Case No. D069630

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

CITY OF SAN DIEGO
Petitioners,

v.

CALIFORNIA 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 AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145 IAFF; 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.

BRIEF OF REAL PARTIES IN INTEREST, CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I certify that the following entities/persons are interested parties:

(1) Public Employment Relations Board, a California state agency;

(2) San Diego Municipal Employees Association;

(2) San Diego Deputy City Attorneys Association;

(3) American Federation of State, County and Municipal Employees, AFL-CIO, Local 127;

(4) San Diego City Firefighters, Local l45, IAFF, AFL-CIO;

(5) City of San Diego

Date: June 10, 2016

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BRIEF OF REAL PARTIES IN INTEREST, CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

Real Parties in Interest, Catherine A. Boling, T.J. Zane and Stephen B. Williams (Proponents) file this Brief in support of the City of San Diego's Petition for Writ of Extraordinary Relief/Review of Public Employment Relations Board (PERB) Decision No. 2464-M, issued December 29, 2015 (Decision). (PERB Administrative Record (AR) 11:186:002979-003103.)

I. INTRODUCTION

Proponents join the City in its Request that this Court vacate and set aside PERB's Decision invalidating the Citizens' Pension Reform Initiative (CPRI or Proposition B) — a voter-approved, citizen-circulated initiative measure — based on the erroneous finding that the City failed to comply with the Meyers-Milias-Brown Act (MMBA); which is not applicable to citizen-circulated initiative measures. (Gov't. Code § 3500 *et seq.; People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach ("Seal Beach")* (1984) 36 Cal.3d 591, 599 n.8.)

As set forth in the City of San Diego's Opening Brief in Support of Petition for Writ of Extraordinary Relief (City's Opening Brief), PERB acknowledged that it did not purport to resolve the constitutional issues raised in the PERB proceedings. (City's Opening Brief, p. 21, citing AR 11:186:003006.) PERB in fact admitted that the "City [raised] some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative." (*Id.*)

PERB then dismissed those material constitutional issues by improperly concluding that the CPRI is somehow "impure", thereby

requiring the application of the MMBA and granting PERB jurisdiction. PERB also improperly excluded these Proponents, the authors of the CPRI, from the administrative proceedings, and now seeks to perpetuate that injustice by moving to dismiss Proponents from the instant action and *Boling, et al v. PERB,* Case No. D069626.

Approval of the CPRI was democracy in action, designed by Proponents to overcome the inaction at City Hall when the financial position of the City required stabilization by a vote of the people. PERB's attempt to create a new category of initiative — that morphs a voter approved measure from a citizen circulated to council-sponsored initiative based on the association between elected officials and initiative supporters — is improper. The law clearly shows that there is no third category of initiative. (Elec. Code §§ 9200-9226, 9255-9269; *see, generally, Seal Beach, supra.*) PERB cannot ignore judicial precedent. (Gov't. Code § 3510(a).)

By issuing the Decision, PERB violated Proponents' constitutional rights to the exercise of free speech, petition, and association. Proponents respectfully join in the arguments of the City in requesting that this Court vacate PERB's Decision[1].

II. STATEMENT OF FACTS

A. The Proponents' Initiative

On April 4, 2011, City Clerk Elizabeth Maland received Proponents' "Notice of Intent to Circulate-Request for Title and Summary". (AR 3:26:000681-000696.) Three months after Proponents began circulating the CPRI, Real Party in Interest, the San Diego

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[1] Proponents have articulated additional arguments in their Opening Brief, filed before this Court in *Boling, et al v. PERB,* Case No. D069626.

Municipal Employees Association (SDMEA), asked to "meet and confer" on the "Pension Reform Ballot Initiative". (AR 1:1:000019-000020.) Since the City had not sponsored the CPRI and could not legally change its terms, the City did not "meet and confer" about the initiative. (AR 1:1:000022-000024.)

On September 30, 2011, Proponent T.J. Zane delivered to the City Clerk a petition containing 145,027 signatures. (AR 16:193:004065.) On November 11, 2011, the City Clerk received a letter from the County Registrar of Voters certifying that Proponents had submitted the requisite number of signatures to qualify the CPRI for the ballot. (AR 20:197:005164.) On December 5, 2011, the City Council adopted a resolution declaring its intent to submit the CPRI to the voters (San Diego Resolution R-307155 (December 5, 2011)). (AR 16:193:004067-69.) On January 30, 2012, the City Council introduced and adopted an ordinance that set the CPRI on the Tuesday, June 5, 2012 ballot as Proposition B. (San Diego Ordinance O-20127.) (AR 16:193:004071-89.)

On June 5, 2012, the voters of the City of San Diego approved Proposition B with a 65.81% affirmative vote. (AR 16:193:004058; 16:193:004094-96.) No substantive challenges to the CPRI were filed in the aftermath of the public vote.

B. Initiation of the PERB Action

On January 20, 2012, SDMEA filed its Unfair Practice Charge (No. LA-CE-746-M) with PERB.[2] (AR 1:1:000002-000237.) On January 31,

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[2] All references herein will be to the SDMEA Unfair Practice Charge case. The three other consolidated Unfair Practice Charges contain nearly identical allegations of violations of MMBA. (AR 11:186:002980, fn. 4.) Only one administrative hearing was held and a single Decision was issued.

