Case No. S242034

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

After a Decision of the Court of Appeal, Fourth Appellate District, Division One, Consolidated Case Nos. D069626 and D069630

COMBINED ANSWER BY CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS TO PETITIONS FOR REVIEW BY THE PUBLIC EMPLOYMENT RELATIONS BOARD AND THE UNION REAL PARTIES IN INTEREST

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COMBINED ANSWER TO PETITIONS FOR REVIEW BY THE PUBLIC EMPLOYMENT RELATIONS BOARD AND THE UNION REAL PARTIES IN INTEREST

Petitioners, Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents/Petitioners") respectfully submit this combined Answer to Petitions for Review requesting that this Court deny the requests for review — by Respondent, California Public Employment Relations Board ("PERB" or "Respondent") and 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 (collectively "Charging Parties" or "Real Parties") — of the Decision of the Court of Appeal, Fourth Appellate District, Division One, 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*").

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.500(a), Proponents respectfully request that this Court leave the *Opinion* in place. By separate Petition filed May 19, 2017, and now pending before this Court, Proponents further request that they be awarded "private attorney general" attorneys' fees for vindicating substantial public rights, or that this Court send the attorneys' fee matter back to the Fourth District for consideration.

PERB and the Charging Parties seek review of the *Opinion* annulling PERB's Administrative Decision, issued on December 29, 2015 ("PERB Decision") in a consolidated case involving four PERB Unfair Practice Charge complaints filed by the Charging Parties[1], invalidating the Citizens'

[1] San Diego Municipal Employees Association ("MEA") (Case No. LA-CE-746-M) (AR 3:13:000572-000573); Deputy City Attorneys Association of San Diego ("DCAASD") (Case No. LA-CE-752-M (AR

Pension Reform Initiative (CPRI or Proposition B) — a voter-approved, citizen-circulated initiative measure — based on the erroneous finding that the City failed to comply with the Meyers-Milias-Brown Act (MMBA); which is not applicable to citizen-circulated initiative measures

Ignoring the uniformity established by the *Opinion's* answer to the question posed by the Third Appellate District, in Footnote 8 of *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, PERB and the Charging Parties, purport to seek "uniform" application of a deferential standard of review to PERB's legal determinations relating to citizen's initiatives. , this request seeks to strip California citizens of their fundamental constitutional rights and should not be entertained.

The Record clearly shows CPRI was a legitimate citizen-sponsored initiative, not a "sham", under California election laws. (*i.e.* AR 3:26:00731) (*Opinion*, at 41-43.) PERB's Decision found "no evidence" that the Proponents were agents of the City, the only grounds listed in each Unfair Practice Charge filed with PERB. In addition, the PERB decision specifically finds that there was no evidence of control of the CPRI campaign by the Mayor. (AR 10:156:002660.)

When PERB could not find evidence to support the "sham" theory that the CPRI was not a citizen-sponsored initiative, it shifted gears to develop a new theory out of whole cloth that the Mayor was an "agent" of the City Council in his private campaigning activities. (*Id.*) However, the Record is devoid of any agency relationship between the Mayor and the

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3:27:000835-000836); TAB 48: American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 ("AFSCME Local 127") (Case No. LA-CE-755-M) (AR 5:48:001180-0001183) and San Diego City Fire Fighters LAFF, Local 145 ("San Diego Local 145") (Case No. LA-CE-758-M) (AR 4:33:000934-000937).)

CPRI campaign. PERB found that the Mayor never controlled or directed the CPRI campaign. (*Id.*) In footnote 18 of the Fourth District's *Opinion*, the Court noted:

> 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.** (*emphasis added*) (*Opinion* at p. 19, n. 18.)

Since the Mayor neither controlled the independent campaign nor received any public funds, PERB could not legally link the City Council, through the Mayor, to a private initiative campaign. CPRI was a citizen's initiative, controlled by citizens. With no link to official actions of the City, it could not be a "sham" or part of an "agency" link to the City Council. Both the "sham" and "agency" arguments fail as a matter of law.

