Case No. **D069630**

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

CITY OF SAN DIEGO,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, DEPUTY CITY ATTORNEYS ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO, CATHERINE A. BOLING, T.J. ZANE, STEPHEN B. WILLIAMS, and 115,991 SAN DIEGO REGISTERED VOTERS WHO EXERCISED THEIR RIGHT TO PLACE A CITIZENS' INITIATIVE ON THE BALLOT
Real Parties in Interest.

Petition for Writ of Extraordinary Relief from Public Employment Relations Board Decision No. 2464-M (Case Nos. LA-CE-746-M; LA-CE-752-M; LA-CE-755-M; and LA-CE-758-M)

CITY OF SAN DIEGO'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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ATTORNEYS FOR PETITIONER, **CITY OF SAN DIEGO**

CERTIFICATE OF INTERESTED PARTIES

(California Rules of Court, Rule 8.208)

The following entities and persons have a financial or other interest in the outcome of the proceeding that justices should consider in determining whether to disqualify themselves:

1. City of San Diego, California;
2. San Diego Municipal Employees Association;
3. Deputy City Attorneys Association;
4. American Federation of State, County and Municipal Employees, AFL-CIO, Local 127;
5. San Diego City Firefighters, Local 145, IAFF, AFL-CIO;
6. Catherine A. Boling;
7. T.J. Zane;
8. Stephen B. Williams; and
9. 115,991 San Diego registered voters who exercised their right to place a citizens' initiative (Proposition B) on the ballot.

Dated: May 9, 2016

JAN I. GOLDSMITH, City Attorney

By _____
M. Travis Phelps
Deputy City Attorney

Attorneys for Petitioner
CITY OF SAN DIEGO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

TABLE OF AUTHORITIES
(con't)

Page

TABLE OF AUTHORITIES
(con't)

Page

TABLE OF AUTHORITIES
(con't)

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES
(con't)

Page

Constitutional Provisions

Petitioner City of San Diego (City) respectfully submits the following Opening Brief in Support of Petition for Writ of Extraordinary Relief from Public Employment Relations Board (PERB) Decision No. 2464-M.

I. INTRODUCTION

On December 29, 2015, PERB decided the City violated the Meyers-Milias-Brown Act (MMBA) duty to meet-and-confer with the City's labor unions[1] over the terms of the Comprehensive Pension Reform Initiative (CPRI), a duly certified citizens' initiative that amended the City Charter to incorporate pension reform. The basis for PERB's conclusion was a finding that then Mayor Jerry Sanders acted as an agent for the City in actively supporting the CPRI, and, because of such support, the CPRI is not a "pure citizens' initiative." PERB's finding has no basis in the law. A citizens' initiative's validity has never before depended upon who supported it, or where the impetus for the initiative originated. ***PERB's Decision is, thus, unprecedented and clearly erroneous as it makes fundamental rights protected by the United States and California***

[1] "Labor unions" or "Unions" refers collectively to Real Parties in Interest, San Diego Municipal Employees Association (MEA), Deputy City Attorneys Association (DCAA), American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME Local 127), and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters Local 145).

Constitutions, the highest laws of the nation and state, subservient to the MMBA.

Three private citizens were the official proponents of the CPRI, Real Parties in Interest Catherine A. Boling, T.J. Zane, and Stephen B. Williams (the "Citizen Proponents"). The Citizen Proponents exercised their constitutional right to initiative by filing with the County Registrar of Voters nearly 116,000 signatures of registered voters on petitions seeking to place the CPRI on the ballot. Those signatures qualified the CPRI for the ballot and, pursuant to the constitutional rights of the Citizen Proponents and the approximately 116,000 petition signers, it was placed on the June 2012 ballot as Proposition B (Prop. B). It passed, receiving close to 66% of the vote.

After voters approved Prop. B, the City requested this Court take direct jurisdiction of the issues raised by PERB in its Superior Court lawsuit, bypassing the PERB's administrative process. City argued that years of administrative hearings at PERB would be wasted as PERB already took a strong legal position and clearly wanted to test the boundaries of constitutional law.

The City's request was refused, and it was sent to an administrative hearing at PERB to defend against the Unions unfair practice charges (UPC). *San Diego Municipal Employees' Ass'n v. Superior Court (MEA)*, 206 Cal. App. 4th 1447 (2012). In rejecting the request, this Court found

the PERB and UPC allegations were sufficient to support an "arguable" violation of the MMBA that: the CPRI was a "sham device" (*Id.* at 1452); "officials of the City had placed the CPRI on the ballot by manipulating the citizen-initiative process. . . ." (*Id.* at 1453); and "the CPRI (while nominally a citizens' initiative) was actually placed on the ballot by using City strawmen to avoid its MMBA obligations. . . ." (*Id.* at 1460.)

Now, three years later, there is a record of PERB's proceedings and findings. PERB found no evidence of "strawmen." In fact, contrary to the Unions allegations in their UPCs, PERB found the three Citizen Proponents of the CPRI were independent and not controlled by the Mayor or City. The Citizen Proponents' lawyers drafted the CPRI, they funded its campaign, circulated the petition, and were responsible for obtaining the required number of signatures to qualify it for the ballot as a citizens' initiative. There was no finding that the CPRI was a "sham device" or that "officials of the City had placed the CPRI on the ballot by manipulating the citizen-initiative process." In other words, PERB made no findings supporting the allegations in the Unions' UPCs.

Unable to find "strawmen" or any evidence of a "sham device," PERB simply concluded that Prop. B was not a "pure" citizens' initiative because the Mayor was allegedly its impetus and supported it. PERB's confusing and far reaching decision found that the Mayor was acting as an agent for the City Council or City (it is not clear which of the two PERB

believes is the principal), despite the fact the City Council never voted for or supported the CPRI; that evidence suggested a majority of the Council opposed the CPRI; and, the Mayor has no vote on the City Council and no say – by vote or veto – on what propositions the City Council votes to place on the ballot.

The Constitution has never distinguished between a "pure" and "impure" citizens' initiative. A citizens' initiative that has obtained the required verified signatures and been duly certified as a citizens' initiative by the elections official for qualification on the ballot – as the CPRI did – *is* a citizens' initiative and *is* constitutionally protected as a right reserved to the People.

Under the California Constitution, there are *only* two ways to propose amendments to the City's Charter: (1) by a citizens' initiative or (2) by a vote of the City's "governing body." If a sufficient number of registered voters sign a petition to place an initiative on the ballot, a city council *must* perform its ministerial duty mandated by the California Constitution and Elections Code to place it on the ballot without change and without compliance with procedural prerequisites usually attached to city council measures, such as the California Environmental Quality Act (CEQA), or in this case, the meet-and-confer requirements of the MMBA.

Mayors and governors regularly advocate for or against initiatives without their advocacy being attributed to their city or state. In fact,

California's political leaders for decades have openly led initiative movements to bypass legislatures and other obstacles to reform. The citizens' initiative is a power reserved to the people for just that purpose.

The City's citizens have an absolute right to know where their elected officials stand on important political topics, such as pension reform. The United States Supreme Court has long recognized and even encouraged elected leaders to advocate in the public arena as an exercise of their First Amendment rights, and such rights are reinforced by statute in California.

A government official does not lose his or her First Amendment rights or the fundamental right to initiative due to his or her elected position. However, that is exactly what the PERB Decision concludes. This Court must protect public officials' First Amendment rights and enforce the peoples' right to initiative by reversing PERB Decision No. 2464-M.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 4, 2011, the Citizen Proponents filed with the City Clerk a notice of intent to circulate a petition within the City for the purpose of amending the City's Charter, pursuant to Section 3 of Article XI of the California Constitution. (I AR 1:000054-65.)[2]

[2] Citations to the PERB Administrative Record (AR) include volume number, tab number, and page number. Thus, I AR 1:000054-65 refers to Volume I, Tab 1, pages 54 through 65.