2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (AR 2:4:000246-000249.) PERB then filed a superior court action seeking to enjoin the City from placing the CPRI on the ballot, the details of which are discussed in the City's Opening Brief[3]. (See, *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1452-1453; City's Opening Brief, pp. 15-17.)

PERB ultimately held an administrative hearing before Administrative Law Judge Ginoza (ALJ) on July 17, 18, 20, and 23, 2012. (AR 11:186:003047.) Testimony at the hearing showed that the Mayor and two Council Members considered their own plans but ultimately supported the San Diego County Taxpayers Association (SDCTA) plan. (AR 11:186:003060-003063 (Sanders/Faulconer plan); 11:186:003064 (Councilmember DeMaio plan); 11:186:003065-003070 (SDCTA/Proponents/CPRI private pension reform).)

PERB excluded Proponents from the hearing, except to allow limited testimony by their attorney. (AR 15:192:003994, line 1-15:192:004007, line 16.) In contrast, PERB improperly admitted as

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[3] SDMEA General Manager Michael Zucchet filed a Declaration with PERB in support of SDMEA's request for injunctive relief, which then became the only verified support for PERB's Superior Court request. (AR 2:5:000251-000254.) The declaration specifically mentions that Proponents circulated the CPRI. (AR 2:5:000252:1-4 (para. 4).) Zucchet also declares, based on hearsay news articles, "Mayor Sanders' substantial sponsorship, involvement, advocacy and funding on behalf of CPRI." (AR 2:5:000252:16-18 (para. 7).) He also declares, based on news articles, that Sanders "negotiated the final terms" of CPRI. (AR 2:5:000252:18-21 (para. 7).) Further, Zucchet declares that "through the San Diego Regional Chamber of Commerce" Sanders urged people to sign the CPRI measure. (AR 2:5:000252:22-25 (para. 8).) The Superior Court ultimately denied the injunction and the CPRI was placed on the June 5, 2012 ballot. (*San Diego Municipal Employees Assn, supra,* at 1454.)

evidence hearsay press reports and testimony about the political activities of Proponents and their political supporters, such as an e-mail sent by the San Diego Chamber of Commerce – on which the Decision relies – as supposed evidence that the Mayor used City resources to support Proposition B. (AR 11:186:002985; 20:197:005135 (Ex. 80).)

PERB also allowed SDMEA legal Counsel to question Mayor Jerry Sanders and his staff about the Mayor's involvement with private persons, including Proponents, in the drafting of the CPRI[4]. The questions related to private meetings held by political opponents of SDMEA, including Proponents, while they were preparing a ballot measure to be circulated; using private funds; and discussing related political issues. None of SDMEA's questions addressed whether the City Council authorized city officials to spend city money to draft, circulate or campaign for Proposition B. No Fair Political Practices Commission (FPPC) Form 460 (campaign disclosure) was ever introduced showing that the City donated any money to these efforts.[5]

C. The Proposed Decision

Following the hearing, the ALJ issued a Proposed Decision on February 11, 2013. (AR 10:157:002613-002675.) The Proposed Decision found that the City's actions had nullified the "*private*"

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4 AR 13:190:003325, line 17-003327, line 23 (questioning Mayor Sanders about his political connections); AR 14:191:003549, line 28-14:191:003552, line 15 (questioning Jay Goldstone about his involvement in the fiscal analysis related to the initiative) and AR 14:191:003568, line 2-14:191:003573, line 4 (questioning Jay Goldstone about Mayor's meetings with private citizens, including Proponents, regarding development of a pension ballot measure for circulation).)

5. Any campaign contribution by a governmental entity must be disclosed. (2 CCR § 18420.)

initiative because the citizen proponents were simply surrogates of the City. (AR 10:157:002667.) Contradicting this conclusion, the narrative in the Proposed Decision describes private efforts to draft, circulate, and campaign for the CPRI. Specifically, the ALJ characterized the drafting process as follows:

> The San Diego County Taxpayers Association hired the law firm of Lounsbery, Ferguson, Altona & Peak to draft the language of the compromise proposal. Lounsbery attorneys were present during the meetings to negotiate the compromise.... The San Diego County Taxpayers Association provided Goldstone and Dubick drafts of the initiative prepared by the Lounsbery firm, and they provided comments back through Lutar. (AR 10:157:002637-002638.)

The Proposed Decision goes to great length to show previous efforts at pension reform, originating both inside and outside of government. (AR 10:157:002620-002641.) PERB's final Decision likewise paints a picture showing that all of the pension reform ideas go back to Sanders and, therefore, are the property of the City. (AR 11:186:003032-003034.) This "ownership" argument serves no legal purpose. The record fails to show any official sanction by the City Council. The record also fails to show the CPRI received any public funding[6].

