve the constitutional issues raised by the City, and acknowledged "the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative." However, it concluded "those issues are not implicated by the facts of this case," and therefore, chose not to address them." (XI AR 186:003006.)

F. Writ for Extraordinary Relief and the Court of Appeal Opinion

On January 26, 2016, the City filed a timely Petition for Writ of Extraordinary Relief seeking to annul PERB's Decision. The Citizen Proponents also filed their own Petition. The Court of Appeal issued the writ of review on August 17, 2016, and oral argument took place on March 17, 2017.

The City's and Citizen Proponents' Petitions were consolidated for purposes of opinion and on April 11, 2017, the Court of Appeal's Opinion was issued. The Opinion granted the writ petitions and annulled PERB's decision.

The Opinion held that the meet-and-confer obligations under the MMBA apply only to a proposed charter amendment placed on the ballot by the governing body of a charter city, but has no application when such proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. (Opn. at p. 6.) Despite several people occupying elected and non-elected positions in City government providing support for the CPRI, the Court of Appeal concluded PERB erred when it applied agency principles to transform the CPRI into a governing-body-sponsored ballot proposal. Notwithstanding the support given to the CPRI by Sanders and others, there was no evidence the CPRI was ever approved by the City Council (the City's governing body), and, therefore, the Opinion held PERB erred when it concluded the City was required to satisfy the concomitant "meet-and-confer" obligations imposed upon governing-body-sponsored charter amendment ballot proposals. *Id.*

Both PERB and the Unions filed rehearing petitions which were denied.

G. Petitions for Review

PERB and the Unions each filed Petitions for Review, which were granted on July 26, 2017. The Court identified two main issues: (1) When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov't Code §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?; and (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?

III. LEGAL ARGUMENT

A. The Court of Appeal Correctly Applied a *De Novo* Standard of Review Pursuant to *Yamaha* as the Material Facts Were Undisputed and PERB's Determination the CPRI Was Not a "Pure" Citizens' Initiative Turned Nearly Entirely on Application of Legal Principles Outside of PERB's Expertise

PERB and the Unions contend the Court of Appeal's Opinion created a conflict regarding the proper standard of review that should be applied when an appellate court considers PERB's interpretation of statutes within its jurisdiction. They contend the "clearly erroneous" standard of *Banning Teachers Ass'n v. PERB (Banning)*, 44 Cal. 3d 799 (1988) should have been applied, as opposed to the "de novo" standard of review the

Court of Appeal found was applicable pursuant to *Yamaha Corp. of America v. State Bd. of Equalization (Yamaha)*, 19 Cal. 4th 1 (1998). They argue the Opinion "overextends" *Yamaha.*

Their argument for application of the clearly erroneous standard of review is overly simplistic and ignores the glaring differences between *Banning* and the case at issue. The *Banning* Court was only addressing a pure labor relations issue that clearly fell within the Education Employment Relations Act (EERA), an area unquestionably within PERB's expertise. *Banning*, 44 Cal. 3d at 804-05. *Banning* determined the Court of Appeal's application of a per se rule that parity agreements were illegal, in part to spare the reviewing court the task of having to examine claims on a case-by-case basis, deprived PERB "of its statutory function to investigate, determine, and take action on unfair practice charges to effectuate the policy of the EERA" and therefore failed to provide PERB's interpretation the deference to which it was entitled. *Id.* at 805.

The situation confronted by PERB in this case was nothing like the situation in *Banning*. It was undeniably unique, and presented a confluence of numerous areas of law outside of PERB's expertise. (Opn. at pp. 43-44.) Accordingly, the Court of Appeal looked to *Yamaha* for guidance as to the appropriate standard of review to apply to an administrative agency's statutory interpretation. The Opinion correctly construed *Yamaha* as recognizing that in our tripartite system of government, "it is the judiciary – not the legislative or executive branches – that is charged with the final responsibility to determine questions of law" and the weight to be accorded to an administrative agency's interpretation is "fundamentally situational." (Opn. at p. 26.) "The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the

determination of the agency *appropriate* to the circumstances of the agency action." (Opn. at p. 24 (quoting *Yamaha*, 19 Cal. 4th at 8 (italics in original)).) An agency's expertise or comparative interpretative advantage over the reviewing court is a major factor to what level of deference and agency's interpretation should be provided. In a situation such as *Banning*, a pure labor relations issue within PERB's expertise, a deferential standard of review is appropriate.

Here, however, PERB's Decision nullified the effects of the CPRI[3] based on its erroneous conclusion that the CPRI was not a citizen sponsored initiative, but rather a governing body sponsored initiative subject to the MMBA. As the Court of Appeal Opinion noted, such a determination rested nearly entirely on PERB's application of the interplay among the City's charter (and Sanders' powers and responsibilities thereunder), common law agency principles, and California's constitutional and statutory provisions governing charter amendments. (Opn. at p. 43.) PERB's Decision "did not turn upon the resolution of material facts (to which the deferential 'substantial evidence' standard would apply) or upon PERB's application of legal principles of which PERB's special expertise with the legal and regulatory milieu surrounding the disputed legal principles would warrant deference."[4] *Id.* at 43-44. PERB's and the

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[3] The Opinion recognized that PERB ordered, among other remedies, "that the City in effect refuse to comply with the CPRI." (Opn. at p. 5.)

[4] The Opinion correctly concluded that when the material facts are undisputed, as they were in the present case, the question of the existence of a principal agent relationship is a matter of law to be decided by the courts. (Opn. at p. 44 n.34 (citing *Kaplan v. Caldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 745 (1997); *see also Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 299 (1984) (noting that if the essential facts are not in conflict the question of the existence of an agency

Unions' briefs are absent of any case law or authority evidencing it holds any expertise with regards to constitutional law governing voter initiatives or common law agency to which the courts should defer.

Therefore, following *Yamaha's* circumstantial approach, the Court of Appeal correctly applied a de novo standard of review as PERB lacks the requisite expertise and holds no comparative advantage over the Court of Appeal with regards to interpreting "the constitutional or statutory scheme governing initiatives" or "common law principles of agency." (Opn. at p. 44.) In fact, giving PERB deference regarding its determination of whether a citizens' initiative is "pure" or "impure" would conflict with this Court's determination that it is the solemn duty of the courts (not PERB) "to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its existence." *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991).