Thereafter, every act by the City related to CPRI was ministerial under California election law. The Clerk issued a title and summary and, after the measure was circulated and submitted, counted the signatures. Once the Clerk certified that it had sufficient signatures, the CPRI was submitted to the City Council to place on the ballot at the next election as Proposition B. Proposition B was approved by the voters. The City submitted it to the Secretary of State and implemented the new law on a prospective basis. No party denies these steps took place.

Despite these ministerial actions, PERB sought to deny citizens their constitutional right to petition because the Mayor and two of seven council members also supported and campaigned for CPRI. California law

recognizes the right of its elected officials to participate in campaign activity. (Gov. Code § 3209.) The Record contains several *amicus* briefs highlighting the free speech, associational and petitioning rights of elected officials.

PERB's application of MMBA to the petitioning activity of private citizens was unprecedented. MMBA's "meet and confer" obligations only apply to a "governing body". (Gov. Code §§ 3504.5 and 3505.) Proponents are not a "governing body". (Cal. Const. Art. XI, § 3(c).) In their Petitions for Review, PERB and the Charging Parties ask this Court to ignore this distinction and change the law to apply MMBA to citizen initiatives. They seek to establish new law that impairs and impedes the constitutional rights of Proponents.

Starting with their attempts to keep CPRI off the June 2012 ballot, PERB and the Charging Parties have failed and refused to recognize the constitutional, statutory and charter rights of Proponents. These latest Petitions filed by PERB and the Charging Parties represent the culmination of an administrative agency's five-year attempt to significantly expand its jurisdiction and power at the expense of the Reserved Power of the People.[2]

II. BACKGROUND FACTS

A. The Proponents' Initiative

On April 4, 2011, City Clerk Elizabeth Maland received Proponents' "Notice of Intent to Circulate-Request for Title and Summary". (AR 3:26:000681-000696.) During signature gathering, Real Party San Diego Municipal Employees Association ("SDMEA") asked to "meet and confer"

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[2] The Court of Appeal *Opinion* denied the PERB's Motion to Dismiss Proponents as Real Parties in Interest in the City of San Diego Writ. (*Opinion* at p. 22.) With the determination of the Court of Appeal that the City's Writ should be issued, the Court was able to avoid ruling on the reserved power/constitutional issues raised in the Proponents' Writ. (*See generally, Ashwander v. Tennessee Valley Auth.* (1936) 297 U.S. 288, 347.) Granting either Petition would resurrect those arguments.

on the "Pension Reform Ballot Initiative". (AR 1:1:000019-000020.) They did not ask to discuss a competing measure or any actions the City could legally take at that time. The City did not agree to bargain over CPRI. (AR 1:1:000022-000024.)

On September 30, 2011, Proponent T.J. Zane delivered to the City Clerk a petition containing 145,027 signatures. (AR 3:26:000697-000699.) On November 11, 2011, the City Clerk received a letter from the County Registrar of Voters certifying that Proponents had submitted the requisite number of signatures to qualify the CPRI for the ballot. (AR 3:26:000731-000733.) On December 5, 2011, the City Council adopted a resolution declaring its intent to submit the CPRI to the voters (San Diego Resolution R-307155 (December 5, 2011)). (AR 3:26:000734-000738.) On January 30, 2012, the City Council introduced and adopted an ordinance that set CPRI on the Tuesday, June 5, 2012 ballot as Proposition B. (San Diego Ordinance O-20127.) (AR 3:26:000739-000759.)

B. Initiation of the PERB Action

On January 20, 2012, SDMEA filed its Unfair Practice Charge (No. LA-CE-746-M) with PERB. (AR 1:1:000002-000237.) On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (AR 2:4:000246-000249.) PERB then filed a superior court action seeking to enjoin the City from placing CPRI on the ballot. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1452-1453.) Proponents and the Charging Parties participated in the election campaign while litigation continued to challenge CPRI on procedural grounds. Proponents raised only private funds to conduct their campaign. (AR 21:198:005432-005456.)

On June 5, 2012, the voters of the City of San Diego approved CPRI with a 65.81% affirmative vote. (AR 16:193:004058; 16:193:004096.) No substantive challenges to CPRI were filed in the aftermath of the public vote.