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[6] The description of the drafting efforts in the Proposed Decision goes back many years before the November 2010 discussion in the final Decision. While the ALJ spent much of his Proposed Decision on history of pension reform, the discussion on the CPRI formulation is approximately two pages. (AR 10:157:002636-002639.) It centers on elected officials and private persons using a private law firm to prepare the CPRI. The entire narrative of claimed City support during the signature gathering effort is about three pages. (AR 10:157:002639-002641.) It centers on a press conference outside of City Hall; calendar

D. PERB Denied Proponents the Right to File Exceptions to The Proposed Decision

The City filed a Statement of Exceptions objecting to the Proposed Decision. (City's Opening Brief, pp. 17-18; AR 10:159:002685-724.) Proponents also applied to PERB to submit exceptions to the Proposed Decision. (AR 10:161:002731-10:162:002760.) On September 20, 2013, despite acknowledging that Proponents were "interested individuals," PERB denied Proponents' request to submit exceptions. (AR 10:178:002891-10:179:002897.) PERB instead relegated Proponents to the submittal of an "informational" brief. (*Id.*)

Proponents therefore filed a brief – which PERB diminishes in its Decision – stringently objecting to the impropriety of PERB's jurisdiction over a citizen sponsored initiative and objecting to the very procedures and Regulations PERB cites in its Motions to Dismiss, on the grounds that PERB improperly and unconstitutionally excluded these Proponents from participating in the administrative proceedings and defending Proposition B. (AR 11:180:002899-002927.)

E. The Decision

i. Focus on City Support

PERB issued the Decision at the center of this Appeal, and Proponents' Appeal in Case No. D069626, thirty-three plus months after the Proposed Decision, on December 29, 2015. (AR 11:186:002979-003103.)

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references of meetings with private parties outside of City Hall; and possible supportive efforts by the Mayor's staff outside of work hours. (*Id.*)

As discussed in the City's Opening Brief, PERB abandoned the "sham device" argument addressed in *San Diego Municipal Employees Assn. v. Superior Court*, *supra*, 206 Cal.App.4th at 1452, 1463, and relied upon by the ALJ in the Proposed Decision. (City's Opening Brief, pp. 10-11.) PERB's final Decision instead wove the Mayor's support of the CPRI into an agency theory — saying the Mayor was acting for the City as its agent — thereby attempting to improperly subject a citizens' initiative to the MMBA.

Despite the absence of City sponsorship, the Decision imputes the Mayor's support of Proposition B to the City Council; holding that the Mayor, although campaigning as a private citizen, was acting as an agent of the City Council. The Decision improperly finds that the Mayor became the "authorized agent" of the City Council while campaigning for the CPRI during the signature-gathering process and the election campaign. (AR 11:186:003039 (affirming ALJ's findings, including those at AR 10:156:002667, as summarized in the Decision at AR 11:186:002986.)

PERB based its conclusion on the ALJ's findings in the Proposed Decision "that the impetus for the pension reform measure originated within the offices of City government" and the ALJ's rejection of the evidence showing that the CPRI was a purely "private" citizens' initiative exempt from the MMBA's meet-and-confer requirements." (AR 11:186:002986.)

In PERB's view, a citizens' initiative lost its right to placement on the ballot because the alleged "impetus" came from City Hall. Nor was the CPRI a purely "private" citizens' initiative because, by PERB's reasoning, the Mayor, acting as the City's agent, refused to "meet and confer" on the terms of a citizens' initiative, with the "knowledge and acquiescence" of the City Council. (AR 11:186:002985.)

The Decision states the City support of the CPRI was "undeniable". In fact, a majority of the City Council opposed the CPRI. (AR 13:190:3342 line 13-13:190:3344 line 7; 13:190:3359 line 23-13:190:3360 line 15.) And PERB cites only to Exhibit 80, an e-mail by the San Diego Chamber of Commerce, a private organization, as support for the broad conclusion of City sponsorship. (AR 20:197:005135.) PERB ignores its own factual record which, reduced to its essence, shows:

- Proponents retained and paid money to a private law firm to draft Proposition B and Proponents' attorneys prepared the petition for circulation to put Proposition B on the ballot. (AR 15:192:003994, line 13-15:192:003995, line 11.)
- Proponents filed the Proposition B petition with the City Clerk. (AR 3:26:000681-000696; See, Elec. Code § 9032.)
- Proponents circulated the Proposition B petition for signatures and filed it with the City Clerk when it contained the requisite signatures requiring an election. (AR 3:26:000697-000699.)
- County Registrar of Voters certified that Proponents had submitted the requisite number of signatures to qualify the CPRI for the ballot. (AR 3:26:000697-000699.)
- The City Council did the only thing it could do under the law; it called an election. (AR 3:26:000734-000759.)
- The City Council, as the legislative body, never took any action on Proposition B; least of all a vote to approve its terms.
- The City Council took no action authorizing or approving the expenditure of public funds to support Proposition B.

- The Mayor and his staff, acting as private citizens, supported the passage of Proposition B. (AR 23:200:005886-005904; 23:200:005944-005956; 24:201:006109-006123.)
- Proponents' efforts were privately funded. (AR 21:198:005432-005456.)
- At no time did the City Council take action to authorize the Mayor to serve as the City's agent in support of Proposition B.
- Proponents spent their money to campaign in support of Proposition B, which won by a 65.8% majority vote. (AR 11:186:003100; AR 16:193:004058; 16:193:004096.)

ii. Denial of Proponents' Rights

The Decision very briefly refers to Proponents, the individuals responsible for the CPRI, attempting to minimize Proponents involvement in their own citizen sponsored initiative. (AR 11:186:003064-003069.)

In so doing, PERB perpetuates its apparent bias against Proponents shown throughout the administrative process by placing quotation marks or italics identifying the testimony of Proponents' and their supporters to denigrate their truthfulness. (*i.e.* AR 11:186:002981; 002985; 3004, 003005, 003006, 003029 ("*private citizen*"); 17:194:004241-004244, ("leave slips"); 11:186: 003011 ("*purely* citizen-sponsored initiative").) PERB continues to show its bias by filing Motions to Dismiss Proponents as Real Parties in Interest in this Matter, and Proponents' entire case in *Boling, et. al. v. PERB* (D069626).

