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Case No. _____

IN THE SUPREME COURT FOR
THE STATE OF CALIFORNIA

CATHERINE A. BOLING, T.J. ZANE and
STEPHEN B. WILLIAMS
Petitioners

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent

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

PETITION FOR REVIEW

OF THE ORDER REJECTING PETITIONERS' MOTION FOR ATTORNEYS' FEES
of the
Court of Appeal, Fourth Appellate District, Division One,
Case No. D069626 Consolidated With
Case No. D069630

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioners, Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents/Petitioners") respectfully submit this Petition for Review seeking a disposition by this Court, pursuant to California Rules of Court, Rule 8.528(a) granting Petitioners' Motion for Attorneys' Fees, pursuant to Code of Civil Procedure section 1021.5, or in the alternative a disposition ordering remand or transfer to the Court of Appeal, pursuant to Rules 8.500(b)(4), 8.528(c) or 8.528(d) to hear, and/or grant, Petitioners' Motion for Attorneys' Fees, against Respondent California Public Employment Relations Board ("PERB") and Real Parties in Interest San Diego Municipal Employees Association ("SDMEA"), Deputy City Attorneys Association ("DCAA"), American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 ("AFSCME"), and San Diego City Firefighters Local 145 ("Local 145") (collectively "Charging Parties").

This Petition for Review, filed pursuant to California Rules of Court, Rule 8.500(b)(2) and (b)(4), follows the Court of Appeal's May 12, 2017 decision to reject Petitioners' Motion for Attorneys' Fees, submitted to the Court of Appeal on May 10, 2017, on the basis of no longer having jurisdiction. A true and correct copy of the May 12, 2017 letter from the Court of Appeal is attached hereto as Exhibit A, in accordance with California Rules of Court, Rule 8.504(b)(5) and (e)(1)(A).

Petitioners timely submitted their Motion for Attorneys' Fees, and supporting documents, on May 10, 2017[1], less than thirty-days after the April 11, 2017 decision of the Court of Appeal, Fourth Appellate District, Division One, was published in Case No. D069626 (consolidated with D069630), hereinafter referred to as *Boling v. Public Employment Relations Bd.* (2017) 10 Cal.App.5th 853 ("Opinion"). The Court of Appeal confirmed receipt of the Motion on May 10, 2017, and should have accepted the Motion as filed on that date. (Cal. Rules of Court, Rules 8.25(b)(1) and 8.77(a).)

Petitioners do not challenge the Opinion, in which the Court of Appeal decided in favor of Petitioners and the City of San Diego. Petitioners challenge the Court's May 12, 2017 decision to reject Petitioners' timely Motion for Attorneys' Fees, and supporting papers, submitted on May 10, 2017, for reason of no longer having jurisdiction, at a time when the Opinion was not yet final under California Rules of Court, Rules 8.499(c)(2) and 8.264(b)(1). (See, Exhibit A: Court of Appeal, Fourth Appellate District, Division One Letter, dated May 12, 2017 – Rejection due to Court no longer having jurisdiction, attached hereto.)

The Court of Appeal was the only forum available to Petitioners to bring a Motion for Attorneys' Fees because Petitioners' Writ to the Court of Appeal challenged a PERB decision, so no trial court is involved in this

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[1] True and correct copies of the Truefiling e-mail confirmations, dated May 10, 2017, showing that the Motion for Attorneys' Fees, and accompanying papers, were received by the Court on May 10, 2017, before the April 11, 2017 Opinion became final, are attached hereto as Exhibit B, pursuant to California Rules of Court, Rule 8.504(e)(1)(B). (See, Declaration of Kathleen Day in Support of Application for Leave to File Oversized Exhibits to Petition for Review.)

action. (*Boling, supra.*) Code of Civil Procedure section 1021.5 requires that a "private attorney general" make its request to a "court". (Code Civ. Proc. § 1021.5.) The Court of Appeal's rejection of Petitioners' Motion without consideration, for the sole reason of having no jurisdiction, deprives Petitioners of that only forum they had available to bring the Motion.

Petitioners seek attorneys' fees for opposing a series of related actions in which PERB and the Charging Parties sought to keep Proponents' Charter Proposition B off the June 2012 ballot and ultimately invalidate its adoption in contravention of Proponents' reserved rights guaranteed by the California Constitution. At each stage of the multiple proceedings culminating in this Court's judgment vindicating the right of the citizens to propose legislation, PERB and the Charging Parties have failed and refused to recognize the constitutional, statutory and Charter rights of Proponents and the people. Proponents have conferred a significant benefit, both pecuniary and nonpecuniary, on the citizens of the City of San Diego and the State of California by defending the public's right to vote and to control public employee compensation. The necessity and financial burden of private enforcement placed on Proponents, as the representatives of the electorate, are such as to make the award appropriate. The interests of justice require that the fees be borne by the governmental entity, PERB, and those Charging Parties who made false claims of a "sham" initiative while providing no evidence of a sham or any legal connection between Proponents and the City Council of the City of San Diego.

Specifically, Petitioners successfully provided the following substantial benefits to the citizens and voters of San Diego and the State of California:

1) Affirmation that a state administrative body cannot take away the right of Proponents of a citizen-circulated measure to defend their measure in the judicial system.
2) Affirmation that the reserved power of the People to propose legislation cannot be limited by an administrative body in contravention of constitutional rights.
3) Affirmation that an administrative body cannot delay placement of a citizen-circulated measure on the ballot while procedural steps only applicable to a "governing body" are exhausted.
4) Affirmation that an administrative body cannot create an "agency" relationship between elected officials who politically support a citizen-circulated ballot measure and the proponents of the measure.
5) Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego defended the ballot placement and enforced a validly adopted Charter measure with vigor.
6) Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego allowed the election to not be delayed and, upon approval, fully implemented a validly adopted Charter measure instead of settling the matter through compromise with PERB and/or the Charging Parties.

I. TIMELINESS.

This Petition is timely pursuant to California Rules of Court, Rule 8.500 (a)(1) and (e)(1), because it was submitted within 10 days of May 11, 2017, the date on which the Court's April 11, 2017 opinion became final (California Rules of Court, Rules 8.499(c)(2) and 8.264(b)(1)), and within 10 days of the Court's May 12, 2017 rejection of Proponents/Petitioners' Motion for Attorneys' Fees.

II. ISSUES PRESENTED.

1. Did the Court of Appeal err in failing to accept Petitioners' Motion for Attorneys' Fees which was submitted a day before the Opinion became final?

2. Are Petitioners prevailing parties entitled to attorneys' fees under common law or Code of Civil Procedure section 1021.5?

III. NECESSITY FOR REVIEW.

Petitioners bring this Petition for Review pursuant to California Rules of Court, Rule 8.500(b)(2), on the grounds that the Court of Appeal wrongfully asserted lack of jurisdiction as the basis for rejecting Proponents' timely submitted Motion for Attorneys' Fees. Petitioners further bring this Petition pursuant to Rule 8.500(b)(4), for the purposes of transferring and/or remanding the matter to the Appellate Court for hearing. (Cal. Rules of Court, Rule 8.500(b)(2) and (4); 8.528(a), (c), (d).)

This case presents grounds for review by this Court because Petitioners, as a successful party in this matter who enforced an important right affecting the public interest and conferred a significant benefit on the general public, properly and timely submitted their Motion for Attorneys' Fees with the Court of Appeal, on May 10, 2017, before the Opinion became final. However, due to clerical error, the Court of Appeals did not process the Motion until May 12, 2017, after its jurisdiction expired. (See, Exhibit A.) Once the Court of Appeal's Opinion became final, it no longer had jurisdiction to hear the timely Motion. (Cal. Rules of Court, Rules 8.499(c)(2) and 8.264(b)(1).)

The Motion was brought before the Court of Appeal based on the unavailability of any other forum for Proponents to make this "private attorney general" request to a "court" as required by Code of Civil Procedure

section 1021.5. This matter is a case of first impression in that there was no Trial Court to remand this matter for final disposition. Code of Civil Procedure section 1021.5 requires that a "court" hear an attorney' fee motion. Since this case falls under Government Code section 3509.5(b), it was remanded directly back to an administrative body, PERB, rather than a Trial Court. (*Boling, supra,* at 95.)

IV. REQUESTED DISPOSITION

Petitioners request one of three potential remedies, as provided under the California Rules of Court. First, this Court can accept review of this request and issue a Normal Disposition determining whether Petitioners' Motion for Attorneys' Fees should be granted because Petitioners were a prevailing party on an election issue that was the subject of multiple proceedings over the last five years. (Cal. Rules of Court, Rule 8.528(a).) Second, in the event the Court disposes of a portion of the issues presented in this Petition, Petitioners request that the Court remand this matter back to the Court of Appeal to hear any remaining issues. (Cal. Rules of Court Rules 8.500(b)(4) and 8.528(c).) Third, this Court could transfer the matter to the Court of Appeal, with directions, for resolution of Petitioners' Motion for Attorneys' Fees, submitted on May 10, 2017. (Cal. Rules of Court, Rules 8.500(b)(4) and 8.528(d); Exhibit C: Petitioners' Motion for Attorney's Fees and Memorandum of Points and Authorities in Support thereof; Exhibit D: Declaration of Kenneth H. Lounsbery in Support of Petitioners' Motion Exhibit E: Declaration of James P. Lough in Support of Petitioners Motion for Attorneys' Fees; and Exhibit F: Petitioners Motion for Judicial Notice; Memorandum of Points and Authorities; Declaration of Yana L. Ridge; and [Proposed] Order in Support of Petitioners' Motion for Attorneys' Fees .)

V. ARGUMENT

A. ISSUE 1: DID THE COURT OF APPEAL ERR IN FAILING TO ACCEPT PETITIONERS' MOTION FOR ATTORNEYS' FEES WHICH WAS SUBMITTED A DAY BEFORE THE OPINION BECAME FINAL?

1) THIS COURT HAS THE POWER TO REVIEW ANY ORDER ISSUED BY THE COURT OF APPEAL.

This Court's "review" power is broad. It is the power to review in the Court's discretion **any** decision or order rendered by the Court of Appeal. (See, Cal. Const., art. VI, § 12(b); Cal. Rules of Court, Rule 8.500 [emphasis added].) This Court's power of review extends to any or all issues in the case, whether or not raised in the court below, if this Court deems it appropriate. (*Cedars-Sinai v. Sup. Ct.* (1998) 18 Cal.4th 1, 5-7 n.2.) This Court should extend its review power to the Court of Appeal's rejection of Petitioners' timely Motion for Attorneys' Fees due to the Court's lack of jurisdiction because it is appropriate for this Court to review the rejection and/or the Motion in light of unavailability of any other forum in which Petitioners can seek redress.

The Court of Appeal's error of failing to process Petitioners' Motion substantially affects Petitioners' rights by depriving Petitioners of an opportunity to be heard on their Motion. Without review by this Court, Petitioners will bear the disproportionate financial burden of protecting the rights of the voters of San Diego in a case ridden with unreasonable and harassing litigation tactics by PERB and the unions. Petitioners' Motion for Attorneys' Fees in an election case is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time. (See, *Cedars-Sinai, supra.*)

2) THE MOTION FOR ATTORNEYS' FEES WAS TIMELY.

Petitioners received written confirmation of receipt by the Court on May 10, 2017. (See, Exhibit B hereto.) In addition, the staff at the

Court of Appeal acknowledged that the Motion was timely received on May 10, 2017, and that as a result of clerical error, the Court failed to consider it before it lost jurisdiction at 5:00 pm on May 11, 2017[2]. This Petition for Review is Proponents' only remaining remedy.

Petitioners filed the underlying Writ of Review in the Court of Appeal, seeking review of a Public Employment Relations Board decision, pursuant to Chapter 8 of the California Rules of Court, "Miscellaneous Writs" and more specifically Rule 8.498. Thus, pursuant to California Rules of Court, Rule 8.499(c)(2) the Opinion in that writ proceeding "is final in that court 30 days after the decision is filed." (Cal. Rules of Court, Rules 8.499(c)(2) and 8.264(b)(1).)

The Court of Appeal filed and published the Opinion on April 11, 2017. (See, *Boling, supra.*) Thus, the Opinion became final 30 days later, at close of business on May 11, 2017.

Proponents submitted the Motion for Attorneys' Fees, and supporting papers, on May 10, 2017 before the Opinion was final, and while the Court had jurisdiction to hear the matter. (See, Exhibit B hereto- May 10, 2017 Truefiling email notices: Fourth District Court of Appeal, First Division – Document Received – Case No. D069626.)

Upon receiving the Motion, on May 10, 2017, the Court of Appeal confirmed receipt and provided no indication that the Motion submittal was defective. (See, Exhibit B hereto.) The Court of Appeal was therefore required to accept the Motion as filed on that date. (Cal. Rules

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[2] On May 15, 2017, Counsel for Petitioners spoke with the Court of Appeal Deputy Clerk, and the Clerk informed Counsel that the Motion "fell through the cracks and was not brought to the clerk's attention until Friday morning on May 12" and that the appropriate remedy is a Petition for Review. (See, Declaration of Yana Ridge in support of Application for Leave To File Oversized Exhibits To Petition For Review.)

of Court, Rule 8.25(b)(1)["A document is deemed filed on the date the clerk receives it."]; see also Rule 8.77(a).) The Appellate Court's failure to timely accept the Motion on May 10, 2017, and its subsequent delay, resulted in the improper rejection of the Motion on May 12, 2017. The Court's delay also extinguished any opportunity for Petitioners to apply to have the Motion deemed timely filed (see, Cal. Rules of Court, Rule 8.77(d)), as the Appellate Court no longer had jurisdiction. Court of Appeal staff subsequently confirmed that a Petition for Review was the only available remedy.

The Motion was timely submitted, and would have been considered but for clerical error on the part of the Appellate Court. *Proponents must not be penalized by such error.* Their constitutional rights need to be restored by this Court.

3) THE MOTION WAS PROPERLY BEFORE THE COURT OF APPEAL.

Normally, a motion for attorney's fees to a prevailing party is decided by a trial court on remand. (See Cal. Rules of Court, Rule 3.1702.) Here, the procedural posture of this case is such that there was no trial court proceeding. The Charging Parties initiated an unfair practice charge with PERB after Petitioners, the proponents of Proposition B, submitted Proposition B with the sufficient number of signatures to the City and before the voters of San Diego approved Proposition B on June 5, 2012. PERB held an administrative hearing, at which Proponents were excluded, and ultimately issued its decision. Petitioners, and the City, then petitioned to the Court of Appeal for Writ of Extraordinary Relief from PERB's decision. The Court heard the oral arguments on March 17, 2017 and issued its decision on April 11, 2017. (*Boling, supra.*)

Code of Civil Procedure section 1021.5 provides that upon motion a court may award attorneys' fees. The Court of Appeal and this Court are the

only courts that can hear this Motion. While the Court of Appeal remanded the case to PERB to nullify its orders, this Motion cannot be heard by PERB for several reasons. First, PERB is not a court and has no jurisdiction over the Motion. Second, PERB has no expertise in motions for attorneys' fees under Code of Civil Procedure section 1021.5. Third, at every stage of administrative and writ proceedings, PERB sought to exclude Petitioners claiming Petitioners had no standing.

Further, despite the Court of Appeal's directive that each party shall bear its own costs of this proceeding, this Motion for Attorneys' Fees was properly before the Court of Appeal because attorneys' fees are treated as separate from and not included in costs. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923; see also Cal. Rules of Court, Rule 8.278(d)(2).)

B. ISSUE 2: ARE PETITIONERS PREVAILING PARTIES ENTITLED TO ATTORNEYS' FEES UNDER COMMON LAW OR CODE OF CIVIL PROCEDURE SEC. 1021.5?

Code of Civil Procedure section 1021.5 provides in pertinent part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:
>
> (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,
>
> (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and
>
> (c) such fees should not in the interest of justice be paid out of the recovery, if any.
>
> With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed

> therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor . . . .

This section is also known as "private attorney general doctrine," the purpose of which is to encourage private enforcement of important rights affecting the public interest. (*Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal.3d 917, 933-42.) Attorneys' fees should be awarded if the statutory criteria of section 1021.5 are met, unless the award would be unjust. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 623-33 and n.17.)

1) PETITIONERS ARE SUCCESSFUL PARTIES IN THIS ACTION.

Petitioners are successful parties in this action because they were a catalyst in the Court's award, successfully defending the citizens' right of initiative in their writ action, and because the Court of Appeal ruled that Petitioners had a real party status in the City's writ action, which was successful.

First, Petitioners' writ action was successful because as proponents, Petitioners successfully defended the right of the people to legislate directly without procedural hurdles when the Court ruled that the City was not obligated to meet and confer prior to placing Proposition B, a citizen's initiative, on the ballot. Petitioners' writ action was successful with respect to this key dispositive argument, which entitles Petitioners to attorney's fees in their writ proceeding.

Second, Petitioners are also entitled to attorney's fees as real parties in interest in the City's successful writ proceeding. A real party in interest in a mandamus proceeding is properly considered a party to the litigation. (*Mejia v. Los Angeles* (2007) 156 Cal.App.4th 151, 160.) As a real party in interest, Petitioners are entitled to attorneys' fees under Section 1021.5

because the City prevailed in its action. (See *Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614.)

2) PETITIONERS' VICTORY ENFORCED AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST AND CONFERRED SIGNIFICANT BENEFITS ON THE PUBLIC.

Under Code of Civil Procedure section 1021.5, Petitioners may recover attorneys' fees because they enforced an important right of the public – the right to legislate by initiative without procedural hurdles such as the meet and confer requirement, and conferred a significant benefit on the public – judicial affirmation that the reserved power of the People to propose legislation cannot be limited by an administrative body in contravention of constitutional rights. (See *Wal-Mart, supra*; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311; *Rich v. Benicia* (1979) 98 Cal.App.3d 428.) The published appellate decision in this case provides strong evidence that this case vindicated an important public right. (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 12.)

Courts have repeatedly held that the state constitutional right of initiative is "one of the most precious rights of our democratic process," reserved to the people, and which the courts have a duty to "jealously guard." (*Walmart, supra.*) Just like the constitutional right to a referendum vote, the right of initiative is an important right under section 1021.5, vindication of which entitles Petitioners to an award of attorneys' fees. (See *Id.*; see also *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499; *Adoption of Joshua S.* (2008) 42 Cal.4th 945, 957 n.4 ["[E]lection law litigation inherently implicates public rights."].)

In this case, Petitioners' successful defense of this action and the people's right of initiative prevented the City of San Diego from settling or negotiating with the Charging Parties, delaying the defense of Proposition B,

or defending the measure less than vigorously. This case is of benefit to all citizens of California because it preserved the citizens' right to defend their initiative even if the State uses the administrative process to review their measure. Petitioners' active defense of Proposition B conferred numerous benefits upon the citizens and voters of San Diego and the residents of cities and counties statewide. The benefits that flowed specifically from the Petitioners' instrumental participation in this action include, but are not limited to:

1) The terms of a citizen's initiative measure, amending a City's pension fund obligations, are not subject to the meet and confer process of the MMBA.
2) An administrative agency, such as PERB, cannot impose limitations on, or in any way interfere with, the opportunity of citizens to exercise their Constitutional right to enact legislation through the initiative process.
3) An administrative agency, such as PERB, cannot delay the placement on the ballot of a citizen's initiative measure.
4) An elected official has the right to exercise his/her First amendment freedoms, in the course of an election, without his/her actions being imputed, based upon an agency theory, to the public agency which he/she serves.
5) A public agency's decisions cannot be inferred, either by imputation or supposed acquiescence by silence, as a result of the political activities of one of its elected officials.

Petitioners achieved significant success in protecting the right of citizens and voters, statewide, to draft, circulate, submit, and later defend their initiatives. Without their participation, the Court would not have seen

this case from the perspective of the private citizens who receive no pecuniary benefit except that experienced by all other taxpayers.

3) THE NECESSITY AND FINANCIAL BURDEN OF PRIVATE ENFORCEMENT MAKE THE AWARD APPROPRIATE.

Petitioners' participation in the administrative and judicial proceedings in this case were necessary for several reasons. Their actions "enhance[d] both the substantive fairness and completeness of the judicial evaluation of the initiative's validity and the appearance of procedural fairness that is essential if a court decision adjudicating the validity of a voter-approved initiative measure is to be perceived as legitimate by the initiative's supporters." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1151.) Further, the risk that the City would not proceed with the defense is too great: The Petitioners could not sit back and hope their constitutional and reserved rights would be protected without their participation. Lastly, Petitioners contributed significantly to the defense of Proposition B throughout this action by presenting, highlighting and defending key dispositive arguments.

i. Through their participation, Petitioners were vindicating a different right than the City.

Petitioners have always been necessary to the prosecution of this matter. Despite the City's defense of Proposition B, through their actions Petitioners were vindicating a different right than the City. Necessity in an election case differs from other cases where the private party enters a case on the same side as the government. (*See, c.f. San Diego Municipal Employees Association v. City of San Diego* (2016) 244 Cal.App.4th 906.) Election cases are unique because of the reserved power and constitutional interests at stake. (*Perry, supra*, at 1148-49; *Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, 822.)

In the pre-election context, Petitioners' role was to vindicate their own right, and the right of all citizens, under the California Constitution and statutory provisions, to have their measure submitted, circulated, and put to a vote of the people. (*Perry, supra*, at 1146-47, citing *Building Industry Ass'n, supra.*) The City had no interest or duty to defend the validity of a law that had not been enacted. (*Id.*) In post-election cases, although public officials ordinarily have the obligation to defend a challenged law, there is a realistic risk that the public officials may not defend the approved initiative measure with vigor. According to this Court in *Perry*, "this enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose." (*Id.* at 1149.) Petitioners here were acting "in an analogous and complementary capacity to those public officials" and participated in this action on behalf of the people's interests. (*Id.*)

Any claim that the City defended Proposition B, making Petitioners' defense was unnecessary, would be an attempt to re-write history. Petitioners could not sit back and wait to see how the City would handle the defense. The record and the Court of Appeal's decision are replete with references to the fact that a majority of the San Diego City Council did not support Proposition B. At the PERB administrative hearing, there was no precedent on whether the City's "duty to defend" an adopted initiative extends to administrative proceedings. There was always a risk that the City could settle with the Charging Parties as was done in the City of San Jose Pension *Quo Warranto* litigation, jeopardizing the citizens' right of initiative. (Declaration of James P. Lough in Support of Petitioners' Motion for Attorney's Fees (Exh. E: "Lough Decl." p. 10 ¶ 24); Declaration of Kenneth H. Lounsbery in Support of Proponents' Motion for Attorney's Fees (Exh.

D: "Lounsbery Decl." p. 8 ¶ 17), see also Exh. F: "Motion for Judicial Notice," Exhs. A-C pp. 9-24).) After the PERB Decision was issued, the City did not file its Writ of Review until days before the deadline. Had Petitioners failed to file their Writ, the City Council could have ordered the City Attorney to not file its Writ at the last minute. Then there was always a risk that even though the City proceeded with the defense the City would defend Proposition B with less than vigor. (Exh. E: "Lough Decl." p. 10 ¶¶ 24-25.) Even now when PERB and/or the Charging Parties may petition to this Court for review of the Court of Appeal's decision, there is a possibility that the City may not proceed with the defense of Proposition B.

Further, if Petitioners were not actively defending the constitutional rights of the people, it is possible that the Court of Appeal could have determined that their constitutional rights were not important interests. If Petitioners had not participated in this action and the Court had deferred to PERB, Petitioners would have no ability to defend these important rights.

The procedural posture here is unusual in that the matter was not in front of a trial court where Petitioners could sit back and let the government defend the matter. In such a case, Petitioners would have had the ability to intervene and obtain an automatic appeal to the Court of Appeal. (See, e.g., *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) Here, the Petitioners were barred from participating in the administrative hearing except as a witness. (Exh. D: "Lounsbery Decl." p. 5 ¶ 8; Exh. E: "Lough Decl." pp. 3-4 ¶¶ 5-6; p. 5 ¶¶ 10-12.) If the Petitioners took no legal action and relied on the City, Petitioners would have no right of automatic appeal to cure any defect in the administrative process. Petitioners' rights would be at the mercy of a petition for review that is not guaranteed. The value of those guaranteed

rights is too great to force Petitioners to wait it out or pay the freight to defend the rights of their fellow citizens.

ii. Petitioners contributed significantly to the success of this matter by providing valuable services and arguments.

Second, Petitioners are appropriately entitled to attorneys' fees although they were defending Proposition B alongside the City, because Petitioners' actions were not "duplicative, unnecessary, and valueless services," or "opportunistic or collusive and undertaken simply to generate such attorney fees." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 545 and n.31; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 85-86.) The ultimate success of the defense of Proposition B was substantially attributable to Petitioners' participation as real parties in interest in the City's case and as petitioners in the Petitioners' writ. California courts have expressly held that "private parties who cooperate with governmental officials in successful public interest litigation, and who contribute significantly to the result, may recover attorney fees under section 1021.5." (*Nestande v. Watson* (2003) 111 Cal.App.4th 232, 240.)

Throughout multiple administrative and court proceedings, Petitioners raised and defended the constitutional protections that permeated this case – the right of Petitioners to submit legislation under content neutral election rules and the right to associate with elected officials who supported the measure. Petitioners took on the disproportionate burden of defending their measure against attack by four bargaining groups who would receive a pecuniary benefit from invalidation of Proposition B and a state agency that used its resources for five years to silence the Petitioners. Private enforcement by Petitioners was necessary because the City was primarily defending the enacted law and the mayor's speech rights to participate as a private citizen and not as an agent of the City. The constitutional rights of Petitioners and the people were not at the forefront of the City's defense.

Petitioners provided expertise not only on the background leading to the enactment of Proposition B into law but also expertise on the constitutional issues relating to the people's right of initiative. (Exh. D: "Lounsbery Decl." pp. 2-4 ¶¶ 2-5; Exh. E: "Lough Decl." p. ¶ 2, p. 11 ¶¶ 27-28.)

In particular, with the support of *Amici*, the City argued the speech rights of the Mayor to participate as a private citizen and not as an agent of the City while Petitioners argued the unique rights held by citizen proponents. Petitioners also argued, as noted in the Court's Opinion at footnote 18, that the PERB Decision never made a link between the Petitioners and the City. No agency relationship could be established without this link as argued by Petitioners. The failure to link the Mayor to the Petitioners' action broke the "agency" chain at its supposed source. Indeed, it was the sworn testimony of Petitioners' counsel at the PERB hearing, which confirmed the authorship of Proposition B by the Petitioners and separated the Mayor from the preparation of Proposition B. Also, the participation of Petitioners highlighted the fundamental problem with PERB's decision to require the meet and confer process for all future citizen-circulated measures and rolled back this ambitious effort to limit the reserved power of initiative to protect a state statutory priority. Thus, Petitioners' arguments and participation were instrumental in the ultimate success of this action.

iii. Petitioners satisfy the financial burdens of private enforcement prong.

Before filing this Petition for Review, Petitioners incurred $635,740 in attorneys' fees to defend Proposition B, but there is no "direct pecuniary benefits [to Petitioners] in the judgment." (*Galante Vineyard v. Monterey Peninsula Wat. Mgmt. Dist.* (1977) 60 Cal.App.4th 1109, 1127.) Rather, Petitioners defended Proposition B to vindicate non-pecuniary interest in the good governance of California. Numerous cases have concluded that ballot

measure proponents with no financial or personal interests at stake, qualified for section 1021.5 awards in actions brought to enforce those measures or qualify them for the ballot. (*Stewart, supra*, at 90.)

4) THE AMOUNT OF FEES REQUESTED IS REASONABLE.

Petitioners' fee request is reasonable and appropriate considering the complex nature of the issues in this case and the extensive briefing required by the unreasonable way PERB and the Charging Parties repeatedly excluded Petitioners and moved to dismiss the case. Petitioners are not seeking fees for counsel's draftsmanship of Proposition B and counsel's guidance and support of Petitioners in their efforts to circulate and submit the measure, and ultimately take it through a successful election. Although such seminal efforts by Petitioners' counsel were key to the landmark decision in this case, Petitioners' fee request is focused on the litigation part of the case, which litigation was made overwhelmingly unreasonable by PERB and the unions, and therefore costly for Petitioners. As discussed more fully below, neither do Petitioners seek a multiplier since their fee request represents a reasonable and fair lodestar calculation. (See also Exh. D: "Lounsbery Decl." pp. 3-4 ¶¶ 4-5, pp. 8-9 ¶¶ 17-20.)