The Citizen Proponents' notice identified the CPRI as the proposition they intended to circulate a petition for in an effort to qualify the measure for presentation to the electorate, and requested the total number of signatures that will be required to be submitted by their coalition to ensure its placement on the June 2012 ballot. *Id.*

The CPRI proposed to make changes to the City's retirement benefits for certain and future City employees, as well as define the terms the City must use when it begins labor negotiations with the City's recognized employee organizations. To accomplish such changes, the CPRI proposed to amend certain provisions of the City's Charter.

In order for the CPRI to qualify for the ballot, the Citizen Proponents needed to obtain verified signatures from at least 15 percent (94,346) of the City's registered voters. (XVI AR 193:004061.)

On September 30, 2011, Citizen Proponent T.J. Zane delivered the petition sections and signatures to the City Clerk and attested that the submitted petition contained at least 94,346 valid signatures. (XVI AR 193:004065.) The City Clerk forwarded the petition to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures.

The SDROV, using a random sample method in accordance with Elections Code section 9115, determined the initiative petition contained 115,991 projected valid signatures. Accordingly, on November 8, 2011, the SDROV issued a Certification that 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.)

The City Clerk submitted the SDROV's Certification to the City Council on December 5, 2011, and that same day the City Council passed Resolution R-307155, a resolution of intention to place the CPRI on the June 5, 2012 Presidential primary election ballot, as required by law. (XVI AR 193:004067-69.)

On January 19, 2012, MEA 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." (I AR 1:000002-237.) 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 MEA UPC. (III AR 15:000579-89; 22:000608-13; IV AR 33:000934-41.)

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.)

On February 10, 2012, PERB's Office of General Counsel issued a PERB complaint against the City based on MEA's UPC alleging the City had violated Government Code sections 3503, 3505, 3506 and California Code of Regulations section 32603. (III AR 13:000571-73.)

PERB filed its verified complaint against the City on February 14, 2012, [San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL] seeking temporary and permanent injunctive relief prohibiting the CPRI from being presented to the City voters and a permanent injunction and peremptory writ of mandate ordering the City to comply with the City's alleged meet and confer obligations relating to the CPRI and any future citizens' initiatives before placing them on the ballot for any subsequent election.

On February 21, 2012, the Superior Court denied PERB's request for a temporary restraining order, ruling court proceedings should await the outcome of the June 5, 2012 election.

PERB, however, continued with its administrative hearings scheduled for April 2-5, 2012, on MEA's UPC against the City. On March 12, 2012, PERB issued subpoenas to multiple elected City officials as well as numerous unelected City employees and private citizens, requiring them to testify and turn over documents concerning their decision of whether or not to support the CPRI. (V AR 56:001317-24.)

On March 27, 2012, following a March 23 hearing on the City's motion to stay PERB's administrative hearings and after having taken the matter under submission, the Superior Court issued a Minute Order that stayed PERB's hearing, quashed the subpoenas, and set a status conference concerning the stay for June 22, 2012. (V AR 61:001404.)

On April 11, 2012, MEA filed a petition for writ of mandate with this Court seeking immediate relief from the Superior Court's stay of the PERB administrative hearings.

On June 5, 2012, Proposition B was approved by nearly two-thirds (65.81%) of the City's voters. Shortly thereafter the election result was certified by the City Clerk and Secretary of State. (XVI AR 193:004094-96.)

On June 19, 2012, this Court issued a peremptory writ of mandate directing the Superior Court to vacate its stay order, and permit the PERB administrative hearings proceed. *San Diego Municipal Employees Ass'n v. Superior Court*, 206 Cal. App. 4th 1447 (2012).

On June 28, 2012, City filed a petition requesting a rehearing. The City's rehearing request was denied on July 3, 2012.

PERB Administrative Law Judge Donn Ginoza (ALJ Ginoza) conducted the administrative hearing on July 17, 18, 20 and 23, 2012, after which the parties filed opening and closing briefs. (VIII AR 147:002303-13; IX AR 148:002315-423; 150:002428-74.)

On February 11, 2013, ALJ Ginoza 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 March 4, 2013, City filed with PERB its Statement of Exceptions to the Proposed Decision and Brief in Support. (X AR 159:002685-724.)

On April 15, 2013, the Unions filed their Consolidated Response to the City's Exceptions. (X AR 175:002818-81.)

On December 29, 2015, the PERB Board issued its Decision, affirming and adopting the Proposed Decision and Remedy by ALJ Ginoza with minor modifications. (XI AR 186:002979-3103.)

The PERB Decision held the City violated the MMBA and PERB regulations by failing and refusing to meet-and-confer with the Unions over Proposition B, which was "championed" by the City's Mayor and other City officials and ultimately approved by voters in a municipal election.

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.)

On January 25, 2016, the City timely filed its Petition seeking appellate review pursuant to Government Code section 3509.5(b) of PERB Decision No. 2464-M.

Shortly after the City filed its writ, PERB brought a motion to dismiss seeking to disenfranchise hundreds of thousands of voters and petition signers without even allowing the CPRI's official proponents – the

Citizen Proponents – the opportunity to be heard. Following full briefing of the motion, on March 9, 2016, this Court issued an order stating the motion will be considered concurrently with the writ.

III. STANDARD OF REVIEW

The relationship of a reviewing court to PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, generally is one of deference. *San Diego Adult Educators, Local 4289 v. Public Employment Relations Board*, 223 Cal. App. 3d 1125, 1131 (1990).

As to facts, the substantial evidence rule applies: PERB's finding of facts, including ultimate facts, "if supported by substantial evidence in the record considered as a whole, is conclusive. *Id.* at 1130-31 (citing Gov't Code § 3542(c)).

"In terms of construction of the law to be utilized by the administrative agency, determinations made within the agency's area of expertise are also accorded deference. Such determinations will be accepted unless they can be found to be 'clearly erroneous.' *San Diego Adult Educators, Local 4289*, 223 Cal. App. 3d at 1131 (emphasis added).

PERB often looks to decisions of the National Labor Relations Board (NLRB) for guidance. Therefore, this Court should note that, while the NLRB, like PERB, enjoys primary jurisdiction over labor disputes, subject only to narrow judicial review, "constitutional pitfalls of potential

interpretation of the [NLBR] are committed *de novo* to the courts." *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950, 959 (9th Cir. 2010). This Court owes "no deference to the administrative agency's view of the First Amendment." *Id.* at 961; *see also Ampersand Publishing, LLC v. National Labor Relations Board*, 702 F.3d 51, 55 (D.C. Cir. 2012) ("We owe no deference to the Board's resolution of constitutional questions."). Accordingly, factual findings which impact constitutional rights should also not be entitled to deference.

IV. LEGAL ARGUMENT

A. PERB's Decision and Order Violates the United States and California Constitutions, and State Law

PERB admitted it did not purport to resolve the constitutional issues raised by the City. PERB 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 that "those issues are not implicated by the facts of this case," and therefore, chose not to address them. (XI AR 186:003006.) PERB held "[i]n the absence of controlling appellate authority directing PERB that the meet-and-confer process is constitutionally infirm or preempted by the citizens' initiative process, we must uphold our duty to administer the MMBA." (XI AR 186:003017.) PERB then proceeded to invite the parties to address the constitutional issues in the courts, stating "[i]f the parties believe that our

decision fails to resolve any underlying constitutional issues, or that our decision intrudes on constitutional rights, they are free to seek redress in the courts, having exhausted their administrative remedies." (*Id.*)

1. MMBA's Meet-and-Confer Process Is Preempted by the First Amendment of the United States Constitution

a. The Mayor Has a First Amendment Right to Engage in Direct Democracy by Initiative, Like Any Other Citizen, and Imposing a Meet-and-Confer Requirement on Such Activity Impinges Upon that Right

PERB's Decision focused on the actions of the Mayor in an attempt to render the duly certified citizens' initiative into a "City-sponsored" Charter amendment. However, it ignored the fact that, apart from his official duties, the Mayor, 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." *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 the Mayor was supporting his own version of pension reform, or was later supporting the CPRI, his activities fall 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 assume office. "There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea, Penn. v. Guarnieri*, 564 U.S. 379, 386 (2011).