III. STANDARD OF REVIEW

A. Jurisdiction; In Application

PERB has attempted to redefine the constitutional right of citizens to circulate initiatives in California. While admitting that it is not able to determine constitutional issues, it in fact concluded that a public employee collective bargaining group can require a local government to "meet and confer" on the terms of a local initiative measure while it is being circulated.[7]

To affirm PERB's Decision, this Court must disregard the law and create a new class of citizens' initiative subject to amendment through the MMBA bargaining process; unlike all other citizen-circulated measures that go to the ballot unchanged. (Cal. Const. Art. II, § 11; Elec. Code §§ 9214, 9255; *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 430.)

The only other way to uphold the Decision is to require that all labor-related citizen ballot measures must undergo a citizen "purity" test to see if they received assistance from public officials. There has never been an initiative category created that penalized proponents of a privately drafted, funded and circulated measure for political support they receive.

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[7] The Decision binds Proposition B and all future measures, citizen or council sponsored. It states: "Upon request, meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects." (AR 11:186:003040 (B)(1).) The language of the order does not define when or how the parties are to "meet and confer", during or after the signature gathering process. By its terms, it is not limited to council-sponsored measures. The order applies to the City, not just the City Council. (AR 11:186:003040.) This language goes beyond the Proposed Decision. (AR 10:157:002670-002671.)

This Court did not grant PERB legal authority over a citizens' measure. (*San Diego Municipal Employees Assn., supra,* 206 Cal.App.4th at 1452, 1463.) It found PERB has jurisdiction to determine whether the CPRI was a "sham" and city-sponsored. Considering the long history in California of allowing proponents to defend their measures, this Court would not have excluded Proponents if PERB had claimed jurisdiction over a citizens' measure. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1125-1126 ("*Perry*").)

This inquiry ends where it should have begun – with a critical analysis of the fundamental question of PERB's jurisdiction over this matter. The proper legal conclusion is inescapable – PERB had no jurisdiction to conduct the hearing, which it so badly mismanaged to the exclusion of Proponents.

B. Independent Judgment Review of the Factual Record

Assuming the Court continues its review despite the fact that the CPRI was a citizens' initiative, over which PERB had no jurisdiction, the Court needs to determine what scrutiny it gives the record below. Proponents' fundamental rights of speech, association and petition are at stake. At a minimum, this Court must exercise its independent judgment in reviewing the factual record because "'[the] abrogation of the right is too important to the [Proponents] to relegate it to exclusive administrative extinction.'" (*Strumsky v. San Diego County* (1974) 11 Cal.3d 28, 34; *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (2011) 202 Cal.App.4th 404, 414.) This Court cannot defer to PERB to adjudicate Proponents' fundamental constitutional rights.[8]

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[8] In addition to the fundamental vested rights at stake, PERB's handling of this matter demonstrates "that the probability of actual **bias** on the part of

C. *De Novo* Review of Legal Questions

As discussed below, and in the City's Opening Brief, a citizen-circulated initiative measure cannot lose its status as an exercise of the People's "reserved power" because of elected official political support. The record shows that the Mayor and only two of nine City Council members publically supported the CPRI. (AR 11:86:2993-2994; Gov't. Code § 3209.) Nothing in the record shows that the City submitted the measure; gathered signatures; funded the CPRI campaign with public funds; or that any elected officials were Proponents of the CPRI. (AR 11:186:3004-3005.) Putting "*private*" in quotes or italics to describe Proponents does not eliminate their rights to free speech. (AR 11:186:3004.)

The questions before this Court are legal ones, and the Court cannot defer to PERB on legal questions regarding elections and the application of MMBA to a citizens' initiative. (See, Gov't. Code § 3510(a).) Does PERB have authority to invalidate a citizen-sponsored initiative due to a City's failure to comply with MMBA? Does PERB have the authority to deny citizens their constitutional rights as electors? This Court owes "no deference to the administrative agency's view of the First Amendment." (*McDermott v. Ampersand Publishing, LLC* (9th Cir. 2010) 593 F.3d 950, 961; *see also Ampersand Publishing, LLC v. National*

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the judge or decision maker is too high to be constitutionally tolerable." (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App. 4th. 169, 187, *citing Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737; Emphasis added.)

Labor Relations Board (D.C. Cir. 2012) 702 F.3d 51, 55 ("We owe no deference to the Board's resolution of constitutional questions.[9]").

This Court must independently determine (*de novo*) whether PERB can legally invalidate a citizens' initiative. (*California Cannabis Coalition v. City of Upland* (2016) 245 Cal.App.4th 970, 989-991 (constitutional differences between citizen and city council initiated measures); *Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1559 (*de novo* review when the case involves resolution of questions of law).) The MMBA does not trump the citizens' right to propose ballot box legislation under the Election Code, City Charter and the California Constitution.