Once the attorneys' fees are found to be warranted under section 1021.5, the amount of the award is calculated by the lodestar adjustment method. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49.) The lodestar calculation is the product of the number of hours reasonably expended in the litigation multiplied by the reasonable hourly rate for each attorney. (*Press, supra*, at 322.) Fees are to be awarded for all hours reasonably spent on the litigation. (*Serrano v. Unruh, supra,* at 639.)

This case involved a substantial number of hours of extensive research, drafting, preparation and arguing by a total of seven attorneys for Petitioners throughout the five years of its journey through the administrative

and judicial proceedings, initiated and prosecuted by PERB and the unions to chill constitutional rights of the people. Even before PERB issued its decision, PERB and the unions initiated Superior Court proceedings to halt the election, and vehemently opposed Petitioners' request for intervention to defend Proposition B and constitutional rights of the people. PERB and the unions' Superior Court actions, which led to a published appellate court decision, were intended to drain Petitioners' resources and prevent Petitioners from pursuing the defense of their measure. At the PERB level, the case was first heard by the administrative law judge, then the parties submitted the exceptions to the proposed decision, then PERB issued its decision. Further, the writ actions in the Court of Appeal required a review of the PERB administrative record which was thousands of pages long; so long that even PERB itself and the Charging Parties requested an oversized brief and an extension of briefing at this Court to allow them time to review the record. Next, PERB sought to dismiss the action and exclude Proponents on more than one occasion, which motions required research and drafting of opposition briefs. (*Richards S. v. Dep't of Dev. Servs.* (9th Cir. 2003) 317 F.3d 1080, 1089 [fees incurred in successfully opposing intervention are compensable].)

Over 200 pages of briefs, containing over 50,000 words, have been prepared and filed by Proponents in the writ actions alone. Petitioners' counsel has devoted 1,378.7 hours to assist Petitioners in this case over a period of nearly five years. It is undisputable that the briefing costs were increased by PERB and the Charging Parties' unreasonable litigation tactics undertaken to chill constitutional rights of the people. (Exh. D: "Lounsbery Decl." pp. 4-7 ¶¶ 6-14; p. 8 ¶¶16-17; Exh. E: "Lough Decl." pp. 5-8 ¶¶ 12-19; p. 9 ¶¶ 22-23.)

Petitioners are entitled to be compensated for attorneys' fees at rates that reflect the reasonable market value of attorneys' services in the community. (*Serrano v. Unruh, supra,* at 642.) Billing rates are established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. (*Welch v. Metro. Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 946.) However, because this case is a matter of first impression in the state, involving complex issues that have not been litigated in San Diego County, the rates claimed in this case are not based on rates that private firms charge in the San Diego area for the kind of work done in similar cases. No similar cases have been litigated in San Diego County, thus there are no rates in San Diego County for the kind of work to use as the benchmark here. (Exh. E: "Lough Decl." pp. 10-11 ¶¶ 24-26.)

The closest case in complexity, importance of issues involved, and constitutional rights at stake is the San Jose matter in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose* as well as the appeal (No. H043727) and writ of mandate (No. H043450) that followed in the Court of Appeal, Sixth District. (Exh. E: "Lough Decl." pp. 10-11 ¶¶ 24-26.)

This firm represents Steven Haug and Silicon Valley Taxpayers' Association, proposed intervenors in the San Jose matter. The San Jose matter involves Measure B, a pension reform in a form of an amendment to the San Jose City Charter, which was judicially invalidated without any hearing on the merits, without judicial review or voter approval, or defense by the local government or proposed intervenors. In that case, the local unions attempted to circumvent the people's charter amendment authority by obtaining a stipulated judgment. The issues on appeal and the writ of

mandate involve the local government's failure to defend Measure B and its ability to stipulate to the invalidation of Measure B, a measure overwhelmingly enacted by San Jose voters, as well as the trial court's refusal to allow intervention by proposed intervenors. Both the San Jose matter and this case involve similar complex and important issues – the people's unobstructed right to legislate directly, without the MMBA procedural hurdles and without the local government's ability to stipulate away the people's constitutional rights. (Exh. E: "Lough Decl." pp. 10-11 ¶¶ 24-26; see also Exh. F: Motion for Judicial Notice, Exhs. A-C, pp. 9-24.)

Based on the lack of similar cases in the community, and the similarities between this case and the San Jose matter, Petitioners are seeking the reasonable market value of the services provided by their attorneys, at a rate that reflects a reasonable and fair lodestar calculation without application of a multiplier. For Attorneys Lounsbery and Lough, Petitioners seek a rate charged by this firm and co-counsel firm in the San Jose matter. For five other attorneys involved in this case throughout the last five years, Petitioners seek a lower rate. This lodestar formula is utilized in recognition of three factors. First, the legal effort was unique, undertaken in the face of an extraordinarily powerful and rigid collection of opponents. Second, the outcome marked an important milestone in the increasingly vital field of public agency pension reform; cities will be facing bankruptcy if they are unable to more effectively manage their exposure to pension liability. This case offers a glimmer of hope in that regard. Third, in mid-2016, the Petitioners ran out of money and this firm was left to complete the litigation fully aware that its compensation was capped; yet, it persevered. Petitioners are also entitled to and are seeking attorneys' fees for bringing this fee motion. (Exh. D: "Lounsbery Decl." pp. 7-8 ¶¶ 17-20.)

Case law under section 1021.5 provides that successful parties may be awarded a "multiplier" of their fees based on the excellent results obtained, the significant benefit to the public of the victory, and the particular skill and expertise brought to the case by Petitioners' counsel. (*Serrano v. Priest, supra,* at 49.) Petitioners' participation, as discussed more fully herein, brought about the judicial affirmation of the important constitutional rights of the people, resulting in a published appellate opinion, and conferred many significant benefits to the public. Petitioners' counsel's skills and expertise in the election and constitutional matters contributed substantially to the successful result of this action. However, despite the excellent results, the significant benefit, and counsel's unique expertise in this legal area, Petitioners are not seeking a multiplier because the fee amount requested by Petitioners represents a reasonable and fair lodestar calculation. (Exh. D: "Lounsbery Decl." pp. 8-9 ¶¶ 17-20.)

As discussed in the Declarations attached to the Motion for Attorneys' fees (Exh. C: Petitioners' Motion for Attorneys' Fees and Memorandum of Points and Authorities in Support Thereof, p. 21), the time requested is based on contemporaneous billing records that were prepared for the clients. (Exh. E: "Lough Decl." 11 ¶ 29.) The actual time and description of each entry were prepared at the time the work was performed and submitted to the clients in the same manner as other legal matters handled by the Firm. Each bill was reviewed by the Senior Partner before it was submitted to the clients. Time spent on this motion includes estimated time from the date of the preparation of this motion. (Exh. D: "Lounsbery Decl." pp. 8-9 ¶¶ 17-19.)

As further discussed in the supporting Declarations, the attorneys who handled this matter are expert in the unique combination of issues found in the legal and administrative matters at issue. Both Senior Partner Kenneth H. Lounsbery and Of Counsel James P. Lough have extensive experience in

election law; public pension initiatives; charter city rights; and the MMBA. It is highly unlikely that any other two attorneys have comparable experience in San Diego County to handle this matter, which contained numerous issues of first impression. (Exh. D: "Lounsbery Decl." p. ¶ 2; Exh. E: "Lough Decl." p. 2 ¶ 2; p. 11 ¶¶ 27-28.)

5) IN THE ALTERNATIVE, PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES UNDER THE EQUITABLE PRIVATE ATTORNEY GENERAL DOCTRINE.

The equitable private attorney general doctrine is also a separate basis for awarding Petitioners their fees in this case. (*Serrano v. Priest, supra,* at 43; *Coalition for Economic Survival v. Deukmejian* (1985) 171 Cal.App.3d 954, 960[codification of the California private attorney general doctrine did not eliminate the judiciary's equitable authority to award fees].) The Court of Appeal and this Court have equitable authority to award fees under this doctrine to Petitioners because they successfully pursued public interest litigation that vindicated important constitutional right. (*Serrano v. Priest, supra.*)

VI. CONCLUSION

Although Petitioners/Proponents' Motion for Attorney's Fees was timely, the Court of Appeal failed to accept the Motion before the Opinion became final. This Petition is necessary to ensure that the Petitioners do not bear the disproportionate financial burden of protecting the rights of the voters of San Diego and that the cost of enforcing important public rights is transferred to the losing parties – PERB and the Charging Parties. (*Marini v. Municipal Court for Santa Cruz Judicial Dist.* (1979) 99 Cal.App.3d 829.) The financial burden should rightfully be borne by those who interfered with the electoral rights that have been guaranteed to the citizens of California since 1911. An award will also protect future groups that wish to initiate legislation. It will protect their right to associate with those elected officials

who share their concerns and to circulate measures without interference by state administrators who attempt to elevate state statutory provisions over constitutional rights.

The failure of the courts to allow an attorneys' fee motion in this case would undermine the purpose of the private attorney general common law and statutory laws. It would mean that the State of California could avoid attorneys' fee awards by bypassing trial court review after an administrative hearing process, even if initiative proponents could not participate in the administrative process. The failure to allow private attorney general awards would have negative impacts on the citizen initiative process because initiative proponents would be burdened with the cost of enforcing important public rights and public sector labor unions could gain a competitive advantage by merely filing an Unfair Practice Charge with PERB.

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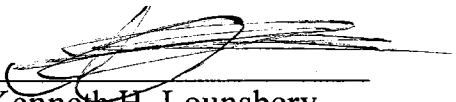
Petitioners respectfully request the Court grant this Petition for Review, and pursuant to California Rules of Court, Rule 8.528(a) issue a disposition granting Petitioners' request for attorneys' fees against PERB and the Charging Parties in the amount of $635,740, plus the cost of bringing this Petition. In the alternative, pursuant to California Rules of Court, Rule 8.528(c) and (d), Petitioners request that this Court remand this matter back to the Court of Appeal to hear any issues not decided by this Court or transfer the matter to the Court of Appeal, with directions, for resolution of the Attorneys' Fee Motion submitted to the Court of Appeal on May 10, 2017 by Petitioners/Proponents. (Cal. Rules of Court Rules 8.500(b)(4) and 8.528(c).)

Date: May 18, 2017

LOUNSBERY FERGUSON
ALTONA & PEAK

By: 

Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Yana Ridge
Attorneys for Petitioners
CATHERINE A. BOLING,
T.J. ZANE
STEPHEN B. WILLIAMS

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d), I certify that this Petition for Review is proportionally spaced, has a typeface of 13 points or more, and contains 7,455 words, excluding the cover, the Verifications, 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: May 18, 2017

LOUNSBERY FERGUSON ALTONA & PEAK, LLP

Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Attorneys for Petitioners,
Catherine A. Boling, T. J. Zane, and Stephen B. Williams

EXHIBIT LIST

Exhibit A: Fourth District Court of Appeal, Division One Letter, dated May 12, 2017: Rejection due to Court no longer having jurisdiction

Exhibit B: Truefiling Email Confirmations, dated May 10, 2017: Receipt of Petitioners' Motion for Attorney's Fees; Declaration of Kenneth H. Lounsbery; Declaration of James P. Lough; and Motion for Judicial Notice

Exhibit C: Petitioners' Motion for Attorney's Fees and Memorandum of Points and Authorities in Support Thereof [CCP § 1021.5], dated May 10, 2017

Exhibit D: Declaration of Kenneth H. Lounsbery in Support of Petitioners' Motion for Attorneys' Fees, dated May 10, 2017

Exhibit E: Declaration of James P. Lough in Support of Motion for Attorneys' Fees, dated May 5, 2017

Exhibit F: Petitioners' Motion for Judicial Notice; Memorandum of Points and Authorities; Declaration of Yana L. Ridge; and [Proposed] Order in Support of Petitioners' Motion for Attorneys' Fees, dated May 10, 2017

Exhibit G: Proof of Service, dated May 10, 2017

Exhibit H: Amended Proof of Service, dated May 11, 2017

EXHIBIT A

Court of Appeal

FOURTH APPELLATE DISTRICT
Division One
750 B Street, Suite 300
San Diego, CA 92101
www.courts.ca.gov
(619) 744-0760

May 12, 2017

RE: CATHERINE A. BOLING, et al.,
Petitioners,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent;
CITY OF SAN DIEGO, et al.,
Real Parties in Interest.
D069626
San Diego County No. 2464-M
San Diego County No. LA-CE-746
San Diego County No. LA-CE-752-M
San Diego County No. LA-CE-755-M
San Diego County No. LA-CE-758-M

Dear Counsel:

Petitioners' motion for attorneys' fees and request for judicial notice are being returned to counsel unfiled. This court no longer has jurisdiction in this matter.

KEVIN J. LANE, CLERK

BY: Rita Rodriguez, Deputy Clerk

cc: All Parties

EXHIBIT B

Kathleen Day

From: truefilingadmin@truefiling.com
Sent: Wednesday, May 10, 2017 4:44 PM
To: Kathleen Day
Cc: Alena Shamos
Subject: Fourth District Court of Appeal, First Division - Document Updated - Case No. D069626

The California 4th District Court of Appeal, Division 1, has made progress for your document for Case No. D069626, Boling, et al. v. Public Employment Relations Board/City of San Diego, et al..

The filing should not be considered filed at this time.

Received filing 95befc8a-63f2-4e15-b3e0-91c980ce6017 at 4:43:06 PM on 5/10/2017.

Filing Details

- Submitted: 5/10/2017 4:42 PM
- Document Type: MOTION - MOTION (FEE PREVIOUSLY PAID)
- Filing Name: D069626MotionforFeesBoling
- Filed By: James Lough (91198)
- From: Lounsbery Ferguson Altona & Peak LLP

Kathleen Day

From: truefilingadmin@truefiling.com
Sent: Wednesday, May 10, 2017 4:44 PM
To: Kathleen Day
Cc: Alena Shamos
Subject: Fourth District Court of Appeal, First Division - Document Updated - Case No. D069626

The California 4th District Court of Appeal, Division 1, has made progress for your document for Case No. D069626, Boling, et al. v. Public Employment Relations Board/City of San Diego, et al..

The filing should not be considered filed at this time.

Received filing bcd89869-3c1b-4b40-bdb4-e3aa07d777a6 at 4:42:59 PM on 5/10/2017.

Filing Details

- Submitted: 5/10/2017 4:42 PM
- Document Type: MOTION - MOTION (FEE PREVIOUSLY PAID)
- Filing Name: D069626LounsberyDeclarationBoling
- Filed By: James Lough (91198)
- From: Lounsbery Ferguson Altona & Peak LLP

Kathleen Day

From: truefilingadmin@truefiling.com
Sent: Wednesday, May 10, 2017 4:44 PM
To: Kathleen Day
Cc: Alena Shamos
Subject: Fourth District Court of Appeal, First Division - Document Updated - Case No. D069626

The California 4th District Court of Appeal, Division 1, has made progress for your document for Case No. D069626, Boling, et al. v. Public Employment Relations Board/City of San Diego, et al..

The filing should not be considered filed at this time.

Received filing 42c0d8b3-f7df-4edb-b2b5-863f65f9486a at 4:43:03 PM on 5/10/2017.

Filing Details

- Submitted: 5/10/2017 4:42 PM
- Document Type: MOTION - MOTION (FEE PREVIOUSLY PAID)
- Filing Name: D069626LoughDeclarationBoling
- Filed By: James Lough (91198)
- From: Lounsbery Ferguson Altona & Peak LLP

Kathleen Day

From: truefilingadmin@truefiling.com
Sent: Wednesday, May 10, 2017 4:44 PM
To: Kathleen Day
Cc: Alena Shamos
Subject: Fourth District Court of Appeal, First Division - Document Updated - Case No. D069626

The California 4th District Court of Appeal, Division 1, has made progress for your document for Case No. D069626, Boling, et al. v. Public Employment Relations Board/City of San Diego, et al..

The filing should not be considered filed at this time.

Received filing 1eb590ab-6b9e-49ad-a349-326244d83f70 at 4:42:56 PM on 5/10/2017.

Filing Details

- Submitted: 5/10/2017 4:42 PM
- Document Type: MOTION - MOTION (FEE PREVIOUSLY PAID)
- Filing Name: D069626RJNBoling
- Filed By: James Lough (91198)
- From: Lounsbery Ferguson Altona & Peak LLP

EXHIBIT C

Case No. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

PETITIONERS' MOTION FOR ATTORNEYS' FEES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [CCP § 1021.5]

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)

Lounsbery Ferguson Altona & Peak, LLP
Kenneth H. Lounsbery/ SBN 38055
James P. Lough/ SBN 91198
Alena Shamos/ SBN 216548
Yana L. Ridge/ SBN 306532
Phone: (760) 743-1201; Fax: (760) 743-9926

Attorneys for Petitioners,
Catherine A. Boling, T.J. Zane and Stephen B. Williams

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONERS CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS' MOTION FOR ATTORNEYS' FEES

Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents") respectfully submit this Memorandum of Points and Authorities in support of their Motion for Attorneys' Fees pursuant to Code of Civil Procedure § 1021.5 against Respondent California Public Employment Relations Board ("PERB") and Real Parties in Interest San Diego Municipal Employees Association ("SDMEA"), Deputy City Attorneys Association ("DCAA"), American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 ("ASCME"), and San Diego City Firefighters Local 145 ("Local 145") (collectively "Charging Parties").

I. INTRODUCTION

The Proponents' Motion is predicated on Proponents being a successful party in this matter who enforced an important right affecting the public interest and conferred a significant benefit on the general public. The Motion is properly brought before this Court based on the unavailability of any other forum for Proponents to make this "private attorney general" request to a "court" as required by Code of Civil Procedure § 1021.5.

Proponents seek attorneys' fees for a series of related actions in which PERB and the Charging Parties sought to keep Proponents' Charter Proposition B off the June 2012 ballot and ultimately invalidate its adoption in contravention of Proponents' reserved rights guaranteed by the California Constitution. At each stage of the multiple proceedings culminating in this Court's judgment vindicating the right of the citizens to propose legislation, PERB and the Charging Parties have failed and refused to recognize the constitutional, statutory and Charter rights of Proponents and the people. Proponents have conferred a significant benefit, both pecuniary and

nonpecuniary, on the citizens of the City of San Diego and the State of California by defending the public's right to vote and to control public employee compensation. The necessity and financial burden of private enforcement placed on Proponents, as the representatives of the electorate, are such as to make the award appropriate. The interests of justice require that the fees be borne by the governmental entity, PERB, and those Charging Parties who made false claims of a "sham" initiative while providing no evidence of a sham or any legal connection between Proponents and the City Council of the City of San Diego.

Specifically, Proponents successfully provided the following substantial benefits to the citizens and voters of San Diego and the State of California:

1) Affirmation that a state administrative body cannot take away the right of Proponents of a citizen-circulated measure to defend their measure in the judicial system.
2) Affirmation that the reserved power of the People to propose legislation cannot be limited by an administrative body in contravention of constitutional rights.
3) Affirmation that an administrative body cannot delay placement of a citizen-circulated measure on the ballot while procedural steps only applicable to a "governing body" are exhausted.
4) Affirmation that an administrative body cannot create an "agency" relationship between elected officials who politically support a citizen-circulated ballot measure and the proponents of the measure.
5) Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego defended the ballot placement and enforced a validly adopted Charter measure with vigor.

6) Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego allowed the election to not be delayed and, upon approval, fully implemented a validly adopted Charter measure instead of settling the matter through compromise with PERB and/or the Charging Parties.

This Motion is necessary to ensure that the Proponents do not bear the disproportionate financial burden of protecting the rights of the voters of San Diego. The award will transfer the cost of enforcing important public rights to the losing parties – PERB and the Charging Parties. (*Marini v. Municipal Court for Santa Cruz Judicial Dist.* (1979) 99 Cal.App.3d 829.) The financial burden should be borne by those who attempted to interfere with electoral rights that have been guaranteed to the citizens of California since 1911. An award will also protect future groups that wish to initiate legislation when their elected officers do not act. Proponents of future legislation will be able to associate with those elected officials who share their concerns. They will be able to circulate measures without interference by state administrators who attempt to protect state statutory priorities over constitutional rights.

II. JURISDICTION: THE PROPONENTS' MOTION IS PROPERLY BEFORE THIS COURT.

Normally, the motion for attorney's fees to a prevailing party is decided by a trial court on remand. (See Cal. Rules of Court, Rule 3.1702.) Here, the procedural posture of this case is such that there was no trial court proceeding. The Charging Parties initiated an unfair practice charge with PERB after Proponents submitted Proposition B with the sufficient number of signatures to the City and before the voters of San Diego approved Proposition B on June 5, 2012. PERB held an administrative hearing, at which Proponents were excluded, and ultimately issued its decision.

Proponents, and the City, then petitioned to this Court for Writ of Extraordinary Relief from PERB's decision. The Court heard the oral arguments on March 17, 2017 and issued its decision on April 11, 2017. (*Boling v. PERB* (2017) Cal. App. LEXIS 329.)

Code of Civil Procedure § 1021.5 provides that upon motion a court may award attorneys' fees. This Court is the only court that can hear this Motion. While this Court remanded the case to PERB to nullify its orders, this Motion cannot be heard by PERB for several reasons. First, PERB is not a court and has no jurisdiction over the Motion. Second, PERB has no expertise in motions for attorneys' fees under Code of Civil Procedure § 1021.5. Third, at every stage of administrative and writ proceedings, PERB sought to exclude Proponents claiming Proponents had no standing.

Further, despite the Court's directive that each party shall bear its own costs of this proceeding, this Motion for Attorneys' Fees is properly before this Court because attorneys' fees are treated as separate from and not included in costs. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923; see also Cal. Rules of Court, Rule 8.278(d)(2).) Therefore, Proponents respectfully request that this Court hear and grant this Motion for attorneys' fees for attorney time and effort in this matter; the related writ; participation in the PERB hearing; and participation in the Superior Court actions prior to the June 2012 ballot.

III. ARGUMENT

Code of Civil Procedure § 1021.5 provides in pertinent part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:
>
> (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,

> (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and
>
> (c) such fees should not in the interest of justice be paid out of the recovery, if any.
>
> With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor . . . .

This section is also known as "private attorney general doctrine," the purpose of which is to encourage private enforcement of important rights affecting the public interest. (*Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal.3d 917, 933-42.) Attorneys' fees should be awarded if the statutory criteria of section 1021.5 are met, unless the award would be unjust. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 623-33 and n.17.)

A. PROPONENTS ARE SUCCESSFUL PARTIES IN THIS ACTION.

Proponents are successful parties in this action because they were a catalyst in the Court's award, successfully defending the citizens' right of initiative in their writ action, and because this Court ruled that Proponents had a real party status in the City's writ action, which was successful.

First, Proponents' writ action was successful because as petitioners Proponents successfully defended the right of the people to legislate directly without procedural hurdles when the Court ruled that the City was not obligated to meet and confer prior to placing Proposition B, a citizen's initiative, on the ballot. Proponents' writ action was successful with respect to this key dispositive argument, which entitles Proponents to attorney's fees in their writ proceeding.

Second, Proponents are also entitled to attorney's fees as real parties in interest in the City's successful writ proceeding. A real party in interest

in a mandamus proceeding is properly considered a party to the litigation. (*Mejia v. Los Angeles* (2007) 156 Cal.App.4th 151, 160.) As a real party in interest, Proponents are entitled to attorneys' fees under section 1021.5 because the City prevailed in its action. (See *Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614.)

B. PROPONENTS' VICTORY ENFORCED AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST AND CONFERRED SIGNIFICANT BENEFITS ON THE PUBLIC.

Under Code of Civil Procedure § 1021.5, Proponents may recover attorneys' fees because they enforced an important right of the public – the right to legislate by initiative without procedural hurdles such as the meet and confer requirement, and conferred a significant benefit on the public – judicial affirmation that the reserved power of the People to propose legislation cannot be limited by an administrative body in contravention of constitutional rights. (See *Wal-Mart, supra*; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311; *Rich v. Benicia* (1979) 98 Cal.App.3d 428.) The published appellate decision in this case provides strong evidence that this case vindicated an important public right. (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 12.)

Courts have repeatedly held that the state constitutional right of initiative is "one of the most precious rights of our democratic process," reserved to the people, and which the courts have a duty to "jealously guard." (*Walmart, supra.*) Just like the constitutional right to a referendum vote, the right of initiative is an important right under section 1021.5, vindication of which entitles Proponents to an award of attorneys' fees. (See *id.*; see also *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499; *Adoption of Joshua S.* (2008) 42 Cal.4th 945, 957 n.4 ["[E]lection law litigation inherently implicates public rights."].)

In this case, Proponents' successful defense of this action and the people's right of initiative prevented the City of San Diego from settling or negotiating with the Charging Parties, delaying the defense of Proposition B, or defending the measure less than vigorously. This case is of benefit to all citizens of California because it preserved the citizens' right to defend their initiative even if the State uses the administrative process to review their measure. Proponents' active defense of Proposition B conferred numerous benefits upon the citizens and voters of San Diego and the residents of cities and counties statewide. The benefits that flowed specifically from the Proponents' instrumental participation in this action include, but are not limited to:

1) The terms of a citizen's initiative measure, amending a City's pension fund obligations, are not subject to the meet and confer process of the MMBA.
2) An administrative agency, such as PERB, cannot impose limitations on, or in any way interfere with, the opportunity of citizens to exercise their Constitutional right to enact legislation through the initiative process.
3) An administrative agency, such as PERB, cannot delay the placement on the ballot of a citizen's initiative measure.
4) An elected official has the right to exercise his/her First amendment freedoms, in the course of an election, without his/her actions being imputed, based upon an agency theory, to the public agency which he/she serves.
5) A public agency's decisions cannot be inferred, either by imputation or supposed acquiescence by silence, as a result of the political activities of one of its elected officials.

Proponents achieved significant success in protecting the right of citizens and voters, statewide, to draft, circulate, submit, and later defend

their initiatives. Without their participation, the Court would not have seen this case from the perspective of the private citizens who receive no pecuniary benefit except that experienced by all other taxpayers.

C. The Necessity And Financial Burden Of Private Enforcement Make The Award Appropriate.

Proponents' participation in the administrative and judicial proceedings in this case were necessary for several reasons. Their actions "enhance[d] both the substantive fairness and completeness of the judicial evaluation of the initiative's validity and the appearance of procedural fairness that is essential if a court decision adjudicating the validity of a voter-approved initiative measure is to be perceived as legitimate by the initiative's supporters." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1151.) Further, the risk that the City would not proceed with the defense is too great: The Proponents could not sit back and hope their constitutional and reserved rights would be protected without their participation. Lastly, Proponents contributed significantly to the defense of Proposition B throughout this action by presenting, highlighting and defending key dispositive arguments.

1) Through their participation, Proponents were vindicating a different right than the City.

Proponents have always been necessary to the prosecution of this matter. Despite the City's defense of Proposition B, through their actions Proponents were vindicating a different right than the City. Necessity in an election case differs from other cases where the private party enters a case on the same side as the government. (*See, c.f. San Diego Municipal Employees Association v. City of San Diego* (2016) 244 Cal.App.4th 906.) Election cases are unique because of the reserved power and constitutional interests at stake. (*Perry, supra*, at 1148-49; *Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, 822.)