In the First Amendment context, this is especially true with respect to the right of public officials to express themselves on matters affecting the general public. As the court stated in *Connick*:

> 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 a textbook example of 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. *See Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)

(holding that "Legislators have an obligation to take positions on controversial political questions"). The City's citizens have an absolute right to know where their elected officials stand on important political topics, such as pension reform.

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).

The purpose behind such stringent protection of core political speech is because it reflects the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to "social, ***political***, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added). "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issue of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236, 253 (2010) (quoting *Keller v. State*

Bar of California, 496 U.S. 1, 12-13 (1990)). Therefore, "[g]overnment has legitimate rights in informing, in educating and in *persuading*, and it may add its voice to the marketplace of ideas on controversial topics." *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee (League of Women Voters)*, 203 Cal. App. 3d 529, 549 (1980) (citing *Keller v. State Bar*, 190 Cal. App. 3d 1196, 1218 (1986), italics in original).

Accordingly, the Mayor, like any other public official, were and are "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*, 203 Cal. App. 3d at 555-56. Furthermore, the California Supreme Court has held there cannot be wholesale restrictions on political activities merely because the persons affected are public employees. *Fort v. Civil Service Com. of Alameda*, 61 Cal. 2d 331, 337 (1964). Yet, that is precisely what PERB's Decision calls for when it concluded "[b]y 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 tantamount to an invalid prior restraint applied to the Mayor solely because of his elected position, a clear violation of the Mayor's First Amendment rights.

The City does acknowledge 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.

The Mayor's alleged actions are nothing like the direct communications to employees involved in such cases. There is no evidence that the Mayor's 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 Prop. B is premised solely on the Constitutionally protected activity of the Mayor, as

well as other City elected officials and staff. Because PERB's Decision necessarily invades the absolution and 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 be reversed.

b. The 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 shows that the Mayor did ***not*** draft Proposition B, 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, supra*, 203 Cal. App. 3d 529, recognized the right of public officials to draft and propose a citizens' initiative, and find private supporters, and 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.

Moreover,

> 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 the Mayor does ***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: "Since 2009, the 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 *infra* in Sections 2 [the California Constitution] and 3 [Gov't Code §§ 3203, 3209]), the Mayor has 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. The Mayor has the legal right to bring an initiative as a private citizen, and the right to announce that, and does not have to meet-and-confer with the unions first. More importantly, the Mayor may 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.

Accordingly, 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. MMBA's Meet-and-Confer Process Is Preempted by the Citizens' Constitutional Right to Initiative Which Is Absolute

The California Constitution guarantees the right of citizens to amend a city charter by initiative. Cal. Const., art. I, § 3(b) ("Amendment [of a charter] . . . may be proposed by initiative or by the governing body.) Thus, the initiative, the right of the citizens to directly legislate, is by its very

nature and purpose a means to bypass the governing body of a public agency.

PERB's decision takes away the people's Constitutional right to legislate directly by initiative. The decision simply ignores the fact that "[t]he power of the citizen initiative has, since its inception, enjoyed a highly protected status in California." *Perry v. Schwarzenegger (Perry)*, 628 F.3d 1191, 1197 (9th Cir. 2011). Under California's constitutional form of government, "[a]ll political power is inherent in the people." Cal. Const., art. II, § 1; *Perry*, 628 F.3d at 1196. The people of this state have *reserved for themselves* the power to pass laws and amend their Constitution. Cal. Const., art. IV, § 1; *Perry*, 628 F.3d at 1196.[3]

This state's constitution makes clear that the initiative power belongs to the people. Article II, section 8(a) of the California Constitution provides, "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt them or reject them." The initiative power is "one of the most precious rights of our democratic process," and "'the sovereign people's initiative power' is considered to be a 'fundamental right.'" *Perry*, 628 F.3d at 1196 (citing *Assoc. Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976);

[3] In the City of San Diego, with regard to the City's Constitution, its Charter, the City's Charter allows for its citizens to directly amend the Charter and the laws of the City in the same manner as that allowed by the California Constitution. San Diego Charter § 223.

Brosnahan v. Brown, 32 Cal. 3d 236, 241 (1982); and *Costa v. Super. Ct.*, 37 Cal. 4th 986, 1007-08 (2006)). The California Supreme Court has described the initiative power held by California's citizens as follows:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.
>
> *Assoc. Home Builders etc., Inc.*, 18 Cal. 3d at 591 (citations omitted).

The California Supreme Court has noted that "[t]he primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that ***their elected public officials had refused or declined to adopt.***" *Perry v. Brown*, 52 Cal. 4th 1116, 1140 (2011). Nor, as previously noted, is it off limits for a City official to draft a citizens' initiative. *See League of Women Voters*, 203 Cal. App. 3d at 548.

Recently, the California Supreme Court reaffirmed such principles, describing citizens' initiatives as 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, bold

emphasis added (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 228 (1978)). Thus, PERB's decision that the City must have met-and-conferred with the Unions as a condition precedent to the validation of Prop. B is legally untenable.

When faced with a challenge to the citizens' right to initiative, 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 this right of the people." *Associated Home Builders*, 18 Cal. 3d at 591. It has long been "judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled" and "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." *Id.*; *see also Raven v. Deukmejuan*, 52 Cal. 3d 336, 341 (1990) ("[W]e are required to resolve any reasonable doubts in favor of the exercise of this precious right.").

PERB's Decision fails to jealously guard the people's right to initiative, and an official's right to speak out in support of an initiative. Rather, PERB creates a new constitutional concept of an "impure" citizens' initiative because the Mayor was allegedly Prop. B's impetus and supported it. PERB comes to this conclusion despite the Unions presenting no evidence that the City Council ever voted for (it never did) or supported the CPRI, in fact, evidence suggested a majority of the Council opposed the CPRI. (XIII AR 190:003342:20-3343:2, 3343:28-3344:7, 3359:15-3360:4,

3478:23-3479:4.) PERB concluded that Prop. B was not a citizens' initiative despite evidence establishing that Prop. B was in fact drafted by private lawyers paid by the San Diego County Tax Payers Association, and was based on an initial pension reform draft of Councilmember DeMaio, not the Mayor. (XV AR 192:003994:13-3995:11.) PERB concluded that the Mayor's support made Prop. B a "City-sponsored initiative" despite the fact the Mayor has no vote on the City Council and no say – by vote or veto – on what propositions the City Council votes to place on the ballot.

The PERB Decision cites to no legal authority that the Mayor's mere involvement in negotiating some minor terms of the CPRI can somehow deprive the Citizen Proponents, petition signers, and voters of their constitutional right to initiative. Under the PERB Decision, government officials who want to lead or support a citizens' initiative movement run the risk that an otherwise qualified citizens' initiative will somehow be deemed an "impure" citizens' initiative, and their involvement will disenfranchise petition signers and voters.