In a writ proceeding brought by SDMEA, the Court of Appeal issued a writ allowing PERB to hold hearings on CPRI. In issuing the Writ, the Court of Appeal stated, in part, as follows:

> (SD)MEA contended the meet and confer procedures applied to the CPRI because the CPRI was a "sham device" used by City officials to circumvent the meet and confer obligations imposed on City by the MMBA. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th at 1452, 1463.)

The essence of SDMEA's "sham" claim was that the Proponents were merely the City's agents, making Proposition B the City's measure. The "sham" was the direct opposite of the agency theory before the Court of Appeal, in which PERB and the Charging Parties argued that the support of the mayor, as the alleged agent of the City, corrupted the CPRI.

PERB held an administrative hearing before Administrative Law Judge Ginoza ("ALJ") on July 17, 18, 20, and 23, 2012. (AR 11:186:003047.) Testimony at the hearing showed that the Mayor and two Council Members considered their own plans but ultimately supported the San Diego County Taxpayers Association ("SDCTA") plan. (AR 11:186:003060-003063 (Sanders/Falconer plan); 11:186:003064 (Councilmember DeMaio plan); 11:186:003065-003070 (SDCTA/Proponents private pension reform plan ("CPRI").) And uncontradicted testimony by Counsel for the Proponents, showed that Lounsbery Ferguson Altona & Peak prepared the initiative for the Proponents, and SDCTA, who paid for the work; not the City. (AR 15:192:003994, line 13-15:192:003995, line 11.)

C. The Proposed Decision

Following the hearing, the ALJ issued a Proposed Decision on February 11, 2013. (AR 10:157:002613-002675.) The Proposed Decision

found that the City's actions had nullified the "private" initiative. (AR 10:156:002667.)

On March 6, 2013, the City filed a Statement of Exceptions objecting to the Proposed Decision. (AR 10:159:002685-002724.) Proponents also applied to PERB to submit exceptions to the Proposed Decision, but their request was denied. (AR 10:178:002891-10:179:002897.) Instead, on September 20, 2013, the PERB granted Proponents the right to submit an "informational" brief, limiting the scope of Proponents' appearance despite acknowledging that Proponents were "interested individuals" in the proceeding. (AR 10:178:002891-10:179:002897.) Proponents filed a Brief objecting to the impropriety of PERB's jurisdiction over a Citizen Sponsored Initiative and objecting to the very procedures and Regulations PERB cited in the Motions to Dismiss filed by PERB before the Court of Appeal, because PERB improperly and unconstitutionally excluded these Proponents from defending CPRI. (AR 11:180:002899-002927.)

D. PERB's Decision

The PERB Decision at the center of this appeal was not issued until December 29, 2015, thirty-three plus months after the Proposed Decision. (AR 11:186:002979-003103.) It abandoned the "sham" argument. Rather, the final decision weaved the Mayor's support of the CPRI into a new and different agency theory. PERB based its conclusion on the following summary of the administrative hearing finding:

> Because the ALJ found that **the impetus for the pension reform measure originated within the offices of City government**, he rejected the City's attempts to portray Proposition B ("CPRI") as a ***purely "private" citizens' initiative*** exempt from the MMBA's meet-and-confer requirements." (AR 11:186:002986) (*emphasis added.*)

When the "sham" argument failed, PERB gave itself authority to determine the quality of a citizen initiative. PERB claimed that elected officials thought of the idea for pension reform and this bound the Proponents. It prevented them from using this "idea". Even though the Court of Appeal found jurisdiction vested in PERB to determine if the measure was a city measure, using city resources and authority, PERB expanded its reach to include citizen measures that are not "pure" enough.

If the original allegations of "sham" were true, those involved would have other sanctions besides PERB. Any payments by the City would have been a violation of law. (*See*, Gov. Code § 54964; Penal Code § 424.) The expenditures by the City would have been subject to an injunction and criminal sanctions. No appropriations were found.