In the pre-election context, Proponents' role was to vindicate their own right, and the right of all citizens, under the California Constitution and statutory provisions, to have their measure submitted, circulated, and put to a vote of the people. (*Perry, supra*, at 1146-47, citing *Building Industry Ass'n, supra.*) The City had no interest or duty to defend the validity of a law that had not been enacted. (*Id.*) In post-election cases, although public officials ordinarily have the obligation to defend a challenged law, there is a realistic risk that the public officials may not defend the approved initiative measure with vigor. According to the Supreme Court, "this enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose." (*Id.* at 1149.) Proponents here were acting "in an analogous and complementary capacity to those public officials" and participated in this action on behalf of the people's interests. (*Id.*)

Any claim that the City defended Proposition B, making Proponents' defense was unnecessary, would be an attempt to re-write history. Proponents could not sit back and wait to see how the City would handle the defense. The record and this Court's decision are replete with references to the fact that a majority of the San Diego City Council did not support Proposition B. At the PERB administrative hearing, there was no precedent on whether the City's "duty to defend" an adopted initiative extends to administrative proceedings. There was always a risk that the City could settle with the Charging Parties as was done in the City of San Jose Pension *Quo Warranto* litigation, jeopardizing the citizens' right of initiative. (Declaration of James P. Lough in Support of Proponents' Motion for Attorney's Fees ("Lough Decl."), ¶ 24; Declaration of Kenneth H. Lounsbery in Support of Proponents' Motion for Attorney's Fees ("Lounsbery Decl.") ¶ 17; see also Motion for Judicial Notice, Exhs. A-C.) After the PERB

Decision was issued, the City did not file its Writ of Review until days before the deadline. Had Proponents failed to file their Writ, the City Council could have ordered the City Attorney to not file its Writ at the last minute. Then there was always a risk that even though the City proceeded with the defense the City would defend Proposition B with less than vigor. (Lough Decl., ¶¶ 24-25.) Even now when PERB and/or the Charging Parties may petition to the Supreme Court for review of this Court's decision, there is a possibility that the City may not proceed with the defense of Proposition B.

Further, if Proponents were not actively defending the constitutional rights of the people, it is possible that the Court could have determined that their constitutional rights were not important interests. If Proponents had not participated in this action and the Court had deferred to PERB, Proponents would have no ability to defend these important rights.

The procedural posture here is unusual in that the matter was not in front of a trial court where Proponents could sit back and let the government defend the matter. In such a case, Proponents would have had the ability to intervene and obtain an automatic appeal to the Court of Appeal. (See, e.g., *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) Here, the Proponents were barred from participating in the administrative hearing except as a witness. (Lounsbery Decl., ¶ 8; Lough Decl., ¶¶ 5-6; 10-12.) If the Proponents took no legal action and relied on the City, Proponents would have no right of automatic appeal to cure any defect in the administrative process. Proponents' rights would be at the mercy of a petition for review that is not guaranteed. The value of those guaranteed rights is too great to force Proponents to wait it out or pay the freight to defend the rights of their fellow citizens.

2) Proponents contributed significantly to the success of this matter by providing valuable services and arguments.

Second, Proponents are appropriately entitled to attorneys' fees although they were defending Proposition B alongside the City, because Proponents' actions were not "duplicative, unnecessary, and valueless services," or "opportunistic or collusive and undertaken simply to generate such attorney fees." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 545 and n.31; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 85-86.) The ultimate success of the defense of Proposition B was substantially attributable to Proponents' participation as real parties in interest in the City's case and as petitioners in the Proponents' writ. California courts have expressly held that "private parties who cooperate with governmental officials in successful public interest litigation, and who contribute significantly to the result, may recover attorney fees under section 1021.5." (*Nestande v. Watson* (2003) 111 Cal.App.4th 232, 240.)

Throughout multiple administrative and court proceedings, Proponents raised and defended the constitutional protections that permeated this case – the right of Proponents to submit legislation under content neutral election rules and the right to associate with elected officials who supported the measure. Proponents took on the disproportionate burden of defending their measure against attack by four bargaining groups who would receive a pecuniary benefit from invalidation of Proposition B and a state agency that used its resources for five years to silence the Proponents. Private enforcement by Proponents was necessary because the City was primarily defending the enacted law and the mayor's speech rights to participate as a private citizen and not as an agent of the City. The constitutional rights of Proponents and the people were not at the forefront of the City's defense. Proponents provided expertise not only on the background leading to the enactment of Proposition B into law but also expertise on the constitutional issues relating to the people's right of initiative. (Lounsbery Decl., ¶¶ 2-5; Lough Decl., ¶¶ 2, 27-28.)

In particular, with the support of *Amici*, the City argued the speech rights of the Mayor to participate as a private citizen and not as an agent of the City while Proponents argued the unique rights held by citizen proponents. Proponents also argued, as noted in the Court's Opinion at footnote 18, that the PERB Decision never made a link between the Proponents and the City. No agency relationship could be established without this link as argued by Proponents. The failure to link the Mayor to the Proponents' action broke the "agency" chain at its supposed source. Indeed, it was the sworn testimony of Proponents' counsel at the PERB hearing, which confirmed the authorship of Proposition B by the Proponents and separated the Mayor from the preparation of Proposition B. Also, the participation of Proponents highlighted the fundamental problem with PERB's decision to require the meet and confer process for all future citizen-circulated measures and rolled back this ambitious effort to limit the reserved power of initiative to protect a state statutory priority. Thus, Proponents' arguments and participation were instrumental in the ultimate success of this action.

3) Proponents satisfy the financial burdens of private enforcement prong.

Proponents have incurred $635,740 in attorneys' fees to defend Proposition B, but there is no "direct pecuniary benefits [to Proponents] in the judgment." (*Galante Vineyard v. Monterey Peninsula Wat. Mgmt. Dist.* (1977) 60 Cal.App.4th 1109, 1127.) Rather, Proponents defended Proposition B to vindicate non-pecuniary interest in the good governance of California. Numerous cases have concluded that ballot measure proponents with no financial or personal interests at stake, qualified for section 1021.5 awards in actions brought to enforce those measures or qualify them for the ballot. (*Stewart, supra*, at 90.)

D. THE AMOUNT OF FEES REQUESTED IS REASONABLE.

Proponents' fee request is reasonable and appropriate considering the complex nature of the issues in this case and the extensive briefing required by the unreasonable way PERB and the Charging Parties repeatedly excluded Proponents and moved to dismiss the case. Proponents are not seeking fees for counsel's draftsmanship of Proposition B and counsel's guidance and support of Proponents in their efforts to circulate and submit the measure, and ultimately take it through a successful election. Although such seminal efforts by Proponents' counsel were key to the landmark decision in this case, Proponents' fee request is focused on the litigation part of the case, which litigation was made overwhelmingly unreasonable by PERB and the unions, and therefore costly for Proponents. As discussed more fully below, neither do Proponents seek a multiplier since their fee request represents a reasonable and fair lodestar calculation. (See also Lounsbery Decl., ¶¶ 4-5, 17-20.)

Once the attorneys' fees are found to be warranted under section 1021.5, the amount of the award is calculated by the lodestar adjustment method. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49.) The lodestar calculation is the product of the number of hours reasonably expended in the litigation multiplied by the reasonable hourly rate for each attorney. (*Press, supra*, at 322.) Fees are to be awarded for all hours reasonably spent on the litigation. (*Serrano v. Unruh, supra,* at 639.)

This case involved a substantial number of hours of extensive research, drafting, preparation and arguing by a total of seven attorneys for Proponents throughout the five years of its journey through the administrative and judicial proceedings, initiated and prosecuted by PERB and the unions to chill constitutional rights of the people. Even before PERB issued its decision, PERB and the unions initiated Superior Court

proceedings to halt the election, and vehemently opposed Proponents' request for intervention to defend Proposition B and constitutional rights of the people. PERB and the unions' Superior Court actions, which led to a published appellate court decision, were intended to drain Proponents' resources and prevent Proponents from pursuing the defense of their measure. At the PERB level, the case was first heard by the administrative law judge, then the parties submitted the exceptions to the proposed decision, then PERB issued its decision. Further, the writ actions in this Court required a review of the PERB administrative record which was thousands of pages long; so long that even PERB itself and the Charging Parties requested an oversized brief and an extension of briefing at this Court to allow them time to review the record. Next, PERB sought to dismiss the action and exclude Proponents on more than one occasion, which motions required research and drafting of opposition briefs. (*Richards S. v. Dep't of Dev. Servs.* (9th Cir. 2003) 317 F.3d 1080, 1089 [fees incurred in successfully opposing intervention are compensable].)

Over 200 pages of briefs, containing over 50,000 words, have been prepared and filed by Proponents in the writ actions alone. Proponents' counsel has devoted 1,378.7 hours to assist Proponents in this case over a period of nearly five years. It is undisputable that the briefing costs were increased by PERB and the Charging Parties' unreasonable litigation tactics undertaken to chill constitutional rights of the people. (Lounsbery Decl., ¶¶ 6-14; 16-17; Lough Decl., ¶¶ 12-19; 22-23.)

Proponents are entitled to be compensated for attorneys' fees at rates that reflect the reasonable market value of attorneys' services in the community. (*Serrano v. Unruh, supra,* at 642.) Billing rates are established by reference to the fees that private attorneys of an ability and reputation

comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. (*Welch v. Metro. Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 946.) However, because this case is a matter of first impression in the state, involving complex issues that have not been litigated in San Diego County, the rates claimed in this case are not based on rates that private firms charge in the San Diego area for the kind of work done in similar cases. No similar cases have been litigated in San Diego County, thus there are no rates in San Diego County for the kind of work to use as the benchmark here. (Lough Decl., ¶¶ 24-26.)

The closest case in complexity, importance of issues involved, and constitutional rights at stake is the San Jose matter in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose* as well as the appeal (No. H043727) and writ of mandate (No. H043450) that followed in the Court of Appeal, Sixth District. (Lough Decl., ¶¶ 24-26.)

This firm represents Steven Haug and Silicon Valley Taxpayers' Association, proposed intervenors in the San Jose matter. The San Jose matter involves Measure B, a pension reform in a form of an amendment to the San Jose City Charter, which was judicially invalidated without any hearing on the merits, without judicial review or voter approval, or defense by the local government or proposed intervenors. In that case, the local unions attempted to circumvent the people's charter amendment authority by obtaining a stipulated judgment. The issues on appeal and the writ of mandate involve the local government's failure to defend Measure B and its ability to stipulate to the invalidation of Measure B, a measure overwhelmingly enacted by San Jose voters, as well as the trial court's

refusal to allow intervention by proposed intervenors. Both the San Jose matter and this case involve similar complex and important issues – the people's unobstructed right to legislate directly, without the MMBA procedural hurdles and without the local government's ability to stipulate away the people's constitutional rights. (Lough Decl., ¶¶ 24-26; see also Motion for Judicial Notice, Exhs. A-C.)

Based on the lack of similar cases in the community, and the similarities between this case and the San Jose matter, Proponents are seeking the reasonable market value of the services provided by their attorneys, at a rate that reflects a reasonable and fair lodestar calculation without application of a multiplier. For Attorneys Lounsbery and Lough, Proponents seek a rate charged by this firm and co-counsel firm in the San Jose matter. For five other attorneys involved in this case throughout the last five years, Proponents seek a lower rate. This lodestar formula is utilized in recognition of three factors. First, the legal effort was unique, undertaken in the face of an extraordinarily powerful and rigid collection of opponents. Second, the outcome marked an important milestone in the increasingly vital field of public agency pension reform; cities will be facing bankruptcy if they are unable to more effectively manage their exposure to pension liability. This case offers a glimmer of hope in that regard. Third, in mid-2016, the Proponents ran out of money and this firm was left to complete the litigation fully aware that its compensation was capped; yet, it persevered. Proponents are also entitled to and are seeking attorneys' fees for bringing this fee motion. (Lounsbery Decl., ¶¶ 17-20.)

Case law under section 1021.5 provides that successful parties may be awarded a "multiplier" of their fees based on the excellent results obtained, the significant benefit to the public of the victory, and the particular

skill and expertise brought to the case by Proponents' counsel. (*Serrano v. Priest, supra,* at 49.) Proponents' participation, as discussed more fully herein, brought about the judicial affirmation of the important constitutional rights of the people, resulting in a published appellate opinion, and conferred many significant benefits to the public. Proponents' counsel's skills and expertise in the election and constitutional matters contributed substantially to the successful result of this action. However, despite the excellent results, the significant benefit, and counsel's unique expertise in this legal area, Proponents are not seeking a multiplier because the fee amount requested by Proponents represents a reasonable and fair lodestar calculation. (Lounsbery Decl., ¶¶ 17-20.)

As discussed in the attached Declarations, the time requested is based on contemporaneous billing records that were prepared for the clients. (Lough Decl., ¶ 29.) The actual time and description of each entry were prepared at the time the work was performed and submitted to the clients in the same manner as other legal matters handled by the Firm. Each bill was reviewed by the Senior Partner before it was submitted to the clients. Time spent on this motion includes estimated time from the date of the preparation of this motion. (Lounsbery Decl., ¶¶ 17-19.)

As further discussed in the supporting Declarations, the attorneys who handled this matter are expert in the unique combination of issues found in the legal and administrative matters at issue. Both Senior Partner Kenneth H. Lounsbery and Of Counsel James P. Lough have extensive experience in election law; public pension initiatives; charter city rights; and the MMBA. It is highly unlikely that any other two attorneys have comparable experience in San Diego County to handle this matter, which contained numerous issues of first impression. (Lounsbery Decl., ¶ 2; Lough Decl., ¶¶ 2; 27-28.)

E. In The Alternative, Proponents Are Entitled To Attorneys' Fees Under The Equitable Private Attorney General Doctrine.

The equitable private attorney general doctrine is also a separate basis for awarding Proponents their fees in this case. (*Serrano v. Priest, supra,* at 43; *Coalition for Economic Survival v. Deukmejian* (1985) 171 Cal.App.3d 954, 960 [codification of the California private attorney general doctrine did not eliminate the judiciary's equitable authority to award fees].) This Court has equitable authority to award fees under this doctrine to Proponents because they successfully pursued public interest litigation that vindicated important constitutional right. (*Serrano v. Priest, supra.*)

IV. CONCLUSION

For the foregoing reasons, Proponents respectfully request the Court grant this motion for attorneys' fees, and order PERB and the Charging Parties to pay the amount of $635,740.

Date: May 10, 2017

LOUNSBERY FERGUSON
ALTONA & PEAK

By: _____
Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Yana Ridge
Attorneys for Proponents
CATHERINE A. BOLING,
T.J. ZANE
STEPHEN B. WILLIAMS

CERTIFICATE OF WORD COUNT

Pursuant to CRC § 8.204(c)(1), I certify that this Petitioners' Motion for Attorneys' Fees and Points and Authorities in Support thereof is proportionally spaced, has a typeface of 13 points or more, and contains 5,266 words, excluding the cover, the Verifications, 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: May 10, 2017

LOUNSBERY FERGUSON ALTONA & PEAK, LLP

Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Attorneys for Proponents,
Catherine A. Boling, T. J. Zane, and Stephen B. Williams

CASE NO. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

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 May 10, 2017, I caused the following documents:

Petitioners' Motion For Attorneys' Fees and Memorandum of Points and Authorities In Support Thereof [CCP § 1021.5]

Petitioners' Motion for Judicial Notice; Memorandum of Points and Authorities; Declaration of Yana L. Ridge; and [Proposed] Order in Support of Petitioners' Motion for Attorneys' Fees

Declaration of Kenneth H. Lounsbery in Support of Petitioners' Motion for Attorneys' Fees

Declaration of James P. Lough in Support of Petitioners' Motion for Attorneys' Fees

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

SERVICE LIST

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Via mail and email

[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 **May 10, 2017** at Escondido, California.

Kathleen Day

EXHIBIT D

Case No. D069626

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

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

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CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
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CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127 AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145
Real Parties in Interest.

DECLARATION OF KENNETH H. LOUNSBERY IN SUPPORT OF PETITIONERS' MOTION FOR ATTORNEYS' FEES

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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Attorneys for Petitioners,
Catherine A. Boling, T.J. Zane and Stephen B. Williams

DECLARATION OF KENNETH H. LOUNSBERY

I, Kenneth H. Lounsbery declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California. I am co-counsel for Petitioners and Real Parties in Interest Catherine A. Boling, T.J. Zane, and Stephen B. Williams ("Proponents") in this action. The following declaration relates to information within my personal knowledge.

2. The professional experience of the undersigned lends focused expertise unique to the issues presented in this case. Upon admission in 1966, I began as a trial Deputy in the San Diego City Attorney's Office, advancing to Chief Deputy in the Criminal Division and later as Chief Deputy in the Civil Division. In 1970, I accepted appointment as City Attorney in Escondido; in 1972, as City Attorney in South Lake Tahoe. In 1976, I returned to Escondido as City Manager. As City Attorney in Escondido and South Lake Tahoe, I was responsible for guiding labor negotiations with all public employee labor groups. As City Manager, I was solely responsible for all public-sector labor negations and budgetary decisions regarding employee expenses. [Unrelated to labor/pension matters, in 1972, I tried, briefed and argued, at the trial, Court of Appeal and Supreme Court levels, the case defining the standard for declaring a billboard to be a nuisance. (*City of Escondido v. Desert Outdoor Advertising, Inc.* 8 Cal.3d 785.) In 1980, I became the Vice President and General Counsel for the Lusardi Construction Company; the position required oversight of all employee compensation agreements. In 1990, upon returning to private practice, I was named City Attorney of the City of San Marcos and, again, became responsible for negotiating public employee compensation commitments pursuant to the MMBA. While holding the San Marcos post, I served on the Legal Advocacy Committee for the League of California Cities. I also drafted and obtained voter approval of the City's Charter, via initiative, which Charter became the

seminal document later followed by the cities of Oceanside, Carlsbad and Vista. Before the California Supreme Court, my firm successfully defended the terms of the Vista City Charter. For the past decade, I have been involved in the guidance and defense of a score of initiative election matters, on behalf of both public and private clients. In addition to our defense of Proposition B, our firm is currently engaged in the defense of Measure B in San Jose, a pension reform initiative sponsored by the City. The Retirement Security Initiative – a foundation dedicated to pension reform in California – is a current client. Over the span of five decades, I have developed perspectives on labor and election laws that have unique application and value to this case.

3. For more than five years, I have served as co-counsel for Proponents in each case in which they were involved regarding Proposition B, the subject matter of this litigation.

4. In March 2011, I was engaged to draft the pension reform measure to meet the standard for qualification as a citizen's initiative. The principal client was Catherine "April" Boling (one of the Proponents) who had been the Chair of the San Diego Pension Reform Committee. She served on the Committee for approximately 18 months from 2004 to 2006 and was the true intellect behind the basic terms of the reform. She advised and guided then Council member Carl DeMaio who was promoting the draft which contained the key reform features she had generally formulated and which I incorporated in the early drafts of the measure. Competing terms were also being proposed by then Mayor Jerry Sanders, the primary thrust of which was to omit application of the measure to the police. For several months, I negotiated between the competing supporters of reform, with continuing authorization from Ms. Boling. In or about April 2011, the San Diego County Taxpayers initiated a meeting between the DeMaio and Sanders factions, which, for want of a better term, I mediated, with the help of James Lough

and John Witt, other members of our firm. The result was an accord in principal regarding the terms. Except for the omission of the police as a subject of the measure, its terms were largely those formulated by Ms. Boling and written by the undersigned. Armed with direction, I and my colleagues finalized the measure, putting it in the form necessary to stand for election as a citizen's initiative.

5. In 2011, working on behalf of the Proponents, I, and others in the firm, directed the filing of the measure with the City Clerk, participated in the preparation of the ballot statement, guided the circulation of the petition for voter signatures, and authorized filing the measure for qualification. On September 30, 2011, the Proponents filed the signed petition with the City Clerk who determined that a sufficient number of signatures had been garnered to compel an election. On January 30, 2012, the City Council introduced and adopted an ordinance directing that the measure be placed on the June 5, 2012 ballot. I then prepared the ballot argument and reply for the measure – Proposition B - and directed the campaign in compliance with election regulations.

6. On February 14, 2012, PERB filed a lawsuit seeking a restraining order to block the City from placing Proposition B on the ballot, which was denied allowing the election to proceed. The City cross-complained to stay PERB's administrative proceedings scheduled for April 2012, and the court granted it. Proponents were not named real parties in interest, but moved ex parte to intervene in the PERB's case. Per the court's directive, Proponents then filed a motion to intervene in the PERB's case, in addition to filing their own complaint to halt the illegal use of governmental power to deny Proponents' free speech rights. PERB and the unions filed a writ action in the Court of Appeal, challenging the trial court's grant of stay of the PERB proceedings. Proponents' motion to intervene was never heard

because the parties stipulated to stay both – PERB's and Proponents' – cases pending the Court of Appeal's decision on the writ. The election was held.

7. At the election of June 5, 2012, San Diego voters approved Proposition B by more than a 67% margin. The PERB hearings, challenging the measure, were allowed to proceed.

8. On July 17 through the 23rd, 2012, PERB conducted an administrative hearing, as allowed by the Court of Appeal, to determine if, in fact, the measure was a sham – the product of the City - rather than a genuine initiative of the people. As the evidence unfolded, there was no factual support for the sham theory. Support for the theory boiled down to hearsay (campaign rhetoric) and double hearsay (newspaper articles). Proponents had requested the right to intervene in the hearings but were denied. The City did, however, call the undersigned to testify as to the true authorship of Proposition B. I traveled to Glendale where the hearings were being held. Arriving in the morning, I was excluded from the hearings. During the noon break, I conferred with counsel for the City, Don Worley. I telephoned my principal client, Ms. Boling, and explained the dire need for first-hand testimony regarding authorship of the measure; such authorization which had not yet been given. Pursuant to authorization, I testified that I drafted the measure at the direction of the Proponents who were my clients; that I received no client direction from City officials; and that I received no compensation from the City.

9. The Administrative Law Judge issued a recommended ruling against the City. Actually, the ALJ adhered to the sham argument to the bitter end, recommending that Proposition B be out rightly invalidated. Proponents, on March 7, 2013, filed a request to file support for the City's Exceptions and filed a legal brief supporting the City's Exceptions. On September 20, 2013, PERB served a letter allowing limited participation by Proponents via a brief filed within 20 days of the letter. On October 9, 2013,

Proponents filed a brief supporting the exceptions filed by the City of San Diego.

10. Realizing that the sham theory was unsupported by the evidence, PERB and the SDMEA converted their challenge to an agency theory - that the Mayor was in charge of the Proposition B election as an agent of the City Council; thus meet and confer rules applied. When the final order was issued, on December 29, 2015, a holiday week-end, SEVENTEEN MONTHS after the hearings, PERB adopted the agency theory and ordered the City, at its expense, to undertake a Quo Warranto proceeding to invalidate Proposition B. Of course, there was no more evidence to support the agency theory than the sham argument. [It is the opinion of this declarant that PERB delayed its ruling pending the outcome of the November City Council elections, hoping that Council support for Proposition B would change politically, thereby eliminating opposition to the PERB ruling. And, the deadline over a holiday weekend, heightened the briefing burden.]

11. On January 25, 2016, the undersigned, on behalf of the Proponents, and the City, filed with this Court Writs challenging the PERB order. Four days later, on January 29, PERB filed its Motion to Dismiss the Proponents' Writ. Three days later, on February 2, PERB filed its motion to dismiss Proponents from the City's Writ proceedings. *Clearly, PERB was lying in wait.*

12. On or about May 9, 2016, Proponents and the City submitted their opening briefs in their writ actions. Proponents filed a brief as real parties in interest in the City's Writ on June 10, 2016. On or about May 12 and May 18, 2016, PERB and the SDMEA asked for and obtained permission to file oversized briefs and an extension of time within which to respond to Proponents' brief in support of their Writ. PERB filed its Opposition to the Writs on or about July 12, 2016, and the SDMEA filed its Opposition as a real party in interest on or about July 13, 2016. Proponents, and the City,

filed Reply briefs on or about August 8, 2016, without requiring an extension of time to file.

13. During the pendency of the Writs before this Court, I engaged, continuously, in the process of coordinating the briefing efforts of the Proponents, the City and three amicus brief writers – the League of California Cities, The Pacific Legal Foundation and the Foundation for the San Diego County Tax Payers Association. Arguments were debated, assignments were agreed upon and drafts of briefs were circulated, reviewed and commented upon before filing.

14. Oral argument was set for March 17, 2017. On March 8, 2017, this Court issue a letter of inquiry requesting that the parties focus on five specific points. After conferring with the City and counsel for the amici regarding such points, I responded to each and prepared for oral argument accordingly. Counsel for the Proponents, the City and the amici conducted joint practice sessions before oral argument. The Court issued its decision on April 11, 2017.

15. The decision herein is of landmark importance. It is now the standard for the following legal principles.

- The terms of a citizen's initiative measure, amending a City's pension fund obligations, are not subject to the meet and confer process of the MMBA.
- An administrative agency, such as PERB, cannot impose limitations on, or in any way interfere with, the opportunity of citizens to exercise their Constitutional right to enact legislation through the initiative process.
- An administrative agency, such as PERB, cannot delay the placement on the ballot of a citizen's initiative measure.
- An elected official has the right to exercise his/her First amendment freedoms, in the course of an election, without

his/her actions being imputed, based upon an agency theory, to the public agency which he/she serves.

- A public agency's decisions cannot be inferred, either by imputation or supposed acquiescence by silence, as a result of the political activities of one of its elected officials.

16. As important as the outcome may be as a matter of law, it cannot match the difficulty experienced in achieving the result. The perseverance of the Proponents in this matter has been of heroic proportions. On their behalf, four pleadings were filed; two motions to intervene and a complaint at the trial court and one with PERB. Eight briefs were filed with this Court – opening and reply combined, and including oppositions to motions to dismiss and oppositions to requests for extension, and not including the instant Fee Motion. At every juncture, Proponents' efforts were intensely and purposefully thwarted by an immense State bureaucracy, along with the weight of three unions. The complexity of the legal issues was made geometrically more difficult to address by the procedural hurdles cast in the path by PERB and the unions. The experience of the undersigned, particularly at the hands of PERB in its hearing, was particularly chilling. The PERB hearing bore no resemblance to an objective judicial review of the issues in this case.

17. All told, 216 pages of briefs have been prepared and filed on behalf of the Proponents at the Court of Appeal alone. The moving and responsive papers contain over 53,000 words. And this work product does not include the time devoted to the coordination of briefing with the City of San Diego and three amici brief writers. This declarant, and six other attorneys in this firm, have devoted 1,378.7 working hours posted to this case over a period of nearly five years. A summary of the hours worked is attached herein as Exhibit 1. Applied to these hours is a billing rate of $500 per hour for the undersigned and James Lough. The rate is identical to that charged in

the companion case handled by the undersigned and Mr. Lough in the San Jose Measure B case, which is still pending before the Sixth District Court of Appeal. Applied to the hours billed by all other attorneys in the firm is a billing rate of $350. The total amount of fees claimed is $635,740.

18. The rates quoted above reflect an appropriate calculation of a lodestar figure. The $500 hourly rates for the undersigned and Mr. Lough are their current rates. The hourly rate of $350 quoted for all other counsel is a blended rate. For example, it is below the current rate of $500 charged by Mr. Ferguson and below the $400 hourly rate charged by attorney Vinaccia. It is the current rate charged by attorneys Shamos and Sidhu. It is above the current rate charged by attorney Ridge. This lodestar calculation is considered by the undersigned to produce just compensation for an extraordinary legal effort, and a more fair and reasonable methodology than a multiplier formula.

19. The lodestar formula is being applied in recognition of three factors. First, the legal effort was enormous; undertaken in the face of an extraordinarily powerful and rigid collection of opponents. Second, as noted, the outcome marked an important milestone in the increasingly vital field of public agency pension reform. *Cities will be facing bankruptcy if they are unable to more effectively manage their exposure to pension liability. This case offers a glimmer of hope in that regard.* Third, in mid-2016, the Proponents ran out of money and this firm was left to complete the litigation fully aware that its compensation was capped; yet, it persevered.