The Constitution has never distinguished between a "pure" and "impure" citizens' initiative. PERB lacks the jurisdiction to make the Constitution subservient to the MMBA. A citizens' initiative that has obtained the required verified signatures and been duly certified as a citizens' initiative by the elections official for qualification on the ballot – such as the CPRI – *is* a citizens' initiative and is constitutionally protected

as an absolute right reserved to the People. Such a precious constitutional right cannot be forfeited based on PERB's newly created legal fiction which ignores the key facts and law.

a. There Are Two, and *Only* Two, Ways to Place a Charter Amendment On the Ballot

City charter amendments are a matter of statewide concern governed exclusively by state law. *Jarvis Taxpayers Ass'n v. City of San Diego*, 120 Cal. App. 4th 374, 387 (2004) (citing *District Election etc. Committee v. O'Connor*, 78 Cal. App. 3d 261, 266-67 (1978)). The charter amendment process is governed by the California Constitution and the California Election Code. *District Election etc.*, 78 Cal. App. 3d at 271.

The California Constitution provides, "[t]he governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body." Cal. Const., art. XI, § 3(b). **Thus, there are two, and *only* two, distinct methods to propose amendments the City's Charter**: (1) a proposal made through a citizens' initiative, or (2) a proposal by a vote of the City's "governing body." No legal authority has ever recognized any other method to amend a California city's charter. Yet, despite PERB's statutory mandate to interpret the Unions' UPCs "consistent with existing

judicial interpretation"[4] of the MMBA, PERB has created a new category of initiative, a "City-sponsored" or "impure" citizens' initiative.

b. All Legislative Powers of the City are Vested in its City Council and are Nondelegable

The PERB Decision erroneously 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.) As detailed below, the Mayor *cannot* establish legislative policy for the City – only the City Council can and such powers are nondelegable.

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(a) ("The Council shall be the legislative body of the City.")

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[4] Government Code section 3509(b) states, "[t]he [PERB] Board shall apply and interpret unfair labor practices consistent with existing judicial interpretation of this chapter."

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.

Thus, an act of the Mayor is not an act of the City under the MMBA. The policy determination referred to in Government Code section 3505 is that of the "governing body" – the City Council. The Mayor may conduct negotiations with the Unions, but even his opening offer at the negotiation table ***must*** be approved by the City Council. (XII AR 189:003226:11-3227:6.) Therefore, the Mayor's support of Prop. B cannot legally have turned it into a "City-sponsored" initiative. *See 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).

c. The CPRI Was Duly Certified by the Elections Official as a Citizens' Initiative and it is Undisputed that the City's "Governing Body" Did Not Propose the CPRI

PERB's claim that the CPRI is not a "pure" citizens' initiative ignores the following *undisputed* facts:

- In April 2011, three private citizens, the Real Parties in Interest Citizen Proponents, gave notice to the City that they intended to circulate a petition to have the CPRI placed on the ballot. (I AR 1:000054-65.)
- 115,991 registered City voters, approximately twenty (20) percent of the electorate, signed the petition exercising their Constitutional right to amend the City's Charter via initiative by indicating their desire to place the CPRI on the ballot. (XX AR 197:005164.)
- On November 8, 2011, the San Diego County Registrar of Voters certified that "SUFFICIENT" signatures had been collected to place the CPRI before the voters on the June 5, 2012, ballot as a citizens' initiative. (*Id.*)

- On January 30, 2012, as required by Elections Code section 9255(b)(2), the City Council performed its ministerial duty to place a qualified citizens' initiative on the ballot as Proposition B. (XVI AR 193:004071-89.)
- The "governing body" of the City, the City Council, did *not* propose, or in any way vote to support, the CPRI.

The Charging Parties made no allegations, and PERB made no finding, that the City Council proposed the CPRI. (*See* I AR 1:000002-237; III AR 15:000579-89; 22:000608-13; IV AR 33:000934-41; & XI AR 186:002979-3103.) It is unquestioned that the CPRI was duly certified by the Elections Official to be a citizens' initiative qualifying for placement on the ballot.

d. Meet-and-Confer Applies to a "Governing Body" Initiated Amendment, It Does *Not* Apply to a Citizens' Initiated Amendment

PERB's Decision improperly requires the City to meet-and-confer over a citizens' initiative. However, the meet-and-confer obligations contained in the MMBA *only* apply to "governing bodies." Gov't Code § 3505. The California Supreme Court in *People ex rel. Seal Beach Police Officers' Ass'n v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591 (1984), recognized that charter amendments proposed by the public employer itself are subject to the requirements of the MMBA. Although, the Supreme

Court expressly noted that the case did ***not*** involve the "question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative," the only other way to propose charter changes, and therefore, did not address that issue. *Seal Beach*, 36 Cal. 3d at 599 n.8. Yet, in the thirty (30) plus years since *Seal Beach*, no court decision has ever applied the meet-and-confer requirement to a citizens' initiative. Nor has PERB done so before this case.

i. The Owners of a Citizens' Initiative Are the Official Proponents – the Citizen Proponents – Not the City

Pursuant to California election laws, the three private citizens who submitted the text of the CPRI – the Real Parties in Interest Citizen Proponents – are the *only* "proponents" of the CPRI. Election Code section 342 defines the "proponent" of an initiative measure as "the elector or electors who submit the text of a proposed initiative or referendum to the [City Clerk] with a request that he or she prepare a circulating title and summary of the chief purpose and points of the measure . . . ." Elections Code section 9001 states, "[t]he electors presenting the request [to the City Clerk] shall be known as the 'proponents.'"

Additionally, the law is clear that the three private citizens that submitted the CPRI text to the City Clerk were the only individuals that could have submitted it to the City Clerk for placement on the ballot after

signatures had been collected. Elections Code section 9032 sets forth that "[t]he right to file the petition [with the designated election official] shall be reserved to its proponents, and any section thereof presented for filing by any person or persons other than the proponents of a measure or by persons duly authorized in writing by one or more of the proponents shall be disregarded by the elections official."

The only action PERB alleges the City Council took towards the CPRI is performing its ministerial duty of placing a citizen initiative on the ballot. Once an elections official certifies that a sufficient number of registered voters have signed a petition to qualify as a citizen initiative, a city council ***must*** perform its ministerial duty to place it on the ballot ***without change*** and, as discussed more fully below, without compliance with procedural prerequisites that usually attach to measures proposed by a city's "governing body," such as CEQA, or in this case, MMBA's meet-and-confer requirements. *See, e.g., 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.")

As this Court has previously noted, "[i]t is the rule under the MMBA 'that a public agency is bound to so 'meet and confer' *only* in respect to '*any agreement that the public agency is authorized* [by law] *to make* . . . .' [citation.]" *American Federation of State etc. Employees v. County of San*

Diego, 11 Cal. App. 4th 506, 517 (1992), italics in original (citing *San Francisco Fire Fighters v. Board of Supervisors*, 96 Cal. App. 3d 538, 545 (1979)).

Requiring the City to meet-and-confer with the Unions regarding the terms of the CPRI necessarily assumes that the City had the power to change the language of the CPRI. It did not. Pursuant to Elections Code section 9255(b)(2), the City had a ministerial duty to place any qualified citizens' initiative on the ballot as authored and worded by the citizens themselves.

Thus, as noted in *American Federation of State etc. Employees*, and which is particularly appropriate in the case at issue, "[a]s a practical matter, it would be inappropriate to attribute to the Legislature a purpose of requiring the [City] to make very substantial negotiating expenditures on subjects over which the [City] has no authority to act. Nothing in the statutory language calls for this result. As in other areas of the law, the MMBA is not to be construed to require meaningless acts." *Id.* at 517 (citing *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 336 (1975)).

