IN THE
SUPREME COURT OF CALIFORNIA

Case No.: S242034
Court of Appeal Consolidated Case No.: D069626

CATHERINE A. BOLING, ET AL. and CITY OF SAN DIEGO,
Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

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

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
Consolidated Case Nos. D069626 and D069630

JOINT ANSWER OF REAL PARTIES IN INTEREST UNIONS TO AMICUS BRIEF FILED BY PACIFIC LEGAL FOUNDATION, HOWARD JARVIS TAXPAYERS ASSOCIATION, AND NATIONAL TAX LIMITATION COMMITTEE IN SUPPORT OF CITY OF SAN DIEGO

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Introduction

Real Parties in Interest San Diego Municipal Employees Association, Deputy City Attorneys Association, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (collectively "Unions") submit this Joint Answer/Opposition Brief in response to the Amicus Curiae Brief filed in support of the City of San Diego by the Pacific Legal Foundation, Howard Jarvis Taxpayers Association, and National Tax Limitation Committee (collectively "PLF") .

The Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M applies the Meyers-Milias-Brown Act (MMBA) to the unique facts and circumstances established by the evidence during a 4-day adversarial hearing.[1] PERB concluded that the City violated the MMBA when its elected Mayor, serving in a paid position as City's Chief Executive Officer and Chief Labor Negotiator, used the prestige, resources, and staff of his Mayoral Office to announce and pursue a pension reform initiative to change negotiable subjects while the City refused the exclusive representatives' (Unions) repeated requests to meet and confer. (AR:XI:3002-3003, 3011.) Mayor Sanders forthrightly admitted his purpose in using the initiative was to avoid

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[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

the City's MMBA bargaining obligation: "[Y]ou 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 meet and confer and you don't know what's going to go on at that point." (AR:XIII-3342-3346; XX, Ex.91:5173-76 [transcript]; XXI, Ex.160:5517 [audiotape].)

Without a single citation to the administrative record or to the text of PERB's actual decision, PLF assails that decision as an "edict" which allegedly undermines the integrity of the citizens' initiative process, "assaults" precious constitutional rights (PLF Brief, pp. 9-12), and effectively "amends" the constitutional scheme. (*Id.* at 16.) Unconstrained by the record or PERB's actual decision, PLF takes great dramatic license to conjure up images of PERB's having imposed the "statutory meet and confer scheme" on the initiative process and created a new "bureaucratic gatekeeping authority" designed to "derail direct democracy before it gets started." (*Id.* at 12, 14, 17)

Nowhere among PLF's 4,146 words – a virtual diatribe against PERB – does PLF offer *any* analysis of the MMBA, the fifty years of administrative and court decisions applying it, or the findings of fact (deemed conclusive under section 3509.5) which informed PERB's Decision. PLF never acknowledges, let alone analyzes, the problematic nature of the *City's* conduct – as the public entity governed by the MMBA – in terms of the MMBA's actual text or the goals, objectives and guarantees it embodies.

What's more, PLF has entirely disregarded the central *issue* of statutory interpretation on which this Court granted review – whether the MMBA's good faith meet-and-confer obligations apply to public agencies under section 3505 or only to the public agencies' governing bodies when they propose to take certain formal action under section 3504.5. Although the answer to this question will impact the rights and duties of hundreds of thousands of public employees and their public entity employers throughout California, PLF turns a blind eye to this central interpretive issue.[2] Divorced as PLF's overwrought defense of allegedly "sacrosanct" and "absolute" local initiative rights is from the MMBA-related record here, PLF's Amicus Brief does not assist this Court in addressing the issues under review.