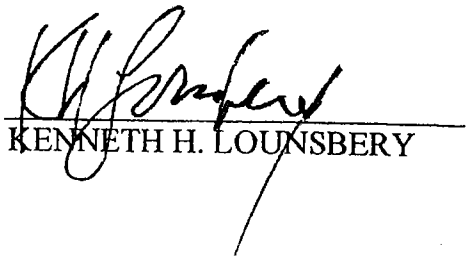
20. Proponents are not seeking fees for counsel's draftsmanship of Proposition B and counsel's guidance and support of Proponents in their efforts to circulate and submit the measure, and ultimately take it through a successful election. Although such seminal efforts by Proponents' counsel were key to the landmark decision in this case, Proponents' fee request is focused on the litigation part of the case, which litigation was made

overwhelmingly unreasonable by PERB and the unions and therefore costly for Proponents. Neither do Proponents seek a multiplier since their fee request represents a reasonable and fair lodestar calculation.

21. The Proponents are thankful for the principled support of the City Attorney's Office in this extended briefing effort. Yet, in a sense the Proponents have often felt like pioneers, alone and at the forefront of the pension reform movement without the concurrence of a majority of the City Council. They are comforted by the knowledge that they have spoken for the many thousands of electors who voted for Proposition B.

22. In the end, it should not be the Proponents who have to pay the price for clarifying the law. Rather it should be the bureaucrats who have stubbornly misapplied the law and who must now live by the landmark terms of this ruling. If they had heeded what is the law – and what they were told is the law - this herculean effort would not have been necessary. Instead, PERB, and the unions, chose the course of trying to bull-doze the rights of the electorate. They must be responsible for paying the price for correcting course and obeying the law.

Executed this 10th day of May, 2017, at Escondido, California.



KENNETH H. LOUNSBERY

EXHIBIT 1

Lounsbery Ferguson Altona and Peak, LLC

Attorney Time

Boling v PERB, et al.

KHL		DWF		JSV		AKS		JPL		YLR		ASO	
MONTH	TIME	MONTH	TIME	MONTH	TIME	MONTH	TIME	MONTH	TIME	MONTH	TIME	MONTH	TIME
08/31/12	199.7	08/31/12	3.1	08/31/12	15.8	08/31/12	8.1	08/31/12	185.3	08/31/12	15.8	08/31/12	6.1
08/31/12	7.1	05/09/16	3.7	08/31/12	18.5			08/31/12	64.1	09/30/16	27	08/31/12	13.5
09/30/16	23.5			05/31/16	0.7			09/30/16	42.2	05/31/16	4.3	09/30/16	62.9
05/31/16	13.5			01/31/16	7.7			05/31/16	3.1	05/09/16	18.3	05/31/16	25.9
05/09/16	39.9							05/09/16	90.6	01/31/16	2.1	05/09/16	24.4
03/31/16	41.1							03/31/16	21.6	04/30/17	6.8	03/31/16	17.7
01/31/16	64.6							01/31/16	47.7	04/30/17	34.7	01/31/16	32.5
04/30/17	102.5							04/30/17	69.5			04/30/17	7.8
								02/28/17	5.3				
	491.9		6.8		42.7		8.1		529.4		109		190.8

RECAP	TIME
Kenneth H. Lounsbery	491.9
David W. Ferguson	6.8
Jacqueline S. Vinaccia	42.7
Avneet K. Sidhu	8.1
James P. Lough	529.4
Yana L. Ridge	109
Alena Shamos	190.8
TOTALS	**1378.7**

EXHIBIT E

Case No. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

DECLARATION OF JAMES P. LOUGH IN SUPPORT OF PETITIONERS' MOTION FOR ATTORNEYS' FEES

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)

Lounsbery Ferguson Altona & Peak, LLP
Kenneth H. Lounsbery/ SBN 38055
James P. Lough/ SBN 91198
Alena Shamos/ SBN 216548
Yana L. Ridge/ SBN 306532
Phone: (760) 743-1201; Fax: (760) 743-9926

Attorneys for Petitioners,
Catherine A. Boling, T.J. Zane and Stephen B. Williams

DECLARATION OF JAMES P. LOUGH

I, James P. Lough, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California. I am co-counsel for Petitioners and Real Parties in Interest Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents") in this action. The following declaration relates to information within my personal knowledge.

2. Since beginning practice in 1980, I have worked with private and public clients in election matters at the appellate level since my first case in 1981 (*Wilcox v. Enstad* (1981) 122 Cal.App.3d 641). I have also handled matters under the Myers, Milias Brown Act ("MMBA") having served as City Attorney for the Cities of Hermosa Beach, Fresno (Charter City), Sanger, Solana Beach and Imperial Beach. I have also served as the County Counsel of Humboldt County. In each of these roles, I worked with MMBA issues. I have also served as counsel for numerous other Charter Cities on a variety of Charter authority, election and policy matters. In one such case, I successfully defended the Charter rights of the City of Vista before the California Supreme Court. I have served on the Legal Advocacy Committee for the League of California Cities on three separate occasions representing Cities in the Los Angeles County, Southern San Joaquin Valley and San Diego/Imperial County Divisions. In that role, I assisted in making policy recommendations to the League's Board of Directors on amicus participation in matters involving Charter City governance, MMBA, and election matters.

3. I served as Counsel for Proponents in each matter in which they were involved regarding Proposition B, the subject matter of this litigation. On January 30, 2012, the City Council introduced and adopted an ordinance calling a Municipal Special Election on Tuesday, June 5, 2012, to submit one or more ballot propositions to the qualified voters of the City, and consolidate the Municipal Special Election with the California State Primary election to

be held on the same date. (San Diego Ordinance O20127.) According to City of San Diego ("City") records, no bargaining group ever asked the City Council to place a competing ballot measure on the ballot.

4. On February 14, 2012, PERB filed an action in San Diego Superior Court ("PERB's case") to prevent the City from placing Proposition B on the June 2012 ballot. (*PERB v. City of San Diego* (San Diego Superior Court-Central Div., Case No. 37-2012-00092295 CU-MC-CTL.) PERB is required to issue a complaint if it is "justified". PERB's action to issue the four complaints and file a Superior Court action were not "justified" under the law and the purpose of PERB's actions was to extend the law to interfere with constitutional rights held by the People of the State of California who file initiatives that control local government compensation. At the time PERB filed its action, PERB was aware of caselaw that prevented interference with rights to pursue direct democratic remedies. Despite this fact, PERB attempted to invalidate Proposition B.

5. In the PERB's case, Proponents were not named as a Real Party in Interest ("RPI") despite being the authors of the measure. PERB refused to add Proponents as RPIs when requested to do so and opposed intervention during the PERB's case. Proponents brought a Motion to Intervene in the matter. Prior to the Motion to Intervene being heard, however, the parties stipulated to stay the PERB's and Boling cases. I am informed and believe that PERB obtained the stipulation to stay the actions, in part, because PERB would have been unable to prevent Proponents' intervention. Such intervention would have allowed Proponents to defend against the unions' frivolous claim that they were "agents" of the Mayor and, by extension, the City Council and that Proposition B was not a "pure" citizen initiative.

6. On February 21, 2012, the Superior Court denied PERB's request for a Temporary Restraining Order. During this hearing in *PERB v. City of San Diego*, Judge Dato stated in open Court that he was considering retaining

jurisdiction over the matter and continuing the matter until after the election. At the time, Proponents did not and never could obtain party status in this matter, the possibility that the case would be stayed and heard by Judge Dato after the election threatened to put a chill on the campaign for Proposition B. If the matter was stayed until after the election, Proponents would have to campaign with a cloud of illegality hanging over the measure based on a frivolous "strawman" argument. For this reason and concern that the Court would act on the matter before granting intervention, Proponents filed their own Writ to allow the election to go forward and contest PERB's authority over a citizen-sponsored Measure. The election was allowed to proceed. (*Boling et. al. v. PERB et. al.* (San Diego Superior Court-Central Div., Case No. 37-2012-00093347 CU-MC-CTL, filed March 5, 2012.) ("*Boling v. PERB Superior Court Action*").)

7. PERB scheduled administrative hearings with the first set for April 2-5, 2012 in the SDMEA Unfair Practice Charge. (5 Administrative Record ("AR") 56:001317-24.) PERB issued subpoenas for elected officials who were supporters of Measure "B".

8. *Boling v. PERB* Superior Court Action was sought to prevent PERB from exercising jurisdiction over a citizen-circulated measure during an election campaign. PERB was, at the time, planning on having administrative hearings during the election campaign, April 2012, in an attempt to either prevent or influence the election. Simultaneously, the City of San Diego filed a cross-complaint in the action brought by PERB trying to halt the election. (PERB v. City of San Diego (San Diego Superior Court-Central Div., Case No. 37-2012-00092295 CU-MC-CTL.)

9. After the trial court granted City's motions, SDMEA filed a writ proceeding seeking to vacate the trial court's order enjoining further administrative hearings regarding the Unfair Practice Charge ("UPC"). The narrow issue presented there is whether the trial court's order staying the

administrative proceedings was proper. As a result, Judge Vargas issued a preliminary injunction halting the PERB hearing, originally scheduled for April 2012. This was taking place while Proponents were still trying to intervene to protect their rights.

10. SDMEA's writ filed with the Court of Appeal, Fourth District was granted. It allowed PERB to proceed, post-election, with an administrative hearing on the unions' UPC. The four PERB complaints were based on the theory that the Proponents were "strawmen" for the City and that Proposition B was a "sham" initiative. The Proponents were not allowed to participate in this matter as they were not a party since their Intervention motion was never heard. Proponents filed papers in each of these actions attempting to assert their rights and arguing that they had pursued a Charter Amendment as private citizens and were not "strawmen" of the City.

11. Overall, Proponents attempted to intervene in actions where they were not a party to defend their rights to pursue a Charter Amendment and to participate, as Proponents, in any proceeding as allowed under California law. Because of their inability to timely participate in the Superior Court action brought by PERB, Proponents sought their own relief in the instant matter. While the City was defending the right to ballot placement on the June 2012 ballot, the City was under no legal duty to do so. At any time, the City Council, a majority of whom did not support Proposition B, could have ordered the City Attorney to stand down and allow a judgment to be entered. (San Diego City Charter, Art. V, Sec. 40.) Such judgment would have eliminated the right of Proponents to pursue Proposition B.

12. Proponents also sought pre-election intervention and brought their own action, when intervention was delayed, because PERB originally set four administrative hearings for April 2012. With a June 2012 election, Proponents were concerned about having to devote time, money and effort for an election campaign and an administrative hearing over the validity of

Proposition B. Since the only argument in the four administrative complaints was that they were "strawmen" for the City in a "sham" citizen's initiative, it was likely that they would receive subpoenas to testify about the campaign and their support received from the minority of San Diego elected officials who supported their campaign. An administrative hearing regarding the campaign activities of Proponents, either through their forced testimony or the testimony of the political allies was meant to "chill" their speech and the speech of others during a valid Charter Amendment election campaign. Proponents' legal actions, during the pre-election period, were meant to preserve their rights to draft, circulate, campaign, defend and protect their civil rights guaranteed under the State and U.S. Constitutions. Three years after the election, PERB found that there was "no evidence" that Proposition B was a "sham" or that Proponents were "strawmen". PERB may only seek the remedies they sought in the judiciary if there was a *prima facie* case of a violation of law. In the end, even PERB found that there was no evidence to support the actions it took pre-election that damaged Proponents' rights to pursue direct democratic remedies.

13. On June 5, 2012, the voters of the City of San Diego approved Proposition B with a 67% affirmative vote. The result was certified by local election officials and the Secretary of State with no objection and the measure is now part of the San Diego City Charter. No *quo warranto* action has been filed to date. No challenge of any substantive provision of Proposition B was ever filed.

14. On June 13, 2012, this Court heard oral argument in *San Diego Municipal Emplyees Association v. Superior Court* (No. D061724). Proponents were not yet parties in the matter below that the Writ was taken from and this Court refused to hear from them despite a request to paticipate. This Court reversed the Trial Court Injunction and allowed PERB to go

forward on the "sham" theory that Proposition B was a City-sponsored initiative.

15. On July 17, 18, 20 and 23, 2012, an Administrative Hearing was held, after which the parties, without Proponents' participation, filed opening and closing briefs. (8 AR 147:002303-13; 9 AR 148:002315-423; 150:002428-74.) Through the City, Proponents monitored the hearing and Kenneth Lounsbery testified to the authoriship of Proposition B. It was authored by the undersigned, Mr. Lounsbery and Ms. Boling with input from Carl Demaio.

16. After the adverse decision was rendered by the Administrative Law Judge against the City of San Diego, Proponents, on March 7, 2013, filed a request to file support for the City's Exceptions and filed a legal brief supporting the City's Exceptions. On September 20, 2013, PERB served a letter allowing limited participation by Proponents via a brief filed within 20 days of the letter. On October 9, 2013, Proponents filed a brief supporting the exceptions filed by the City of San Diego.

17. The PERB's final decision did not come out until December 29, 2015. I am informed and believe that it came out, during the holiday season, to make it difficult for Proponents to contest the matter within the 30-day statutory window for Writs. Proponents filed their Writ on January 25, 2016. On the same day, the City of San Diego filed its writ. On January 29, 2016, PERB filed its Motion to Dismiss Proponents' writ. On February 2, 2016, PERB filed its Motion to Dismiss to remove Proponents from the City's writ action.

18. I am informed, believe and hereon allege that PERB had begun preparation of the Motion to Dismiss prior to Proponents having filed their Writ. Under PERB's Decision, they found no evidence that Proposition B was a "sham". The PERB decision found that the Mayor was an "agent" of the City Council and, therefore, Proposition B was subject to the "meet and

confer" requirement. However, Proponents' arguments made that finding frivolous. As pointed out by this Court in a footnote in its Opinion, PERB and the unions never explained how the Mayor's agency had been tied to the actions of Proponents. As it states in Footnote 18 of the Decision:

> "Curiously, although PERB concluded common law agency principles permitted PERB to charge City with Sanders's conduct in promoting and campaigning for the CPRI, PERB also concluded the evidence showed the Proponents of the CPRI (who paid to have the CPRI drafted and who ran the signature effort and campaign for passage of the CPRI) were not Sanders's agents because they undertook their actions outside of Sanders's control. PERB nevertheless concluded common law principles of ratification and apparent authority applied 'so as not to excuse the City's failure to meet and confer based on the actions of private citizens involved in the passage of [the CPRI].'"

This footnote indicates the purpose for trying to suppress Proponents' participation in these related actions from February 12, 2012 onward. Without Proponents, their actions could be ignored and their significance diminished. Without the participation of Proponents, the actions of the Mayor would have stood alone. Exclusion of Proponents would have made it easier for PERB and the unions to attempt to turn a private attempt at legislation into a San Diego City effort, to which MMBA would apply.

19. PERB and the unions acted for over five years to attempt to stifle the efforts of three private citizens under different theories. First, they were "strawmen" of the City when there was no evidence of a "sham". Then Proposition B became the Mayor's and he was acting as the Agent of the City.

20. The Proponents, by their persistence in the face of adversity, have now obtained a result that a state administrative body cannot take away the right of Proponents of a citizen-circulated measure to defend their measure in the judicial system.

21. The Proponents were also a catalyst in bringing about a reaffirmation of the constitutional right of direct democracy and the ability of Proponents to defend their handiwork. PERB and the unions touted the statutory right of collective bargaining as superceding the right of citizens to defend their initiatives in a court of law. Using an administrative procedural process that has no room for citizens could not elminate the rights of citizens to defend their attempt at direct democracy.

22. When other arguments failed, PERB and the unions attempted to carve out bargaining to allow the "meet and confer" process to delay placement of a citizen-circulated ballot measure on a later ballot while management and labor bargain obver the terms of a competing ballot measure. As Proponents discussed in oral argument, injecting the MMBA bargaining process into the content neutral ballot placement process would only benefit public sector labor organizations solely because of the subject matter of the measure. While none of the bargaining requests of the unions asked to bargain over a competing ballot measure in any of their written requests, this became an issue when the "sham" argument failed. Proponents were the only parties that addressed this issue with any significance. The Opinion vidicates the rights of initiative proponents to propose legislation regarding compensation of public employees without a more stringent procedure than any other type of measure.

23. Ultimately, PERB settled on an "agency" argument to take away the authority of Proponents to go directly to the ballot with their qualified initiative. With the participation of Proponents as a catalyst on this issue, the Proponents demonstrated from their first efforts in February 2012 through oral argument before this Court that their actions were separate from the City. In spite of possessing no evidence to the contrary, PERB cannot create an "agency" relationship between elected officials who politically support a citizen-circulated ballot measure and the proponents of the measure.

24. Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego defended the ballot placement and enforcement of a validly adopted Charter measure with vigor. Proponents were a catalyst throughout the legal and administrative processes which ensured that the City of San Diego did not settle, compromise or fail to implement Proposition B. This effort is in contrast with another matter handled by this Declarant and this firm. This Declarant is co-counsel in a matter involving a *Quo Warranto* action that challenged the implementation of Measure B (pension reform) in the City of San Jose. The San Jose Measure "B" was also approved in the election of June 2012. It has been the subject of numerous legal actions including a *Quo Warranto* lawsuit. In the *Quo Warranto* action, the local unions and the City of San Jose stipulated to a violation of MMBA and jointly dismissed the action. This action invalidated San Jose Measure "B" without a single contested hearing in the *Quo Warranto* case. As Counsel for the Silicon Valley Taxpayers Association and Steven Haug, Declarant and this firm filed for Intervention, then to stay the dismissal and requested authority to defend the Measure. This dismissal is currently stayed by the Sixth District Court of Appeal pending briefing. (*Constant, et al. v. Sup. Ct.*, No. H043540; *People v. City of San Jose and Constant, et al.* as Defendants- Intervenors, No. H043727.)

25. Without the efforts of Proponents, the outcome could be the same in this action as it was in the San Jose matter. Most of the City Council did not support San Diego's Proposition B and its fate would have likely been the same or similar to the San Jose's experience where citizen participation was precluded. In California, the Proponents of a measure are the recognized representatives of the voters. Proponents' participation prevented settlement or ensured PERB's final decision was challenged.

26. Proponents, through their legal and administrative actions, before and after the June 2012 election, ensured that the City of San Diego allowed the election to not be delayed and, upon approval, fully implemented a validly adopted Charter measure instead of settling the matter through compromise with PERB and/or the unions. Proponents were a catalysis that kept the election on schedule and prevented any delay in implementation. Since Proposition B placed a five-year pension pay freeze on the City of San Diego, delay in implementation could have had disastrous result for the fiscal health of San Diego.

27. The firm and Declarant are experienced in election matters, public pension ballot measures, and the MMBA. This is a unique combination, and this case and the San Jose matter are the only two public/pension election matters currently being litigated in the State. Since these election matters are of statewide concern and similar public pension/election cases are rare, the "community" is not San Diego County but the State of California. As such, the base rate of this matter should be set at the same rate in this case as in the San Jose case. In the San Jose matter, the Declarant was and is being compensated at a rate of $500 per hour.

28. The firm has represented other citizen groups and individuals in California on public pension ballot matters. In addition, the firm has provided advisory opinions on public pension matters in other jurisdictions.

29. The hours expended on these matters were reasonable and appropriate for the type of matter and the urgency in which the matters had to be handled both pre- and post-election. The hours listed in the attachments to this Declaration are the actual hours that were billed and are being billed to the clients (Proponents) in these matters. The hours were recorded contemporaneous with the time the work was performed.

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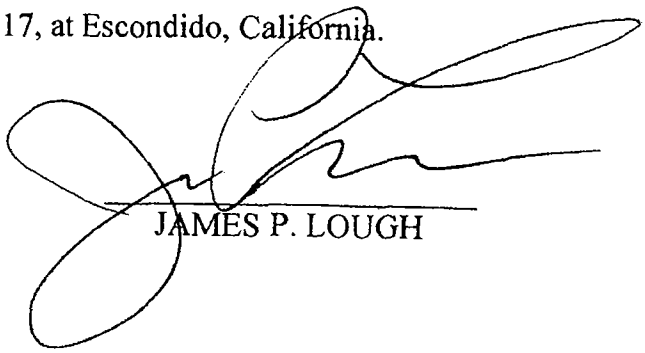
30. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of May, 2017, at Escondido, California.



JAMES P. LOUGH

EXHIBIT F

Case No. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

PETITIONERS' MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF YANA L. RIDGE AND [PROPOSED] ORDER IN SUPPORT OF PETITIONERS' MOTION FOR ATTORNEYS' FEES

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)

Lounsbery Ferguson Altona & Peak, LLP
Kenneth H. Lounsbery/ SBN 38055
James P. Lough/ SBN 91198
Alena Shamos/ SBN 216548
Yana L. Ridge/ SBN 306532
Phone: (760) 743-1201; Fax: (760) 743-9926

Attorneys for Petitioners,
Catherine A. Boling, T.J. Zane and Stephen B. Williams

Under California Rule of Court 8.252(a) and under Evidence Code sections 452, subdiv. (d) and 459(a), Petitioners Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Petitioners") move this Court for an Order taking Judicial Notice of official records of the Superior Court, the documents are directly relevant to the instant Motion for Attorney's Fees.

True and correct copies of these records are attached hereto pursuant to California Rule of Court 8.252(a)(3):

A. Stipulated Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.

B. Stipulated Facts and Proposed Findings, Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.

C. Writ in Quo Warranto filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.

Petitioners' Motion for Judicial Notice is based on this notice, the attached Memorandum of Points and Authorities, the attached Declaration of Yana Ridge, and Petitioners' Memorandum of Points and Authorities in Support of Motion for Attorney's Fees.

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Respectfully submitted,

Date: May 10, 2017

LOUNSBERY FERGUSON
ALTONA & PEAK, LLP

By: _____
Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Yana Ridge
Attorneys for Proponents
CATHERINE A. BOLING,
T.J. ZANE, and STEPHEN B.
WILLIAMS

MEMORANDUM OF POINTS AND AUTHORITIES

This Supplemental Motion seeks judicial notice of official court records on the basis that the documents are official records of Superior Court, and the documents are directly relevant to the instant Motion for Attorney's Fees.

Exhibit A is a copy of the Stipulated Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose*, which is available on the Santa Clara Superior Court website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

Exhibit B is a copy of the Stipulated Facts and Proposed Findings, Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose,* which is available which is available on the Santa Clara Superior Court website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

Exhibit C is a copy of the Writ in Quo Warranto filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose,* which is available on the Santa Clara Superior Court website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

This Court has authority to judicially notice "any matter specified in Evid. Code, § 452." (Evidence Code § 459, subd. (a); Cal. Rules of Court, Rule 8.252, subd. (a)(2)(c); *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1211.) Pursuant to California Evidence Code, section

452, subd. (d), the Court is authorized to take judicial notice of "Records of (1) any court of this state." (*Robertson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1503, n.3.) As established in the accompanying declaration of Yana Ridge, Exhibits A-C are a true and correct copy of the Stipulated Judgment, Writ in Quo Warranto, and Stipulated Facts and Proposed Findings, filed in the Santa Clara Superior Court on March 30, 2016. These documents are records of Superior Court. They are relevant to show how the City of San Diego could have handled the matter if Petitioners did not defend their constitutional rights (by stipulating away the rights of the people without a hearing or opportunity to defend them), and to show that this firm is co-counsel in the San Jose matter, for purposes of establishing the fee rate.

Based on the foregoing reasons and authorities, Petitioners respectfully request the Court grant their Motion for Judicial Notice.

Respectfully submitted,

Date: May 10, 2017

LOUNSBERY FERGUSON
ALTONA & PEAK, LLP

By: _____
Kenneth H. Lounsbery
James P. Lough
Alena Shamos
Yana Ridge
Attorneys for Proponents
CATHERINE A. BOLING,
T.J. ZANE
STEPHEN B. WILLIAMS

DECLARATION OF YANA RIDGE

I, Yana Ridge, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California. I am employed with the law firm of Lounsbery Ferguson Altona & Peak LLP, attorneys of record for Catherine A. Boling, T.J. Zane and Stephen B. Williams, Petitioners in this case and Real Parties in Interest in the City of San Diego's Case No. D069630. I have personal knowledge of the matters set forth below.

2. Attached as Exhibit A is a true and correct copy of the Stipulated Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.*

3. I obtained Exhibit A from the Santa Clara Superior Court's website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

4. Attached as Exhibit B is a true and correct copy of the Stipulated Facts and Proposed Findings, Judgment and Order filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.*

5. I obtained Exhibit B from the Santa Clara Superior Court's website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

6. Attached as Exhibit C is a true and correct copy of the Writ in Quo Warranto filed March 30, 2016 in Santa Clara Superior Court Case No. 1-13-CV-245503 titled *the People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose and City Council of San Jose.*

7. I obtained Exhibit C from the County of the Santa Clara Superior Court's website: http://www.scscourt.org/ under Case Information Portal by entering the case number.

8. The documents are official records of the Santa Clara Superior Court and are properly the subject of judicial notice as provided in the attached Memorandum and Points of Authorities.

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

Executed this 10th day of May, 2017, at Escondido, California.

Yana Ridge

Case No. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

[PROPOSED] ORDER GRANTING PROPONENTS' MOTION FOR JUDICIAL NOTICE

There being good cause, **IT IS HEREBY ORDERED** that Petitioners' Motion for Judicial Notice is **GRANTED.**

DATED: _____, 2017 _____

PRESIDING JUDGE

EXHIBIT A

CHARLES D. SAKAI (SBN 173726)
STEVEN P. SHAW (SBN 242593)
RENNE SLOAN HOLTZMAN SAKAI LLP
350 Sansome Street, Suite 300
San Francisco, CA 94104
Telephone: (415) 678-3800
Facsimile: (415) 678-3838

Attorneys for Defendants
CITY OF SAN JOSÉ and
CITY COUNCIL OF SAN JOSÉ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. SAN JOSÉ POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSÉ and CITY COUNCIL OF SAN JOSÉ,

Defendants.

Case No.: 1-13-CV-245503

EXEMPT FROM FEES (GOV. CODE § 6103)

~~[PROPOSED]~~ STIPULATED JUDGMENT AND ORDER

Complaint Filed: April 29, 2013
Trial Date: None Set

In this action, Plaintiff San José Police Officers' Association ("SJPOA") filed a Verified Complaint in *Quo Warranto* against Defendants City of San José and City Council of San José ("City") (collectively, "the Parties") on April 29, 2013, alleging various defects in bargaining over the pension reform ballot measure (Resolution No. 76158) that subsequently became known as Measure B. The Court has been advised that, after extensive negotiations, the Parties have reached a Settlement Framework and Agreement of this action and related proceedings, and has received Stipulated Facts and Proposed Findings executed by the Parties, pursuant to the Settlement Framework and Agreement. The Court, having considered the Stipulated Facts and Proposed Findings and the other papers and pleadings filed, and good cause existing therefor, hereby issues the following as its Stipulated Judgment and Order herein.

Factual Findings of the Court

1. The California Supreme Court has held that a charter city (such as the City of San José) must comply with the meet and confer requirements of the Meyers-Milias-Brown Act ("MMBA") – which govern relations between local public agency employers and local public employee organizations – before placing an initiative measure on the ballot that would affect matters within the scope of the Act.

2. It is clear from the Parties' submissions and recitations of the relevant facts that the Parties did, in fact, meet and exchange proposals over a period of several months, reaching an agreed-upon impasse on October 31, 2011.

3. The MMBA's "duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse .... " If an impasse exists, however, it may be broken, and the duty to bargain revived, by a change in circumstances that suggests that bargaining may no longer be futile.

4. In this case, the issue is whether impasse existed and, if so, whether it had been broken by post-impasse ballot changes made by the City and whether the City Council should have negotiated further with SJPOA prior to placing the matter before the voters.

Conclusions

1. Here, both Parties met and conferred in good faith before reaching an agreed-upon impasse on October 31, 2011.

2. However, continued modification of the proposed ballot language after impasse – including concessions made by the City – created a further obligation to meet and confer before placing Measure B on the ballot.

3. The City's failure to do so is deemed to be a procedural defect significant enough to declare null and void Resolution 76158, which placed Measure B on ballot.

Based on the foregoing, IT IS ORDERED that Resolution 76158, which placed Measure B on ballot, is null and void due to a procedural defect in bargaining.

IT IS FURTHER ORDERED that Measure B was not properly placed before the electorate and it and all of its provisions are therefore invalid.