No legal authority has ever before applied the MMBA meet-and-confer requirements to a citizens' initiative. To do so would make no sense, because a public agency is barred from changing an initiative after it qualifies, nor may a public agency amend an initiative after it is adopted by

the voters. Therefore, ***there is nothing to be negotiated because nothing could be changed.*** The meet-and-confer process, in such a situation, would be an exercise in futility.

ii. PERB's Decision Erred in Applying Procedural Prerequisites to an Initiative Which Are Meant Only to Be Applied to "Governing Body" Action

The responsibility to meet-and-confer rests only upon the governing body – the City Council, although others, like the Mayor, participate in that process. Moreover, it is a *procedural process*. A long line of cases hold that procedural prerequisites applicable to governing body actions should not be imposed on citizens' initiatives. PERB's Decision, however, does exactly that as it orders the City to meet-and-confer before adopting *any* ballot measures affecting pension benefits and/or other negotiable subjects. (XI AR 188:003122-23.)

Applicable to this case, California's Supreme Court has explained that imposing certain "procedural prerequisites applicable to legislative bodies," such as compliance with the California Environmental Quality Act (CEQA), could impose "an impermissible burden on the electors' constitutional power to legislate by initiative." *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 189 (2001) (citing Cal. Const., art.

II, §§ 8, 11); *see also DeVita v. County of Napa*, 9 Cal. 4th 763, 785-86 (1995) (citing multiple cases involving citizen initiatives which were upheld upon challenges for failure to comply with procedural prerequisites applicable to legislative bodies).

In *Friends of Sierra Madre*, the Court examined an earlier decision of the Court of Appeal, *Stein v. City of Santa Monica*, 110 Cal. App. 3d 458, 460-61 (1980), which refrained from imposing CEQA on an initiative.

In *Stein*, a group of landlords, who opposed a charter amendment relating to urban rent control, sought a writ of prohibition or mandate, seeking to block enforcement and implementation on the basis that it did not comply with CEQA. *Id.* at 458-60. The charter amendment was placed on the ballot pursuant to a petition signed by 15 percent of the registered voters of the city in accordance with article XI, section 3 of the California Constitution and applicable statutory law. *Id.* at 460. The city did not take any steps to comply with CEQA in placing the initiative measure on the ballot. *Id.* at 458.

The *Stein* court explained that a proposal to amend a city charter by initiative is "an activity undertaken by the electorate and did not require the approval of the governing body. The acts of placing the issue on the ballot and certifying the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA." *Id.* at 461.

The opponents of the charter amendment argued that the electorate was exercising the city's legislative authority in approving the charter amendment, and, therefore, "the people were agents of the city in promulgating this charter amendment." *Id.* The Court of Appeal rejected that argument and declared that, upon the sponsors' qualifying an initiative measure by filing a legally sound petition, the City becomes the agent of the sponsors:

> The argument is unsupported by controlling authority and otherwise totally unacceptable. *Presumably the initiative*, Proposition 'A,' amending the charter to include rent control, *was the result of its sponsors qualifying the measure by the filing of a legally sound petition and was properly certified to the electorate by the city. City had no discretion to do otherwise.* ***Under the circumstances city was the agent for the sponsors rather than vice versa.***

Id. at 461 (emphasis added).

The law that the reserved power of initiative prevails over procedural requirements meant to apply to governing body legislation is not limited solely to CEQA cases. Years prior to the *Stein* decision, the California Supreme Court in *Associated Home Builders*, 18 Cal. 3d 582, ruled that the notice and hearing requirements of the zoning law were inapplicable to initiatives. The decision overturned a 1927 decision which held that failure to observe the notice and hearing requirements of zoning law rendered a zoning initiative invalid. The *Associated Home Builders* court stated, ". . . the Legislature never intended the notice and hearing

requirements of zoning law to apply to enactment of zoning initiatives." *Id.* at 594. "The Legislature plainly drafted the questioned provisions of the zoning law with a view to ordinances adopted by a vote of the city council . . . Procedural requirements which govern *council* action however generally do not apply to initiatives." *Id.*, italics in original (citing to *Bayless v. Limber*, 26 Cal. App. 3d 463, 470 (1972), which held that "[u]nless constitutionally compelled, the requirements for law-making by the legislative process should not be imposed upon law-making by the initiative process."). *Associated Home Builders* also pointed out that the overruled decision mistakenly treated the zoning law to be of equal status with initiative law. They are not equal, however, because the initiative is protected by the Constitution. *Associated Home Builders*, 18 Cal. 3d at 594-95.

The first challenge to the 1911 amendment that reserved the power of initiative and referendum to the People was resolved in *Dwyer v. City Council*, 200 Cal. 505 (1927). The Supreme Court required the Berkley City Council to submit a zoning ordinance to a referendum of its citizens. *Id.* at 518. It rejected an argument that the referendum procedure denied affected persons the procedural right, granted them by municipal ordinance, to appear before the Berkley City Council to state their views on the ordinance. The Court reasoned that:

> [T]he matter has been removed from the forum of the Council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens. . . . ***It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirement.*** . . .
>
> *Id.* at 516, emphasis added.

The Court of Appeal in *Native American Sacred Site and Environmental Protection Ass'n v. City of San Juan Capistrano*, 120 Cal. App. 4th 961, 968 (2004), summarized the rule of this line of cases, as follows: "And it is plain that voter-sponsored initiatives are 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.***" (Emphasis added.)

After the ALJ's proposed decision was issued, the California Supreme Court made clear in *Tuolumne Jobs & Small Business Alliance v. Superior Court (Tuolumne Jobs)*, 59 Cal. 4th 1029 (2014), that when faced with a duly certified citizens' initiative, the Council must adopt it directly without alteration or send it to the ballot without alteration. While *Tuolumne Jobs* is a CEQA decision, and one involving an ordinance rather than a Charter amendment, its statements about the exclusive choices under Elections Code sections 9214 are even more strongly applicable to Prop. B, because, under Elections Code section 9255 the City had only one choice –

send the CPRI to the ballot. Moreover, nearly every substantive statement in the decision, about the Elections Code mandate overriding CEQA, applies equally to the MMBA. In fact, you can substitute "MMBA" and "meet-and-confer" for "CEQA" and "CEQA review" and Elections Code section "9255" for section "9214" in those statements, and they are equally valid. For example:

> Because CEQA review [MMBA meet-and-confer] is contrary to the statutory language and legislative history pertaining to voter initiatives, and because policy considerations do not compel a different result, such review is not required before adoption of a voter initiative.
>
> *Tuolumne Jobs*, 59 Cal. 4th at 1036.
>
> Requiring CEQA review [MMBA meet-and-confer] before direct adoption [or sending the measure to ballot] would essentially nullify both subdivisions (a) and (c) [section 9255]. The plain language of section 9214 requires that the city government act quickly to either adopt a qualified voter initiative or hold a special election. (§ 9214 (a)-(b).) [section 9255 only requires sending the Charter amendment to the ballot]"
>
> *Id.* at 1037.
>
> In contrast to these condensed deadlines [in the Elections Code], CEQA review [MMBA meet-and-confer] typically takes months.
>
> *Id.*
>
> Adding CEQA review [MMBA meet-and-confer] to the procedures in section 9214(a) [section 9255] would render that provision inoperative for a great many voter initiatives.

Id. at 1039.

> If the Legislature had intended to require CEQA review [MMBA meet-and-confer] before direct adoption [or sending the initiative to the ballot], despite the section 9214(a) deadlines, it could easily have said so. It did not.

Id.

> [A] conclusion that CEQA [MMBA] prevails over contrary Elections Code procedures would impliedly repeal section 9214(a) [section 9255]. There is a strong presumption against repeal by implication.

Id.

> Finally, even if time constraints permitted CEQA review [MMBA meet-and-confer], cities would be powerless to reject the proposed project [proposed Charter amendment] or to require alterations in the project [proposed Charter amendment] that would lessen its environmental impact [respond to meet-and-confer], no matter what the review [meet-and-review] showed. Section 9214 [section 9255] requires that local governments either adopt qualified initiatives or submit them to voters "without alteration."