PERB's actual decision – rather than PLF's fictional account of it – will, in fact, have *no impact whatsoever* on the exercise of initiative rights by local citizens beyond the unique facts and circumstances presented in this administrative record. On the other hand, the Fourth District Court of Appeal's opinion – by announcing and applying a brand new, narrow (and unexplained) interpretation of the MMBA in order to declare PERB's Decision

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[2] PLF also offers no analysis on the second issue for review: whether PERB's interpretations of the statutes it administers and its findings of fact are subject to deference under the "clearly erroneous" standard or are subject to *de novo* review. PLF resorts only to a disparaging, albeit brief, diatribe to say that "whatever its 'expertise' on the MMBA, PERB's interpretation of that statute in this context cannot be given deference" – adding in conclusory fashion that PERB "distorted," "misused," and "misread" the MMBA. PLF does not say how. (PLF Brief at pp. 22-23.)

void – will have an undeniably detrimental impact on the continued vitality of the MMBA as a means to foster public sector labor peace in California. While PLF's single-minded goal is to save this one tainted exercise of local initiative rights, the challenge before this Court is to "save" the MMBA in furtherance of its statewide purpose.

Argument

I. PLF Rails Against Imaginary "Political Roadblocks," "Governmental Checkpoints," and "Bureaucratic Reviews" Which It Predicts Will Derail the Exercise of Initiative Powers

PERB's jurisdiction to decide this case despite the approval of the "Comprehensive Pension Reform Initiative"(CPRI)/Proposition B at the polls on June 5, 2012, was established by *San Diego Municipal Employees Ass'n v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458, *review denied.*

PERB's decision is carefully tailored to remedy the *City*'s violation of the MMBA based on the administrative record establishing an unlawful unilateral change when the City authorized the placement of Proposition B on the ballot without first meeting and conferring with Unions.[3] (AR:XI:3039-3040; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*

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[3] Unilateral change violations are one of the most common and frequently alleged unfair labor practices. A unilateral change violation is a per se violation of the duty to bargain in good faith because such conduct has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813.818; *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 12-17.)

(1984) 36 Cal.3d 591.) The MMBA's bilateral good faith meet-and-confer process – and the obligations surrounding it – is the centerpiece of a statutory scheme governing local public sector labor relations in California. Courts have "consistently held that the Legislature intended the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employees and employers." (*Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, 539.) PERB is entrusted with the power "to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action [...] as will effectuate the policies of the applicable statute." (Cal.Code Regs., tit. 8, § 32325.)

Yet PLF either fails to comprehend or intentionally misrepresents PERB's holding which does not adjudicate the rights of citizens but adjudicates the conduct of the City with respect to its MMBA collective bargaining obligations – and does so pursuant to its mandate to investigate and remedy unfair practice allegations. (Gov. C. § 3509, subd. (b).) The Board's decision regulates the City's conduct – by and through its City officials acting in their official capacity – that violated the collective bargaining requirements set forth in the MMBA. (AR:XI:3034, 3037, 3039-3040.) The City, not the Mayor, was held liable for these MMBA violations. (*Id.* at 2980, 3039.) The decision does not preclude City officials from voicing their opinion or

participating in the initiative process, nor does it restrict any speech or associational activity. (See, e.g., AR:XI:3038.) The decision held that, under the facts of this case, the Mayor was not acting solely as a *private* citizen when he used City resources and the prestige of his public office to create, develop and promote the pension initiative. (*Id.* at 2989, 3013.) While the support of government officials will certainly not impact *every* citizens' initiative, that support may, in certain circumstances – such as those present here – be imputed to the local public agency itself and, where it is imputed, meeting and conferring in good faith is required if the subject matter is within the scope of representation.

PLF simply fails to explain how or why the City's decision in this case to make a unilateral change in pensions by initiative to avoid its MMBA bargaining obligations is or should be immune from review. PLF declares that the "nature and extent of the mayor's involvement"[4] is irrelevant "from a constitutional perspective." But the Mayor's conduct is consequential to the resolution of this unfair practice case where the Mayor served as City's Chief Executive Officer and Chief Labor Negotiator and where the City's conduct is the centerpiece of the unilateral change analysis at issue. In truth, PLF offers this Court no analysis related to the MMBA features of this *MMBA* case.

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[4] PLF ignores the evidence establishing this involvement – saying only that San Diego's mayor "supposedly" acted "in some kind of city-sanctioned capacity when taking a leading role in formulating and promoting CPRI." (PLF Brief at p. 11.)