Dated: 3.15.16

Hon. Beth A.R. McGowen
Judge of the Santa Clara County Superior Court

Judge Beth McGov

RENNE SLOAN HOLTZMAN SAKAI LLP
Attorneys at Law

EXHIBIT B

CHARLES D. SAKAI (SBN 173726)
STEVEN P. SHAW (SBN 242593)
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Attorneys for Defendants
CITY OF SAN JOSÉ and
CITY COUNCIL OF SAN JOSÉ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. SAN JOSÉ POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSÉ and CITY COUNCIL OF SAN JOSÉ, Defendants.	Case No.: 1-13-CV-245503 EXEMPT FROM FEES (GOV. CODE § 6103) STIPULATED FACTS AND PROPOSED FINDINGS, JUDGMENT AND ORDER Complaint Filed: April 29, 2013 Trial Date: None Set

STIPULATION

These Stipulated Facts and Proposed Findings, Judgment and Order are entered into by and between Plaintiff San José Police Officers' Association ("SJPOA"), on the one hand, and the City of San José ("City"), on the other hand (collectively, the "Parties"), with respect to allegations and claims in SJPOA's Verified Complaint in *Quo Warranto* ("Complaint"). The Parties have engaged in extensive settlement negotiations and have reached agreement on the following stipulated facts and Order.

WHEREAS, the Parties recognize the overriding public interest in expedited resolution of these quo warranto proceedings and implementation of the Settlement Framework approved by the San José City Council on August 25, 2015 to restore and improve City services and sustainability of retirement plans.

WHEREAS, the parties have reached this Stipulation in order to: (1) conserve resources; and (2) address the costs, time, and risks of continued litigation, both in this forum and in others; and (3) resolve between these parties the question of whether a decision in this matter would be universally applicable with respect to the requirements of the ballot measure known as "Measure B," as applied to bargaining units and employees outside of SJPOA should SJPOA's quo warranto proceedings succeed in invalidating Measure B based on the bargaining history that took place between the City and SJPOA.

WHEREAS, the Parties make this agreement in the interest of identifying a collaborative solution which addresses the financial challenges facing the City with respect to funding retirement obligations, as well as a mutual desire on the part of employees, retirees and City to make such benefits sustainable.

IT IS THEREFORE STIPULATED AND AGREED by and between the Parties to the above-referenced action, through their respective attorneys of record, that the following be adopted as the findings and Order of this Court.

Stipulated Facts

1. On June 3, 2011, SJPOA and the City entered into a tentative agreement entitled "Side Letter Agreement Between the City of San José and San José Police Officers' Association – Retirement Reform."

2. On June 9, 2011, George Beattie, then-President of SJPOA, and Robert Sapien, then-President of the International Association of Firefighters, Local 230 ("IAFF") wrote to Alex Gurza, then-Director of Employee Relations for the City, requesting to commence joint bargaining over retirement reform.

3. On June 20, 2011, the Parties entered into a Pledge of Cooperation and Agreement Upon a Framework for Retirement Reform and Related Ballot Measure Negotiations ("Pledge and Agreement"). The Pledge and Agreement essentially provided a set of ground rules for the Parties to negotiate concurrently on the issues of retirement reform and related ballot measure(s). In addition to SJPOA and the City, IAFF was a signatory to the Pledge and Agreement and negotiations occurred

between the City and both of those public safety Unions at the same table. A true and correct copy of the Pledge and Agreement is attached hereto as Exhibit 1.

4. During the period spanning June 20, 2011 through October 28, 2011, SJPOA, IAFF and the City met and conferred over retirement reform issues and/or related ballot measures on June 20, July 13, August 1, August 20, August 31, September 13, September 15, October 4, October 12, October 14, October 20, October 24, and October 28, 2011.

5. SJPOA and IAFF issued a joint Retirement Reform Proposal on September 27, 2011.

6. During the period spanning June 20, 2011 through October 28, 2011, the CITY proposed five (5) separate draft ballot measures to SJPOA and IAFF, which were provided on July 6, September 9, October 5, October 20, and October 27, 2011, respectively.

7. On October 31, 2011, having not reached an agreement on retirement reform and/or related ballot measures, the Parties reached impasse pursuant to the terms of the Pledge and Agreement.

8. On November 11, 2011, SJPOA and IAFF issued a revised SJPOA/Fire Fighter retirement reform proposal.

9. Pursuant to the terms of the Pledge and Agreement, which provided that the Parties would proceed to impasse procedures if unable to reach agreement by October 31, 2011, SJPOA, IAFF and the City participated in joint mediation sessions on November 15 and 16, 2011 before Mediator Paul Roose of the California State Mediation and Conciliation Service.

10. At the conclusion of the November 15 and 16 mediation sessions, the Parties still had not reached agreement on retirement reform and/or related ballot measures.

11. On November 18, 2011, SJPOA and IAFF issued new proposals significantly amending their prior proposals. The Unions asked to resume bargaining based on their revised proposals.

12. Following SJPOA and IAFF's revised retirement reform proposal, the City issued a sixth draft ballot measure proposal on November 22, 2011, which it provided to SJPOA and IAFF, informing those bargaining units that the revised ballot measure would be presented to City Council for consideration and possible adoption at the December 6, 2011 Council meeting. The November 22 ballot measure made significant revisions from prior versions.

13. On December 1, 2011, SJPOA and IAFF sent the City another revised proposal and asked to meet and confer about it.

14. On December 5, 2011, the City issued a seventh draft ballot measure, which was presented to City Council for consideration and possible adoption at the December 6, 2011 Council meeting. While the December 5 ballot measure was publically available before the December 6, 2011 City Council meeting, it was not provided to SJPOA and IAFF as part of the bargaining process. The December 5 version of the ballot measure made additional concessions as compared to the November 22 version.

15. On December 6, 2011, the City Council adopted Resolution No. 76087, which approved the City's last proposed ballot measure (i.e., December 5 version) for placement on the June 2012 ballot.

16. On December 13, 2011, SJPOA and IAFF wrote to the City asking to resume negotiations or in the alternative engaging in further mediation.

17. Thereafter, SJPOA, IAFF and the City participated in a second joint mediation, before mediator Douglas Collins, on January 17, January 18, February 6, and February 10, 2012, in an effort to reach agreement on retirement reform and/or related ballot measures prior to the proposed ballot measure previously adopted by the City Council being placed before the voters.

18. At the conclusion of the January 18 through February 10 mediation sessions, the Parties still had not reached agreement on retirement reform and/or related ballot measures.

19. On February 21, 2012, the City proposed an eighth draft ballot measure to SJPOA and IAFF, and informed those bargaining units that the revised ballot measure would be presented to the City Council for consideration and possible adoption at the Council meeting scheduled for March 6, 2012. If approved, the revised ballot measure would replace the version previously adopted by the City Council on December 6, 2012.

20. On February 24, 2012, the SJPOA requested to bargain about the February 21, 2012 ballot measure. The City responded to the SJPOA's letter on February 27, 2012, but the City and Unions did not engage in further negotiations.

21. On March 3, 2012, SJPOA and IAFF issued a further revised SJPOA/Fire Fighter retirement reform proposal.

22. On March 5, 2012, the City responded to SJPOA and IAFF's March 3 proposal via letter, but the parties did not engage in further negotiations.

23. On March 6, 2012, the San José City Council adopted Resolution No. 76158, which repealed Resolution No. 76087, and instead approved the February 21, 2012 proposed ballot measure for placement on the June 5, 2012 ballot.

24. On June 5, 2012, that ballot measure, which had become known as Measure B, was passed by the voters.

Stipulated Findings

1. The California Supreme Court has held that a charter city (such as the City of San José) must comply with the meet and confer requirements of the Meyers-Milias-Brown Act ("MMBA") – which govern relations between local public agency employers and local public employee organizations – before placing an initiative measure on the ballot that would affect matters within the scope of the Act.

2. It is clear from the Parties' submissions and recitations of the relevant facts that the Parties did, in fact, meet and exchange proposals over a period of several months, reaching an agreed-upon impasse on October 31, 2011.

3. The MMBA's "duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse .... " If an impasse exists, however, it may be broken, and the duty to bargain revived, by a change in circumstances that suggests that bargaining may no longer be futile.

4. In this case, the issue is whether impasse existed and, if it did, whether it had been broken by post-impasse ballot changes made by the City and whether the City Council should have negotiated further with SJPOA prior to placing the matter before the voters.

Stipulated Conclusions

1. Here, both Parties met and conferred in good faith before reaching an agreed-upon impasse on October 31, 2011.

2. However, continued modification of the proposed ballot language after impasse – including concessions made by the City – created a further obligation to meet and confer before placing Measure B on the ballot.

3. The City's failure to do so is deemed to be a procedural defect significant enough to declare null and void Resolution 76158, which placed Measure B on ballot.

~~[Proposed]~~ Stipulated Judgment and Order

In light of the Stipulated Facts, Findings and Conclusions set forth above, and pursuant to the Parties' desire to settle and resolve the disputes between them through the terms of this Stipulation, the Parties respectfully submit the attached Proposed Stipulated Judgment and Order (Exhibit A), which is incorporated herein.

Dated: March 8, 2016

RENNE SLOAN HOLTZMAN SAKAI LLP

By: _____
Charles D. Sakai
Steven P. Shaw
Attorneys for Defendants
CITY OF SAN JOSÉ and
CITY COUNCIL OF SAN JOSÉ

Dated: March 2, 2016

MESSING ADAM & JASMINE LLP

By: _____
Gregg McLean Adam
Attorneys for Relator-Plaintiff
SAN JOSE POLICE OFFICERS' ASSOCIATION

APPROVED AS TO FORM:

Dated: March 2, 2016

ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA

By: _____
Marc J. Nolan
Deputy Attorney General

EXHIBIT C

Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Jonathan Yank, Bar No. 215495
jonathan@majlabor.com
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Attorneys for Relator-Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE, Defendants.	Case No. 1-13-CV-245503 ~~[PROPOSED]~~ WRIT IN *QUO WARRANTO*

To the City of San José and City Council of San José ("City"), Defendants:

WHEREAS, Plaintiff San José Police Officers' Association ("SJPOA") filed a Verified Complaint in *Quo Warranto* ("Complaint") against Defendants City of San José and City Council of San José ("City") (collectively, "the Parties") on April 29, 2013, alleging various defects in bargaining over the pension reform ballot measure (Resolution No. 76158) that subsequently became known as Measure B;

WHEREAS, the parties subsequently engaged in extensive settlement negotiations and entered into the attached Stipulated Facts and Proposed Findings, Judgment and Order which concluded that the continued modification of the proposed ballot language after impasse created a

further obligation to meet and confer before placing Measure B on the ballot and that the City's failure to do so is deemed to be a procedural defect significant enough to declare null and void Resolution 76158, which placed Measure B on ballot.

WHEREAS, the Court, having considered the Stipulated Facts and Proposed Findings, Judgment and Order, and the other papers and pleadings filed, under the authority vested in the judiciary via California Code of Civil Procedure section 803 has determined that Resolution 76158, which placed Measure B on the ballot, was null and void due to a procedural defect in bargaining.

THEREFORE, YOU ARE HEREBY COMMANDED, upon receipt of this Writ in *Quo Warranto*, to take all necessary steps to comply with the attached Stipulated Facts and Proposed Findings, Judgment and Order, and declare Resolution 76158 null and void due to a procedural defect.

YOU ARE FURTHER COMMANDED to declare that Measure B was not properly placed before the electorate and it and all of its provisions amending the City of San Jose Charter are therefore invalid and are stricken. Subsequent ordinances amending the Municipal Code to conform with Measure B shall be replaced.

Dated: 8.15, 2016

By _____
Hon. _____
Judge of the Superior Court

Judge Beth McGowen

APPROVED AS TO FORM

Dated: March 2, 2016

MESSING ADAM & JASMINE LLP

By _____
Gregg McLean Adam
Attorneys for Relator-Plaintiff
San Jose Police Officers' Association

Dated: March 8, 2016

CITY OF SAN JOSE and CITY COUNCIL OF SAN JOSE

By _____
Charles Sakai
Attorneys for City of San Jose

Dated: March 2, 2016

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

By _____
Marc J. Nolan
Deputy Attorney General

EXHIBIT G

CASE NO. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

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 May 10, 2017, I caused the following documents:

Petitioners' Motion For Attorneys' Fees and Memorandum of Points and Authorities In Support Thereof [CCP § 1021.5]

Petitioners' Motion for Judicial Notice; Memorandum of Points and Authorities; Declaration of Yana L. Ridge; and [Proposed] Order in Support of Petitioners' Motion for Attorneys' Fees

Declaration of Kenneth H. Lounsbery in Support of Petitioners' Motion for Attorneys' Fees

Declaration of James P. Lough in Support of Petitioners' Motion for Attorneys' Fees

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

SERVICE LIST

J. Felix De la Torre, General Counsel Wendi Ross, Deputy General Counsel Mary Weiss, Sr. Regional Attorney Joseph W. Eckhart, Regional Attorney **Public Employment Relations Board** 1031 18th Street Sacramento, CA 95811-4124 PERBLitigation@perb.ca.gov	*Attorneys for Public Employment Relations Board* **Via mail and email**
Mara W. Elliott, City Attorney Walter Chung, Deputy City Attorney M. Travis Phelps, Deputy City Attorney **City of San Diego** 1200 Third Avenue, Ste. 1100 San Diego, CA 92101 melliott@sandiego.gov cityattorney@sandiego.gov wchung@sandiego.gov mphelps@sandiego.gov	*Attorneys for City of San Diego* **Via mail and email**
Fern M. Steiner **Smith Steiner Vanderpool & Wax** 401 West A Street, Ste. 320 San Diego, CA 92101 fsteiner@ssvwlaw.com	*Attorneys for San Diego City Firefighters, Local 145* **Via mail and email**
Ann M. Smith **Smith, Steiner Vanderpool & Wax** 401 West A. Street, Ste. 320 San Diego, CA 92101 asmith@ssvwlaw.com	*Attorneys for, and Agent of Service of Process for, San Diego Municipal Employees Association* **Via mail and Email**

James J. Cunningham
Law Offices of James J. Cunningham
4141 Avenida De La Plata
Oceanside, CA 92056
jimcunninghamlaw@gmail.com

Attorneys for Deputy City Attorneys Association of San Diego

Via mail and email

Ellen Greenstone
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Via mail and email

[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 **May 10, 2017** at Escondido, California.

Kathleen Day

EXHIBIT H

CASE NO. D069626

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

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

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

AMENDED: 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. This Proof of Service is Amended to reflect that on May 11, 2017, I caused the following documents, which were served via email on May 10, 2017 to also be mailed to the parties listed per the original Proof of Service:

Petitioners' Motion For Attorneys' Fees and Memorandum of Points and Authorities In Support Thereof [CCP § 1021.5]

Petitioners' Motion for Judicial Notice; Memorandum of Points and Authorities; Declaration of Yana L. Ridge; and [Proposed] Order in Support of Petitioners' Motion for Attorneys' Fees

Declaration of Kenneth H. Lounsbery in Support of Petitioners' Motion for Attorneys' Fees

Declaration of James P. Lough in Support of Petitioners' Motion for Attorneys' Fees

SERVICE LIST

J. Felix De la Torre, General Counsel Wendi Ross, Deputy General Counsel Mary Weiss, Sr. Regional Attorney Joseph W. Eckhart, Regional Attorney **Public Employment Relations Board** 1031 18th Street Sacramento, CA 95811-4124 PERBLitigation@perb.ca.gov	*Attorneys for Public Employment Relations Board* **Via mail**
Walter Chung, Deputy City Attorney M. Travis Phelps, Deputy City Attorney **City of San Diego** 1200 Third Avenue, Ste. 1100 San Diego, CA 92101 melliott@sandiego.gov cityattorney@sandiego.gov wchung@sandiego.gov mphelps@sandiego.gov	*Attorneys for City of San Diego* **Via mail**
Fern M. Steiner **Smith Steiner Vanderpool & Wax** 401 West A Street, Ste. 320 San Diego, CA 92101 fsteiner@ssvwlaw.com	*Attorneys for San Diego City Firefighters, Local 145* **Via mail**
Ann M. Smith **Smith, Steiner Vanderpool & Wax** 401 West A. Street, Ste. 320 San Diego, CA 92101 asmith@ssvwlaw.com	*Attorneys for, and Agent of Service of Process for, San Diego Municipal Employees Association* **Via mail**

James J. Cunningham
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Via mail

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Attorneys for AFSCME, AFL-CIO, Local 127

Via mail

[ ] **(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 **May 11, 2017** at Escondido, California.

Kathleen Day

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

Catherine Boling, et al,
Petitioner
v.
Public Employment Relations Board
Respondent;

City of San Diego,
Real Parties in Interest
California Fourth District Court of Appeals Case No. D069626

I, Kathleen Day, declare that I am over 18 years of age, employed in the City of Escondido, and am not a party to the instant action. My business address is 960 Canterbury Place, Ste. 300, Escondido, California. On May 18, 2017, I served **PETITION FOR REVIEW** to the recipients listed below via the following methods:

VIA EMAIL: Pursuant to California Rules of Court, Rule 8.71, I sent the documents via email addressed to the email address listed for each recipient, 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 via email, which practice is that when documents are to be served by email, they are a scanned into a .pdf format and sent to the addresses on that same day and in the ordinary course of business.

VIA FEDERAL EXPRESS: I caused each such envelope to be placed in the Federal Express depository at Escondido, California. I am readily familiar with the firm's practice of collection and processing of correspondence for Federal Express delivery. Under that practice it would be deposited in a box or other facility regularly maintained by Federal Express, in an envelope or package designed by Federal Express with delivery fees prepaid.

Clerk of the Court **California Fourth District Court of Appeal, Division 1** **750 B Street, Ste. 300** **San Diego, CA 92101**	*Via Truefiling*
J. Felix De la Torre, General Counsel Wendi Ross, Deputy General Counsel Mary Weiss, Sr. Regional Attorney Joseph W. Eckhart, Regional Attorney **Public Employment Relations Board** 1031 18th Street Sacramento, CA 95811-4124 PERBLitigation@perb.ca.gov	*Attorneys for Public Employment Relations Board* **Via FedEx and email**
Walter Chung, Deputy City Attorney M. Travis Phelps, Deputy City Attorney **City of San Diego** 1200 Third Avenue, Ste. 1100 San Diego, CA 92101 cityattorney@sandiego.gov wchung@sandiego.gov mphelps@sandiego.gov	*Attorneys for City of San Diego* **Via FedEx and email**
Fern M. Steiner **Smith Steiner Vanderpool & Wax** 401 West A Street, Ste. 320 San Diego, CA 92101 fsteiner@ssvwlaw.com	*Attorneys for San Diego City Firefighters, Local 145* **Via FedEx and email**
Ann M. Smith **Smith, Steiner Vanderpool & Wax** 401 West A. Street, Ste. 320 San Diego, CA 92101 asmith@ssvwlaw.com	*Attorneys for, and Agent of Service of Process for, San Diego Municipal Employees Association* **Via FedEx and Email**
James J. Cunningham Law Offices of James J. Cunningham 4141 Avenida De La Plata Oceanside, CA 92056 jimcunninghamlaw@gmail.com	*Attorneys for Deputy City Attorneys Association of San Diego* **Via FedEx and email**

Ellen Greenstone
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Pasadena, CA 91101
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Attorneys for AFSCME, AFL-CIO, Local 127

Via FedEx and email

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

Executed on **May 18, 2017** at Escondido, California.

Kathleen Day

Filed 4/11/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CATHERINE A. BOLING et al., Petitioners, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent; CITY OF SAN DIEGO et al., Real Parties in Interest.	D069626
CITY OF SAN DIEGO, Petitioner, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION et al., Real Parties in Interest.	D069630

Petition for extraordinary relief from a decision of the Public Employment Relations Board. Decision annulled.

Lounsbery Ferguson Altona & Peak, Kenneth H. Lounsbery, James P. Lough and Alena Shamos for Petitioners and Real Parties in Interest Catherine A. Boling, T. J. Zane and Stephen B. Williams in No. D069626 and No. D069630.

Jan I. Goldsmith and Mara Elliott, City Attorneys, Daniel F. Bamberg, Assistant City Attorney, Walter C. Chung and M. Travis Phelps, Deputy City Attorneys, for Petitioner and Real Party in Interest City of San Diego in No. D069630 and No. D069626.

JONES DAY, Gregory G. Katsas, G. Ryan Snyder, Karen P. Hewitt and Brian L. Hazen for San Diego Taxpayers Education Foundation as Amicus Curiae on behalf of Petitioner in No. D069630.

Renne Sloan Holtzman Sakai and Arthur A. Hartinger for League of California Cities as Amicus Curiae on behalf of Petitioner in No. D069630.

Meriem L. Hubbard and Harold E. Johnson for Pacific Legal Foundation, Howard Jarvis Taxpayers Association and National Tax Limitation Committee as Amici Curiae on behalf of Petitioner in No. D069630.

J. Felix de la Torre, Wendi L. Ross, Mary Weiss, and Joseph W. Eckhart for Respondent.

Smith, Steiner, Vanderpool & Wax and Ann M. Smith for Real Party in Interest San Diego Municipal Employees Association in No. D069626.

Smith, Steiner, Vanderpool & Wax and Fern M. Steiner for Real Party in Interest San Diego City Firefighters Local 145 in No. D069626.

Rothner, Segall and Greenstone, Ellen Greenstone and Connie Hsiao for Real Party in Interest AFCSME Local 127 in No. D069626.

Law Offices of James J. Cunningham and James J. Cunningham for Real Party in Interest Deputy City Attorneys Association of San Diego in No. D069626.

In June 2012 the voters of City of San Diego (City) approved a citizen-sponsored initiative, the "Citizens Pension Reform Initiative" (hereafter, CPRI), which adopted a charter amendment mandating changes in the pension plan for certain employees of City of San Diego (City). In the proceedings below, the Public Employment Relations Board (PERB) determined City was obliged to "meet and confer" pursuant to the provisions of the Meyers-Milias-Brown Act (MMBA) (Gov. Code,[1] § 3500 et seq.) over the CPRI before placing it on the ballot and further determined that, because City violated this purported obligation, PERB could order "make whole" remedies that de facto compelled City to disregard the CPRI.

We conclude, for the reasons stated below, that under relevant California law the meet-and-confer obligations under the MMBA have no application when a proposed charter amendment is placed on the ballot by citizen proponents through the initiative process, but instead apply only to proposed charter amendments placed on the ballot by the governing body of a charter city. We also conclude that, although it is undisputed

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1 All statutory references are to the Government Code unless otherwise specified.

that Jerry Sanders (City's Mayor during the relevant period) and others in City's government provided support to the proponents to develop and campaign for the CPRI, PERB erred when it applied agency principles to transform the CPRI from a citizen-sponsored initiative, for which no meet-and-confer obligations exist, into a governing-body-sponsored ballot proposal within the ambit of *People ex rel. Seal Beach Police Officers Assn. v City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*). Accordingly, we hold PERB erred when it concluded City was required to satisfy the concomitant "meet-and-confer" obligations imposed by *Seal Beach* for governing-body-sponsored charter amendment ballot proposals, and therefore PERB erred when it found Sanders and the San Diego City Council (City Council) committed an unfair labor practice by declining to meet and confer over the CPRI before placing it on the ballot.

I

OVERVIEW

The San Diego Municipal Employees Association and other unions representing the prospectively affected employees (Unions) made repeated demands on Sanders and the City Council for City to meet and confer pursuant to the MMBA over the CPRI before placing it on the ballot. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1451-1452 (*San Diego Municipal Employees*).) However, there was no dispute the proponents of the CPRI had gathered sufficient signatures to qualify the CPRI for the ballot, and the City Council declined Unions' meet-and-confer

demands and placed it on the ballot. (*Id.* at pp. 1452-1453.) The citizens of San Diego ultimately voted to approve the CPRI.

Unions filed unfair practice claims with the Public Employment Relations Board (PERB), asserting the rejection by Sanders and the City Council of their meet-and-confer demands constituted an unfair practice under the MMBA. PERB commenced proceedings against City and ultimately ruled City violated the MMBA by refusing to meet and confer over the CPRI before placing it on the June 2012 ballot. PERB ordered, among other remedies, that City in effect refuse to comply with the CPRI. City filed this petition for extraordinary review challenging PERB's conclusion that, because high level officials and other individuals within City's government publicly and privately supported the campaign to adopt the citizen-sponsored charter amendment embodied in the CPRI, City committed an unfair labor practice under the MMBA by placing the CPRI on the ballot without complying with the MMBA's meet-and-confer requirements.

In *Seal Beach, supra,* 36 Cal.3d 591, our high court was required to harmonize the provisions of the meet-and-confer requirements of the MMBA with the constitutional grant of power to a "governing body" to place a charter amendment on the ballot that would impact the terms and conditions of employment for employees of that city. The *Seal Beach* court concluded that, before a *governing body* may place such a charter amendment on the ballot, it must first comply with the meet-and-confer obligations under the MMBA. (*Seal Beach,* at pp. 597-601.) The *Seal Beach* court cautioned, however, that the case before it "[did] not involve the question whether the meet-and-confer

requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at p. 599, fn. 8.)

The present proceeding requires that we first determine the issue left open in *Seal Beach*: does the meet-and-confer requirement apply when the charter amendment is proposed by a citizen-sponsored initiative rather than a governing-body-sponsored ballot proposal? We conclude the meet-and-confer obligations under the MMBA apply only to a proposed charter amendment placed on the ballot by the governing body of a charter city, but has no application when such proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. With that predicate determination, we must then decide whether PERB properly concluded City nevertheless violated its meet-and-confer obligations because the CPRI was *not* a citizen-sponsored initiative outside of *Seal Beach's* holding, but was instead a "City"-sponsored ballot proposal within the ambit of *Seal Beach*. Although several people occupying elected and nonelected positions in City's government did provide support for the CPRI, we conclude PERB erred when it applied agency principles to transform the CPRI into a governing-body-sponsored ballot proposal. Because we conclude that, notwithstanding the support given to the CPRI by Sanders and others, there is no evidence the CPRI was ever approved by City's governing body (the City Council), we hold PERB erred when it concluded City was required to satisfy the concomitant "meet-and-confer" obligations imposed by *Seal Beach* for governing-body-sponsored charter amendment ballot proposals.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. DeMaio's Pension Reform Proposal

In early November 2010, City Councilmember Carl DeMaio announced his comprehensive plan to reform the City's finances. His wide-ranging plan to reform the City's finances included, among its many proposals, a proposal to replace defined benefit pensions with 401(k)-style plans for newly hired employees.

B. Sanders's Pension Reform Proposal

In late November 2010, Sanders also announced that he would attempt to develop and place a citizen's initiative on the ballot to eliminate traditional pensions for new hires at City and to replace them with a 401(k)-style plan for nonsafety new hires. Sanders believed replacing the old system with the new 401(k)-style plan was necessary to solve what he viewed to be the unsustainable cost to City of the defined benefit pension for City employees.

Sanders, after discussions with various members of his staff, decided to pursue his pension reform proposal as a citizens' initiative, rather than to pursue it by a City Council-sponsored ballot measure. Sanders chose to pursue his pension reform proposal as a citizen-sponsored initiative, rather than a City Council-sponsored ballot proposal, because he did not believe the City Council would put his proposal on the ballot "under any circumstances," and he also believed pursuing a City Council-sponsored ballot

proposal (which would also require negotiating with the unions) could require unacceptable compromises to his proposal.[2]

Sanders held a "kick-off" press conference to announce his intent to pursue his pension reform plans through a private initiative. This event, which was held at City Hall and at which Sanders was joined by others,[3] was covered by the local media and included media statements informing the public that "San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [C]ity employees."[4] Sanders's office also issued a news release—styled as a "Mayor Jerry Sanders Fact Sheet"—to announce his decision. Faulconer disseminated Sanders's press release by an e-mail stating Sanders and Faulconer "would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters," and Sanders sent a similar e-mail announcing he was partnering

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2 Sanders, in a tape-recorded interview with a local magazine, explained he pursued a citizen-sponsored initiative rather than other avenues to achieve his pension reform objectives because: "[W]hen you go out and signature gather and it costs a tremendous amount of money, it takes a tremendous amount of time and effort . . . . But you do that so that you get the ballot initiative on that you actually want. [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point . . . ."