The Opinion does not create any conflict with *Banning* because the cases are completely distinguishable. Likewise, *Cumero v. PERB*, 49 Cal. 3d 575 (1989), is distinguishable as it did not involve the convergence of numerous areas of law outside of PERB's expertise, nor did it involve an underlying decision that eviscerated the constitutional rights of an elected official, initiative proponents, petition signers, and the City's electorate.

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relationship is a question of law).) Accordingly, any claim that the Opinion created a conflict with *Inglewood Teachers Ass'n v. PERB*, 227 Cal. App. 3d 767 (1991) is incorrect, as *Inglewood* did not involve a situation where the material facts were undisputed. Nor did *Inglewood* involve a situation undeniably outside of PERB's expertise such as determining what is, or is not, a "pure" citizens' initiative. Also, as the Opinion pointed out, "courts in other contexts have declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles." (Opn. at p. 26 n.21 (citing *Los Angeles Unified School Dist. v. PERB*, 191 Cal. App. 3d 551, 556-57 (1983)).)

Furthermore, PERB's Decision acknowledged "the City raised some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative," however, it concluded "those issues are not implicated by the facts of this case," and therefore did not address them and invited the parties to raise them with the court. (XI AR 186:003006.) Thus, PERB invited the Court of Appeal to review its decision de novo.

B. The Court of Appeal Opinion Did Ultimately Determine PERB's Decision Was Legally Erroneous

Regardless of the standard of review applied, the Opinion ultimately correctly concluded that based on the undisputed facts the legal conclusions underlying PERB's Decision were erroneous. When the material facts are undisputed and a Court is presented with a pure question of law, whether a legal conclusion is classified as "erroneous" or "clearly erroneous" is a distinction without a difference. There are no varying degrees of legally erroneous, a legal conclusion based on an undisputed set of facts is either right or wrong.

This Court has stated, it is the duty of the courts when a question of law is properly presented, to state the true meaning of a statute, even though such requires the overthrow of an earlier erroneous administrative construction. *Cumero*, 49 Cal. 3d at 587. Here, the Opinion did just that, as it concluded "PERB's fundamental premise – that under agency principles Sanders' support for the CPRI converted it from a citizen-sponsored initiative on which no meet-and-confer obligations were imposed into a City Council-sponsored ballot proposal to which section 3504.5's meet-and-confer obligations became applicable – is legally erroneous." (Opn. at pp. 65-66.)

C. PERB and the Unions' Interpretation of Government Code Section 3505 to Attempt to Turn the CPRI into a City Sponsored Initiative Ignores Fundamental Principles Governing the Charter Amendment Process and Limitations Established by the City's Charter

PERB and the Unions attempt to hold the City liable for an MMBA violation under a statutory agency theory ignores the fact that Sanders had absolutely *no* authority without City Council direction or authorization, to sponsor or pursue a Charter amendment on behalf of the City. The City's Mayor derives his authority solely from the City's Charter. *See, e.g., Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1086 (2004) ("When a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute.")

Pursuant to the San Diego City Charter, "[a]ll legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State." San Diego Charter § 11. Accordingly, the City Council is the City's "governing body." *Id.*; *see also* San Diego Charter § 270.

For the City Council to act, it may do so *only* as a body. San Diego Charter § 15 ("Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote"); *see also* San Diego Charter § 270(c) ("No resolution, ordinance, or other action of the Council shall be passed or become effective without receiving the affirmative vote

of five members of the Council, unless a greater number is otherwise required by the Charter or other superseding law.") Furthermore, ***the City Council cannot delegate its legislative power or responsibility to the City's Mayor***, individual Council members, or anyone else. San Diego Charter § 11.1.

PERB's Decision concluded that "when meeting and conferring with the employee representatives, the Mayor makes the initial determination of policy with regard to what position the City will take . . . ." (XI AR 186:002983.) It further erroneously held that "Sanders was a statutory agent of the City with actual authority to speak for and bind the City with initial proposals . . . ." (*Id.* at 186:003005.) Both conclusions blatantly ignore the fact that the Mayor *cannot* unilaterally establish or choose to pursue legislative policy on behalf of the City – only the City Council can and pursuant to the City Charter *such powers are nondelegable.* Accordingly, contrary to PERB's findings, Sanders did not, and could not, have had the statutory authority to bind the City with initial legislative proposals, let alone the mere announcement of his desire to pursue pension reform via voter initiative *as a private citizen.* However, that is the finding this Court is being asked to reinstate in an effort to nullify the CPRI, a duly certified citizens' initiative.

Under Government Code section 3505,[5] the "governing body" or "other representatives as may be properly designated by law or such

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[5] Government Code section 3505 states:

The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee

governing body," must meet-and-confer on subject matters of bargaining "prior to arriving at a determination of policy or course of action." The "determination of policy or course of action" with regards to a legislative act referred to in Government Code section 3505 *must* be made by the "governing body" – the City Council. Otherwise it would constitute an improper delegation of legislative authority. *See Kugler v. Yocum*, 69 Cal. 2d 731, 735 (1968); *Bolger v. City of San Diego*, 239 Cal. App. 2d 888, 893 (1966) ("An attempted delegation of power to an officer of a municipality where no standards are established by which the officer shall be governed in his actions, is in effect an attempted delegation of authority to legislate and therefore void"); *Ex parte Stone*, 48 Cal. App. 463 (1920) (noting when all legislative power is vested in city council by charter any intention to abridge that power must be made manifest by express provision and cannot be presumed or implied).

While it is true the Mayor may conduct negotiations with the Unions, even his opening offer at the negotiation table *must* be approved by

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organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

the City Council. (XII AR 189:003226:11-3227:6.) Here, that never occurred. Sanders has no statutory authority to make a legislative policy decision or determine a course of action concerning legislative policy without City Council direction and approval. The cases pointed to by the Unions and PERB are distinguishable and therefore irrelevant, as they involve actions were there was no necessary predicate involvement by the government body, as is required in the present situation. (Unions' Brief at pp. 44-45 n.16 & 17; PERB Brief at pp. 51-52 n.13.)