A. Mayor Sanders Was Not Acting In the "Tradition of Officeholders" Who Support Citizens' Initiatives

Citing the "significant tradition of officeholders undertaking 'extensive actions' in support of citizens' initiatives" (PLF Brief at pp. 20-21), PLF analogizes Mayor Sanders' conduct in this case with that of Governor Reagan and a Los Angeles County Supervisor when each respectively sponsored a tax-related citizens' initiative in 1973 and a term limits measure in 1990.

However, in neither instance was the subject matter being addressed by the initiative within the scope of representation under the MMBA. The state's public sector collective bargaining law was simply not implicated in either instance and thus these examples offer no meaningful analogy to the MMBA-scofflaw scheme at issue here. PLF ignores the facts conclusively established during the adversarial proceedings below that the City's Mayor sought to achieve a unilateral change in subject matter within the scope of representation by using an initiative to avoid the MMBA's good faith meet and confer process. (AR:XI:2997.) As Mayor Sanders said under oath: "we would be going the citizens' signature route" because that way "you don't meet and confer prior to putting that on the ballot [...]" (XIII:3342, 3344; see also XIII:3341-3346.)

Nor does the fact of Mayor Sanders' status as an *elected* official aid PLF's failed analogy to the "tradition" of other "officeholders" supporting or sponsoring initiatives. The officeholders who "sponsored" the measures PLF

cites were not entrusted with the duty, as Mayor Sanders was here, to perform a specific Charter-mandated job in compliance with the State's MMBA. In a published Memorandum of Law directed to the Mayor and City Council in January 2009, City Attorney Jan Goldsmith explained the Mayor's role under the City's "strong mayor form of governance." It is the Mayor who must "ensure that the City's responsibilities under section 3500, subdivision (a) of the MMBA [...] are met," (XII:3191-3192:2, 3192:16-3193:5; XVIII, Ex. 17:4626-38; XVIII, Ex. 24:4721, 4727-4728), and it is the Mayor's "duty to negotiate with Unions in an attempt to reach agreement for the Council's consideration and possible adoption." (XVIII, Ex. 24 at 4728.) Moreover, since the *City* itself is a municipal corporation and a single employer for purposes of its compliance with the MMBA, "[i]n determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City." (*Id.* at 4730, emphasis added.)

The City's former City Attorney (Michael Aguirre) had also recognized these same legal principles when responding to Mayor Sanders' announced intention to lead a voter initiative to get certain pension reforms on the ballot in the spring of 2008. In a published Memorandum of Law (MOL) dated June 19, 2008, he cautioned Mayor Sanders and the City Council that, even if the

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Mayor asserted a First Amendment right to act as a "private citizen," his sponsorship of a pension initiative:

> would legally be considered as (his) acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition, the City would have the same meet and confer obligations with its unions as [if he were proposing a ballot measure on behalf of the City]. (AR:XVIII, Ex. 23:4710.)

In response, Mayor Sanders abandoned his idea of leading a citizens' initiative (because it would not avoid the City's meet and confer duty) and instead returned to the bargaining table with the City's Unions. The Mayor negotiated a new "hybrid" defined benefit/defined contribution pension plan for employees hired after July 1, 2009, (XIV:3627-3630; XX, Ex. 143:5354-56) – announcing the tentative agreement (subject to City Council's action) with the Unions at his side during a press conference outside City Hall in the summer of 2008:

> We are all assembled here today to announce that the unions and I as the City's lead negotiator have arrived at a tentative agreement regarding pension reform. [...] This compromise helps us achieve the same underlying principles that I always thought were critical . . . shift(ing) risk away from taxpayers. [...] I think this is a very fair compromise for both taxpayers and future City employees. [...] I think it's in the best interest of all parties that we arrived at this arrangement and would urge the City Council to pass it unanimously once it's before them. (XXI-Ex. 161:5519[video clip].)

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The Mayor's tentative agreement went to the City Council for "determination" under the MMBA and the Council approved it – demonstrating the respective roles of the Mayor and City Council when fulfilling their shared duties to comply with the MMBA on behalf of the City.