3 Also in attendance were City Attorney Jan Goldsmith, City Councilmember Kevin Faulconer, and City's Chief Operating Officer Jay Goldstone).

4 NBC San Diego news coverage of Sanders's press conference included a photograph of Sanders standing in front of the City seal to make his initiative announcement.

with Faulconer to "craft language and gather signatures" for a ballot initiative to reform public pensions.

Over the ensuing months, Sanders continued developing and publicizing his pension reform proposal, and in early January 2011 a committee was formed (San Diegans for Pension Reform (SDPR)) to raise money to support his proposed initiative. At his January 2011 State of the City address,[5] Sanders vowed to "complete our financial reforms and eliminate our structural budget deficit." He stated he was "proposing a bold step" of "creating a 401(k)-style plan for future employees . . . [to] contain pension costs and restore sanity to a situation confronting every big city" and that, "acting in the public interest, but as private citizens," Sanders announced that he, Faulconer, and the San Diego City Attorney (City Attorney) "will soon bring to voters an initiative to enact a 401(k)-style plan." That same day, Sanders's office issued a press release publicizing his vow "to push forward his ballot initiative" for pension reform.[6]

Sanders believed he had made it clear to the public that he undertook his efforts as a private citizen even though he was identified as "Mayor" when speaking in public about his proposal.

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5 Article XV, section 265(c) of the City Charter requires the address as a message from the Mayor to the City Council that includes "a statement of the conditions and affairs of the City" and "recommendations on such matters as he or she may deem expedient and proper." Members of Sanders's staff helped write the speech.

6 After his speech, Sanders continued his publicity efforts for his proposal, and he was aided in those efforts by individuals who were also members of his staff.

C. DeMaio's Competing Pension Reform Initiative

The plan announced by DeMaio in early November 2010 for pension reform differed in some respects from Sanders's proposal. For example, DeMaio's proposed plan for a 401(k)-style plan for new hires did not exempt police, firefighters and lifeguards. DeMaio's proposed plan also included a "cap" on pensionable pay.[7] Two local organizations, the Lincoln Club and the San Diego County Taxpayers Association (SDCTA), supported DeMaio's competing plan as a plan that was "tougher" than Sanders's proposal.

D. The CPRI

In the aftermath of Sanders's January 2011 State of the City address, people in the business and development community informed Sanders they believed two competing initiative proposals—the DeMaio proposal and the Sanders proposal—would be

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7 By mid-March 2011, SDPR (the committee formed to support Sanders's proposed plan) hired an attorney to provide advice related to Sanders's proposed plan, and the attorney had opined the "cap" on pensionable pay as proposed by DeMaio's plan would make such a plan more vulnerable to legal challenges. SDPR also independently hired Buck Consultants, then serving as City's actuary for City's existing pension plan (and therefore with access to the data on City's pension system database), to provide a fiscal analysis of the impacts of 401(k) plans for new employees. Apparently, during the transition period to a 401(k)-style plan for new employees, there would be an immediate shorter term cost to City (because the change in the actuarial method used in doing the calculation would increase City's payments into the pension plan in the first three or four years), and a proposal for a "hard cap" on total payroll expenses could have mitigated the short-term impacts on City from the pension reform proposal. At his March 24, 2011, press conference, Sanders (along with Faulconer and the co-chairman for SDPR) reiterated their intent to move forward as private citizens with their pension reform proposal, and stated it would include caps and restrictions (including a five-year cap on City's payroll expenses) to produce greater savings for City.

confusing and there would be inadequate money to fund two competing citizen initiatives. Shortly after a March 24, 2011, press conference at which Sanders presented his refined proposal, people within either the Lincoln Club or SDCTA told Sanders they were "moving forward" with DeMaio's plan because it had sufficient money and was going to go onto the ballot, and that Sanders could either join them or go off on his own. This apparently triggered a series of meetings between supporters of the competing proposals,[8] and they reached an accord on the parameters of a single initiative.

The final initiative proposal, which ultimately became the CPRI, melded elements of both Sanders's and DeMaio's proposals: newly hired police would still continue with a defined benefit pension plan for newly-hired police officers, but newly-hired firefighters would be placed into the 401(k)-style plan. The pensionable pay freeze would be subject to the meet-and-confer process and could be overridden by a two-thirds majority of the City Council, but there would be no cap on total payroll. Sanders called the negotiations "difficult," and testified he did not like every part of the new proposal, but he nonetheless supported it because he believed it was "important for the City in the long run."

A law firm (Lounsbery, Ferguson, Altona & Peak (hereafter Lounsbery)) was hired by SDCTA to draft the language of the CPRI. SDCTA gave Lounsbery the DeMaio draft of the initiative as the starting point for Lounsbery's drafting of the final

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8 Among those who attended one or more of the meetings were Sanders, Goldstone and Dubick (Sanders's chief of staff).

language for the initiative.[9] Lounsbery made relatively few revisions to it to finalize the language that became the CPRI. Lounsbery was paid by SDCTA for its services.[10]

On April 4, 2011, the City Clerk received a notice of intent to circulate a petition seeking to place the CPRI on the ballot, seeking to amend City's Charter pursuant to section 3 of article XI of the California Constitution. The ballot proponents were Catherine A. Boling (Boling), T.J. Zane (Zane), and Stephen Williams (Williams) (collectively, Proponents).[11]

To qualify the CPRI for the ballot, the Proponents needed to obtain verified signatures from at least 15 percent (94,346) of the City's registered voters. On September 30, 2011, Zane delivered to the City Clerk a petition containing over 145,000 signatures, and the City Clerk forwarded the petition to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures. The SDROV determined the initiative

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9 Goldstone testified SDCTA sought his feedback on its proposed language, and he reviewed and responded to two or three drafts in the evening or weekends at his home. Dubick and Goldsmith also reviewed and provided feedback on the proposed language.

10 Lounsbery filed a quarterly disclosure form indicating San Diego Taxpayers Association paid $18,000 to Lounsbery for its services in connection with its work on the CPRI for the first quarter of 2011. Among the people listed as being "lobbied" in connection with Lounsbery's work on the CPRI were Sanders, Goldstone, Goldsmith, Dubick and Faulconer.

11 Williams and Zane were leaders in the Lincoln Club, and the Lincoln Club (along with SDPR, the committee formed to raise money in support of Sanders's proposed initiative) was a major contributor to the committee formed to promote the campaign for the CPRI. Although Sanders would have preferred that SDPR's head (Shephard) run the campaign, Sanders was persuaded by a vice chairman of the Lincoln Club that Zane was perfectly capable of running the ballot initiative campaign from the Lincoln Club.

petition contained sufficient valid signatures and, 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. 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.

E. Sanders Campaigns for the CPRI

The day after the proponents filed their notice of intent to circulate, Sanders, DeMaio, Goldsmith, Faulconer, Boling, and Zane held a press conference on the City Concourse at which they announced the filing of the CPRI petition.[12] A news media outlet reported that proponents of the dueling ballot measures to curtail San Diego City pensions had reached a compromise to combine forces behind a single initiative for the June ballot. Sanders thereafter supported the campaign to gather signatures and promote the CPRI. He touted its importance by providing interviews and quotes to the media and by discussing it at his speaking appearances[13]. Additionally, campaign disclosure

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12 Sanders testified he appeared as a private citizen, and assumed the same was true for Goldsmith, although there is no evidence whether they communicated this fact to the press or the public at the press conference.!(XIII:3427-3428)!

13 For example, he included the CPRI in the "bullet points" prepared for his speaking engagements before various groups. He also approved issuing a "message from Mayor Jerry Sanders" for circulation to members of the San Diego Regional Chamber of Commerce that solicited financial and other support for the signature gathering effort, although he did not know whether the language of that message was drafted by the

statements indicated SDPR (the committee formed to promote Sanders's original initiative proposal) contributed $89,000 in cash and nonmonetary support to the committee supporting the CPRI from January 1, 2011, through June 1, 2011.

F. The Meet-and-Confer Demands

On July 15, 2011, the San Diego Municipal Employees Association (MEA) wrote to Sanders asserting City had the obligation under the MMBA to meet and confer over the CPRI. When Sanders did not respond, MEA wrote a second letter demanding City satisfy its meet-and-confer obligations concerning the CPRI. City Attorney Goldsmith responded by stating, among other things, the City Council was required (under the California Constitution and state elections law) to place the CPRI without modification on the ballot as long as the proponents submitted the requisite signatures and otherwise met the procedural requirements for a citizen initiative to amend the Charter. Goldsmith explained that, "[a]ssuming the proponents of the [CPRI] obtain the requisite number of signatures on their petition and meet all other legal requirements, there will be no determination of policy or course of action by the City Council, within the meaning of the MMBA, triggering a duty to meet and confer in the act of placing the citizen initiative on the ballot."

MEA, in its September 9, 2011, response to Goldsmith's explanation, asserted City *was* obligated to meet and confer because Sanders was acting as the Mayor to promote

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campaign or by his staff. Members of Sanders's staff facilitated his promoting of the CPRI by, for example, responding to requests from the media for quotes.

the CPRI and hence "has clearly made a determination of policy *for this City* related to mandatory subjects of bargaining . . . ." MEA asserted Sanders was "using the pretense that [the CPRI] is a 'citizens' initiative' when it is, in fact, this *City's* initiative" as a deliberate tactic to "dodge the City's obligations under the MMBA." The City Attorney's office reiterated City had no meet-and-confer obligations "at this point in the process" because "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot," but instead the City Council "must comply with California Elections Code . . . section 9255" and place the CPRI on the ballot if it meets the signature and other procedural requirements set forth in the Elections Code. Accordingly, City declined MEA's demand to meet and confer over the CPRI.[14]

G. The Initial Proceedings and *San Diego Municipal Employees*

MEA filed its unfair practice charge (UPC) on January 20, 2012, asserting City refused to meet and confer over the CPRI because "City claims that it is a 'citizen's initiative' *not* 'City's initiative,' " and MEA alleged this refusal violated the MMBA because the CPRI "is merely a sham device which City's 'Strong Mayor' has used for the express purpose of avoiding City's MMBA obligations to meet and confer." However, on January 30, 2012, the City Council, after recognizing the petitions for the CPRI contained the requisite number of signatures, enacted an ordinance placing the CPRI on the June 2012 ballot.

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14 Subsequent demands by MEA (as well as other employee unions) to meet and confer were rejected by City for similar reasons.

On February 10, 2012, PERB issued a complaint against City, alleging City's failure to meet and confer violated sections 3505 and 3506, and was an unfair practice within the meaning of section 3509, subdivision (b) and California Code of Regulations, title 8, section 32603, subdivisions (a) through (c).[15] PERB also ordered an expedited administrative hearing and appointed an administrative law judge (ALJ) to hold an evidentiary hearing on the complaints. (*San Diego Municipal Employees, supra,* 206 Cal.App.4th at p. 1453.)

PERB also filed a superior court action seeking, among other relief, an order temporarily enjoining presentation of the CPRI to the voters on the June 2012 ballot, but the trial court rejected PERB's motion for a preliminary injunction. (*San Diego Municipal Employees, supra,* 206 Cal.App.4th at pp. 1453-1454.) After the ALJ scheduled an administrative hearing for early April 2012 on the complaints, City moved in the superior court action for an order staying the administrative hearing and quashing the subpoenas issued by the ALJ. The trial court granted City's motion to stay the administrative proceedings, and MEA pursued writ relief. (*Id.* at pp. 1454-1455.) In *San Diego Municipal Employees,* this court concluded the stay was improper because "[a]s the expert administrative agency established by the Legislature to administer collective bargaining for covered governmental employees, PERB has exclusive initial jurisdiction over conduct that arguably violates the MMBA" (*id.* at p. 1458), and PERB's "initial

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15 Other unions also filed UPC's and PERB issued complaints on those claims. All of the claims and complaints were ultimately consolidated for hearing.

exclusive jurisdiction extends to activities ' "*arguably* . . . prohibited" by public employment labor law . . . .' " (*Id.* at p. 1460, quoting *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606, italics added by *San Diego Municipal Employees*).) This court noted that, had City directly placed the CPRI on the ballot without satisfying the meet-and-confer procedures, it would have engaged in conduct prohibited by the MMBA, and we ultimately concluded that because "MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using straw men to avoid its MMBA obligations, the UPC does allege City engaged in activity *arguably* prohibited by public employment labor law, giving rise to PERB's initial exclusive jurisdiction." (*Id.* at p. 1460.) This court ultimately concluded it was error to stay PERB's exclusive initial jurisdiction over the UPC claims, and vacated the stay. (*Id.* at pp. 1465-1466.)

H. PERB Proceedings and Determination

The ALJ Proposed Decision

The ALJ held an administrative hearing and, after taking evidence, issued a proposed decision. The proposed decision found Sanders chose to pursue a citizens' initiative measure, rather than invoke the City Council's authority to place his plan on the ballot as a City Council-sponsored ballot proposal, because he doubted the City Council's willingness to agree with him and because he sought to avoid concessions to the unions. The ALJ found the CPRI, which embodied a compromise between Sanders's proposal

and the proposal championed by DeMaio, was then carried forward as a citizens' initiative and was adopted by the electorate. The ALJ found that, because Sanders occupied the office of Mayor in a city that uses the "strong mayor" form of governance, and in that role has certain responsibilities when conducting collective bargaining with represented employee organizations on behalf of City (including the responsibility to develop City's initial bargaining proposals, to map out a strategy for negotiations, and to brief the City Council on the proposals and strategies and to obtain the City Council's agreement to proceed), Sanders "was not legally privileged to pursue implementation of [pension reform] as a private citizen." The ALJ concluded that because Sanders, acting "under the color of his elected office" and with the support of two City Councilmembers and the City Attorney,[16] launched and pursued the pension reform initiative campaign, Sanders made "a policy determination that [City] propose[d] for adoption by the electorate" on a negotiable matter but denied the unions "an opportunity to meet and

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16 The ALJ's decision also cited evidence that "[q]uantifiable time and resources derived from the City . . . were devoted to the Mayor's promotion of his initiative, notwithstanding the views of some or all of the City's witnesses that their activities were on personal time." However, the ALJ appeared to find that, even if all of the support work done by individual members of Sanders's staff had been "done on non-work time, their defense that these activities were done for private purposes is no stronger than the Mayor's . . . ." We note this finding because the PERB decision, as well as PERB's arguments in this writ proceeding, devotes substantial analysis to explaining that City-owned resources (as well as time spent by individuals who were members of Sanders's staff) were employed to support the CPRI. Although there is some evidentiary support for these factual findings, neither PERB's decision nor PERB's briefs in this proceeding articulates the legal relevance of these findings on the central issue raised in this proceeding—whether Sanders's acts in supporting the CPRI were as agent for the City Council—and we therefore limit our remaining discussion of those facts.

confer over his policy determination in the form of [the CPRI]," in violation of the meet-and-confer obligations under *Seal Beach.* The ALJ further concluded that, because of Sanders's "status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applie[d] to the City because it has ratified the policy decision resulting in the unilateral change."

The PERB Decision

After PERB considered supplemental briefing concerning the ALJ's proposed decision from City, Unions and the ballot proponents, PERB issued the decision challenged in this writ proceeding that largely affirmed the ALJ's decision.[17] Specifically, PERB rejected City's exceptions to the ALJ's conclusions that City was charged with Sanders's conduct under principles of statutory agency, common law principles of agency based on actual and apparent authority, and common law ratification principles.[18] Instead, PERB adopted the ALJ's findings that: (1) "under the City's Strong Mayor form of governance and common law principles of agency, Sanders was a

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17 PERB modified the remedies ordered by the ALJ's proposed decision (see fn. 20, *post*) but affirmed the core determination that the refusal to meet and confer over the CPRI before placing it on the ballot violated the MMBA.

18 Curiously, although PERB concluded common law agency principles permitted PERB to charge City with Sanders's conduct in promoting and campaigning for the CPRI, PERB also concluded the evidence showed the Proponents of the CPRI (who paid to have the CPRI drafted and who ran the signature effort and campaign for passage of the CPRI) were *not* Sanders's agents because they undertook their actions outside of Sanders's control. PERB nevertheless concluded common law principles of ratification and apparent authority applied "so as not to excuse the City's failure to meet and confer based on the actions of private citizens involved in the passage of [the CPRI]."

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, [Sanders] acted with actual and apparent authority when publicly announcing and supporting a ballot measure to alter employee pension benefits; and (3) the City Council had knowledge of [Sanders's conduct], by its action and inaction, and, by accepting the benefits of Proposition B, thereby ratified his conduct." PERB's decision also concluded that, because City (through Sanders as its agent) decided to place the CPRI on the ballot while acquiescing in Sanders's rejection of the unions' meet-and-confer demands, City violated the MMBA.[19]

PERB modified the remedy ordered in the ALJ's proposed decision insofar as the proposed decision ordered City to vacate the results of the election adopting the CPRI.[20]

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19 Specifically, PERB found the City Council "was on notice that, even if pursued as a private citizens' initiative, [Sanders's] public support for an initiative to alter employee pension benefits would be attributed to the City for purposes of MMBA. . . . [¶] . . . [¶] After it became aware of the Unions' requests for bargaining, the City Council, like [Sanders], relied on the advice of Goldsmith that no meet-and-confer obligation arose because [the CPRI] was a purely 'private' citizens' initiative. The City Council failed to disavow the conduct of its bargaining representative and may therefore be held responsible for [Sanders's] conduct. [Citation.] The City Council also accepted the benefits of [the CPRI] with prior knowledge of [Sanders's] conduct . . . . [¶] We agree with the ALJ's findings that, with knowledge of his conduct and, in large measure, notice of the potential legal consequences, the City Council acquiesced to [Sanders's] actions, including his repeated rejection of the Unions' requests for bargaining, and that, by accepting the considerable financial benefits resulting from passage and implementation of [the CPRI], the City Council thereby ratified [Sanders's] conduct."

20 The ALJ's Proposed Decision required, among other affirmative actions by City, that City "[r]escind the provisions of [the CPRI] adopted by the City and return to the status quo that existed at the time the City refused to meet and confer . . . ." The PERB decision declined to adopt that aspect of the remedy posited in the ALJ's proposed

However, PERB's remedy, invoking its "make-whole" and "restoration" powers for remedying violations of the MMBA, ordered (among other things) that City "pay employees for all lost compensation, including but not limited to the value of lost pension benefits, resulting from the enactment of [the CPRI], offset by the value of new benefits required from the City under [the CPRI]."

Writ Proceedings Challenging PERB Decision

City timely filed this writ petition challenging PERB's decision (§ 3509.5), and this court issued its writ of review. In City's writ proceeding, City named Proponents as additional real parties in interest and Proponents have filed briefs in that proceeding. Proponents also filed a separate writ petition challenging PERB's decision, and this court issued a writ of review. We subsequently consolidated the two writ proceedings for consideration and disposition.

In City's writ proceeding, PERB (joined by Unions) has moved to dismiss Proponents as real parties in interest, arguing Proponents lack standing to participate as real parties because they were not (and were indeed barred by PERB regulations from being) parties to the underlying PERB proceeding. PERB has separately moved to dismiss Proponents' writ proceeding on the same ground. We conclude official proponents of a ballot initiative have a sufficiently direct interest in the result of the proceeding (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178) to join as real parties in interest in an action, either by intervention or because they are named by other

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decision because PERB expressed doubts it had the power to rescind an initiative adopted by the voters.

parties as real parties in interest, which is directed at the evisceration of the ballot measure for which they were the official proponents. (See *Perry v. Brown* (2011) 52 Cal.4th 1116, 1125; see also *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250.) Accordingly, we deny PERB's motion to dismiss Proponents as real parties in interest from City's writ proceeding. Additionally, in light of our conclusion that PERB's decision must be annulled because City was not obligated to meet and confer prior to placing the CPRI on the ballot, PERB's motion to dismiss Proponents' writ proceeding (and the additional arguments raised in Proponents' writ proceeding) are moot and we need not address them.

II

STANDARDS OF REVIEW

The standards applicable to our review of a PERB decision are governed by differing degrees of deference. First, insofar as PERB's decision rests on its resolution of disputed factual questions, we apply the most deferential standard of review. Under this standard, PERB's factual findings are conclusive as long as there is any substantial evidence in the record to support its factual findings. (*Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1123; see, e.g., *Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 618-623 [affirming PERB determination that students were employees under Higher Education Employer-Employee Relations Act because substantial evidence supported

conclusion students' educational objectives were subordinate to the services students performed as housestaff].)

The deference to be accorded PERB's resolution of questions of law, and PERB's application of that law to the facts found by PERB, presents a more complicated question, because "balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter . . . ." (*Gonzales v. Oregon* (2006) 546 U.S. 243, 255.) PERB asserts that we must follow its determinations of law unless clearly erroneous. Specifically, PERB argues that because it has been invested by the legislative scheme with the "specialized and focused task" of protecting " 'both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by [law]' " (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804), PERB is " 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' " (*Ibid.*, quoting *Universal Camera Corp. v. National Labor Relations Bd.* (1951) 340 U.S. 474, 488.) Accordingly, PERB argues, "[T]he relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference" (*Ibid.*, citing *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981)

120 Cal.App.3d 1007, 1012), and PERB's interpretation will generally be followed unless it is clearly erroneous.

However, in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), our Supreme Court explained, " 'The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.' " (*Id.* at p. 8.) *Yamaha's* conceptual framework noted that courts must distinguish between two classes of interpretive actions by the administrative body—those that are "quasi-legislative" in nature and those that represent interpretations of the applicable law—and cautions that "because of their differing legal sources, [each] command significantly different degrees of deference by the courts." (*Id.* at p. 10.) When examining the former type of action, an agency interpretation "represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. [Citations.] Because agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Id.* at pp. 10-11.)

However, "[t]he quasi-legislative standard of review 'is *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a

controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.' [(Quoting *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7.)]" (*Yamaha, supra*, 19 Cal.4th at p. 12, italics added by *Yamaha*.) *Yamaha* recognized that, unlike quasi-legislative rule making by the agency, an agency's interpretation of the law does not implicate the exercise of a delegated lawmaking power but "instead . . . represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." (*Id.* at p. 11.) *Yamaha* recognized that an agency may often be interpreting the legal principles within its administrative jurisdiction and, as such "may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation . . . , that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Ibid.*)

We construe *Yamaha* as recognizing that, in our tripartite system of government, it is the judiciary—not the legislative or executive branches—that is charged with the final responsibility to determine questions of law (*Yamaha, supra,* 19 Cal.4th at p. 11 & fn. 4), and "[w]hether judicial deference to an agency's interpretation is appropriate and, if so, its

extent—the 'weight' it should be given—is thus fundamentally *situational*." (*Id.* at p. 12, italics added.) Thus, while *some* deference to an agency's resolution of questions of law may be warranted when the agency possesses a special expertise with the legal and regulatory milieu surrounding the disputed question (see *New Cingular Wireless PCS, LLC v. Public Utilities Commission* (2016) 246 Cal.App.4th 784, 809-810), the judiciary accords no deference to agency determinations on legal questions falling outside the parameters of the agency's peculiar expertise.[21] (See, e.g., *Overstreet ex rel. NLRB v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506* (9th Cir. 2005) 409 F.3d 1199, 1208-1209 [no deference accorded to the NLRB's interpretation of NLRA when judged against backdrop of competing constitutional issues]; accord, *California State Teachers' Retirement System v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 55 [under *Yamaha* "the degree of deference accorded should

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21 Indeed, although a court may accept statutory constructions made by PERB that are "within PERB's legislatively designated field of expertise . . . unless it is clearly erroneous" (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 854-856 [because PERB is empowered to determine in disputed cases whether a particular item is within or without the scope of representation requiring bargaining, interpretation of a statutory provision defining scope of representation falls squarely within PERB's legislatively designated field of expertise and will not be reversed unless clearly erroneous]), the courts in other contexts have declined to accord any deference when the PERB decision does not adequately evaluate and apply common law principles. (See, e.g., *Los Angeles Unified School Dist. v. Public Employment Relations Bd.* (1983) 191 Cal.App.3d 551, 556-557 [PERB determined two local public employee unions, both affiliated with same international, were not "same employee organization" within the meaning of section 3545, subdivision (b)(2), because *actual* conduct showed international did not exercise dominion and control over local unions; court reversed PERB ruling and concluded two local unions would qualify as the same employee organization within the meaning of the statute as long as international actually *or potentially* exercised the requisite dominion and control].)

be dependent in large part upon whether the agency has a ' "comparative interpretative advantage over the courts" ' and on whether it has probably arrived at the correct interpretation"]; *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 14 [Where dispositive facts are undisputed and purely legal issues remain requiring interpretation of a statute an administrative agency is responsible for enforcing, courts exercise independent judgment, and "agency's interpretation is ' "one of several interpretive tools that may be helpful. In the end, however, '[the court] must . . . independently judge the text of the statute.' " ' "].)

IV

ANALYSIS

A. Overview of MMBA

The MMBA codifies California's recognition of the right of public employees to collectively bargain with their government employers, and reflects a strong policy in California favoring peaceful resolution of employment disputes by negotiations. (§ 3500; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622.) In furtherance of that goal, section 3504.5 of the MMBA requires that reasonable written notice be given to organizations such as the MEA of any action "proposed to be adopted by the governing body" that directly relates to matters within the scope of representation.[22] It further

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22 Section 3504.5, subdivision (a) provides that, "Except in cases of emergency as provided in this section, the governing body of a public agency . . . shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation

requires such governing body or its designated representative, "prior to arriving at a determination of policy or course of action," to "meet-and-confer in good faith" with representatives of the union concerning negotiable subjects.[23]

The duty to meet and confer, which "has been construed as a duty to bargain . . . [citation] [and] . . . requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse" (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537), thus places on the employer the duties (1) to give reasonable written notice (to each recognized employee organization affected) of an ordinance directly relating to matters within the scope of representation "proposed to be adopted by the governing body" and provide such organization the opportunity to meet with the governing body, and (2) to meet and confer in good faith (and consider fully the presentations by the organization) prior to arriving at any determination on the governing body's course of action. (§§ 3504.5, subd. (a) & 3505.) Accordingly, absent emergency circumstances or other exceptions, a governing body that is subject to the MMBA may not adopt a legislative policy that unilaterally changes its employees' wages and working

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proposed to be adopted by the governing body . . . and shall give the recognized employee organization the opportunity to meet with the governing body . . . ."

23 Section 3505 provides: "The governing body of a public agency . . . or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . , and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

conditions without first complying with its meet-and-confer obligations imposed by the MMBA.

In *Seal Beach*, the court was required to harmonize the provisions of the "meet-and-confer" requirements of the MMBA with the constitutional grant of power to a city council, as governing body for a charter city, to place a charter amendment on the ballot that would (if adopted) impact the terms and conditions of employment for employees of that city. The *Seal Beach* court concluded that, before such a governing body may place this type of charter amendment on the ballot, it must first comply with the meet-and-confer obligations under the MMBA. (*Seal Beach, supra,* 36 Cal.3d at pp. 597-601.) The *Seal Beach* court cautioned, however, that the case before it "[did] not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at p. 599, fn. 8.)