Id. at 1040.

While PERB discusses this powerful line of cases in its decision, PERB simply ignores their significance by again contending this case is distinguishable because it is allegedly not a "pure citizens' initiative." (XI AR 186:003015.)

In retort to PERB, as the Court of Appeal so clearly stated, "voter-sponsored initiatives are 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." *Native American Sacred Site and Environmental Protection Ass'n*, 120 Cal. App. 4th at 968.

This same principle must be apply to the meet-and-confer requirements of Government Code section 3505, because meet-and-confer is a procedural prerequisite for action by the "governing body." Therefore, it is inapplicable to legislation by citizens' initiative. Imposing the meet-and-confer requirement of the MMBA would, in the words of the California Supreme Court in *Friends of Sierra Madre*, 25 Cal. 4th at 189, impose "an impermissible burden on the elector's constitutional power to legislate by initiative."

3. MMBA's Meet-and-Confer Process Is Preempted by Government Code sections 3203 and 3209

Government Code section 3209 expressly allows the City's Mayor and Councilmembers 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. Certainly, PERB's determination that grafting a meet-and-confer requirement on such activity would seriously impede the rights of public officials recognized and protected in Government Code sections 3203 and 3209.

A basic rule of statutory construction is that "courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." *California Teachers Ass'n v. San Diego Community College Dist.*, 28 Cal. 3d 692, 698 (1981). "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *Id.*

The plain language of Government Code sections 3203 and 3209 are clear, and they do not contain a meet-and-confer exception. If the Legislature intended such an exception, they knew precisely how to include one. Multiple times, when the Legislature intended to make a statute subject to the meet-and-confer requirements of the MMBA, the Legislature provided such an expressed qualification. *See, e.g.,* Gov't Code § 31581.2 ("(b) . . . The board of supervisors or the governing body of the district may amend or repeal the resolution at any time, ***subject to the provisions of Sections 3504 and 3505***, or any similar rule or regulation of the county or district." Emphasis added.); Health & Safety Code § 101841 ("(c) If the hospital authority determines that contracting out for the services pursuant to subdivision (b) is necessary, the authority shall provide for full communication between the hospital authority and county civil service employees, ***pursuant to Section 3505 of the Government Code***. . . ." Emphasis added.). Thus, state law, which was enacted nearly a decade

after the MMBA and with the full knowledge of its meet-and-confer obligations, expressly authorized the Mayor to support the CPRI unimpeded by the MMBA.

Therefore, if a City official used City facilities or personnel to support an initiative (as PERB's Decision concludes), 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 absent some new sweeping legal decision of first impression.

B. The PERB Decision Erred In Using Inapplicable Agency Theories to Impose a Meet-and-Confer Obligation on the City

PERB concluded the Mayor "was acting as the City's agent when he announced the decision to pursue a pension reform initiative that eventually resulted in Proposition B, and that the City Council, by its action and inaction, ratified Sanders' decision and his refusal to meet and confer with the Unions." (XI AR 186:002986, 2990, 2993, & 3005.) These conclusions are based on theories of actual and apparent statutory authority. However, such agency theories are inapplicable to the situation at issue, and further, they are not supported by the law or record.

Agency principles apply to contracts and torts, however, this case does not involve a contract or tort. ***This case involves the Mayor's***

exercise of his First Amendment right and his right to participate in the citizens' initiative process guaranteed by the California Constitution.

While any of PERB's agency theories are clearly defeated by the authorities discussed in detail *supra*, and therefore, inapplicable and irrelevant, out of an abundance of caution the City will further detail why PERB's conclusion is in error.

1. PERB's Finding That the Mayor Acted as an Agent for the City Is Unsupported by Substantial Evidence and Irrelevant

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." Civ. 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).

In alleging that the Mayor was an "agent" of the City in supporting Prop. B, PERB states that it is within the Mayor's scope of authority under the City Charter to "propose necessary legislation" and, therefore, the Mayor was exercising that authority in proposing Prop. B. (XI AR 186:002993.) However, PERB's Decision fails to recite the complete City Charter section. The City Charter authorizes the Mayor to "recommend to the Council such measures and ordinances as he or she may deem necessary

. . . ." San Diego Charter § 265(b)(3). The portion omitted by PERB is "recommend to the Council." The Mayor is not authorized to propose on behalf of the City measures to the voters. The Mayor did not recommend Prop. B to the Council, he recommended Prop. B to the voters.

PERB also contends that because the Mayor had authority to negotiate benefits with the Unions, he had authority to support Prop. B on behalf of the City Council. (XI AR 186:002993.) In supporting Prop. B, however, the Mayor was not negotiating with the Unions. He was supporting a citizens' initiative. The City Charter does not grant him the authority to do that. Rather, it is the United States and California Constitutions, and state law, which grant him the ability to support a citizens' initiative.

Nothing in the record indicates that the City Council expressly or implicitly authorized the Mayor to pursue a pension reform ballot measure, or that the Mayor believed he had such authorization from the Council. As PERB finds, the Mayor was the City's chief negotiator with its Unions and had previously proposed a pension reform ballot measure to the Council. (XI AR 186:002993, 3048, 3052). However, he did not have authority to act independently on such matters. Rather, as the evidence established and PERB acknowledged, he was required to obtain the City Council's *advance* approval of both bargaining proposals and ballot measures. (XI AR 186:003048, "the Mayor briefs the City Council on the proposals and

strategy and *obtains its agreement to proceed.*" *Id.*, 3052, "City policy requires that if the Mayor proposes an initiative measure *he must obtain the Council's approval.*" Emphasis added.)

Thus, the Mayor could only act within the scope of his authority on pension reform *if* the Council approved his actions. It is undisputed that the Council did not authorize Mayor Sanders to proceed with his own pension reform initiative or the CPRI. Moreover, the Mayor testified that he believed he was acting in his capacity as a private citizen when he pursued support for his own proposed initiative and later threw his support behind Prop. B. (XIII AR 190:003361:21-3362:20.) Therefore, regardless of the acts or omissions of the Council, Sanders did not "believe himself to possess" the authority to pursue such a ballot measure on behalf of the City. Because the Mayor did not have such authority, there was no conduct by the Council that led the Mayor to believe he had such authority, and the Mayor did not believe he had such authority, there was no basis for a finding of actual authority. *See Inglewood Teachers Association v. PERB*, 227 Cal. App. 3d 767, 781 (1991).

In an attempt to shore up its overly broad conclusion, PERB relies heavily on the City Council's purported ratification of the Mayor's conduct. But creation of agency by ratification is possible only when the person whose unauthorized act is to be accepted purported to act as an agent for the ratifying party. *Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th

549, 571 (2003). Here, Mayor Sanders did not purport to act on behalf of the City or the City Council; he believed, and made it known publicly, that he was pursuing a pension reform initiative as a private citizen, not as the Mayor. (XIX AR 196:004836; & XIII AR 190:003341:11-24, 3361:21-3362:20.)

PERB's Decision also concludes the Mayor acted with apparent authority. Apparent or ostensible authority stems from conduct of the principal which leads a third party reasonably to believe that the agent is authorized to bind the principal. Civ. Code § 2317. "Apparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question." *Chula Vista Elementary School District* (2004) PERB Decision No. 1647.

The apparent authority relied upon by PERB illustrates how misguided it is to apply an agency analysis to the situation at hand. PERB's Decision concludes that employees were reasonable in concluding that the Mayor was pursuing pension reform in his capacity as both elected official and the City's chief executive officer based on his public statements, news coverage of those statements, and his history of dealing with unions on pension matters, some in the form of proposed ballot initiatives. (XI AR 186:002997 & 3086.) These may be important points if there were contract negotiations, but they are not with regard to a citizens' initiative. The Mayor was not negotiating with the employees, and

therefore, what they thought is irrelevant. The Mayor was exercising his First Amendment and California constitutional rights.