The Board's decision did not in any way create or require a "gatekeeper" to oversee citizens' initiatives. (XI:2994, 3018-3019.) No objective reader would conclude, as PLF asserts, that this decision represents a requirement that *all* citizens' initiatives be "vetted" or "reviewed" by government, labor leaders or other "politically powerful" people before they may be placed on the ballot. (PLF Brief at p. 12.)

B. The City Council Aided and Abetted This MMBA-Opt-Out Scheme Despite Its Independent Duty To Fulfill the City's Good Faith Bargaining Obligations

Nor does anything in the Board's Decision suggest that the City Council could have simply refused to place the CPRI on the ballot. Rather, the Board held that the City violated the MMBA by placing the initiative on the ballot *before negotiating* with the Unions. (AR:XI:3042.)

As early as January 12, 2011, the Mayor delivered his "State of the City" Address *to the City Council*, as required by the City Charter, to provide the Council with "a statement of the conditions and affairs of the City" and "recommendations on such matters as he or she may deem expedient and proper." (AR:XVII:4494.) On this official, highly visible public occasion,

Mayor Sanders announced his determination that pension policy must be radically changed in the "public interest" by replacing defined benefit pensions with a 401(k) plan for non-police new hires. He said this "bold step" was needed to "complete our financial reforms and eliminate our structural budget deficit." To accomplish this, Mayor Sanders promised that he (together with Councilman Kevin Faulconer and the City Attorney) would "soon bring to voters an initiative to enact a 401(k)-style plan." (AR:XVIII:4816; XIX:4832, 4836; XVII:4494.)

Having been directly and publicly briefed on the Mayor's intentions, the Council took no action to repudiate or to remedy the Mayor's failure and refusal to bargain. Even on receipt of multiple written demands to bargain – directed specifically to the Council to urge its action as a body and as a statutory agent under the MMBA (Gov. C. § 3505), the Council acquiesced in the Mayor's violation of the MMBA:

✦ by taking no action to direct the Mayor to perform his Charter-mandated duties as CEO and Chief Labor Negotiator by initiating bargaining with City's Unions over the determination that 401(k)-style pension reform was needed in the City's interest; and,

✦ by failing to fulfill its own obligation to initiate bargaining over the concept of 401(k)-style pension reform on behalf of the *City*.

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Notably, the City Council had every opportunity to cure the *City*'s violation of the MMBA after learning of the Mayor's intentions on January 12, 2011 – months before a "notice of intent to circulate" the CPRI signature-gathering petition was filed on April 4, 2011, and many more months before CPRI/Prop B qualified for the ballot. In fact, the City Council learned of the Mayor's determination to change negotiable subjects by initiative to avoid bargaining a *full year* before the Council voted in January 2012 to put CPRI/Prop B on the June 5, 2012 ballot. Unions sent seven letters (from July 2011 through February 2012) to urge the Mayor, City Attorney, and City Council not to go forward with their unlawful actions. (AR:XIX:5109-5110, 5112; XX:5123-5126, 5142-5144, 5157-5162.)[5]

Moreover, the City Council had ample opportunity to comply with the MMBA without abandoning its ministerial duties under the Elections Code and without adversely affecting local initiative rights. When presented with a qualified citizens' initiative to amend the City's Charter, the City Council was required by state law to submit the initiative to the voters "at an established statewide general, statewide primary, or regularly scheduled municipal election . . . occurring *not less than* 88 days after the date of the

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[5] MEA's first letter to Mayor Sanders dated July 15, 2011, sought bargaining over the *pension reform subject matter* covered by his initiative effort – subject matter which was clearly within the scope of representation and also covered by existing Memoranda of Understanding between MEA and the City. (AR:XIX:5109-10.)

order of election." (Elec. Code, § 9255, subd. (c), emphasis added.) Because there was no maximum time limit for the City Council to submit the initiative to the voters, nothing prevented the City from negotiating with the Unions before that occurred. (See *Jeffrey v. Super. Ct.* (2002) 102 Cal.App.4th 1, 4 [observing that section 9255 "enumerates minimum time limits, but no maximum time limits."].) However, the City Council failed and refused to exercise its discretion to do so – adopting Ordinance O-20127 on January 30, 2012, to put the CPRI on the June 2012 primary ballot – even after Unions' unfair practice charge had been filed and served, and despite the option available to the Council under Elections Code section 9255 to exercise its discretion to defer the vote on CPRI to the November 2012 general election to permit bargaining over pension reform. (AR:I:2-229; XVI:4071-89.)