E. The Appeal

Proponents filed their Petition for Writ of Extraordinary Relief with the Fourth District Court of Appeal on January 25, 2016, challenging PERB's Decision, and the City filed its Petition the next day. PERB filed a motion to dismiss Proponents' writ petition on January 29, 2016, which Proponents opposed. On March 9, 2016, the Court of Appeal issued its order on the Motion to Dismiss stating that the motion to dismiss will be considered concurrently with the writ petition. Proponents filed an opening brief in their writ petition on May 9, 2016. PERB and the unions requested an extension of time to file their opposition briefs and the Court's permission to file an oversized brief, which the Court granted. After opposition and reply briefs were filed, the Court issued the writ of review on August 17, 2016. The oral argument was held on March 17, 2017.

Subsequently, the Court consolidated Proponents' Writ Petition with that of the City and issued its Opinion on April 11, 2017. Both PERB and the Charging Parties filed rehearing petitions with the Court, seeking the Court's reconsideration of its Opinion, which the Court denied. On May 10,

2017 Proponents filed their Motion for Attorneys' fees, which was returned by the Court on May 12, 2017. Thereafter, the respective parties filed their Petitions for Review.

III. THE *OPINION* IS CONSISTENT WITH AND ADVANCES THE LAW DISCUSSED BY THE THIRD DISTRICT COURT OF APPEAL.

In *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* ("*Seal Beach*") (1984) 36 Cal.3d 591, the Third District Court of Appeal addressed the applicability of the MMBA to an initiative measure impacting employee compensation. The Court ruled, quite understandably, that such terms of an election measure, when initiated by the City Council, had to be the subject of the meet and confer requirements of the MMBA as a condition precedent to proper enactment. In Seal Beach, the initiative measure in question was drafted by and proposed for election by the local legislative body, the very entity statutorily bound by the terms of the MMBA.

However, in a moment of prescience, the *Seal Beach* Court, in footnote number eight, said "[n]eedless to say, this case does not involve the question whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Seal Beach*, at 599, fn. 8; see *Opinion,* at pp. 30-35.) Exercising admirable judicial restraint, the *Seal Beach* Court fell short of RULING that the MMBA does not apply to a citizens' initiative measure. It observed that its ruling of applicability applied to a City sponsored initiative but questioned whether it applied to a citizen's initiative. Yet, the die was cast. The foundation was clearly laid for the Court of Appeal herein to close the loop on the issue, which it has done. (*Opinion,* at pp. 30-34.) As hinted at by the Third District in *Seal Beach*, a citizens' initiative is not the work product of a legislative body. Rather, it is the result of the citizenry exercising a constitutional right over which the statutory

constraints of the MMBA have no control. In the *Opinion*, the Fourth District has locked down the law.

PERB and the Charging Parties claim that the ruling of the Court of Appeal herein departs from established law and charts a new and contradictory legal course. The claim is wrong. The *Opinion* is a natural extension of – an affirmation of – the Third District's ruling in the *Seal Beach* case. Indeed, it expressly closes the question so pointedly raised by the *Seal Beach* Court. (*Opinion,* at pp. 30-34.) There is no basis for review of this case based upon a claim of a conflict between the rulings of the Appellate Courts.

IV. THE COURT OF APPEAL APPLIED THE PROPER STANDARD OF REVIEW.

A. PERB'S Factual Determinations Showed No City/ Proponents Link and PERB'S Legal Conclusions Regarding Election Procedure were Clearly Erroneous.

PERB and the Charging Parties argue that this Court should grant review because the Court of Appeal was wrong to apply the *de novo* standard set forth in *Yamaha Corp. of America v. State Bd. of Equalization ("Yamaha")* (1998) 19 Cal.4th 1, instead of the more deferential "clearly erroneous" standard set forth in *Banning Teachers Assn. v. PERB ("Banning")* (1988) 44 Cal.3d. 799[3].