Accordingly, Sanders' support of the CPRI cannot legally have turned it into a "City-sponsored" initiative, let alone a "government body" sponsored initiative subject to MMBA meet-and-confer requirements.[6] *See, e.g., First Street Plaza Partners v. City of Los Angeles*, 65 Cal. App. 4th 650 (1998) (holding the provisions of a city's charter cannot be satisfied by implication or procedures different than those specified in the charter).

D. The Court of Appeal Correctly Determined PERB's Attempt to Use a Common Law Agency Theory to Find Sanders' Actions Transformed the CPRI Into a Government Sponsored Initiative Was Erroneous

It is a municipal law maxim, that any act that violates the City's Charter is void. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161,

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[6] The City does not dispute that a recognized employee organization may itself trigger an employer's duty to bargain by a demand to meet-and-confer over a negotiable subject absent a government body proposal to take formal action. However, that never occurred in this case. As noted *infra* in Section D.4 the Unions are disingenuous in their claim they requested to meet-and-confer over a competing or alternative ballot measure concerning the subject matter covered by the CPRI. Instead, claiming the CPRI was a "sham" initiative and not a true citizens' initiative, their demands were to meet-and-confer over the CPRI.

171 (1994). And when a charter provision has not been complied with, the City cannot be held liable or deny the validity of such act. *See, e.g., First Street Plaza Partners*, 65 Cal. App. 4th at 667; *Dynamic Ind. Co. v. City of Long Beach*, 159 Cal. App. 2d 294, 299 (1958) (holding when a charter provision has not been complied with, the city may not be held responsible in quasi contract, or estopped from denying validity of such contract); *see also Calaveras City v. Calaveras Cty. Water Distr.*, 184 Cal. App. 2d 276, 280 (1960) ("No government, whether state or local, is bound to any extent by an officer acting in excess of his authority . . . .") As discussed above, PERB's Decision completely disregarded the City's nondelegation of legislative authority doctrine.

The City is unaware of any case law applying common law agency principles related to the exercise of a City's legislative powers, they are simply not applicable to the City in such context. However, even using agency principles a lone individual may not be an agent of the City's governing body for purposes of creating legislation. Similar to the City's nondelegation doctrine, Civil Code section 2304 makes it clear that an agent may not be authorized to do acts which the principal is bound to gives his personal attention. Accordingly, it is clear under common law agency principles that Sanders cannot act as an agent of the City when unilaterally creating or pursuing legislative policy because the City Council is bound by the Charter to give its personal attention to such tasks.

1. Sanders Did Not Have Actual Authority to Unilaterally Speak on Behalf of and Bind the City

The facts and applicable law do not support PERB's conclusion that Sanders was acting as an agent of the City under an actual authority analysis. As discussed, pursuant to the City Charter, only the City Council

can establish City legislation and such power is nondelegable. San Diego Charter §§ 11, 11.1.

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." Cal. Civ. Code § 2316. "Actual authority" stems from conduct of the principal that causes the purported agent to reasonably believe that the principal has authorized or consented to the agent's act. *Mannion v. Campbell Soup Co.*, 243 Cal. App. 2d 317, 320 (1966). The Opinion correctly found that there was *no evidence* the City Council actually authorized Sanders to act on its behalf to support the CPRI. (Opn. at p. 54.) Additionally, there was *no evidence* that Sanders believed he was acting or had actual authority to act on behalf of the City Council. *Id.*

2. Sanders Did Not Have Apparent (Ostensible) Authority to Speak on Behalf of and to Bind the City

In an apparent agency analysis, the focus is on whether the principal, either intentionally or by want of ordinary care, caused or allowed a third party to believe the agent possessed authority to act on behalf of the principal. Cal. Civ. Code § 2317. Thus, apparent agency *must* be established through the conduct of the principal and cannot be created merely by the purported agent's conduct or representations. *See Hill v. Citizens Nat'l Trust & Savings Bank of Los Angeles*, 9 Cal. 2d 172, 176 (1937); *Young v. Horizon West, Inc.*, 220 Cal. App. 4th 1122, 1132 (2013).

The Opinion correctly found that PERB's apparent agency finding was erroneous for multiple reasons. As it noted, neither the PERB Decision

nor PERB's or the Unions' appellate briefing set forth *any evidence* that the City Council affirmatively said or did anything which could have caused reasonable employees to believe Sanders was authorized to act on behalf of the City Council when promoting the CPRI. Rather, they relied completely on hearsay statements of news reporters and statements by the alleged agent himself.

Additionally, the third party's belief that an agent is acting on behalf of the principal must be reasonable and not based on negligence. *Hill*, 9 Cal. 2d at 176. It is unreasonable, and in fact disingenuous, for the Unions to claim that they do not pay attention to the State of the City address, and assert that they believed Sanders was acting in his official City capacity with City Council approval when he expressly stated that he was acting as a private citizen.

Furthermore, it is well established law that an agency relationship is not to be presumed, and "one dealing with a municipal corporation is chargeable with knowledge of the limitations of power of its agents and officers." *Contra Costa Co. v. Daly City*, 48 Cal. App. 622, 625 (1920). Accordingly, the Unions are charged with the knowledge of Sanders' lack of authority to establish legislative policy or even present a proposal without first getting the approval of City Council.[7] San Diego Charter § 11.1.

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[7] As the Opinion noted, "apparent" authority is a form of estoppel, and PERB's Decision completely failed to explain how the third element – change of position from reliance upon representations by principal which resulted in injury – of estoppel was satisfied. (Opn. at p. 56 n.44.) Additionally, "estoppel" will not be applied against the government if to do so would effectively nullify a "strong rule of public policy, adopted for the benefits of the public." *Cotta v. City & County of San Francisco*, 157 Cal.

3. The City Council Did Not Create an Agency Relationship by Ratification

The PERB Decision claimed that, under a common law ratification theory, the City Council ratified Sanders' actions by acquiescing to his promotion of the initiative, by placing it on the ballot, and denying the Unions the opportunity to meet-and-confer, while accepting the financial benefits of the CPRI. (XI AR 186:003003.)