Moreover, if an "apparent authority" test is always applied to determine whether an initiative is "pure" or "impure," there will always be uncertainty with regard to initiatives supported by public officials. For example, a Governor would always be clothed with "apparent authority" to act or speak on behalf of the State. If public officials wished to support a citizens' initiative they would do so at the risk of disenfranchising hundreds of thousands of individuals who signed a petition to place it on the ballot and voted for its implementation.[5]

Additionally, by using agency theory principles to create binding acts on behalf of the City Council that do not comply with the methods prescribed by the City's Charter, PERB has violated the constitutional rights of a charter city. *See, e.g., First Street Plaza Partners*, 65 Cal. App.

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[5] This Court needs only to look back at the 2012 California Sales and Tax Increase Initiative, an initiative place on the ballot through the filing of over 800,000 signatures, to see how illogical PERB's ruling is. Governor Brown was the impetus for the initiative and aggressively campaigned for it as a way to bypass the state legislature because he could not get the two-thirds vote approval required by the Constitution for legislative tax increases. Under PERB's newly created constitutional concept, the tax increase should be overturned because it resulted from an "impure" citizens' initiative (due to the Governor being the impetus), making the initiative really an act of the State. Accordingly, the measure should go to the state legislature for a vote. The same analysis could be applied to nearly all state and local citizens' initiatives having support from elected officeholders.

4th at 667 (holding provisions of a city's charter cannot be satisfied by implication of procedures different than those specified in the charter).

PERB's apparent authority conclusions is also fundamentally flawed because the record is devoid of testimony by any City employee that he or she believed Sanders was acting in his capacity as Mayor when he spoke publicly about a pension reform initiative, or for that matter that any employee actually saw or heard the public statements upon which the Board relies. PERB has simply accepted Union argument for evidence. PERB points to testimony of the Mayor's speechwriter, yet fails to mention that in the Mayor's speeches he identified that he was acting as a private citizen. (*See, e.g.*, XIX AR 196:004836.)

PERB's *inferences* of such belief are impermissible in light of *Inglewood Unified School District* (1990) PERB Decision No. 792, which requires that the charging party prove that employees believed the purported agent was acting with the employer's authorization, noting that "mere surmise as to the authority of an agent is insufficient to impose liability on the principal." *Id.*, at 20; *see also Inglewood Teachers Association v. PERB*, 227 Cal. App. 3d at 782. PERB also completely ignores the fact that under California agency law, a person dealing with an assumed agent has a duty to inquire into the nature and extent of the assumed agent's authority. *Id.*; *Inglewood Unified School District*, PERB Dec. No. 792, at 20. Thus, even if City employees believed Mayor Sanders

was acting at all times in his official capacity, and therefore as an agent of the City, such belief was unreasonable because it is contradicted by his very public and repeated statements that he was acting as a private citizen, and the employees did not inquire further into whether this was so.

Finally, PERB relies on the City Council's purported failure to disavow Sanders' actions as evidence that the Council ratified them. Once the principal becomes aware of the purported agent's conduct, its failure to disavow that conduct may support a finding of apparent authority. *State of California (Departments of Veterans Affairs & Personnel Administration* (2008) PERB Decision No. 1997-S; *Chula Vista Elementary School District, supra*, PERB Decision No. 1647. Here, however, the Mayor made clear in his public statements that he was pursuing a citizens' pension reform measure, and later supporting the CPRI, in his capacity as a private citizen. (XIX AR 196:004836; XIII AR 190:003341:11-24, 3361:21-3362:20.) Given Sanders' disclaimers of acting on behalf of the City, there was no need for the City Council to disavow Sanders' conduct or to claim that he was acting outside the scope of his authority. Accordingly, the Council's silence could not amount to ratification of the Mayor's conduct, and therefore no apparent authority could have existed.

2. The PERB Decision Erred in Finding that the City Council Ratified the Mayor's Actions

PERB asserts the City Council ratified the Mayor's actions by acquiescing to the Mayor's promotion of the initiative, by placing the measure on the ballot, and denying the Unions opportunity to meet-and-confer, all while accepting the financial benefits of Prop. B. (XI AR 186:002993.) PERB's analysis is erroneous in several respects.

First, PERB cites no authority whatsoever that would allow the Council to order the Mayor to cease his "promotion of the initiative." To the contrary, the Mayor's promotion of the CPRI was within his Constitutional rights, and had the warrant of statutory law (all more fully discussed above in Section A). Therefore, the "inaction" of Council, which PERB elevates in its opinion to "acquiescence," has no legal significance.

Second, after Prop. B qualified as a duly certified citizens' initiative, the City Council had no choice but to place Prop. B on the ballot. *Save Stanislaus Area Farm Economy*, 13 Cal. App. 4th at 149.

Third, "accepting the considerable financial benefits" occurred because Prop. B changed the law. The City Council could not choose to ignore the law.

Finally, the Council did not have the power to force negotiation over the terms of Prop. B, a citizens' initiative, as the Citizen Proponents had the exclusive control over the petitions and language of the initiative. Elec.

Code § 9032; *Perry v. Brown*, 52 Cal. 4th at 1142. Accordingly, all of PERB's "acquiescence" and "ratification" claims are meaningless.

C. PERB's Decision Abandons the Original Basis for Challenging Proposition B Argued to This Court Over Three Years Ago

PERB Regulation 32178, requires a charging party to prove its UPC by a preponderance of evidence to prevail. The Unions, however, utterly failed to prove the key allegations of their UPCs. The Administrative Law Judge (ALJ) and PERB both failed to acknowledge this.

As the below chart illustrates, the evidence proved the following allegations which formed the basis of the various UPCs[6] to be utterly false:

UPC Allegation	Evidence / PERB Concession
"Mayor Sanders hired the attorneys who wrote the proposition for pension reform to his specifications." (I AR 1:000010.)	Kenneth Lounsbery, of the private law firm, Lounsbery Ferguson Altona & Peak, testified that his firm drafted Prop. B on behalf of his client, the San Diego County Taxpayers Association (SDCTA), who paid for his services. (XV AR 192:003994:13-3995:8.) Mayor Sanders did not pay any part of Mr. Lounsbery's legal fees for drafting Prop. B. (*Id.*, 3995:9-11.)

[6] These key unproven allegations also formed the entire basis of this Court's 2012 decision to refuse to take direct jurisdiction of the issues raised by PERB in its Superior Court lawsuit, and allow the PERB administrative process to proceed. *San Diego Municipal Employees' Ass'n v. Superior Court (MEA)*, 206 Cal. App. 4th 1447, 1452-53, 1460 (2012).

"The contact person *and* treasurer for the Mayor's committee is CPRI proponent April Boling." (I AR 1:000009, emphasis in original.)	Footnote 6 at page 4 of the PERB Decision acknowledges this allegations is false. (XI AR 186:002982 n.6.)
"[T]his so called 'citizen initiative' is merely a sham device which City's 'Strong Mayor' has used for purposes of avoiding City's MMBA obligation to meet and confer." (I AR 1:000005.)	The SDCTA paid their own private attorneys to draft Prop. B, based primarily off a draft version of Councilmember DeMaio's desired pension reform, not Mayor Sanders'. (XV AR 192:003994:13-3995:11.) PERB's Decision, acknowledged that the Citizen Proponents were not acting as agents of the City. (XI AR 186:003088-89.)
"[T]he Mayor has spearheaded the entire CPR project from its inception." (I AR 1:000008.)	PERB's Decision acknowledges that Citizen Proponent T.J. Zane ran the initiative campaign from the Lincoln Club, and noted that there was "no evidence the Mayor retained authority to run the campaign." (XI AR 186:003089.)
The three initiative proponents, April Boling, T.J. Zane and Steve Williams "filed the Mayor's initiative for him." (III AR 15:000585.)	PERB's Decision expressly acknowledged that the Citizen Proponents were not acting as agents of the Mayor or City. (XI AR 186:003088-89.) And, as previously noted, the SDCTA paid their own private attorneys to draft Prop. B, based primarily off a draft version of Councilmember DeMaio's desired pension reform, not Mayor Sanders'. (XV AR 192:003994:13-3995:11.)