Furthermore, nothing in PERB's decision supports the notion that government, labor leaders or anyone else will now be empowered to force a citizens' initiative to be altered or amended through an MMBA meet-and-confer process; nor does PERB's decision apply the MMBA as a means to derail or veto a citizen's initiative or to deprive an initiative's proponents of their pre-election rights to control the initiative as discussed generally in *Perry v. Brown* (2011) 52 Cal.4th 1116. What the Board correctly noted is that the City was not relieved of its duties under the MMBA on the basis that a proposed citizens' initiative on negotiable subjects was being circulated or

even had qualified for the ballot. Indeed, a recognized employee organization may itself trigger an employer's duty to bargain by a demand to meet-and-confer over a negotiable subject. (*Dublin Prof'l Fire Fighters, Local 1885 v. Valley Comm. Svs. Dist.* (1975) 45 Cal.App.3d 116, 118.) As the Board concluded, the City and the Unions might have agreed on a competing or alternative measure as a result of a good faith bargaining process conducted under MMBA section 3505. (AR:XI:3034 & fn. 23.) As the ALJ explained:

> The unions' interest in bargaining with the Mayor without implicating the rights of the citizen proponents is not difficult to ascertain. They could have hoped for a compromise proposal with the Mayor, possibly through intervention of the City Council. Even assuming the CPR Committee's measure would have succeeded on its own, a compromise solution of any derivation would have resulted in the presentation of a competing initiative measure possibly giving the electorate a more moderate option for addressing pension costs. (*Id.* at 3091, fn. 19.)

In this regard, it is well-settled, and the City never disputed, that conflicting ballot measures may be presented at the same election, with the measure receiving the highest vote total prevailing. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188.) In fact, the San Diego City Council had itself previously put a competing ballot measure before voters as an alternative to a duly-qualified citizen's initiative. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 [*both* measures were approved and *both* invalidated on cross-motions for declaratory relief].) PERB expressly rejected the contention that City had no authority to

meet and confer with Unions simply because it was obligated to place CPRI on the ballot without alteration. (XI:3034 and fn. 23.)

Finally, PLF asserts that the constitutional rights of ballot proponents include the *right to prevent* a public entity from fulfilling its MMBA-related duties and responsibilities by bargaining over the subject matter covered by their initiative. (PLF Brief at p. 22.) They argue that allowing "meet and confer" on the *subject matter* of their initiative could "derail" it outright or "subvert" it "by introducing a competing measure." (*Ibid.*) They cite no authority in support of the erroneous assertion that local initiative proponents have the right to be the *exclusive* proponents on a given subject matter (in fact, *Howard Jarvis Taxpayers Assn. v. City of San Diego, supra*, demonstrates otherwise) – let alone that initiative proponents have the right to preempt the MMBA's bilateral meet and confer obligations when subject matter within the scope of a public entity's duty to bargain is involved.

II. The MMBA's Preemptive Force Arises From Its Statewide Importance and Nothing In This Court's Recent *Upland* Decision Changes That Result

PLF asserts that PERB "imposed the MMBA's 'meet and confer' scheme onto the initiative process." (PLF Brief at p. 17.) PERB did not do so; PERB applied the MMBA statutory scheme to the *City* based on the actions of its Mayor – who was employed at all relevant times as the *City's* Chief Executive Officer and its Chief Labor Negotiator – and based on the

action/inaction of its legislative body, the City Council. The local citizens' initiative process became implicated in this unfair practice case because Mayor Sanders announced his intention to take unilateral action to transform City employee pensions – *for the benefit of the City* – by using an initiative in order to avoid the City's MMBA obligations. His announcement and the conduct which followed to fulfill his intentions spanned several months *before* any petition to circulate a citizens' initiative had even been filed. It is the use of a "citizens' initiative" *by government* – for the stated purpose of dodging its MMBA-related obligations and bypassing its recognized employee organizations – which gave rise to this unfair practice case and triggered PERB's duty to fulfill the enforcement mandate assigned to it by the Legislature in Government Code section 3509.5.