D. Strict Scrutiny Review of Restrictions on Petitioning, Speech and Associational Interests of Proponents

Fundamental rights of "pure speech" cannot take a back seat to the MMBA and PERB's rules. Proponents' "pure speech" rights are at stake. PERB's procedural rules claiming jurisdiction over a citizen measure do not prevent application of the "strict scrutiny" standard. Review of limitations to "core political speech" have been characterized as follows:

> When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is **narrowly tailored to serve an overriding state interest**. (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 347; *Emphasis added.*)

PERB's Decision broadly applies to all labor-related initiatives, citizen or legislative body generated. (AR 11:186:003040 Sub. (B)(1).) No

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[9] PERB frequently looks for guidance from decisions of the National Labor Relations Board (NLRB). This Court should note that, while the NLRB, like PERB, enjoys primary jurisdiction over labor disputes, subject only to narrow judicial review, constitutional issues require *de novo* review. (*McDermott, supra,* at 959.)

other category of citizen initiative faces the burdens faced by the CPRI solely based on the content of its message. PERB's Decision attempts to protect a statutory right of collective bargaining from interference by the free exercise of core political speech by initiative proponents. (Cal. Const. Art. II, § 1; Gov't. Code § 3505; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

PERB's rules keeping Proponents out of the administrative process; its decision invalidating the CPRI/Proposition B; and its ban on future citizen measures without pre-ballot collective bargaining all are subject to the "strict scrutiny" constitutional standard of review.

IV. ARGUMENT

A. MMBA Does Not Apply to a Citizens' Initiative

Application of the MMBA is limited to the "governing body," not to a voter-sponsored initiative (See, *Seal Beach,* 36 Cal.3d at 599 n. 8; Gov't. Code § 3505.) PERB created a hybrid category of initiative in order to enable application of the MMBA, improperly obtain jurisdiction over the CPRI and exclude Proponents from its inquiry; demonstrating a total disregard of judicial precedent and constitutional rights. (*Perry,* at 1142-1144.) Proponents join in the City's arguments that PERB's Decision violates the United States and California Constitutions on the basis that the MMBA Meet and Confer process is preempted. (City's Opening Brief pp. 21-50.)

B. The CPRI is Protected by the Constitution as a Citizens' Initiative

i. The CPRI is a Citizens' Initiative

PERB refuses to acknowledge that the CPRI is a citizens' initiative. Proponents were never a factor in PERB's Decision. They were treated as "non-parties" in all respects with no rights or protections.

PERB proceeds in that manner despite the reality that the CPRI was a citizen-sponsored and circulated initiative measure. As discussed herein, and in the City's Opening Brief (at pp. 39-40), it is apparent from the administrative record that all parties were aware that the CPRI was a circulated initiative from the beginning. (See AR 1:1:000002-237; 3:15:000579-89; 3:22:000608-13; 4:33:000934-41; and 11:186:002979-3103.)

The record is also clear that the legislative body of the City of San Diego never hired or retained the Proponents to circulate an initiative that had 115,991 valid signatures. (AR 3:26:00731.) For example, SDMEA's General Manager Michael Zucchet declared, under penalty of perjury, that the CPRI was circulated by Proponents. (AR 2:5:000252:1-4 (para. 4).)

The Supreme Court, in *Stanson v. Mott* found that "campaign" materials and activities may not be paid for by public funds. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 227.) There is no evidence that the City used any funds to sponsor the measure. Even if the City had, the proper remedy would be a gift of public funds action. (*See, Vargas v. City of Salinas* (2009) 46 Cal. 4th 1, 23-26.)

PERB created the hybrid category of initiative in order to enable application of the MMBA, and improperly obtain jurisdiction over the CPRI in violation of the holding in *Seal Beach*; demonstrating a total disregard of judicial precedent and Constitutional rights with which it is required to abide. (Gov't. Code § 3510(a).)

ii. A Citizens' Initiative is Protected Political Speech

The CPRI is a circulated citizens' initiative covering a proper subject of legislation. It involves "core political speech" that is an "interactive communication concerning political change." (*Meyer v. Grant* (1988) 486 U.S. 414, 421-422; see City's Opening Brief, pp. 30-35.) As discussed in the City's Opening Brief, First Amendment protection of speech for petitioning activities by initiative proponents is entitled to protection "'at its zenith'". (*Meyer v. Grant, supra,* at 425; see, City's Opening Brief at pp. 22-34.) Restrictions on the right to circulate must be justified under the most exacting standards of strict scrutiny. (*McIntyre, supra,* at 347, 357.)

Neither Proponents, nor the Mayor, can lose their constitutional rights and PERB cannot lawfully take them away. If the Court upholds the Decision, this will be the first case in California that penalizes citizen-petitioning activity because of so-called governmental conduct.

iii. The CPRI Is the Proper Subject of a Citizen's Initiative

San Diego is a Charter City. Charter Cities have the right to control the compensation of their employees. (Cal. Const. Art. XI § 5; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 289; *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 314-315.) The California Constitution grants plenary authority to charter cities to allow them to amend their charter without alteration to regulate compensation, which includes pension benefits. (Cal. Const. Art. XI, § 5(b); *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 629.) When a charter city's enactment falls within one of these core areas governed by Article XI, § 5(b), including compensation, it supersedes any conflicting state statute.

(*Cobb v. O'Connell* (2005) 134 Cal.App.4th 91, 96; *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 335.)