PERB contends the knowledge component required for ratification was met because the City Council was in attendance at Sanders' State of the City speech. The speech during which Sanders unequivocally stated he was acting as a private citizen. (XVIII AR 195:004823.) PERB, in its appellate briefing admitted "[t]here is no dispute that [Sanders] had constitutional and statutory rights as a private citizen to take positions on matters of City employee compensation, including supporting [the CPRI]." (PERB Appellate Reply Brief, p. 68; *see also* Opn. at p. 60 n.50.) The evidence establishes Sanders' went out of his way to repeatedly state he was acting as a private citizen. (XIII AR 190:003361:l-3362:9, 3362:18-20; XVIII AR 195:00593; XXIII AR 200:005815, 5829, and 5834.) PERB's contention the City's failure to disavow something Sanders admittedly had a constitutional and statutory right to do creates an agency relationship that effectively eviscerates such right is misguided.

App. 4th 1550, 1567 (2007). Here, two strong rules of public policy, the City's prohibition against delegation of legislative authority and the exercise of the citizens' initiative power to enact the CPRI, would be nullified if apparent authority were applied.

PERB's claim that the City Council's placing the CPRI on the ballot, and the Council's acceptance of the financial benefits accruing from the CPRI's passage by the voters is also unavailing. Once the CPRI qualified as a duly certified citizens' initiative, the City Council was required to place it on the ballot without change. *Save Stanislaus Area Farm Economy v. Bd. of Supervisors*, 13 Cal. App. 4th 141, 149 (1993) ("A local government is not empowered to refuse to place a duly certified initiative on the ballot.") Pursuant to Election Code section 9255(b)(2), the City had a ministerial duty to place any qualified citizens' initiative on the ballot as worded. The Citizen Proponents, whom PERB found were *not* agents of the City, had the exclusive control over the CPRI's wording. *See* Cal. Elec. Code § 9032; *Perry v. Brown*, 52 Cal. 4th 1116, 1142 (2011). The City Council could not choose to ignore the law, and had no option but to accept any potential benefits from its enactment. The Opinion correctly concluded, ratification can have no application when the principal is unable to decline the benefits of an agent's unauthorized actions. This Court has made it clear that non-discretionary or ministerial actions cannot amount to ratification stating "[i]t is essential . . . that the act of adoption be *truly voluntary* in character." *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972) (Emphasis added).

4. The Unions *Never* Requested to Meet-and-Confer Over a Competing Ballot Measure, Rather, They Demanded to Meet-and-Confer *Over the CPRI* Because They Insisted It Was a "Sham" Citizens' Initiative and Really *the City's* Initiative

The Unions mischaracterize SDMEA's July 15, 2011 letter and subsequent meet-and-confer demands. There was never a request to meet-

and-confer over a competing ballot measure regarding the "pension reform subject matter covered by [Sanders'] initiative effort," as they contend in their Opening Brief. (Unions' Brief at p. 60.) As the Court of Appeal noted, the Unions insisted and asserted that the "City had the obligation to meet-and-confer ***over the CPRI***." (Opn. at p. 14, emphasis added; *see, e.g.*, XXIII AR 200:005908 ("[t]he purpose of this letter is to request that the City meet and confer with Local 145 on the Comprehensive Pension Reform Initiative, as required under the [MMBA]; *Id.* at 005913 ("the City is obligated to meet and confer over the proposed charter amendment [the CPRI], . . .").) SDMEA's UPC filed with PERB never claims it requested to meet-and-confer over a competing ballot measure concerning pension reform, rather it admits its multiple requests sought to meet-and-confer *over the CPRI*. (I AR 1:000011 (stating the City rejected "each of MEA's several demands for meet and confer over the CPR Ballot Initiative, . . .") This is because the Unions' were pushing their "sham"/"strawman" theory (debunked by the PERB Decision), that the Citizen Proponents were simply "special agents" acting for the City. PERB's Administrative Complaints also state the City's alleged MMBA violation was its denial of the Unions' requests to meet-and-confer over the CPRI before placing it on the ballot. (III AR 13:000572-3; III AR 27:000836; V AR 48:001181; and V AR 62:001408.)

There was never a request for the City to meet-and-confer over a competing ballot measure. Neither PERB nor the Unions cite to any authority requiring the City to engage in the meet-and-confer process over

the subject matter covering a citizens' initiative when no such request was made. That is because there is no such authority, and no such obligation.[8]

The contention the City should or could have delayed placing the CPRI on the ballot until a competing measure could have been made is also mistaken. (*See* Unions' Brief at pp. 64-65 (pointing to the Opinion at footnote 25 stating the governing body "arguably" has some flexibility as to at which election an initiative is presented to the voters, citing *Jeffrey v. Superior Court (Jeffrey)*, 102 Cal. App. 4th 1, 4-10 (2002).) *Jeffrey*, addressing the argument a hostile city council could effectively de facto veto an initiative by manipulating when an initiative appears on the ballot, noted that a legislative body must, if possible, respect the effective dates initiative supporters establish within their initiative. *Jeffrey*, 102 Cal. App. 4th at 9-10. The CPRI expressly called for limitations on base compensation for calculation of pension benefits to take effect beginning July 1, 2012. (AR XIX 196:005015 (CPRI/Prop. B, proposed San Diego Charter § 70.2).) Any delay in placing the CPRI on the ballot would have been inconsistent with effective dates set forth in the citizens' initiative.

E. The Citizens' Initiative Power Is Broad, and It Is the Duty of the Courts to Jealously Guard and Protect Such Power

The California Constitution provides for *only* two distinct methods to propose amendments to the City's Charter – (1) a proposal made via citizens' initiative, or (2) a proposal by vote of the City's "governing

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[8] For the sake of *arguendo*, even if it the City did fail to comply with the MMBA by not engaging in a meet-and-confer process over a competing or alternative pension reform initiative, it would not justify PERB's remedy which effectively nullifies the CPRI. Rather, a more appropriate remedy would be to order the City to meet-and-confer with the Unions over a potential alternative measure.

body." Cal. Const., art. XI, § 3(b). The Constitution speaks of the citizens' initiative, not as a right granted to the people, but as a power reserved by them. *Associated Home Builders etc., Inc. v. City of Livermore (Associated Home Builders)*, 18 Cal. 3d 582, 591 (1976). When faced with a challenge to the citizens' initiative power, recognizing it to be one of the democratic processes most precious rights, it has been declared to be the duty of the courts to "jealously guard" and liberally construe the right so that it is not "improperly annulled." *Id.*; *see also Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990).