PLF argues that, when applying the MMBA to the *City* in a context where a citizens' initiative is also implicated, PERB violated the so-called "clear statement" rule announced by this Court in *California Cannabis Coalition v. Upland* (2017) 3 Cal.5th 924 (*Upland*). (PLF Brief at p. 18.) In *Upland*, this Court interpreted two state constitutional provisions, both involving voter participation: Article II, sections 8 and 11, containing the initiative power, and Article XIIIC, limiting the ability of local governments to impose, extend, or increase any general tax without a vote of the electorate at a regularly scheduled general election for members of the governing body.

Based on its reading of *Upland*, 3 Cal.5th at 946, PLF argues that no law may be read "to constrain [the] exercise of the initiative power" if it does not include a "clear statement" of that purpose – and that the MMBA "is devoid of any mention of the initiative process." (PLF Brief at pp. 17-18.) However, this Court has previously rejected the argument that the MMBA must expressly extend its coverage to local voter initiatives or otherwise state as an intended purpose that its meet and confer requirements constrain the local electorate's initiative power.

In *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8 Cal.4th 765 (*Trinity County*), this Court addressed the relationship between the MMBA and local referendum powers which derive from the *same* article II constitutional source as powers of local initiative. This Court held in *Trinity County* that the Legislature need not state its preemptive choices with respect to initiative and referendum expressly. Its power to restrict local initiatives and referenda may be implicit or may also derive "from its power to enact general laws of statewide importance that override local legislation." (*Trinity County* at 779.) In support of its holding, *Trinity County* cited *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491 (*COST*), where this Court held that, in matters of statewide concern, the state may preempt the entire field excluding all local control, or it may choose to grant some measure of local control, including placing

procedural restrictions on the exercise of local authority.

> "The state's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body." (*COST* at 511-12.)

When applying the *COST* standard, *Trinity County* concluded that the purpose of the MMBA in fostering labor peace by promoting the resolution of labor-management disputes through bilateral collective bargaining, justifies a result preempting and displacing the exercise of local referendum power. Accordingly, *Trinity County* upheld the county's refusal to place a referendum on the ballot which would have invited voters to rescind a memorandum of understanding between a labor union and the county. Since the MMBA "embodies a statutory scheme in an area of statewide concern" and its meet-and-confer requirement is the "centerpiece of the MMBA," *Trinity County* found a "problematic" relationship between the MMBA and the local referendum power. A restriction on citizens' referendum rights was justified, *Trinity County* concluded, notwithstanding that referendum rights derive from the *constitution* and despite the obligation of the courts to resolve all doubts in favor of the exercise of these rights. (8 Cal.4th at 780-82.)

A decade before its decision in *Trinity County*, this Court had described the MMBA's meet and confer requirement in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach)*, as an

"essential component of the state's legislative scheme for regulating the city's employment practices" as a matter of general law of "statewide concern," (*id.* at 599-601), and cited "an unbroken series of public employee cases" (citations omitted) holding that the preemptive force of the state's labor relations statutes prevail over charter city home rule rights where conflicts existed between state statutes and city law." (*Id.* at 600.) Thus, it was also long ago settled that the process of setting public employees' terms and conditions of employment is a matter of statewide concern subject to regulation by the Legislature. (*Id.* at 600, fn. 11.) Accordingly, the constitutional provisions granting plenary power to charter cities are subordinate to statewide public employee labor relations statutes like the MMBA.

Moreover, having rejected the City of *Seal Beach*'s reliance on the constitution as a defense to its violation of the MMBA when placing charter amendments affecting negotiable subjects before the voters without first engaging in good faith bargaining,[6] this Court ordered the electorate's vote on those charter amendments set aside in order to restore the status quo ante until the good faith meet and confer requirements of the MMBA had been satisfied.