PERB's Decision violates PERB Regulation 32178 as the Unions failed to prove the primary allegations of their UPCs.

D. The PERB Decision Erred in Confusing and Conflating the Mayor's Ideas of Pension Reform with Those Supported by the Citizen Proponents Who Were Proceeding with Their Own Dueling Initiative

PERB characterized the issue in this case as: "Did the City violate its duty to meet and confer *as a result of the Mayor's development, sponsorship and promotion of his pension reform proposal* coupled with the City's refusal to negotiate with the unions over the matter?" (XI AR 186:003072.)

What is "his pension reform proposal"? There are two possible interpretations, (1) the proposal announced in November 2010, which the Mayor scuttled in March 2011, or (2) Prop. B, to which he contributed a few minor ideas, but which citizen groups developed, drafted, financed, and promoted. (XV AR 192:003994:13-3995:11.)

The Mayor's proposal went nowhere. It was not even reduced to writing, and, of course, never went to the ballot. If "his" proposal refers to the CPRI, then PERB's statement of the principal issue is flatly wrong. It is not supported by substantial evidence, all evidence being to the contrary.

Throughout its decision PERB conflates the Mayor's ideas for pension reform, first announced in November, 2010, with a different, competing and "dueling" measure embraced by citizens groups, and that eventually became CPRI or Prop. B.

In December, 2010, the Mayor and Councilman Faulconer met with business leaders and representatives of the Lincoln Club, SDCTA, and the Chamber of Commerce to disclose their concept for pension reform. These leaders were "lukewarm" to their concepts because they preferred Councilman DeMaio's proposal. (XV AR 192:003801:25-3802:2.) The Mayor and others testified the citizen group representatives told him his pension reform concept was not tough enough, did not save enough money, and that they wanted only one initiative to go forward. (XIII AR 190:003481:2-22; XIV AR 191:003575:2-9.)

On December 17, 2010, the SDCTA Board voted to adopt pension reform principles, which included "[t]he creation of a 401(k)-type plan for new hires coupled with either Social Security or an equivalent modest defined benefit plan" (XXIII AR 200:005769), and in March 2011, SDCTA found DeMaio's Roadmap for Recovery in alignment with their principles (XVI AR 193:004206). SDCTA then told Sanders and Faulconer it would only fund one ballot measure and it would not be theirs.

Although they continued to pursue their own measure a short while longer, Sanders and Faulconer reached a compromise in late March, 2011,

with the citizen-group backers who supported the DeMaio proposal, and they publicly announced their support for the CPRI on April 5, 2011, one day after the citizen proponents filed their notice of intent to circulate the CPRI petition.

MEA's first meet-and-confer demand letter of July 15, 2011, written over three months *after* the official proponents filed their notice to circulate petitions for the CPRI, states in part:

> Having expected but not yet received a request from you to meet and confer **over your much-publicized "Pension Reform" Ballot Initiative**, MEA demands that you initiate this meet and confer process as the MMBA requires . . . unless advised to the contrary, **MEA will treat the Ballot Initiative, as presently written, as your opening proposal on the covered subject matter**.
>
> (XIX AR 196:005109, emphasis added.)

The July 15, 2011, meet-and-confer demand does not mention failure to negotiate over the Mayor's "concept," announced in November 2010.

MEA's UPC (I AR 1:000003-13), adopted by the other unions, clearly directs its allegation at the Mayor's activities regarding the CPRI, which became Proposition B. There is no mention of a failure to meet-and-confer over the Mayor's pension reform "concept" first articulated in November 2010. Likewise, the administrative complaints issued by PERB alleged a failure to meet-and-confer over the CPRI.

As previously noted, the City, even if it wished to, could not meet-and-confer over the language of the CPRI as requested in MEA's letter. The CPRI's official proponents – the Citizen Proponents – whom PERB admits were not agents of the City and were running the CPRI's campaign (XI AR 186:003089) had full control over its language. Elec. Code § 9032.

PERB's decision states, "even accepting the City's characterizations of Proposition B as a purely citizens' initiative," (apparently conceding meet-and-confer over language of what PERB deems a "pure" citizens' initiative would be improper) PERB contends that the Union's meet-and-confer demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject." (XI AR 186:003035.) If that is what the City failed to do to comply with the MMBA, it does not justify PERB's remedy which effectively nullifies Prop. B. Rather, the proper remedy would be to order the City to meet-and-confer with the Charging Parties over an alternative pension reform measure.

E. PERB's Order Is Illegal and Unenforceable

PERB's order is illegal and unenforceable for a multitude of reasons. First, it's A.1. order (XI AR 188:003122) to cease and desist from "[r]efusing to meet and confer with Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects," and, corresponding B.1. (*Id.*), constitute illegal infringements on the people's constitutional right to exercise their reserved initiative power. If a citizens'

initiative qualifies and is passed by the voters, the City *must* adopt such measure.

Second, even though PERB acknowledges it lacks the authority to overturn Prop. B, it still orders the City to take actions effectively nullify its effects. However, unless Prop. B is invalidated by a court, the City is obligated and bound to enforce its provisions which make it impossible for the City to fully comply with the order even if it wished to. *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994). PERB's order attempts to force the City to do something it simply cannot, negotiate away a duly certified citizens' initiative – ignoring the constitutional rights of the Citizen Proponents, the nearly 116,000 petition signers, and the overwhelming majority of voters who approved Prop. B.

Third, PERB exceeded its remedial authority in ordering the City to reimburse the Unions' attorneys' fees and costs for litigation undertaken to rescind Prop. B's provisions (XI AR 188:003122, B.2). *See City of Alhambra* (2009) PERB Decision No. 2036-M (noting fees should be awarded only when evidence of "bad faith" exists). This case clearly does not involve "bad faith," and PERB made no such findings.

And finally, PERB's order for the City to reimburse the Unions fees' and costs in seeking to overturn Prop. B violates the separation of powers doctrine, as such an award is a determination to be made by the court in favor of a prevailing party, not by PERB in advance of litigation.

V. CONCLUSION

Prop. B, a citizens' initiative that indisputably obtained the required verified signatures for qualification on the ballot as a citizens' initiative, is a constitutionally protected fundamental right reserved by the people. PERB's Decision erroneously holds 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, thereby disenfranchising hundreds of thousands of voters who overwhelmingly passed the initiative.

The Mayor's actions, however, were all fully within his First Amendment and California constitutional rights, and expressly warranted by state statutes. Accordingly, the City's Petition for Writ of Extraordinary Relief should be granted, and PERB should be directed to set aside and vacate Decision No. 2464-M.

Dated: May 9, 2016

JAN I. GOLDSMITH, City Attorney

By _____
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Deputy City Attorney

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13975 words, including footnotes, 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: May 9, 2016

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

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City of San Diego v. Public Employment Relations Board

Appeal No. D069630
Public Employment Relations Board 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, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On May 9, 2016, I served true copies of the following documents:

- **CITY OF SAN DIEGO'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF EXTRAORDINARY RELIEF**

on the interested parties in this action as follows:

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[XX] (BY OVERNIGHT DELIVERY) I enclosed said document(s) in an envelope or package provided by Golden State Overnight (GSO) and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of May 2016, at San Diego, California.

Marci Bailey