When weighing the tradeoffs associated with the initiative power, this Court recently reaffirmed the obligation that doubts must be resolved in favor of the exercise of the right whenever possible, and any provisions that would limit or burden the exercise of such power must be narrowly construed. *California Cannabis Coalition v. City of Upland (Upland)*, 3 Cal. 5th 924, 938 (2018). The enactment of the initiative power came about due to "dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Perry v. Brown*, 52 Cal. 4th 1116, 1140 (2011). Its primary purpose is to empower the people with the ability to propose and adopt statutory provisions "that their elected public officials had refused or declined to adopt." *Id.* To that end, citizens' initiatives have been compared to a "'*legislative battering ram*' because they 'may be used to tear through the exasperating tangle of the traditional legislative process and strike directly toward the desired end.'" *Tuolumne Jobs & Small Business Alliance v. Superior Court (Tuolumne Jobs)*, 59 Cal. 4th 1029, 1035 (2014) (italics in original).

1. Citizens May Bring an Initiative and Directly Legislate On Any Matter Over Which a Municipal Governing Body May Legislate

DeVita v. County of Napa, 9 Cal. 4th 763, 775 (1955) states the rule that "the local electorate's right to initiative and referendum is guaranteed by the Constitution . . . and is generally co-extensive with the legislative power of the local governing body." In other words, anything on which the City Council can legislate, the citizens may directly legislate by initiative.

The CPRI adopts a new 401(k) style pension plan for new employees and makes other changes to the City's retirement system – it does not attempt to modify benefits for existing employees or affect vested rights. Since the subject of the CPRI falls within the "municipal affairs" power of the City Council, it must also fall within the legislative powers reserved to the people through initiative.

DeVita cautioned that "[t]he presumption in favor of the right of initiative is ***rebuttable upon a definite indication that the Legislature***, as part of the exercise of its power to preempt all local legislation in matters of statewide concern, ***has intended to restrict that right.***" *Id.* at 776 (emphasis added). Nonetheless, it reaffirmed "the constitutionally based presumption that the local electorate could legislate on any subject on which the local governing body could also legislate." *Id.* at 777. *DeVita* then found that the Legislature intended that general plans *could* be amended by initiative.

2. The Legislature Has Never Indicated the MMBA in Any Way Limits the Citizens' Initiative Power

In enacting the MMBA, the Legislature never gave a "definitive indication" that it was attempting to preempt or in any way limit the

citizens' initiative power on subject matters of bargaining (e.g., wages, hours, working conditions, etc., including pensions). In fact, the MMBA itself is totally silent on initiatives or the rights of citizens. As this Court recently opinioned, to infer a limitation on the initiative power from such an absence would "essentially embrace a presumption against the initiative power, rather than in favor of it. Such a conclusion would be profoundly ay odds [with this Court's] obligation to 'jealously guard' the voters' exercise of their initiative power." *Upland*, 3 Cal. 5th at 938-39 (citing *Associated Home Builders*, 18 Cal. 3d at 591).

3. No Case Has Declared That the MMBA Preempts or In Any Way Limits the Citizens' Initiative Power

No court decision states that the MMBA preempts, or in any way limits, the initiative power of citizens to legislate directly on subjects of bargaining. The two main cases the Unions contend support their argument, that the constitutional rights of initiative should yield to the MMBA due to Sanders support of the CPRI (Unions' Brief at p. 66), are distinguishable and inapplicable to the present situation.

a. The *Seal Beach* Case[9]

First, the Unions' erroneous claim that the *Seal Beach* case somehow limited or restricted the government body's constitutional rights must be dispelled. The Supreme Court in *Seal Beach* confronted the city's claim that a conflict existed between the city council's constitutional power to propose charter amendments and the statutory procedural requirement of the MMBA to meet-and-confer before legislating over employment

[9] *People ex. rel. Seal Beach Police Officers Ass'n v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591 (1984).

matters. The Supreme Court found: "No such conflict exists," because "the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and to make its own decision. [Citation omitted.] This power preserves the council's rights under article XI, section 3, subdivision (b) – it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." *Seal Beach*, 36 Cal. 3d at 601. Accordingly, reading *Seal Beach* correctly, one finds it does *not* hold, as the Unions claim (Unions' Brief at p. 67), that the MMBA limits or restricts a charter city's constitutional right to propose ballot measures on matters within the scope of representation. Rather, this Court ruled that the MMBA applied to governing body action specifically because the MMBA did *not* limit or abridge a local agency's constitutional rights, and therefore was deemed compatible with such rights. *Seal Beach*, 36 Cal. 3d at 601.

However, an irreconcilable conflict exists between the citizens' constitutional right to legislate by initiative and the procedural requirement of the MMBA. The source of the conflict is the central role which the governing body plays in the bargaining process. As the Supreme Court stated in *Voters for Responsible Retirement v. Bd. of Supv. of Trinity County (Trinity County)*, 8 Cal. 4th 765, 782 (1994):

> [T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3501.1 – i.e., the governing body – is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges.

The very nature of the initiative process is to allow citizens *to bypass and act independently of the governing body* – in this case, the City Council. If the citizens or their representatives have to wait for a Council-supervised bargaining process to unfold and reach conclusion or impasse before presenting an initiative to the ballot, they become hostage to a process conducted by the very governing body which they seek to bypass and from which they seek independence. Hence, the obvious conflict.

This Court has recognized that "the major impetus behind [the 1911 amendments granting the rights of initiative and referendum] was to enable the people of this state, on the local level and statewide, to reclaim the legislative power from the influence of what is contemporary parlance is called "special interests." *DeVita*, 9 Cal. 4th at 795. The Citizen Proponents and business group backers who carried the CPRI forward meant to "reclaim the legislative power" over pensions from the City Council and the Unions, so a requirement that its passage should have awaited completion of a bargaining process involving only the Council and the Unions runs counter to the very nature and purpose of the citizens' initiative.

If PERB's Decision and Orders were to be reinstated and citizens' initiative are held to have to comply with the MMBA meet-and-confer requirements it would effectively eviscerate the citizens' constitutional initiative rights. Accordingly, *Seal Beach* does not in any way support the position that the citizens' precious constitutional rights to initiative should in any way yield to the MMBA meet-and-confer requirements.

b. The *Trinity County* Case[10]

In *Trinity County*, this Court addressed whether a referendum[11] was proper to review the County's approval of a Memorandum of Understanding (MOU) related to retirement, which had been adopted *after* a meet-and-confer process had already concluded.