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[6] The constitutional right for citizens to propose a charter amendment by local initiative derives from the exact same constitutional source as the right of a governing body to do so. "Amendment or repeal (of a county or city charter) may be proposed by initiative or by the governing body." (CA Constitution, art. XI, § 3(b).)

With these precedents in mind, it is readily apparent that PLF has overstated the impact of this Court's recent *Upland* decision. PLF dismisses the significant, relevant analysis contained in *Seal Beach* on the basis that it dealt with a city council-sponsored charter amendment, and then suggests that *Trinity County* is of no relevance here because the referendum power, though it derives, like the initiative, from article II of the California Constitution, is allegedly "a more limited, context-specific exercise of direct democracy than the citizens' initiative." (PLF Brief at pp. 18-19.) PLF misses the point. Neither the majority nor concurring and dissenting opinions in *Upland* cited or discussed any cases involving the intersection of local voter initiatives and statutes governing matters of statewide concern. *Upland* did not cite *Seal Beach or Trinity County*, or decisions reviewing agency adjudication under laws of statewide concern. *Upland* simply cannot be read as having overruled the legal principle established by *COST* and *Trinity County* that the power to restrict constitutionally-based local initiative and referenda rights may be *implicit* in a statutory scheme of statewide concern without express legislative restriction.[7]

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[7] When a statute makes reference to action by a local legislative body, a legislative intent to preclude action on the same subject by the electorate is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair. (*COST*, 45 Cal.3d at 501.) (*See also DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776 [when the subject at issue is a matter of statewide concern rather than a municipal affair, there is a greater probability of a legislative intent to bar initiative and referendum].)

III. Local Initiative Rights Are Not Absolute and When A Public Agency Misuses this Power As An MMBA-Opt-Out Scheme, As the City Did Here, the Preemptive Force of State Law Operates to Invalidate It

PERB expressly stated that this case does not ultimately involve a face-off between the MMBA and a "pure" local citizens' initiative – meaning an initiative to change terms and conditions of employment untainted by a public employer's unfair practice conduct of the type and scope shown here.[8] PERB did not conclude that the statewide objectives embodied in the MMBA serve to preempt *all* local voter-proposed initiatives on compensation and other subject matter within the scope of representation. (AR:XI:3013.)

Instead, PERB properly exercised its authority and expertise to apply the MMBA in a way that harmonizes the guarantees and goals of the MMBA with local initiative rights. In so doing, PERB implemented the same policy premise which informed this Court's analysis in *Seal Beach* and *Trinity County* – that "the City cannot exploit the tension between the MMBA and the initiative process to evade its meet-and-confer obligations," (*id.* at 3038), by applying the MMBA to the facts established in this record and shaping an appropriate remedy in furtherance of the MMBA's purpose and objectives.[9]

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[8] "While the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative, those issues are not implicated by the facts of this case and we therefore decline to decide them." (AR:XI:3006.)

[9] PERB also does not render advisory opinions. It exercises its adjudicatory function through decisions resolving actual controversies between the parties concerning findings of facts and/or conclusions of law.

Thus, this case does not challenge the general proposition that the people's power to legislate by initiative is an important Constitutional right. And while it is true that courts must "jealously guard" this right, there is a relevant corollary which PLF fails to acknowledge: courts guard this initiative power with "both sword and shield." They must not only "protect against interference with its proper exercise, but [] must strike down efforts to exploit the power for an improper purpose." (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 786.) As PERB concluded, where local control implicates matters of statewide concern, it must be harmonized with the general laws of the state (*Seal Beach*) and, where a genuine conflict exists, the constitutional right of local initiative is preempted by the general laws affecting statewide concerns. *(Trinity County, supra*, 8 Cal.4th 765; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 869-70.) (AR XI-186:3008-17.) A charter city cannot expand its power to affect statewide matters simply by acting through its electorate rather than through traditional legislative means. (*Id.* at 3012.)

PERB did not "disregard the proponents' interests and rights," as PLF argues.[10] (PLF Brief at p. 22.) To the contrary, having waited from November

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(*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28.)