B. *Seal Beach's* Meet-and-Confer Obligations Do Not Apply to Citizen Initiatives

We first address and resolve the issue expressly left open in *Seal Beach:* whether the meet-and-confer requirements of the MMBA, which *Seal Beach* concluded *did* apply to a city council's determination to place a charter amendment on the ballot, apply with equal force before the governing body of a charter city may comply with its statutory obligation to place on the ballot a duly qualified citizen's initiative proposing the same type of charter amendment.[24]

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24 We believe it is both necessary and appropriate to resolve this threshold issue. It is necessary because if we were to conclude the same meet-and-confer obligations are compelled, *regardless* of whether persons associated with city government are involved

Citizens Initiatives Do Not Trigger MMBA Procedural Requirements

The charter amendment provisions contained in article XI, section 3, subdivision (b), of the California Constitution provide only two avenues by which a charter amendment may be proposed: it "may be proposed by initiative or by the governing body." When an amendment is proposed by *initiative*, and at least 15 percent of the registered voters of the charter city sign the initiative petition, the governing body "*shall* . . . [submit the initiative] to the voters" at an election not less than 88 days after the date of the order of election. (Elec. Code, 9255, subd. (c), italics added.) The "governing body" has no discretion to do anything other than to place a properly qualified initiative on the ballot.[25] (*Farley v. Healey* (1967) 67 Cal.2d 325, 327; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148 ["local governments have the purely ministerial duty to place duly certified initiatives on the

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in drafting and/or campaigning for a citizen-sponsored initiative, we would have to affirm PERB's principal determination that City violated the MMBA by refusing unions' demands to meet and confer before placing the CPRI on the ballot, and all of PERB's subsidiary conclusions regarding Sanders's actual or ostensible agency relationship to City (even if legally erroneous) would become superfluous. (Cf. *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 853 [when decision is correct on any theory applicable to the case, appellate court will affirm the decision regardless of correctness of grounds relied on below to reach conclusion].) We believe resolution of the question left open in *Seal Beach* is also appropriate because it provides some illumination for our analysis of whether City violated its MMBA obligations when it placed the CPRI on the ballot without first meeting and conferring with the unions.

25 The governing body arguably has some flexibility as to at which election the initiative is presented to the voters (*Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 4-10), but PERB cites no authority that such flexibility would have permitted the City Council to refuse to place the CPRI on a ballot without modification in contravention of the mandatory language contained in Elections Code section 9255.

ballot"].) Because "[p]rocedural requirements which govern *council* action . . . generally do not apply to initiatives" (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594), the courts have repeatedly noted "it is well established . . . that the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of [a citizen-sponsored] initiative . . . ." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785; accord, *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 823-824 [procedural requirements of § 65863.6, which must be met before local agency adopts no-growth ordinance, inapplicable to voter-sponsored initiative adopting no-growth ordinance].)

In contrast, when a governing body of a city votes to adopt a proposal for submission to its voters, such action *is* a discretionary rather than ministerial determination by the governing body. (See, e.g., *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187 (*Friends of Sierra Madre*).) Because of the "clear distinction between voter-sponsored and city-council-generated initiatives" (*id.* at p. 189), the courts have repeatedly concluded the same procedural limitations that would otherwise apply to the same discretionary determination by a governing body will apply to a city council-generated ballot proposal. Thus, in *Friends of Sierra Madre,* the court held that the procedural mandates of CEQA were required for a ballot measure, generated by a city council in exercise of its discretion, which would remove certain structures from protection as historic landmarks. While similar *citizen-sponsored* measures do not require compliance with analogous regulatory procedural prerequisites (see, e.g., *Stein v.*

City of Santa Monica (1980) 110 Cal.App.3d 458, 460-461; cf. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035-1037), *Friends of Sierra Madre* concluded a *city council*-sponsored ballot proposal for a discretionary project could not evade compliance with CEQA. (*Friends of Sierra Madre,* at pp. 186-191.)

In this setting, *Seal Beach* concluded the procedural requirements of the MMBA *did* apply to a city council-sponsored ballot proposal amending the charter as to matters concerning the terms and conditions of public employment. The court reasoned the meet-and-confer requirements, imposed on public agencies as procedural requirements a public agency must satisfy before adopting its final budget for the ensuing year (*Seal Beach, supra*, 36 Cal.3d at pp. 596-597), were procedural requirements that could coexist with the constitutional power of a city council to propose a substantive charter amendment. (*Id.* at p. 600, fn. 11 [noting "there is a clear distinction between the *substance* of a public employee labor issue and the *procedure* by which it is resolved" and acknowledging that although salaries of local employees of a charter city constitute municipal affairs not subject to general laws, the *process* by which salaries are fixed is matter of statewide concern].) *Seal Beach* noted that "[a]lthough [section 3505] encourages binding agreements resulting from the parties' bargaining, the governing body of the agency—here the city council—retains the ultimate power to refuse an agreement and to make its own decision. [Citation.] This power preserves the council's rights under article XI, section 3, subdivision (b)—it may still propose a charter amendment if the meet-and-

confer process does not persuade it otherwise. [¶] We therefore conclude that the meet-and-confer requirement of section 3505 is compatible with the city council's constitutional power to propose charter amendments." (*Id.* at p. 601, fn. omitted.)

The core tenets of *Seal Beach* were that (1) the MMBA was clearly intended to apply to regulate actions by the governing bodies of charter cities and (2) the MMBA mandates that those governing bodies satisfy the procedural prerequisites (the meet-and-confer process) before unilaterally imposing any changes to the matters within the scope of representation. (*Seal Beach, supra,* 36 Cal.3d at pp. 596-597.) From those tenets, *Seal Beach* concluded a governing body constrained by the procedural requirements of the MMBA cannot circumvent the meet-and-confer requirement by using a charter amendment to unilaterally implement the same changes that would otherwise be subjected to the meet-and-confer requirement. (*Id.* at p. 602.)[26]

In contrast, the courts have refused to subject citizen-sponsored initiatives to the same procedural constraints that would apply if the same subject matter were embodied in a city council-sponsored ballot proposal (compare *Stein v. City of Santa Monica,*

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26 Indeed, *Seal Beach* specifically noted that "[t]he logical consequence of the city's position is, actually, that the MMBA cannot be applied to charter cities at all. If a meet-and-confer session with the city council concerning contemplated charter amendments impinges on the council's constitutional power, what of salary ordinances? It is 'firmly established that the mode and manner of passing ordinances is a municipal affair . . . and that there can be no implied limitations upon charter powers concerning municipal affairs.' [(Quoting *Adler v. City Council* (1960) 184 Cal.App.2d 763, 776-777.)] If meeting and conferring on charter amendments is an illegal limitations [sic] on the city council's power, why is the same not true of any ordinance which affects 'terms and conditions of public employment?' " (*Id.* at p. 602, fn. 12.)

supra, 110 Cal.App.3d at pp. 460-461 with *Friends of Sierra Madre, supra,* 25 Cal.4th at pp. 186-191), which militates in favor of a conclusion that the procedural meet-and-confer obligation cannot be superimposed on a citizen-sponsored initiative addressing matters within the "scope of representation" as that term is used in the MMBA. (Accord, *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 968 ["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"].) More importantly, the meet-and-confer requirements of the MMBA by its express terms constrains only *proposals* by the *"governing body"* (§§ 3504.5, subd. (a) ["the governing body . . . shall give reasonable written notice . . . of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"] & 3505 ["[t]he governing body . . . shall meet and confer . . . prior to arriving at a determination of policy or course of action].) Because a citizen-sponsored initiative does not involve a proposal *by* the "governing body," we are convinced there are no analogous meet-and-confer requirements for citizen-sponsored initiatives.[27]

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27 Indeed, we are convinced that imposing a "meet-and-confer" obligation on a city before it can place a citizen-sponsored initiative on the ballot would also be inconsistent with the "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.]' [Citation.] As a practical matter, it would be inappropriate to attribute to the Legislature a purpose of requiring the County to make very substantial negotiating expenditures on subjects over which the County has no authority to act.

PERB's Contrary Analysis Is Unpersuasive

The PERB decision ostensibly "decline[d] to decide" the "significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative," which it appeared to deem unnecessary because it concluded the CPRI was not a "pure" citizen-sponsored initiative because of Sanders's involvement in promoting the CPRI. However, PERB nevertheless appeared to conclude the citizen's initiative rights enshrined in article II, section 11, and article XI, section 3, subdivision (b), of the California Constitution would *not* obviate the meet-and-confer obligations imposed on City by the MMBA.[28] In this writ proceeding, PERB and Unions appear to

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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." (*American Federation of State, etc. Employees v. County of San Diego* (1992) 11 Cal.App.4th 506, 517.) Because a governing body lacks authority to make any changes to a duly qualified citizen's initiative (Elec. Code, § 9032), and instead must simply place it on the ballot without change (*Save Stanislaus Area Farm Economy v. Board of Supervisors, supra,* 13 Cal.App.4th at pp. 148-149), imposing a meet-and-confer obligation on the governing body before it could place a duly qualified citizen's initiative on the ballot would require an idle act by the governing body.

28 Specifically, PERB's decision reasoned (1) the local electorate's right to legislate directly is generally co-extensive with the legislative power of the local governing body, (2) the constitutional right of a local electorate to legislate by initiative extends only to *municipal affairs* and (as such) is preempted by general laws affecting matters of statewide concern, and (3) "[l]egislation establishing a uniform system of fair labor practices, including the collective bargaining process between local government agencies and employee organizations representing public employees, is 'an area of statewide concern that justifies . . . restriction' on the local electorate's power to legislate through the initiative or referendum process" (quoting and relying on *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780 (*Voters*)). These authorities apparently led PERB to conclude that "[w]here local control implicates matters of statewide concern" and the two competing interests cannot be harmonized,

resurrect this argument, asserting the PERB decision does no violence to the citizen's initiative process. Specifically, they note the Legislature *can* limit (or entirely preempt) the local initiative power on matters of statewide (as opposed to purely local) concern, and contend that because the Supreme Court in *Voters* concluded a local referendum could not be used to reverse the adoption of a memorandum of understanding (MOU) following negotiations pursuant to the MMBA because allowing such use of the referendum would harm the statewide interest underlying the MMBA, the same conclusion applies equally to the initiative process. Accordingly, PERB and Unions argue that when the electorate seeks to exercise control over matters (such as pension benefits) that would be negotiable subjects under the MMBA, the constitutional right of initiative must yield to the statewide objectives of the MMBA, including the procedural requirements of the MMBA imposing a meet-and-confer process before proposals impacting negotiable subjects may be adopted.[29]

"the constitutional right of local initiative is preempted by the general laws affecting statewide concerns."

29 PERB's decision did recognize that at least one recent Supreme Court case (*Tuolumne Jobs & Small Business Alliance v. Superior Court, supra*, 59 Cal.4th 1029) concluded certain procedural prerequisites under CEQA that *would* apply before a governing body may make a discretionary determination do *not* apply to adoption of initiatives seeking to enact that same determination. Moreover, PERB acknowledges numerous other courts have reached the same conclusion as to other procedural prerequisites. (See, e.g., *Associated Home Builders, Inc. v. City of Livermore, supra,* 18 Cal.3d at p. 594 [holding that state law, which required any ordinance changing zoning or imposing specified land use restrictions can be enacted only after noticed hearing before the city's planning commission and legislative body, does not apply to initiative enacting same type of ordinance]; *Building Industry Assn. v. City of Camarillo, supra,* 41 Cal.3d at pp. 823-824 [procedural requirements of § 65863.6, which must be met before local

We believe PERB and Unions misconstrue, and hence overstate, the import of *Voters*. The *Voters* court addressed a distinct and limited issue: whether voters in a county were entitled to mount a *referendum* challenge to a county ordinance (which adopted an MOU impacting county employee pension benefits) under the relevant constitutional and statutory provisions. The court first concluded that article XI, section 1, subdivision (b), of the California Constitution neither authorized nor restricted voters from challenging the county ordinance by referendum. (*Voters*, *supra*, 8 Cal.4th at pp. 770-776.) The court, after recognizing courts should apply a liberal construction to the initiative power, with any reasonable doubt resolved in favor of preserving it, opined that "we will presume, *absent a clear showing of the Legislature's intent to the contrary*, that legislative decisions of a city council or board of supervisors—including local employee compensation decisions [citation]—are subject to initiative and referendum. *In this case, the legislative intent to bar the referendum power over the ordinance in question is unmistakable*." (*Id.* at p. 777, italics added.) Specifically, *Voters* determined the Legislature, by its enactment of section 25123, subdivision (e), evinced an unmistakable legislative intent to bar challenges *by referendum* to county ordinances

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agency adopts no-growth ordinance, inapplicable to citizen's initiative adopting no-growth ordinance]; *Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505; *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 785 ["the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of [a citizen-sponsored] initiative"].) However, PERB peremptorily concluded (and argues here) the MMBA's meet-and-confer procedure is somehow "qualitatively different" from these other provisions, and thus exempted from the type of procedural rules that ordinarily do not apply to initiatives.

specifically related to the adoption or implementation of MOU's. (*Voters,* at pp. 777-778.)[30] The *Voters* court then rejected the petitioner's claim that section 25123, subdivision (e), was unconstitutional, reasoning the Legislature may properly restrict the right of referendum "if this is done as part of the exercise of its plenary power to legislate in matters of statewide concern," and concluded it was required to uphold section 25123, subdivision (e)'s constitutionality if its referendum restriction, which was effectively an "implied delegation of exclusive decisionmaking authority to the boards of supervisors to adopt and implement memoranda of understanding between counties and their employee

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30 The court explained the legislative procedures for county referenda are set forth in the Elections Code. Those statutes provide that all county ordinances, with certain enumerated exceptions, "shall become effective 30 days from and after the date of final passage" by the board of supervisors (Elec. Code, § 9141, subd. (b)), and Elections Code section 9144 provides that between the date of the adoption of the ordinance and the date the ordinance becomes finally effective 30 days later, a petition signed by the requisite number of voters will suspend the ordinance and compel the board of supervisors to reconsider it. If the board of supervisors fails to "entirely repeal" the ordinance, it must be submitted to a countywide referendum. (*Id.*, § 9145.) However, Elections Code section 9141 *excepts* certain types of county ordinances from the 30-day effective date rule, providing instead that these ordinances go into effect immediately, including ordinances "specifically required by law to take immediate effect." (*Id.*, subd. (a)(2).) These provisions, when read together, "make[] clear that when the Legislature desired to denominate certain types of ordinances that were not subject to county referendum procedures, it did so not by specifically declaring these ordinances ineligible for referendum, but rather by providing that they go into effect immediately." (*Voters, supra*, 8 Cal.4th at p. 777.) The court then noted section 25123 (which parallels Elec. Code, § 9141 et seq. in providing all county ordinances shall become effective 30 days from final passage except for certain classes of ordinances, which are to go into effect immediately), specifically provides at subdivision (e) that ordinances related to the adoption or implementation of MOU's with employee organizations are to take effect immediately. This statutory scheme convinced the court that, by designating MOU ordinances as a class of ordinances specifically required by law to take effect immediately, the Legislature evinced an unmistakable intent to exempt such ordinances from the referendum procedures. (*Voters, supra.*)

associations" (*Voters,* at p. 780), could be construed as fulfilling some legislative purpose of statewide import. The court inferred the legislative purpose of statewide import existed because of the MMBA, which was "a statutory scheme in an area of statewide concern that justifies the referendum restriction inherent in section 25123, subdivision (e)." (*Id.* at pp. 780, 778-784.)

The distinct and limited issue examined in *Voters—whether* the Legislature clearly and unmistakably intended to delimit the electorate's referendum rights and (if so) *whether* that constraint was constitutionally permissible—has no applicable counterpart here. Although *Voters* would support the constitutionality of an enactment by the California Legislature barring citizen initiatives that seek to amend a city charter to limit employee compensation, we are unaware of any statute clearly and unmistakably barring such citizen initiatives[31] (nor have PERB or Unions identified any such bar) and "we will presume, absent a clear showing of the Legislature's intent to the contrary, that . . . local employee compensation decisions [citation] . . . are subject to initiative and referendum." (*Voters, supra,* 8 Cal.4th at p. 777.) The courts have repeatedly upheld the ability of the electorate of a charter city to legislate on compensation issues by initiative (see, e.g., *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77-79; *Kugler v. Yocum* (1968) 69 Cal.2d 371, 374-377 (*Kugler*)), and the *Voters* court specifically declined to extend its holding to overrule another decision, *United Public Employees v. City and*

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31 Indeed, the *Voters* court noted the statute it was considering "is applicable to counties only and has no counterpart for cities," and hence cautioned that "[w]e do not decide whether *city* ordinances that adopt or implement memorandums of understanding pursuant to the MMBA are subject to referendum." (8 Cal.4th at p. 784, fn. 6.)

County of San Francisco (1987) 190 Cal.App.3d 419, which concluded a charter provision requiring that all increases in employee benefits be subject to voter approval by referendum was compatible with the MMBA. (*Voters,* at pp. 781-782 & fn. 4.)

Thus, contrary to PERB and Union's arguments, *Voters* does not support the conclusion that the MMBA preempts, or superimposes procedural restrictions on, the right of citizens to invoke the initiative process to legislate on compensation issues for the employees of a charter city.

Conclusion

We conclude, in light of the language of the MMBA and the "clear distinction between voter-sponsored and city-council-generated initiatives" (*Friends of Sierra Madre, supra,* 25 Cal.4th at p. 189), a city has no obligation under the MMBA to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot because such an initiative does not involve a proposal by the "governing body" nor could produce an agreement regarding such an initiative that the public agency is authorized to make.

C. PERB's Determination That City Was Obligated by the MMBA to Meet and Confer Before Placing the CPRI on the Ballot Is Erroneous

PERB concluded City owed, but failed to discharge, the meet-and-confer obligations imposed by the MMBA on governing bodies by placing the CPRI on the ballot without first meeting and conferring with unions. We have already concluded, contrary to PERB's apparent opposing conclusion, a governing body has no obligation to

meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot, but does have meet-and-confer obligations before placing on the ballot a proposal adopted by the governing body that falls within the parameters of sections 3504.5 and 3505.[32] We thus turn to the critical question: whether PERB correctly held the CPRI was not a duly qualified citizen-sponsored initiative exempted from the meet-and-confer requirements, but was instead a governing-body-sponsored ballot proposal within the ambit of *Seal Beach* and the meet-and-confer obligations the MMBA imposes on actions that constitute a "determination of policy" (§ 3505) that have been "proposed [for] adopt[ion] by the governing body" (§ 3504.5, subd. (a)) within the meaning of the MMBA.

We begin by noting the evidence was undisputed (and PERB did not conclude to the contrary) the charter amendment embodied in the CPRI was placed on the ballot because it qualified for the ballot under the "citizen initiative" procedures for charter amendments as provided by the first clause of article XI, section 3, subdivision (b), of the California Constitution (which provides that a charter amendment "may be proposed by initiative or by the governing body") and the governing provisions of Elections Code

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32 The parties have brought to our attention the recent decision in *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, which evaluated whether the City of Palo Alto committed an unfair labor practice when it failed to meet and consult with the unions before placing a ballot proposal on the ballot. We conclude that case provides no guidance here because it involved whether a governing body owed meet-and-consult obligations before it could place a *city council*-sponsored ballot proposal on the ballot (*id.* at p. 1284), and *not* whether a governing body owes meet-and-confer obligations for a *citizen*-sponsored initiative when some city officials and city staff members assisted in drafting and campaigning for the initiative.

9200 et seq. We also note there was no evidence, and PERB did not find, that the charter amendment embodied in the CPRI was placed on the ballot because it qualified as a ballot measure sponsored or proposed *by the governing body* of City under the second clause of article XI, section 3, subdivision (b), of the California Constitution.[33] (See generally *Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 21 ["Under the California Constitution there are only two methods for proposing an amendment to a city charter: (1) an *initiative* qualified for the ballot through signed voter petitions; or (2) a *ballot measure* sponsored by the governing body of the city," and noting differing standards applicable to each].) Accordingly, we evaluate whether PERB's decision, which appears to rest on the theory that the participation by a few government officials

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33 Finally, we note the record is devoid of any evidence, and PERB did not find, that the Proponents of the CPRI were merely straw men used by the City Council (as governing body for City) to achieve placement of a City Council-sponsored proposal onto the ballot as a ruse to circumvent the concomitant meet-and-confer obligations that would have been required for an *overt* City Council-sponsored ballot proposal. In *San Diego Municipal Employees, supra*, 206 Cal.App.4th 1447, this court noted the unions' UPC's alleged a significant factual claim—that the CPRI was not a true citizen-sponsored initiative but was instead a sham device employed to circumvent the meet-and-confer obligations owed by City under the MMBA (*id.* at p. 1463)—which in turn raised the question of whether "the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using straw men to avoid its MMBA obligations." (*Id.* at p. 1460.) It was because such activity was *arguably* prohibited by public employment labor law within PERB's initial exclusive jurisdiction (*ibid.*) that led us to conclude it was error to divest PERB of its ability to conduct proceedings on this issue. (*Ibid.*) However, PERB's decision did not sustain this allegation; to the contrary, PERB's decision appeared to reject the Unions' claims that Proponents acted as agents for City in pursuing the CPRI. Accordingly, we have no occasion to address the distinct issue of whether an entity would violate its meet-and-confer obligations if its *governing body* sought to avoid its meet-and-confer obligations by enlisting private citizens to recast a governing-body-sponsored ballot proposal into a citizen-sponsored initiative.

and employees in drafting and campaigning for a citizen-sponsored initiative somehow converted the CPRI from a citizen-sponsored initiative into a governing-body-sponsored ballot proposal, is erroneous under applicable law.

We conclude PERB's determination was error. As a preliminary matter, we believe that, under *Yamaha, supra*, 19 Cal.4th 1, we must apply de novo review of PERB's determination, rather than the more deferential standards of review advocated by PERB and Unions, because PERB's determination turned almost entirely upon its application of the interplay among City's charter provisions (and Sanders's powers and responsibilities thereunder), common law principles of agency, and California's constitutional and statutory provisions governing charter amendments, and did not turn upon resolution of material factual disputes (to which the deferential "substantial evidence" standard would apply) or upon PERB's application of legal principles of which PERB's special expertise with the legal and regulatory milieu surrounding the disputed legal principles would warrant deference. Accordingly, we accord no deference to PERB's legal conclusions as to the constitutional or statutory scheme governing initiatives (*Overstreet ex rel. NLRB v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506, supra,* 409 F.3d 1199, 1208-1209; *Azusa Land Partners v. Department of Indus. Relations, supra,* 191 Cal.App.4th at p. 14) or to PERB's application of common law principles of agency over which PERB has no specialized

expertise warranting deference.[34] (Cf. *Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment* (2012) 210 Cal.App.4th 1082, 1100 [no deference where agency in question has no particular interpretive advantage over the courts based on some expertise]; *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584-585 [agency denied applicant unemployment benefits based on finding employee lacked "good cause" to leave employment; court reviewed lack of good cause finding de novo as issue of law].)

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34 PERB, citing *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965, argues on appeal that because the existence of an agency relationship is a question of fact, we must defer to PERB's determination on appeal as long as it is supported by substantial evidence. Certainly, the existence of an agency relationship can present a question of fact. However, when the material facts are undisputed, the question of the existence of a principal-agent relationship is a matter of law for the courts (see, e.g., *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 745), of which PERB has no specialized expertise. Indeed, because we will conclude the relevant inquiry is *not* whether Sanders was an agent for City (at least in some capacities), but instead whether he was the actual or ostensible agent *for the governing body* when he helped draft and campaign for the CPRI, we will examine whether PERB correctly concluded Sanders's actions can be charged to a governing body under common law principles. For example, under common law principles, unless a party (the putative principal) has the legal right to control the action of the other person (the putative agent), the former ordinarily cannot be held vicariously liable for the other person's acts on an agency theory. (See generally *Edwards v. Freeman* (1949) 34 Cal.2d 589, 592 [absent right of control, no true agency and therefore no imputation of wrongdoer's negligence]; *Kaplan,* at p. 746 ["Absent a showing that Coldwell Banker controlled or had the right to control the day-to-day operations of Marsh's office, it was not liable for Marsh's acts or omissions as a real estate broker on a true agency-respondeat superior theory."].) Thus, even if the appropriate inquiry was under a "substantial evidence" rubric, there is no evidence the City Council had the *right* to control Sanders's actions here, and hence there would be no substantial evidence to support the conclusion Sanders was the agent of the City Council in promulgating and promoting the CPRI.

It is clear that, apart from charter commission proposals (see generally §§ 34451-34458), California recognizes only two avenues by which a proposed city charter amendment may be placed before the electorate: an initiative that qualifies for the ballot through signed voter petitions, or a ballot proposal that qualifies for the ballot because the governing body (here, the City Council) adopts a resolution placing it on the ballot.[35] (*Hernandez v. County of Los Angeles, supra,* 167 Cal.App.4th at p. 21.) Whether PERB correctly concluded meet-and-confer obligations were triggered here rests on whether it properly recast the CPRI from the former into the latter. Because PERB employed several variants of agency theory to reformulate the CPRI from a citizen-sponsored proposal to a City Council-sponsored proposal, we examine PERB's theories seriatim.

Statutory Agency

PERB's first theory, which it denominated as a statutory agency theory, focused on the fact that Sanders, both in his capacity as a so-called "strong mayor" and in his role as the lead negotiator for the City Council in labor-related matters,[36] was empowered by the

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35 Section 34458 et seq. prescribing the methods for a governing body to place a proposed charter amendment before the voters, only appears to permit "the governing body" to make the proposal and submit it to the voters for approval. (*Id.*, subd. (a).)

36 Sanders was the City's lead negotiator in collective bargaining with the City's nine represented bargaining units. In this role, Sanders developed proposals for the City's initial bargaining proposals, but the practice was for the Mayor to brief and obtain approval from the City Council on his proposals before he presented them to the Unions. If the negotiations between Sanders and a bargaining unit produced a tentative agreement, however, Council Policy 300-06 still required the agreement be presented to the City Council (or the Civil Service Commission) for determination and adoption. Thus, the ultimate authority to approve a proposal remained with the City Council.

City Charter to recommend "measures and ordinances" that he believed to be "necessary and expedient" (San Diego City Charter, art. XV, § 265(b)(3)), including recommendations encompassed in his "State of the City" address. (*Id.*, art. XV, § 265(c).) From these predicates, PERB deemed the activities of Sanders in aiding in the drafting of and campaign for the CPRI (both individually and insofar as additional actions were undertaken by the staff of his mayoral office at his direction) to have been the actions of the City Council because he was the "statutory agent" for the City Council in labor-related matters. Under this theory, PERB appeared to rule that (1) the CPRI was sufficiently interwoven with Sanders's proposal such that the CPRI was as much Sanders's proposal as it was the Proponents' proposal, and (2) Sanders was statutorily empowered to act on behalf of (and to make proposals on labor-related matters for) the City Council in labor-related matters, and therefore the CPRI became a City Council-sponsored (or at least co-sponsored) proposal carrying meet-and-confer obligations within the meaning of *Seal Beach*.[37]

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37 PERB also appeared to conclude that, because section 3505 states (in relevant part) that "The governing body of a public agency, . . . or other representatives as may be properly designated by law or by such governing body, shall meet and confer," the Legislature contemplated that, in addition to the governing body of an agency, other designated representatives would make policy decisions on behalf of the agency and that such decisions would trigger meet-and-confer obligations. We reject this reading of the statutory scheme. Section 3504.5, subdivision (a) describes *when* meet-and-confer obligations are triggered (i.e. when there is an "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"), and section 3505 describes *how* that process should be accomplished, including *who* (i.e. the "governing body . . . or other representatives as may be properly designated by law or by such governing body") shall participate on behalf of the governing body. The designation in section 3505 of who shall *conduct* the

We conclude reliance on this theory was error because it ignores fundamental principles governing the charter amendment process and the conduct of municipal affairs. First, a charter amendment measure only becomes a "proposal" if it qualifies for the ballot under the citizen-sponsored-proposal provisions (for which no meet-and-confer obligation exists) or qualifies for the ballot as a governing-body-sponsored ballot measure (which would trigger meet-and-confer obligations) under section 34458 et seq. PERB's statutory agency theory essentially deemed Sanders's actions to have been those of the City Council, thereby treating the CPRI as a governing-body-sponsored ballot measure, even though the City Charter[38] specifically provides *all* legislative powers of the City are vested in the City Council (San Diego City Charter, art. III, § 11) as City's legislative body (*id.*, art. XV, § 270(a)), and provides such legislative power may not be delegated (*id.*, art. III, § 11.1) but must be exercised by a majority vote of the elected councilmembers. (*Id.*, art III, § 15 & art. XV, § 270(c).) PERB cites no law suggesting

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meet-and-confer process does not expand who *owes* the meet-and-confer obligations imposed by section 3405.5.