The *Trinity County* case does not in any way support a conclusion that citizens' initiatives must yield in any way to the MMBA. First, the ruling rested entirely on a specific statute, Government Code section 25123(e), which stated that any ordinance adopting an MOU became *effective immediately*. Because of the immediate effectiveness of the MOU under Section 25123(e), a referendum simply could not operate to affect the MOU. In approving the application of Section 25123(e), this Court reasoned, "[i]f the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum." *Trinity County*, 8 Cal. 4th at 782. The MOU was the *culmination* of a meet-and-confer process. Allowing voters to, in effect, rescind the MOU

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[10] *Voters for Responsible Retirement v. Bd. of Supv. of Trinity County (Trinity County)*, 8 Cal. 4th 765, 782 (1994).

[11] Although the powers of initiative and referendum both arise from reforms of the progressive era adopted over 100 years ago, the two powers are distinctly different. "Both reserved powers allow local as well as statewide voters to take legislative action without the aid or interference of their elected officials. [Citations omitted.) However, as the name suggests, the initiative allows voters to *propose* new legislation. (Cal. Const., art. II, § 8.) In contrast, the referendum permits voters to *reject* legislation that has already been adopted." *Jahr v. Casebeer*, 70 Cal. App. 4th 1250, 1259 (1999).

by referendum would clearly interfere with an MMBA-sanctioned bargaining process, which had *already occurred and proceeded to completion*. That rationale has no application to initiatives or to this case, where the issue is whether the meet-and-confer procedures of the MMBA must *begin at all* before voters can legislate on the *substance* of public employee pensions for future new hires.

Here, the CPRI affected pensions which are "municipal affairs," matters of local rather than statewide concern. The instant case, unlike *Trinity County*, does not affect a completed collective bargaining process – a matter of statewide concern.

This Court also made a point to expressly note that its decision *did not apply to cities*, because the statute it enforced applied to county ordinances only. *Trinity County*, 8 Cal. 4th at 784 n.6. Therefore, *Trinity County* provides no basis whatsoever for the argument that the MMBA contains some implicit restriction of any kind on the electorate to govern directly on matters within the scope of representation, regardless of whether an initiative received support from public officials.

4. The Meet-and-Confer Requirement of the MMBA is Procedural, and, Therefore, Inapplicable to Citizens' Initiatives

The Opinion followed well settled law and correctly concluded that the MMBA's procedural meet-and-confer obligation applicable to a government body proposed initiative cannot be superimposed on a citizen sponsored initiative addressing matters within the MMBA "scope of representation." *See Friends of Sierra Madre v. City of Sierra Madre*, 25

Cal. 4th 165, 189 (2001) (explaining that imposing certain procedural prerequisites applicable to legislative bodies, such as compliance with the California Environmental Quality Act, could impose impermissible burdens on the electors constitutional power to legislate by initiative); *Native American Sacred Site and Envt'l Protection Ass'n v. City of San Juan Capistrano*, 120 Cal. App. 4th 961, 968 (2004) ("[I]t is plain that voter-sponsored initiatives and not subject to the procedural requirements that might be imposed on statutes or ordinances proposed and adopted by a legislative body, regardless of the substantive law that might be involved.").

F. The First Amendment Protected the Mayor's Actions

The First Amendment to the United States Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., amend. I. The same prohibition is extended to the States by the Fourteenth Amendment. *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 133 (1999).

PERB's Decision focused on the actions of Sanders in support of the CPRI in an attempt to render the duly certified citizens' initiative into a "City-sponsored" Charter amendment, and, therefore, claim the CPRI was somehow not "pure" and subject to the MMBA meet-and-confer process. However, PERB's Decision ignored the fact that, apart from his official duties, Sanders, as well as any public official, may act privately and have fundamental First Amendment rights to petition their government for redress and to express their views on "matters of public concern." *See Pickering v. Bd. of Ed. of Tp. High School Dist. 205*, 391 U.S. 563, 574 (1968); *Connick v. Myers*, 61 U.S. 138, 145-46 (1983). Whether or not Sanders was initially discussing his own concept of pension reform, or was

later supporting the CPRI, his activities fell squarely within this category of "matters of public concern."

When they assumed their duties as elected officials, neither the Mayor nor City Councilmembers relinquish their First Amendment rights to address the merits of pending ballot measures or to even propose and draft them. Public officials do not leave their First Amendment rights "at the door" when they enter office.

The United States Supreme Court has stated:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values," and is entitled to special protection.

Connick, 461 U.S. 138 at 145 (citations omitted).

Whether or not to amend the City Charter to reform the City's pension systems is unquestionably a "matter of public concern." The Mayor and individual Councilmembers have a right to weigh in on this issue, just as any other citizen. Indeed, they have a duty to inform the public of their views. Rather than limiting elected government officials' speech, Supreme Court decisions make it clear that protection of their First

Amendment speech is robust and that they do not forfeit such protections as a upon assuming office.[12]

In *Wood v. Georgia*, 370 U.S. 375, 395 (1962), the Court held that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." And, there can be no question that the City's

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[12] Citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), PERB and the Unions argued in the Court of Appeal that even if viewed through the prism of First Amendment and statutory speech, Sanders' activities were not protected because "[t]he First Amendment does not protect activities undertaken in the course of a government employee's official duties." Sanders repeatedly made it clear, however, that he was taking his actions as a private citizen, not in the course of any official duties. (XIX AR 196:004836; XIII AR 190:003341:11-24, 3361:21-3362:20.) Furthermore, *Garcetti* is inapplicable, as it applies to government employees, *not* elected public officials.

The *Garcetti* Court justified the limits it placed on *public employees'* speech by noting that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public service." *Garcetti*, 547 U.S. at 418. The same rationale does not apply to elected public officials. When dealing with elected public officials the "significant degree of control" needed is held by the electorate, not the government employer, as the elected public official is responsible to the electorate who voted him or her into office.