PERB and the Charging Parties' argument disregard's the Court of Appeal's conclusion that PERB's application of agency principles to convert

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[3] Charging Parties' Petition implies that the Court of Appeal applied a less deferential standard *sua sponte*, without giving the parties an opportunity to brief the issue. (Charging Parties Petition, p. 17.) Charging Parties attempt to sweep under the rug Proponents' argument in their Opening Brief before the Court of Appeal that the *de novo* standard applied to legal questions. (Proponents' Opening Brief, Case No. D069626 pp. 26-27.)

CPRI "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..." was "**legally erroneous.**" (*Opinion*, at p. 65; emphasis added.)

The fundamental flaw in PERB's and the Charging Parties' Petition's "standard of review" argument is that deference does not require a reviewing court to ignore fatal legal flaws in an argument. Although finding that there was no control by the Mayor over the CPRI campaign ("sham" argument), PERB erroneously declared that the "agency" of the Mayor applies to a citizen-circulated initiative over which he had no control. (AR 10:156:002660.) The PERB Decision stated as follows:

> Here the element of control is lacking. After the negotiations with representatives from the Lincoln Club and the San Diego Taxpayers Association, the Mayor was asked and did agree that Zane could run the initiative campaign from the Lincoln Club. **There is no evidence the Mayor retained authority to run the campaign.** (AR 10:156:002660.) (*emphasis added.*)

Ignoring its own findings, PERB attempted to apply "agency" theory to a City Council that was under a mandatory duty to place the charter measure on the ballot, without alteration, under content neutral election laws.

The *Opinion* defers to PERB's dispositive factual findings. (*Opinion*, at p. 22) The Court of Appeal expressly states that "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 "citizens' initiative" procedures for charter amendments" (*Opinion*, at p. 41). The *Opinion* goes on to note, that "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." (*Opinion*, at p. 42).

Based on those undisputed factual findings, the Court of Appeal evaluated,

> whether PERB's decision, which appears to rest on the theory that the participation by a few government officials 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.** (*Opinion*, at p. 42-43; emphasis added; see also p. 65.)

The Court of Appeal's analysis resulted in its conclusion that "PERB's determination was error" (*Opinion,* at p. 43)

Thus, in addition to correctly applying the *de novo* standard of review, the Court of Appeal held that PERB's Decision was "clearly erroneous." Therefore, although *Banning* is not controlling in this matter, the holding that the PERB Decision is "clearly erroneous" demonstrates the very deference that PERB and the Charging Parties complain is lacking in the *Opinion.* PERB's and the Charging Parties' objections on the grounds that the Court should have applied the "clearly erroneous" standard of review, is therefore without basis and should not be entertained by this Court.

B. The Court of Appeal Correctly Applied the *De Novo* Standard of Review to PERB's Decision.

i. *Banning Teachers Assn. v. PERB* is not Controlling in this Matter.

In *Banning*, this Court determined that the clearly erroneous standard of review applied where PERB was deciding school district related labor matters governed by the Education Employment Relations Act ("EERA"). The Court stated that "The EERA created PERB as an independent board of

three members and vested it with a broad spectrum of powers and duties, including the responsibility to investigate unfair practice charges or alleged violations of the EERA." (*Banning*, at 803-804.) In *Banning*, unlike this case, there was no dispute that the parity agreement between school district and its employees was a labor issue within the scope of EERA, and within PERB's power and expertise. Thus, under the facts of *Banning*, the Court of Appeal's failure to give PERB greater deference "deprived PERB of its statutory function to investigate, determine, and take action on unfair practice charges to effectuate the policy of the EERA." (*Id.*)

Unlike *Banning*, Court of Appeal in this case was being asked to interpret a law outside the expertise of PERB. (*Banning*, at 804.) The issues in this case are not labor law issues the Legislature delegated to PERB to interpret. (Contra, *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922 and *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 12, review denied (July 13, 2016).) This is evidenced, among other things, by PERB ignoring the mandatory duty of a "governing body" to place a qualified measure on the ballot because an elected official gave it political support. (Cal. Const. Art. XI, §§ 3(c) and 5(b); *Blotter v. Farrell* (1954) 42 Cal.2d 804; San Diego Municipal Code § § 27.1034, 27.1035[4], 27.2808.[5])

ii.* The Opinion correctly applies the *De Novo* Standard under *Yamaha Corp. of America v. State Bd. of Equalization.