38 PERB asserts in this proceeding that, although it introduced portions of the San Diego City Charter to support its statutory agency claim, it is improper for this court to consider the impact of City Charter provisions not introduced below and not presently the subject of a request for judicial notice. However, charter provisions are judicially noticeable materials (cf. *Giles v. Horn* (2002) 100 Cal.App.4th 206, 225, fn. 6), and we are aware of no impediment to judicially noticing those provisions on our own motion (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1204, fn. 25), particularly where it is necessary to examine the entirety of a document to construe the effect of individual portions contained therein. (See generally *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 780-781.) Accordingly, we will take judicial notice of the provisions of the San Diego City Charter.

Sanders was in fact (or even could have been) statutorily delegated the power to place a City Council-sponsored ballot proposal on the ballot without submitting it to (and obtaining approval from) the City Council (*Kugler, supra,* 69 Cal.2d at p. 375 [legislative power may not be delegated]; *City of Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 575-576, disapproved on other grounds by *Bishop v City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6 [recognizing "the general principle that the public powers or trusts devolved by law or charter upon a governing body cannot be delegated to others"]), and because there was no evidence suggesting Sanders sought or obtained such approval, PERB erred in concluding Sanders's actions in supporting the CPRI were in fact acts creating a City Council-sponsored ballot proposal. (Cf. *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 667 [where city charter prescribes procedures for taking binding action, those requirements may not be deemed satisfied by implication from use of procedures different from those specified in charter]; *Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 294, 299 ["When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract"].)

PERB nevertheless argues its agency theory was correct because employers (including governmental entities) can be held liable for unfair labor practices committed by their agent even when the agent's actions were not formally approved by the governing body. PERB also asserts its agency theory is supported by a 2008 opinion by a former City Attorney (the Aguirre Memo) that concluded, if the Mayor "initiate[d] or

sponsor[ed]" a voter petition drive to place a measure on the ballot to amend the City Charter provisions related to retirement pensions, City "would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment."

We are unconvinced the Aguirre Memo undermines our analysis, for several reasons. First, a later opinion from the City Attorney rejected the conclusions of the Aguirre Memo, which it described as "overly broad and incomplete in its analysis," and explained why the City Attorney believed the conclusions reached by the Aguirre Memo were unsound.[39] Second, PERB cites nothing to suggest the opinions expressed in the Aguirre Memo are somehow binding on City, much less that such opinions are entitled to any deference by this court. (*Yamaha, supra,* 19 Cal.4th 1, 11 ["an agency's *legal opinion*, however 'expert,' . . . commands a commensurably lesser degree of judicial deference"].) Because the Aguirre Memo reached its conclusions without considering (or even mentioning) the limiting language of section 3404.5, which triggers meet-and-confer obligations only as to "any ordinance, rule, resolution, or regulation . . . *proposed to be adopted by the governing body,*" its conclusion that meet-and-confer obligations

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39 Specifically, the later letter explained the Aguirre Memo had relied on a misapplication of *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767 (*Inglewood*), and had been generated in a different context in which "[i]t was contemplated the Mayor's proposal would be submitted to voters as a City Council proposal." The later letter explained the Aguirre Memo did not address whether any meet-and-confer obligation would exist when "there is no evidence . . . that the City Council is proposing the [CPRI], or authorizing the Mayor to propose or sponsor it."

exist for a Mayoral-initiated voter petition drive (which appears to have rested on the erroneous assumption that a measure supported by the Mayor is equivalent to a measure proposed to be adopted by the governing body) is unpersuasive.

We are equally unpersuaded that the cases cited by PERB that upheld unfair labor practices claims against governmental entities for conduct by their agents even when the agent's actions were undertaken without approval by the governing body have any relevance here. In the cases relied on by PERB, the agents' unapproved actions involved statements or actions by the agents that are declared to be unfair labor practices without the necessity of any predicate involvement by the governing body. Specifically, the unapproved actions interfered with, restrained, or coerced the employees in violation of section 3506 of the MMBA (see *Public Employees Assn. v. Bd. of Supervisors* (1985) 167 Cal.App.3d 797, 806-807 ["section 3506 is patterned closely after section 8(a)(1) of the NLRA [citation], which provides it is an unfair labor practice for an employer to 'interfere with, restrain, or coerce' employees in the exercise of rights to 'bargain collectively' "]) or in violation of section 3543.5, subdivision (a). However, both of those sections are distinct from section 3504.5, because both of those sections condemn specified conduct as unlawful labor practices, regardless of whether that specified conduct was accompanied by actions of the governing body.[40] In contrast, the unlawful

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40 The PERB decisions cited by PERB and Unions are of a similar ilk. For example, in *County of Riverside* (2010) PERB Decision No. 2119-M [34 PERC ¶ 108], the alleged unlawful labor practice included allegations that the defendant interfered with employee rights because of the unauthorized actions of two county officials, who made separate statements to SEIU representatives (who were attempting to create a bargaining unit for

labor practice condemned by section 3504.5—the failure to meet and confer—is condemned *only* if preceded by specified conduct or actions of the governing body, i.e. when there is an "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body." Because section 3504.5 requires predicate action by "the governing body" before the meet-and-confer obligations of section 3505 can be triggered, cases addressing statutes that do not contemplate similar predicate action by a governing body have no persuasive value on the issues presented by the present action.

For all of these reasons, we agree with City that PERB erred in applying "statutory agency" principles to find the CPRI was a de facto governing-body-sponsored ballot proposal that could have triggered meet-and-confer obligations within the contemplation of section 3504.5.

Common Law Agency: Actual Authority

PERB's second set of theories, which it denominated as a common law agency theory, focused on the common law doctrine of when a principal can be charged with the

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"TAP" employees) that such employees would get a union when the officials died, retired or the county went out of business, which PERB concluded violated section 3506's proscription against interfering with, restraining, or coercing employees in the exercise of rights to bargain collectively. (*County of Riverside,* at pp. 16-23.) Similarly, in *San Diego Unified School Dist.* (1980) PERB Decision No. 137E [4 PERC ¶ 11115], PERB concluded the unauthorized action of two school board members in placing letters of commendation into the personnel files of nonstriking teachers violated the proscription contained in section 3543.5, subdivision (a), which prohibits a public school employer from imposing or threatening to impose reprisals on employees because of their exercise of rights guaranteed under the Educational Employment Relations Act, section 3540 et seq.

acts of its agent. PERB's articulated rationale for attributing Sanders's support of the CPRI (as putative agent) to the City Council (as putative principal) under "actual authority" principles was that actual authority is the authority a principal either intentionally confers on the agent or "by want of ordinary care" allows the agent to believe himself to possess (Civ. Code, § 2316), and a principal is responsible to third parties for the wrongful acts of an agent in transacting the principal's business regardless of whether the acts were authorized or ratified by the principal. (Civ. Code, §§ 2330, 2338.) Under this theory, PERB noted (1) Sanders had broad authority as Mayor to recommend legislation to the City Council, (2) he pursued pension reform as a goal for his remaining tenure as Mayor and for the announced purpose of improving the City's financial well-being, and (3) the City Council was aware of Sanders's desire for pension reform and of his efforts to implement it through a citizen-sponsored initiative. From these facts, PERB concluded Sanders's actions could be charged to the City Council because:

> "by want of ordinary care, the City Council allowed Sanders to believe that he could pursue a citizens' initiative to alter employee pension benefits, and that no conflict existed between his duties as the City's chief executive officer and spokesperson for collective bargaining and his rights as a private citizen. . . . Sanders acted with actual authority because proposing necessary legislation and negotiating pension benefits with the Unions were within the scope of the Mayor's authority and because the City acquiesced to his public promotion of the initiative, [and] by placing the measure on the ballot, . . . while accepting the considerable financial benefits resulting from the passage and implementation of [the CPRI]." (Fn. omitted.)

We conclude PERB's use of a common law agency theory, which PERB appears to have used in order to find Sanders's actions are to be charged to or deemed the acts of the City Council, is erroneous.[41] "Actual" authority is (1) the authority the principal intentionally gives the agent, or (2) the authority the principal intentionally or negligently allows the agent to believe he possesses. (Civ. Code, § 2316.) There is no evidence the City Council *actually* authorized Sanders to act on its behalf to formulate and campaign for the CPRI, nor any evidence Sanders *believed* he was acting or had the authority to act *on behalf of the City Council* when he took those actions.[42]

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41 We accord no deference to PERB's legal conclusions because, although PERB certainly evaluates and applies common law principles of agency when making its administrative adjudications (see, e.g., *Chula Vista Elementary School Dist.* (2004) PERB Decision No. 1647E [28 PERC ¶ 184] [applying agency principles to hold school district liable for acts of school principal that constituted unlawful intimidation in violation of § 3543.5]; *Inglewood Unified School Dist.* (1990) PERB Decision 792E [14 PERC ¶ 21057] [concluding ALJ erroneously applied agency principles to hold school district liable for acts of school principal that allegedly constituted unlawful intimidation]), it has no comparative expertise in the common law that would warrant deference by this court (*California State Teachers' Retirement System v. County of Los Angeles, supra,* 216 Cal.App.4th at p. 55), and we therefore accord no deference to PERB's legal analysis of common law principles.

42 Indeed, PERB appears to have acknowledged it was not relying on any actual authorization when applying the actual agency theory, because it acknowledged that "[u]nder the circumstances, making liability dependent on whether the City Council *expressly* authorized Sanders . . . to pursue a pension reform ballot measure would undermine the principle of bilateral negotiations by exploiting the 'problematic nature of the relationship between the MMBA and the local [initiative-referendum] power.' [(Citing *Voters, supra,* 8 Cal.4th 765, 782.)]" Moreover, when PERB evaluated whether the City Council had " 'intentionally, or by want of ordinary care' " induced Sanders to *believe* he was acting on behalf of the City Council when he took those actions, PERB merely recited that Sanders "believed pension reform was needed to eliminate the City's $73 million structural budget deficit" and could be accomplished by the CPRI and therefore "*believed himself to be acting on behalf of the City.*" However, PERB

PERB's "Apparent Agency" Theory[43]

PERB's decision also relied on common law agency principles of "apparent authority" to support charging the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI. PERB's articulated rationale for attributing Sanders's support of the CPRI to the City Council under "apparent" authority principles was that the City Council intentionally or negligently caused or allowed the employees to reasonably believe Sanders was acting on behalf of the City Council in promulgating and supporting the CPRI within the meaning of the apparent authority principles codified in Civil Code section 2317. PERB, although acknowledging that *Inglewood, supra,* 227 Cal.App.3d 767 required the party asserting an agency relationship by way of apparent authority to satisfy the burden of proving the elements of that theory (*id.* at p. 780) and that "[m]ere surmise as to the authority of an agent is insufficient to impose liability on the principal" (*id.* at p. 782), concluded *Inglewood's* test was satisfied. PERB reasoned that, because employees knew Sanders

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erroneously transformed the only "belief" for which there *was* evidentiary support—that Sanders believed his support for the CPRI was in the City's best financial interests—into a finding for which there was *no* evidentiary support: that the City Council somehow induced Sanders to believe his actions in promoting the CPRI were on *behalf of the City Council.* Although the evidence supports the finding that Sanders believed his actions promoted the City's best financial interests, there is no evidentiary support he believed he was promoting the CPRI on behalf of the City Council, and therefore this aspect of PERB's actual agency theory lacks support.

43 The courts have interchangeably used the nomenclature of "apparent" agency or "ostensible" agency to describe this principle of vicarious liability. (See, e.g., *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942.) We will refer to it, as did PERB, as "apparent" agency.

was an elected official and City's chief executive officer, and knew Sanders touted the CPRI as a measure that was in the best interests of City, employees "would reasonably conclude[] that the City Council had authorized or permitted [Sanders] to pursue his campaign for pension reform to avoid meeting and conferring with employee labor representatives."

We conclude PERB's "apparent agency" rationale is erroneous, for several reasons. First, apparent agency focuses on whether the principal (either intentionally or by want of ordinary care) caused or allowed a third person to believe the agent possessed authority to act on behalf of the principal (Civ. Code, § 2317), and therefore must be established through the conduct *of the principal* and cannot be created merely by a purported agent's conduct or representations.[44] (*Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 367; *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1132.) Thus, even assuming apparent agency *could* be applied to permit Sanders's actions to somehow "bind" the City Council into being a co-sponsor of the CPRI,[45] PERB's

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44 We also note that "[l]iability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761.) PERB's decision does not explain how the third element necessary to application of the common law principle was satisfied, which further undermines the propriety of invoking that doctrine in this case.

45 We have substantial doubt an "apparent agency" theory can even be applied here. In *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, the court (although noting that "[e]ven in the field of private contracts, the doctrines of ostensible agency or agency by estoppel are not based upon the representations of the agent but upon the representations of the principal" (*id.* at p. 643), rejected a plaintiff's effort to invoke "agency by

decision (and PERB's and Unions' briefs on appeal) cite only the actions of Sanders and his staff as the evidentiary foundation for application of "apparent" agency theory. Neither PERB's decision nor PERB's and Unions' brief's on appeal cite any evidence that the putative principal (the City Council) affirmatively did or said anything that could have caused or allowed a reasonable employee to believe Sanders had been authorized to act on behalf of the City Council in promoting the CPRI, which undermines PERB's "apparent" agency theory.[46]

PERB's "apparent" agency theory in the present decision eschewed any reliance on affirmative manifestations by the City Council affirming Sanders's support for the CPRI was on its behalf.[47] Instead, PERB relied solely on the fact that Sanders supported the

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estoppel," noting that "[t]o invoke estoppel in cases like the present would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so. It [has been] held that the authority of a public officer cannot be expanded by estoppel. [Citations.]" (*Ibid.*) We need not decide that issue here because, even assuming it could apply, there appears to be no evidentiary support for that theory.

46 We recognize that apparent agency can be premised on inaction by the principal because "where the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability." (*Preis v. American Indemnity Co., supra,* 220 Cal.App.3d at p. 761.) However, even assuming this theory can apply here (but see fn. 45, *ante*), PERB recognized that Sanders repeatedly stated his efforts in promoting the CPRI were in his capacity as a private citizen, and there is no evidence Sanders ever claimed his efforts were as the City Council's representative, which renders the City Council's inaction or silence incapable of supporting an "apparent" authority finding.

47 PERB's prior decisions have appeared to acknowledge that " 'apparent authority to act on behalf of the employer may be found where *the manifestations of the employer* create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question' " (*Trustees of the California State University*

CPRI while occupying an office the responsibilities of which included acting for the City Council as the labor relations point man and recommending measures on labor issues to the City Council, and based thereon concluded Sanders had apparent or actual discretionary authority to promote the CPRI on behalf of the City Council, and therefore the City Council can be charged with liability for Sanders's failure to meet and confer over the CPRI. We recognize that "apparent" agency, like a respondeat superior theory (see *Inglewood, supra,* 227 Cal.App.3d at p. 779 [noting courts do not always distinguish between ostensible agency theory and tort doctrine of respondeat superior]), permits a third party to hold a principal liable for the wrongful conduct of his agent within the scope of his authority even where the agent was not operating with the express authorization of his principal when engaging in that conduct. (See generally *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1137-1139; *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403 [noting ostensible agency principles can be used to hold principal vicariously liable for agent's acts].)[48] In the field

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(2014) PERB Decision No. 2384-H, p. 39, quoting *West Contra Costa County Healthcare District* (2011) PERB Dec. No. 2164-M, p. 7, italics added by *Trustees*), but PERB's decision here cites no such conduct by the City Council.

48 Many PERB decisions have also held that an employer's officials, particularly those whose duties include employee or labor relations or collective bargaining matters, have been presumed to have acted on behalf of the employer such that their commission of acts constituting unfair labor practices were imputed to the employer. (*San Diego Unified School Dist., supra,* PERB Decision No. 137-E [unauthorized action of two school board members in placing letters of commendation into the personnel files of nonstriking teachers violated the proscription violated "no reprisal" rule of § 3543.5, subd. (a)]; *Trustees of the California State University, supra,* PERB Decision No. 2384-H.)

of labor relations, some cases decided under the Agricultural Labor Relations Act (ALRA) have upheld imposing liability on an employer for an act by an agent that constituted an unfair labor practice, even when such act was not expressly authorized by the employer, as long as such act was within the scope of the agent's duties.[49] (See *Vista*

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49 PERB's brief in this writ proceeding also asserts it was appropriate for the PERB decision to charge the City Council with Sanders's actions because he "acted within the scope of his authority as lead labor negotiator" in supporting the CPRI, which can be sufficient under NLRA precedent (see *H. J. Heinz Co. v. NLRB* (1941) 311 U.S. 514, 520-521; *International Assn. of Machinists v. NLRB* (1940) 311 U.S. 72, 80) to charge an employer with the wrongful conduct of its supervisory personnel. However, the court in *Inglewood* recognized NLRA precedent is of limited value in the Education Employment Relations Act (EERA) arena because "there are significant differences between the two statutes" and "at times, PERB has even stated that not only is NLRA precedent not controlling, it may not even be instructive." (*Inglewood, supra*, 227 Cal.App.3d at p. 777.) We note that, under the NLRA, an employer is specifically defined to include "any person acting as an agent of an employer, directly or indirectly" (29 U.S.C. § 152(2)), and explicitly states that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." (29 U.S.C. § 152(13).) In light of that statutory scheme, the *Heinz* court explained "[t]he question is not one of legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior*, but only whether the [NLRA] condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes." (*Heinz,* at p. 521.) Although NLRA precedent can be relevant in some circumstances (see, e.g., *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272), it is too distinct from the issue presented here: whether the MMBA was designed to permit the governing body to be charged with the unapproved conduct of its agents (cf. *Inglewood,* at p. 778 [rejecting union argument that agent should be included in definition of employer under EERA, because "[s]ince the Legislature is deemed to be aware of the content of its own statutory enactments, it is a reasonable inference that the Legislature would have included the term agent in the definition of employer under the EERA if it wanted school districts perpetually exposed to liability for any unfair labor practice committed by an agent of a school district"]), particularly when the specific conduct—compliance with the meet-and-confer mandate of section 3504.5—is triggered only when there is some action "proposed

Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307; *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100.) However, decisions under the ALRA provide little guidance because "under the ALRA, application of the NLRA standard is statutorily mandated" (*Inglewood, supra*, 227 Cal.App.3d at p. 778), and those standards are not premised on common law principles (*id.* at pp. 776-777; accord, *Superior Farming Co.*, at p. 118 ["employer responsibility for acts of agents or quasi-agents . . . is not governed by common law agency principles"]; see also fn. 49, *ante*), nor have PERB or Unions demonstrated there are sufficient parallels between the relevant provisions of the MMBA and the ALRA to permit cases decided under the latter scheme to provide persuasive guidance under the distinct scheme of the MMBA.

More importantly, affixing vicarious liability upon a principal under common law agency principles, regardless of whether the principal authorized the explicit conduct at issue, appears to presuppose the agent committed a wrongful act ab initio. (Cf. *Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 320.) This theory may well justify charging a principal with liability for an agent's acts that are inherently wrongful and injurious, such as the act committed by the agent in *Vista Verde Farms v. Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d at pp. 317-318 (in which the court noted the agent's acts violated Lab. Code, § 1153 and "would unquestionably constitute an unfair labor practice [citation] if engaged in directly by the employer"), regardless of whether the principal

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to be adopted by the governing body" (§ 3504.5, subd. (a)) rather than some action proposed by a putative agent of the governing body.

authorized those acts. However, the acts alleged here—an individual's advocacy for a citizen-sponsored initiative effecting employee benefits—is not an inherently wrongful act,[50] nor are we persuaded the MMBA explicitly proscribes such conduct merely because that individual occupies public office. Instead, the MMBA only requires compliance with the meet-and-confer mandate of section 3504.5 when there is some action "proposed to be adopted by the governing body" (*id.*, subd. (a)), and has no apparent applicability when the "governing body" is not affirmatively involved with the proposal.

We conclude PERB's reliance on common law principles of "apparent" agency or respondeat superior, in order to charge the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI despite the

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50 To the contrary, Sanders's advocacy for the CPRI is not inherently wrongful, but is instead protected under both statutory law (see §§ 3203 ["[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"] and 3209 ["[n]othing in this chapter prevents an officer . . . 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 under the Constitution. (See generally *Wood v. Georgia* (1962) 370 U.S. 375, 394 ["petitioner was an elected official and had the right to enter the field of political controversy"]; *Bond v. Floyd* (1966) 385 U.S. 116, 136-137.) Accordingly, common law principles of "apparent" agency or respondeat superior, which permit a third party to hold a principal liable for the *wrongful* acts of his agent, have no application here.

absence of any evidence the City Council actually authorized these acts, is without legal support and was erroneous.

PERB's "Ratification" Theory

PERB's decision also relied on common law principles of "ratification" to support charging the City Council (as putative principal) with the acts of Sanders (as putative agent) in promulgating and supporting the CPRI. As articulated by PERB, the City Council adopted Sanders's actions in promulgating and supporting the CPRI as their own measure because:

> "An agency relationship may also be established by adoption or subsequent ratification of the acts of another. (Civ. Code, §§ 2307, 2310.) It is well established as a principal of labor law that where a party ratifies the conduct of another, the party adopting such conduct also accepts responsibility for any unfair practices implicated by that conduct. [Citing *Compton Unified School District* (2003) PERB Decision No. 1518-E at p. 5 and *Dowd v. International Longshoremen's Assn., AFL-CIO* (11th Cir. 1992) 975 F.2d 779, 785-786.] Thus, ratification may impose liability for the acts of employees or representatives, even when the principal is not at fault and takes no active part in those acts. [Citation.] Ratification may be express or implied, and an implied ratification may be found if an employer fails to investigate or respond to allegations of wrongdoing by its employee."

PERB's decision, noting it was adequately shown the City Council had actual or constructive knowledge of Sanders's actions in support of the CPRI, relied on two grounds for applying "ratification" to convert Sanders's support for the citizen-sponsored CPRI initiative into City Council support for that initiative: the City Council's inaction (because it was aware of Sanders's support but did not disavow or repudiate his conduct), and the City Council's actions in placing the CPRI on the ballot while rejecting Unions'

"meet-and-confer" demands and accepting the financial benefits accruing from its passage. We conclude none of these grounds support PERB's determination that the City Council can be deemed to have promulgated or supported the CPRI under ratification principles.[51]

The first basis for PERB's ratification theory appears to be that the City Council did not disavow or repudiate his conduct. Although the failure to repudiate otherwise wrongful conduct can warrant charging a putative principal with responsibility for any unfair practices implicated by that conduct, as was the case in *Compton Unified School District, supra,* PERB Decision No. 1518E [27 PERC ¶ 56] and *Dowd v. International Longshoremen Assn., AFL-CI0, supra,* 975 F.2d 779, this presupposes the issue to be

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51 We note that, in this writ proceeding, PERB's brief appears to focus almost exclusively on the foundational issue—whether there was substantial evidence the City Council was aware of Sanders's conduct and "failed to disavow it"—with almost no discussion of whether (in light of that knowledge) the City Council's inaction (failure to disavow), or action (placing the CPRI on the ballot and rejecting Unions' "meet-and-confer" demands), or acceptance of the financial benefits supports the legal conclusion that the City Council adopted Sanders's support for the citizen-sponsored CPRI as its own under ratification principles. Similarly, the Unions' brief is largely silent on this issue, arguing only that (by failing to meet and confer over the CPRI) "the City Council ratified [Sanders's] unlawful scheme . . . ." This argument—that the City Council's *lawful* rejection of Unions' meet-and-confer demands (based on our conclusion there are no meet-and-confer obligations on citizen-sponsored initiatives, see part III.B., *ante*) converted such conduct into an *unlawful* rejection of those meet-and-confer demands under ratification principles—amounts to a *petitio principii* argument (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 1005) and sheds no light on the propriety of PERB's conclusion. While this lacuna would permit us to deem this claim abandoned (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]), we nevertheless examine PERB's stated basis for its "ratification" theory.

determined: whether Sanders's conduct *was* an unfair labor practice. (See fn. 50, *ante*.) We are aware of no law holding that an elected official's support (however vigorous) for a citizen-sponsored ballot measure impacting a subject otherwise negotiable under the MMBA violates the meet-and-confer provisions (or any other provision) of the MMBA, and we are convinced Sanders was entitled to support the CPRI (either as an individual or through capitalizing on his office's bully pulpit) because he was not supporting the proposal as the "governing body," which is the only entity constrained by the meet-and-confer obligations under the MMBA.

Moreover, reliance on the City Council's inaction is incompatible with other common law principles of ratification, which recognize that " 'ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified . . . .' (Civ. Code, § 2310.) Thus, where the equal dignities rule applies, it requires formal, written ratification." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571; accord, *John Paul Lumber Co. v. Agnew* (1954) 125 Cal.App.2d 613, 622 [corporation's ratification of alleged agent's unauthorized sale of its property can only be effected through a resolution of its board of directors when duly assembled].) Accordingly, absent a majority vote of the elected councilmembers (City Charter, art. III, § 15 & art. XV, § 270(c)), it is improper to find that Sanders's support for a citizen-sponsored initiative could convert the CPRI into a City Council-sponsored ballot proposal under ratification principles. (*Kugler, supra,* 69 Cal.2d at p. 375; *First Street Plaza Partners v. City of Los Angeles, supra,* 65 Cal.App.4th at p. 667 [where city charter

prescribes procedures for taking binding action, those requirements may not be satisfied by implication from use of procedures different from those specified in charter]; cf. *Stowe v. Maxey* (1927) 84 Cal.App. 532, 547-549 [declining to apply ratification principles to validate act where act was one county board was incapable of delegating].)

Finally, insofar as PERB premised ratification on the City Council's placing the CPRI on the ballot, and the City Council's acceptance of the financial benefits accruing from its passage by the voters, we conclude that theory also lacks legal foundation. This aspect of PERB's legal analysis rests on the unstated predicate that the City Council could have declined to place the CPRI on the ballot or to accept the financial benefits accruing from its passage, and that its decision to act to the contrary adopted Sanders's otherwise unauthorized conduct by ratification. However, ratification has no application when the principal is unable to decline the benefits of an agent's unauthorized actions. (See generally *Pacific Bone, Coal & Fertilizer Co. v. Bleakmore* (1927) 81 Cal.App. 659, 664-665.) The City Council was required by the Elections Code to place the CPRI before the voters (without alteration) because it qualified for the ballot (cf. *Blotter v. Farrell* (1954) 42 Cal.2d 804, 812-813), and PERB cites no authority suggesting the City Council could have elected to ignore the mandates of the CPRI (by refusing to accept the financial benefits accruing from its passage) once the CPRI was approved by the voters. Accordingly, the fact the City Council complied with its legal obligations cannot support PERB's ratification theory.

D. Conclusion

We conclude, for the reasons previously explained, a city has no obligation under the MMBA to meet and confer before placing a duly qualified citizen-sponsored initiative on the ballot, and only owes such obligations before placing a governing-body-sponsored ballot proposal on the ballot. We further conclude PERB's fundamental premise—that under agency principles Sanders's support for the CPRI converted it from a citizen-sponsored initiative on which no meet-and-confer obligations were imposed into a City Council-sponsored ballot proposal to which section 3504.5's meet-and-confer obligations became applicable—is legally erroneous. Because PERB's remaining determinations—that the City Council engaged in an unfair labor practice when it defaulted on its obligations under section 3504.5 and that PERB's "make whole" remedies for that alleged unfair labor practice could order City to de facto refuse to comply with the CPRI—proceeded from this fundamental but legally erroneous premise, PERB's decision must be annulled and remanded for further proceedings consistent with the views expressed in this opinion. (*San Mateo City School Dist. v. Public Employment Relations Bd., supra,* 33 Cal.3d at p. 867.)

DISPOSITION

The Public Employment Relations Board (PERB) decision is annulled, and the matter is remanded to PERB with directions to dismiss the complaints and to order any other appropriate relief consistent with the views expressed within this opinion. Each party shall bear its own costs of this proceeding.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

NARES, J.