Additionally, the Court of Appeal has noted that *Garcetti* does not deal with a government official's public comments on official matters, but rather dealt with the narrow "question of the extent to which a public employer may discipline a public employee for making statements in the course of the employee's official duties." *Morrow v. Los Angeles Unified Sch. Dist.*, 149 Cal. App. 4th 1424, 1437 n.6 (2007).

pension plan, funded by the taxpayers, was and is a matter of public importance.[13]

The Supreme Court in *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966), dismissed any notion that elected public officials can have diminished First Amendment protection, noting that in a representative government the First Amendment requires elected public officials to "be given the widest latitude to express their views on issues of policy," and finding they have an "obligation to take positions on controversial political questions so their constituents can be fully informed by them, ..." In this case, Sanders was expressing his view to the constituents on how the City's runaway pension costs could be stopped.[14]

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[13] The Court of Appeal Opinion noted that Sanders' advocacy for the CPRI was not wrongful, and was in fact protected under the United States Constitution. (Opn. at p. 60-61 n.50 (citing *Wood v. Georgia*, 370 U.S. 375, 394 (1962) and *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)).)

[14] The Unions, at footnote 20 of their Opening Brief, argue that "[t]here is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is the first step in an act of law-making . . . ." Even assuming that to be true, it is irrelevant. Sanders did not take any of the official steps necessary to "place an initiative on the ballot." He did not sign the notice of intent, request the ballot summary, or file the final petition. See Cal. Elec. Code §§ 9202(a), 9203, 9265. Rather, the Citizen Proponents, whom PERB concluded were *not* agents of Sanders or the City Council took those steps. (XI AR 186:003088-89.) It is irrelevant whether those specific actions of the Citizen Proponents qualify as speech. What is relevant is that Sanders was engaged in protected speech when he said he wanted to pursue a citizens' initiative and when he openly supported the CPRI.

Given the importance of political speech in the history of this country, courts afford political speech – such as the actions alleged in this case – the highest level of protection. *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (noting advocating for an initiative petition is "core political speech" and describing the First Amendment protection of "core political speech" to be "at its zenith"). Thus, the First Amendment imposes tight constraints upon government efforts to restrict core political speech. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Accordingly, the Mayor, like any other public official, was and is "free to join a citizens' group supporting the legislative goals expressed in [a] purposed initiative; as individuals they [have] the right to advocate qualification and passage of the initiative." *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee (League of Women Voters)*, 203 Cal. App. 3d 529, 555-56 (1980).

The City acknowledges that its officials are not entirely immunized by the First Amendment from potential violations of the MMBA. However, PERB cases that limit free expression in the labor relations context, such as *City of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M (2010), *Rio Hondo Community College District*, PERB Decision No. 128 (1980), and *State of California (Department of Transportation)*, PERB Decision No. 1176-S (1996), all relate to expression directed at employees which constitute threats or otherwise impinge on their representational rights, such as discouraging them from organizing, or, in the *City of San Diego* decision, advocating *to the employees* a course of action in circumvention of their right to exclusive representation.

Sanders' alleged actions are nothing like the direct communications to employees involved in such cases. There is no evidence that Sanders' communications were other than to the public at large, and thus, clearly within the protected zone of commenting on public issues. No court or PERB decision renders such alleged activities unprotected by the First Amendment, and placing the burden of a meet-and-confer requirement on his Constitutional rights, when no law has ever done so before, impinges on those rights.

PERB's Decision and Order nullifying the effects of the CPRI is premised solely on the Constitutionally protected activity of Sanders, as well as other City elected officials and staff. Because PERB's Decision necessarily invades the protection of an individual's fundamental First Amendment rights to reach the conclusion that a duly certified initiative that received the signatures of 115,991 individuals is somehow "City-sponsored," and, therefore, an "impure" citizens' initiative, the Decision is in error and must not be reinstated.

1. The City's Mayor (or Councilmembers) May Draft an Initiative Ballot Measure and Seek Private Citizens to Carry It Forward

Contrary to the Unions' false charges, the evidence showed Sanders did *not* draft the CPRI, nor hire the attorneys who did so. (XV AR 192:003994:13-3995:8.) Acting as a private citizen, he did propose an alternative initiative, but did not get private citizens to carry it forward. Nonetheless, any of these activities, *even when done as a public official*, would be perfectly legal. The Court of Appeal in *League of Women Voters,* 203 Cal. App. 3d 529, recognized the right of public officials to draft and

propose a citizens' initiative, and find private supporters, and even held the use of public funds to do so did not violate any law:

> . . . if . . . the Legislature has proven disinterested, there appears to be no logical reason not to imply from the undisputable power to draft proposed legislation the power to draft a proposed initiative measure in the hope a sympathetic private supporter will forward the cause and the public will prove more receptive.

Id. at 548.

Clearly, prior to and through the drafting stage of the proposed initiative, the action is not taken to attempt to influence voters either to qualify or to pass an initiative measure; there is as yet nothing to proceed to either of those stages. The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens ... It follows those activities *cannot reasonably be construed as partisan campaigning.*

Id. at 550 (italics added).

The PERB Decision states, "The City's claim that the Mayor lacks authority to make a policy decision in terms of a ballot measure (only the City Council has that right) and any attempt to do so would amount to an unlawful delegation of legislative power, is misdirected. The policy decision relevant to the MMBA is one to change negotiable subjects, not whether to seek placement of a policy to that effect on the ballot." (XI AR 186:003079.) According to PERB's misguided view, the mere announcement at the State of the City speech that the Mayor was going to seek to place a pension reform initiative on the ballot as a private citizen,

amounted to a "determination of policy" that immediately triggered a meet and confer requirement. (XI AR 186:002985-86.)

PERB's Decision also states, "In terms of his statutory duties, the Mayor has gone outside the chain of command. The Mayor cannot have it both ways; he cannot be lacking authority to make decisions on labor relations matters, yet also have the ability to take actions that have the effect of changing terms and conditions of employment." (XI AR 186:003080.)

The evidence, however, established that Sanders did *not* have the authority to make decisions on labor relations matters *except upon first having approval of the City Council.* (XII AR 189:003226:11-3027:6 (detailing that the Mayor *must* get Council approval before even making an opening proposal at meet-and-confer; XIII AR 190:003477:20-3478:21.) PERB contradicts itself in its decision as it acknowledges this: "[T]he City's practice has been that the Mayor briefs the City Council on his proposals and strategy and obtains its agreement to proceed." (XI AR 186:002983 & 3080 (noting "[t]he unions do not dispute that currently the Mayor must obtain prior approval of all initial bargaining proposals including ballot proposals.")