Citizens have the right to propose legislation, even affecting local city salaries. (*Spencer v. Alhambra* (1941) 44 Cal.App.2d 75, 77-79.) In fact, local initiative power may be broader than the initiative power reserved in the Constitution. (*Rossi v. Brown* ("*Rossi*") (1976) 9 Cal.4th 688, 696-697.) Citing approvingly of *Spencer, Rossi* opined that the limitations on state initiative power may be narrower than local initiative authority. (*Id.*) Local legislative initiative authority covers "every municipal subject unless expressly or by clear and necessary implication" excluded. (*Rossi, supra,* at 697, *citing Spencer, supra,* at 78-79.) There are no express or implied limits on this authority. (Cal. Const. Art. XI, § 5(b).)

iv. PERB's Decision is an Attempt to Regulate Initiatives Based on Content

Initiative petition cases usually concern "content neutral" procedures intended to address the integrity of the election process. For instance, in *McIntyre,* nametag requirements for signature gathers are invalidated. *(McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334.) In *Meyer*, a prohibition on payment of signature gatherers was struck down. (*Meyer v. Grant* (1988) 486 U.S. 414) In *Buckley,* restrictions on the residency of signature gatherers and other procedural impediments were struck down. (*Buckley v. Am. Constitutional Law Found.* (1999) 525 U.S. 182.)

The Decision impermissibly applies pre-election restrictions only to subject matter that regulates local government labor issues. All other initiative and charter measures would go directly to the ballot. (Cal. Const. Art. II, § 11 & Art. XI, § 3(a); Elec. Code §§ 9214, 9255; *Save*

Stanislaus Area Farm Economy v. *Board of Supervisors* (1993) 13 Cal. App. 4th 142, 148-149.)

PERB contradicts the very reason why Governor Hiram Johnson proposed initiative, referendum and recall in the first place. (*Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 690.) To promote equality, the local initiative process was set up to be uniform:

> We are thus led to the conclusion that when the framers of this amendment ("local initiative process") provided... **that the method and procedure for submission in each case should be substantially the same.** (*Id.; emphasis added.*)

The framers did not intend variation based on differing initiative subject matter. To do so would allow overt content discrimination. The answer, of course, is made amply clear in these papers. The MMBA simply does not apply to a citizen-sponsored initiative. *(Seal Beach, supra,* 36 Cal.3d at 599 n.8.) PERB has no jurisdiction to determine the validity, or invalidity, of a citizen initiative.

C. PERB's Hearing Process and Decision Violate the Proponents' Rights of Association

The freedom to associate with others "for the advancement of beliefs" is protected by the Due Process Clause of the Fourteenth Amendment in the same manner as freedom of speech. (*NAACP v. Alabama ex rel. Patterson* (1958) 357 U.S. 449, 460.) The freedom to associate includes the protection of political speech. (*Citizens Against Rent Control v. City of Berkeley* (1982) 454 U.S. 290.) State action is subject to the closest scrutiny. The state must show a compelling interest in the regulation of the associational interests.

Granting PERB the power to inquire into the personal politics of individuals, establish rules that prospectively bar petitioning rights, and

interfere with the rights to freely associate with others to bring about political change, crosses into censorship to protect collective bargaining. (*See, generally, In re Application of Campbell* (1923) 64 Cal.App. 300.) Protection of the right to change laws without content-based impediments does not take a back seat to a statutory measure designed to protect a small class of persons. (*Smith v. Arkansas State Hwy. Employees Local* (1979) 441 U.S. 463, 464; *see also Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 177-182.) Collective bargaining is not a constitutional right, but a subject for state law.

PERB must show a compelling governmental interest in its ban on endorsements and support by elected officials to regulate Proponents' petitioning conduct. (*Eu v. San Francisco County Democratic Cent. Comm.* (1989) 489 U.S. 214, 222-229.) Just as preventing endorsements in political primaries was a violation of associational rights of political parties, so are bans on association with elected officials in the citizen initiative process if the subject matter of the measure is government employee benefits. (*Id.*) The record fails to show that the CPRI received anything more than political support from the elected officials. No City funds went into the campaign.

PERB's "agency" theory prevents Proponents from associating with elected officials in their petitioning activities under CPRI and in the future. The process and Decision, including its prospective effect, chills associational rights based on the popularity of political views with public sector labor unions.

D. Proponents' California "Reserved" Constitutional Rights Entitle Them to Full Participatory Rights in the PERB Action and in this Appeal

This Court's March 9, 2016 Order provides that the parties' briefs may address the issues of standing raised in PERB's Motion to Dismiss.

Proponents joined in the City's Opposition to PERB's Motion to Dismiss, on the basis that they have standing in this action as Real Parties in Interest. Proponents have been excluded from an administrative process that wrongfully invalidated the CPRI, and such exclusion cannot lawfully continue. Proponents join in the City's Opposition to PERB's Motion to Dismiss.

i. PERB Unconstitutionally Excluded Proponents from the Administrative Proceedings

PERB denied Proponents any role in the active adversarial process, the only exception being through the City calling one of Proponents' attorneys as a witness. (AR 15:192:003394-004007.) This was the only chance for Proponents to present their side of the story at the administrative hearing. Then after issuance of the Proposed Decision, PERB limited Proponents' role to filing an "informational" brief, despite acknowledging that Proponents were "interested individuals" in the proceeding. (AR 10:179:002895-2897.)