[10] As noted above at page 20, proponents had no "right" to prevent the City from meeting and conferring over the "subject matter" of their initiative because a competing measure may have resulted.

2010 through April 2011, while Mayor Sanders crafted, promoted and fine-tuned his 401(k)-style pension reform initiative before filing their "notice of intent to circulate" a petition, the official proponents' particularized pre-election interests as "co-legislators" with City government were fulfilled and extinguished. Indeed, the official proponents stood by in silence on the City Concourse as Mayor Sanders led a press conference to announce the filing of this notice of intent: "We've made progress over the last few years in reforming our (pension) system," he said, but "today we're taking the next step and let me tell you it's a big one." (AR:XIII:3339-3340, 3376-3377, 3421, 3431; XIX:5009-07, 5013-21, 5028-29 [Fox News: "Pension reformers Unite Behind Compromise Plan"]; XXI:5515 [KUSI videoclip].)

As an act of local legislation, an initiative must remain subject to the pre-emptive force of general legislation on a matter of statewide importance. The right of citizens to legislate by local initiative must be balanced against the strong statewide interest in enforcement of its public sector collective bargaining law. Here, application of these legal principles means that *some impact* on the exercise of local initiative rights must be expected and tolerated if the guarantees and protections of the MMBA for represented employees are to have any meaning at all. Consistent with its authority and jurisdiction, PERB has ordered a make-whole remedy against the City with both restorative and compensatory features in accordance with well-established precedent.

(AR:XI:3018, 3023.) The City itself assured the Superior Court in 2012, when opposing PERB's injunctive relief requests related to CPRI/Prop B, that PERB has the remedial power "to place employees back in the position they were in prior to the unfair labor practice – ordering those employees to be provided the City's defined benefit retirement plan subject, of course, to judicial review." (XXI, Ex.158:5513:1-5.) However, PERB has plainly acknowledged that its remedial power as an administrative agency – as distinct from this Court's power – does not extend to the invalidation of a municipal election. (AR:XI: 3020-3023.) PERB did *not* invalidate Proposition B but left it to the Unions to seek relief in the courts to overturn it as to those employees who are represented by the four Union Real Parties in Interest.

Conclusion

Since PLF offers no analysis related to the MMBA or the proper standard of review for PERB's decisions and makes no attempt to reconcile this Court's established preemption analysis with the MMBA-related administrative record below, PLF's argument that local initiative powers may be exercised in defiance of state law without legal consequences, is of no help to this Court.

PLF simply fails to recognize that PERB is fulfilling its legislative mandate to enforce the MMBA on a uniform, statewide basis, and to do so in a manner consistent with controlling court decisions. Binding precedent

already establishes that *local* initiative rights are *not* absolute and must yield to legislative enactments on matters of statewide concern, such as the MMBA, if there is an actual conflict as there is here.

In the final analysis, the need for local initiative power to be guarded with "both sword and shield" is particularly critical in this case where the initiative power was used not by the people as a so-called "legislative battering ram" but *by government* itself as an MMBA opt-out scheme. Left unremedied, the City's unfair practice conduct – which PLF does not dispute – will be rewarded (and likely mimicked) while the state's legitimate interest in the enforcement of a uniform collective bargaining law designed to foster communication and labor peace in the public sector will be defeated.

Dated: December 13, 2017

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CERTIFICATE OF COMPLIANCE PURSUANT TO

CALIFORNIA RULES OF COURT, RULE 8.520(c)(1) and (3)

In accordance with Rule 8.520(c)(1), I certify that the text of this brief, after excluding the words permitted by Rule 8.520(c)(3), but including all footnotes, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect 11), contains 6,063 words.

Dated: December 13, 2017

ANN M. SMITH

PROOF OF SERVICE

COURT NAME: In the Supreme Court for the State of California

CASE NUMBER: Supreme Court: S242034
Appellate Court: D069626 and D069630

CASE NAME: Boling, et al.; City of San Diego v. Public Employment Relations Board

I, the undersigned, hereby declare and state:

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

On December 14, 2017, I served the within document described as:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 14, 2017, at San Diego, California.

ELIZABETH DIAZ