Further, as indicated by the authorities cited above (as well as those discussed *supra* in Section E [the California Constitution] and *infra* in Section G [Gov't Code §§ 3203, 3209]), Sanders had the right as a private citizen to take actions alone or to support others whose proposals may have an effect on negotiable subjects. PERB disparages these authorities and asserts that the City argues that they amount to a "privilege to violate the MMBA." (XI AR 186:003095.) The City never argued that it has a

privilege to violate the MMBA, but rather contends these political activities have specific sanction in law, and do not violate the MMBA. Sanders had the legal right to bring an initiative as a private citizen, and the right to announce that, and did not have to meet-and-confer with the Unions first. More importantly, Sanders was legally permitted to support someone else's private initiative, such as the CPRI, because that act is sanctioned expressly by the First Amendment, the California Constitution, and Government Code sections 3203 and 3209, and therefore, cannot constitute a violation of the MMBA.

Therefore, in one instance, the Mayor can take a pension reform proposal to the City Council seeking authority to propose an opening bargaining position. In the other instance, if in his political judgment, which no evidence presented indicated was wrong, he perceived the Council to be unwilling to impose an alternative pension plan on new hires, he may, as any other private citizen, support a citizens' initiative. The authorities cited above support such position, and no authority says otherwise.

2. The PERB Decision Imposes an Impermissible Prior Restraint on Sanders' Speech

PERB's Decision holds Sanders lacks *any* First Amendment right to engage in the citizens' initiative process simply because of his position as the City's Mayor. "By virtue of the Mayor's status . . . the Mayor was not legally privileged to pursue implementation of [the CPRI] as a private citizen." (XI AR 186:003096.) Such a blanket restriction is without question an invalid prior restraint applied to the Mayor solely because of his elected position, a clear violation of the Mayor's First Amendment rights. Prior restraints are "the most serious and the least tolerable

infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

G. State Law Protected Sanders' Actions

The Opinion also correctly concluded that any advocacy expressed by Sanders in support of the CPRI was protected by California statutory law. (Opn. at p. 60 n.50.) Government Code section 3209 expressly allows the City's Mayor and other public officials and employees to give substantial support to an initiative ballot measure which specifically "would affect the rate of pay, hours of work, retirement . . . or other working conditions. . . ."

In 1976, following court decisions which overturned, on constitutional grounds, local and State laws prohibiting political activities of government officials and employees, the State Legislature added Chapter 9.5 to the Government Code, concerning "Public Activities of Public Employees." Government Code section 3203 states, "[e]xcept as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, ***no restriction shall be placed on the political activities of any officer or employee of a state or local agency***." (Emphasis added.)

On ballot measures specifically related to wages, hours, retirement and working conditions, Government Code section 3209 states:

> ***Nothing in this chapter prevents an officer or employee of a state or local agency from soliciting or receiving political funds or contributions to promote the passage or defeat of a ballot measure which would affect the rate of pay, hours of work, retirement, civil service, or other working conditions***

> ***of officers or employees of such state or local agency***, except that a state or local agency may prohibit or limit such activities by its employees during their working hours and may prohibit or limit entry into governmental offices for such purposes during working hours.

Read together, Government Code sections 3203 and 3209 mean that public officials can support activities for a ballot measure regarding retirement and working conditions – such as the CPRI. And public officials' right to support ballot initiatives may not be impeded in any way, except by local regulations on use of City time. PERB's attempt to graft a meet-and-confer requirement on such activity would seriously impede the rights of public officials recognized and protected in Government Code sections 3203 and 3209.

The City acknowledges that public funds may not be expended to campaign in support of or opposition to initiatives or candidates. Violating such laws can have serious consequences for public officials. *See, e.g., Stanson v. Mott*, 17 Cal. 3d 206, 223-26 (1976). If a City official used City facilities or personnel to support an initiative (as PERB's Decision concluded), there may be potential criminal or, more likely, ethical violations. However, such conduct cannot nullify a duly certified citizens' initiative and disenfranchise hundreds of thousands of voters.[15] Allowing such a result would run counter to this Court's edict "to jealously guard the

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[15] The record is replete with the efforts Sanders and his staff attempted to take to adhere to local and state law policy on political activity. (XII AR 190:003361:1-3362:9; *Id.* at 3362:18-20; XIV AR 191:003687:16-23; *Id.* at 3688:22-3689:3; XVIII AR 195:004786, 4823; XXIII AR 200:005815, 5829, and 5834.)

precious initiative power, and to resolve any reasonable doubts in favor of its existence." *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991).

IV. CONCLUSION

The CPRI, an initiative which unquestionably obtained the required number of verified signatures mandating it qualify for placement on the ballot as a citizens' initiative, was an exercise of the constitutionally protected fundamental right of direct democracy reserved by the people. It is a right that this Court has a duty to jealously guard and liberally construe so it is not improperly annulled. Any provision that could possibly limit its use must be narrowly construed.

PERB's Decision improperly concluded, whether viewed under a de novo or clearly erroneous standard of review, that the support of the City's Mayor somehow transformed the act of approximately 116,000 individuals signing a petition into a City-sponsored act subjecting it to the MMBA's procedural meet-and-confer requirement, thereby disenfranchising the hundreds of thousands of voters who overwhelmingly passed the initiative.

Sanders' actions, however, did not implicate the MMBA and were all fully within his First Amendment and California constitutional rights, and expressly warranted by state statutes. Accordingly, the Court of

Appeal's Opinion granting the City's writ petition and annulling PERB's Decision should be affirmed.

Dated: October 10, 2017

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CITY OF SAN DIEGO

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13970 words, including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), and is printed in a 13-point typeface. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: October 10, 2017

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CITY OF SAN DIEGO

IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

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Boling v. Public Employment Relations Board

Case No. S242034
Appellate Case No. D069626 and D06930
PERB Decision No.: 2464-M, PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M and LA-CE-758-M

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On October 10, 2017, I served true copies of the following document(s) described as:

- **CITY OF SAN DIEGO'S COMBINED ANSWER BRIEF ON THE MERITS TO THE OPENING BRIEFS OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD AND THE REAL PARTIES IN INTEREST UNIONS**

on the interested parties in this action as follows:

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[xx] **(BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.

[ ] **(BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

[ ] **(BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

[ ] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 10th day of October 2017, at San Diego, California.

Marci Bailey