PERB's Motion to Dismiss asserts that the PERB Regulations "would not have permitted Proponents to participate as a party in the administrative proceedings" because "PERB's regulatory scheme delineates clearly between the rights of parties and the more limited rights of non-parties in PERB proceedings." (PERB's Motion to Dismiss, p. 17.) To the extent that Proponents were not permitted to participate, the very Regulations cited in PERB's Motion, Cal. Code Reg. §§ 32210, 32410, 32602, 32603 and 33210, set forth a legislative scheme that is facially unconstitutional to bar Proponents from defending the CPRI. PERB claims its rules make Proponents a "non-party" in an administrative proceeding that determines whether Proponents were initiative

sponsors[10]. By PERB's own admission, its rules were not designed to regulate a citizens' initiative.

Being an administrative body does not relieve PERB of its obligation to follow the Constitution. To the extent PERB's regulations barred, or limited, Proponents' involvement, PERB violates the "reserved right of the people" to propose and defend initiative measures. "[T]he official proponents of an initiative measure are recognized as having a distinct role – involving both authority and responsibilities that differ from other supporters of the measure...." (*Perry, supra,* at 1142.) As the Supreme Court has stated, the cases are "legion" that hold the right of an initiative proponent to defend their work product. (*Id.* at 1143-1144.)

Proponents have an interest in the initiatives they circulate. (*Id.* at 1147.) PERB violated Proponents' due process rights by denying them the right to defend their initiative in the administrative proceeding. (*See Today's Fresh Start, Inc. v. Los Angeles County Board of Education* (2013) 57 Cal.4th 197, 213, citations omitted.) PERB's Decision casts

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[10] PERB Hearing rules do not provide access for Initiative Proponents and, to the extent they do, require the disclosure of protected speech and chill public discussion of issues. PERB Rule No. 32165 (8 CCR § 32165). "Application to Join a Representation Hearing as a Limited Party. In a representation proceeding the Board agent may allow any person, employer, or employee organization which did not file a timely request for recognition, intervention or petition to join the hearing as a limited party provided: (a) The person, employer, or employee organization files a written application prior to the commencement of the hearing stating facts showing that it has an interest in the proceedings; and (b) The Board agent determines that the person, employee organization or employer has an interest in the case and will not unduly impede the proceeding." PERB refused to grant this status to Proponents. Furthermore, the administrative hearing focused on communication between Proponents and their political allies. (AR 13:190:003306-003498.) For example, Mayor Sanders was asked about private fundraising discussions with the President of the Lincoln Club of San Diego County. (AR 13:190:003325, line 17-003327, line 23.)

aside the Proponents' successful efforts at direct democracy as secondary to the rules of PERB.

California Courts have routinely allowed initiative proponents to intervene with "party" status in any challenge to their measure "in order 'to guard the people's right to exercise initiative power'". (*Perry, supra,* at 1125-1126, quoting *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822.) Allowing proponents to defend the initiative measure:

> (1) assures voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf, and (2) ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense. (*Perry*, at 1125-1126.)

To the extent they were not permitted to defend the CPRI, Proponents add to their facial challenge and make an "as applied" constitutional challenge to PERB's regulations and statutes which make Proponents' defense of their initiative impossible. An "as applied" challenge "involves an otherwise facially valid measure that has been applied in a constitutionally impermissible manner." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 21, 277 (dis. opn. of Cantil-Sakauye, C.J.); *Stuard v. Stuard* (2016) 244 Cal.App.4th 768, 781.) This type of challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those

particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

The risk of erroneous deprivation of constitutional rights could not be higher. As a consequence of their exclusion, Proponents had no right to cross-examine witnesses, introduce evidence or object to inquiries into their political affiliations. The government interest was to protect a state statutory right (collective bargaining). However, in protecting that right, PERB excluded Proponents, whose constitutional right to petition the government was at the center of the administrative inquiry. PERB's conduct, and regulations, have violated basic principles of due process in this case. PERB nonetheless continues to rely on these unconstitutional prohibitions in its regulatory scheme in its efforts to exclude Proponents from these appellate proceedings.

ii. The City Properly Named Proponents as Real Parties in this Action

PERB's Motion entirely disregards' its own description of Proponents as "interested individuals". (AR 10:178:002891-10:179:002897.) Instead PERB mischaracterizes the nature of Proponents' briefing in the administrative proceedings as akin to an amicus brief in the Appellate Court, based on a misapplication of the holding of *Santa Clarita Community College District* (*College of the Canyons*) (2003) PERB Decision No. 1506, p.3, fn. 3[11].

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[11] Decision No. 1506 does not support PERB's contention. In that action, the third party affirmatively petitioned PERB "for permission to submit an amicus letter," unlike these Proponents who applied to PERB to submit exceptions to the Proposed Decision. (AR 10:161:002731-10:162:002760.)

Code of Civil Procedure § 367, applicable to civil actions, provides that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." A "real party in interest" is defined as "any person or entity whose interest will be directly affected by the proceeding. (citations omitted)" (*Redevelopment Agency v. California Comm'n on State Mandates* (1996) 43 Cal.App.4th 1188, 1197; *Sonoma County Nuclear Free Zone v. Superior Court* (1987) 189 Cal.App.3d 167, 173; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178) The real parties' interest in an action can be legal as well as equitable. (*Dietzel v. Anger* (1937) 8 Cal.2d 373, 376.)

The California Supreme Court held that "official proponents of initiative measures in California have uniformly been permitted to participate as parties — either as interveners **or as real parties in interest.**" (*Perry, supra,* at 1125; Emphasis added.)

> Such participation has routinely been permitted (1) without any inquiry into or showing that the proponents' own property, liberty, or other personal legally protected interests would be specially affected by invalidation of the measure, and (2) whether or not the government officials who ordinarily defend a challenged enactment were also defending the measure in the proceeding. (*Id.* at 1125.)

Perry cites at least twelve Supreme Court decisions supporting the concept that proponents are real parties in interest in any action challenging the validity of the initiative they sponsored. (*Id.* at 1127-1128; i.e., *Strauss v. Horton* (2009) 46 Cal.4th 364, 399.)

Proponents have a "direct interest in the result" of this action and fall squarely within the definition of Real Party in Interest. (*Connerly*, *supra*, at 1178.) Proponents cannot simply be relegated to a role as amici curiae as argued by PERB. Proponents must be able to participate in this Action and

defend their initiative[12]. (*Perry, supra,* at 1116, 1127; see also *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250 ["the organization that drafted Proposition 103 and campaigned for its passage" was granted intervention to assist in the defense of an initiative measure against conflicting legislation, despite the Governor, Attorney General, Insurance Commissioner and State Board of Equalization being named as defendants]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 [intervention granted to groups supporting initiative]; *People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 665, 662 [groups that possess specific interests that would be "directly affected in a substantial way by the outcome of the litigation" have a right to intervene.].)

In the *Perry* decision, the Court cautioned that even where government entities are defending an initiative's validity in an action "**it may well be an abuse of discretion for a court to fail to permit the official proponents of an initiative"** to be included in the proceeding. (*Perry, supra.* at 1126; Emphasis added.)

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[12] Proponents need not show they are "beneficially interested" parties in order to be named as Real Parties in Interest. (Motion to Dismiss, pp. 20-21.) The "beneficial interest" standard applies to parties filing a Writ. (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal. 4th 352, 362.) Although *Associated Builders and Contractors, Inc.* is factually distinguishable from the present action, Proponents fit *Associated Builders'* definition of "beneficial interest" because Proponents have "a special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Id.* at 362.) Proponents' injury is actual, not "conjectural or hypothetical" as PERB asserts. (*Id.*, citations omitted.) PERB's reliance on *Hollingsworth v. Perry* (2013) 133 S. Ct. 2652, 2664, for the proposition that Proponents cannot demonstrate their actual injury is misplaced, as *Hollingsworth* does not address standing of Real Parties in Interest and does not apply California law.

Proponents are properly named as Real Parties in Interest, and were wrongfully excluded from the PERB action. If PERB is allowed to dismiss these Proponents, it will succeed in nullifying Proponents' exercise of their constitutional initiative right and First Amendment rights, and violate Proponents' rights as Real Parties in Interest.

V. CONCLUSION

Proponents join in the City's request that this Court set aside and vacate PERB's Decision. The Decision ignores the facts and misapplies the law. The CPRI/Proposition B is a citizens' initiative to which the MMBA, and PERB's jurisdiction, do not apply. To gain jurisdiction where none exists, PERB has trampled Proponents' constitutional rights by contriving a legal and factual fallacy that the CPRI/Proposition B is a hybrid initiative. The Decision cannot stand.

Date: June 10, 2016

LOUNSBERY FERGUSON
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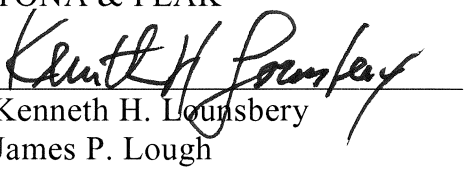
By: 

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this Brief of Real Parties in Interest, Catherine A. Boling, T.J. Zane and Stephen B. Williams, in Support of City of San Diego's Writ of Extraordinary Relief is proportionally spaced, has a typeface of 13 points or more, and contains 7,084 words, excluding the cover, the Tables, the signature block and this certificate, which is less than permitted by the Rules of Court. Counsel relied on the word count feature of the word processing program used to prepare this brief.

DATED: 6/10/16

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Case No. D069630

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

CITY OF SAN DIEGO
Petitioners,

v.

CALIFORNIA 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 AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145 IAFF; 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.

PROOF OF SERVICE

I, Kathleen Day, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and am not a party to the above-referenced action. My business address is 960 Canterbury Place, Ste. 300, Escondido, California 92025. On **June 13, 2016,** I caused the following documents:

BRIEF OF REAL PARTIES IN INTEREST, CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

to be served to the following parties listed below, in the manner indicated:

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[X] **(BY EMAIL)** Pursuant to California Rules of Court, Rule 8.71 and Court of Appeals, Fourth District Rule 5(g). I sent the documents via email addressed to the e-mail address listed above and in accordance with the Code of Civil Procedure and the California Rules of Court. I am readily familiar with the firm's practice of preparing and serving documents by e-mail, which practice is that when documents are to be served by e-mail, they are scanned in a .pdf format and sent to the addresses on that same day and in the ordinary course of business.

[X] **(BY MAIL)** I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail for collection and mailing at Lounsbery Ferguson Altona & Peak LLP, Escondido, California, following ordinary business practices. I am familiar with the practice of Lounsbery Ferguson Altona & Peak LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

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

Executed on **June 13, 2016** at Escondido, California.

Kathleen Day