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[4] San Diego Municipal Code § § 27.1034, 27.1035: (http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division10.pdf).

[5] San Diego Municipal Code § § 27.2808: (http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division28.pdf).

The *Opinion* properly applies the *de novo* standard of review, reflected in this Court's holding in *Yamaha.* Quoting *Yamaha*, the *Opinion* states:

> **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.'"** *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.** (citations omitted) (*Opinion*, at p. 24, citing *Yamaha*, at 8 and 10.)

The *Yamaha* decision, "recognized that... 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.'" (*Opinion*, at p. 25, quoting *Yamaha* at 11; *see also*, *Azusa Land Partners v. Dep't of Indus. Relations* (2010) 191 Cal. App.4th 1, 14.)

The key distinction made in *Yamaha*, and correctly relied on in the *Opinion*, is that the "expertise" which forms the basis for greater deference to an agency's interpretation of the law, arises when the agency interprets "legal principles within its administrative jurisdiction and, as such 'may possess special familiarity with satellite legal and regulatory issues.'" (*Opinion*, citing *Yamaha* at 11.) The judiciary, as the branch of government "charged with the final responsibility to determine questions of law" must ultimately decide when, and how much, weight will be given to an agency's legal interpretation. (*Opinion*, citing *Yamaha* at 11; see also *Los Angeles*

Unified School Dist. v. Public Employment Relations Bd. (1983) 191 Cal.App.3d 551, 556-557 (no deference when the decision "does not adequately evaluate and apply common law principles" *Opinion* at p. 26, n. 21).)

Accordingly, the *Opinion* finds that,

> ... 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, **the judiciary accords no deference to agency determinations on legal questions falling outside the parameters of the agency's peculiar expertise.** (*Opinion*, at p. 26, citations omitted; see fn. 21) (emphasis added.)

Here, PERB's Decision was based "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." It "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." (*Opinion*, at pp. 43-44.)

PERB's lack of expertise is demonstrated by its interpretation of "agency" resulting in a Mayor, in his official capacity, becoming the legal representative of a citizen's initiative despite the constitutional separation between citizen and local government. (Cal. Const. Art. XI, § 3(c); see generally *Perry v. Brown* (2011) 52 Cal.4th 1116; *Rossi v. Brown* (1976) 9 Cal.4th 688.) This is not a case where PERB has determined whether a school principal is acting as an agent of a district while on duty on school grounds by applying "agency" principles, under NLRB case law.

(*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776-779.)

What is more, PERB's Decision claimed no constitutional law expertise, then ignored election law implications. (AR 11:186:003006; 11:186:003017.) PERB demonstrated its ignorance of Proponents' special duties and responsibilities by law to guard the interests of a ballot measure by attempting to exclude Proponents from the underlying proceedings, and dismiss them from the Appeal. (see, *Perry, supra,* at 1141.)

The law is consistent that no "deference" is owed "to the administrative agency's view of the First Amendment." (*McDermott v. Ampersand Publishing, LLC* (9th Cir. 2010) 593 F.3d 950, 961; *see also Ampersand Publishing, LLC v. National Labor Relations Board* (D.C. Cir. 2012) 702 F.3d 51, 55 ("We owe no deference to the Board's resolution of constitutional questions."). A court must exercise its independent judgment because "'[the] abrogation of the right is too important to the [Proponents] to relegate it to exclusive administrative extinction.'" (*Strumsky v. San Diego County* (1974) 11 Cal.3d 28, 34; *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (2011) 202 Cal.App.4th 404, 414.) These fundamental rights deserve a standard of review commensurate with their responsibilities to protect the right of the People to propose legislation without impediment.

Thus, the Court of Appeal correctly applied the *de novo* standard to PERB's Decision, as PERB lacks the requisite expertise with respect to "the constitutional or statutory scheme governing initiatives" or "common law principles of agency over which PERB has no specialized expertise warranting deference." (*Opinion,* at pp. 43-44.)

By arguing that greater deference applies to PERB, PERB and the Charging Parties attempt to separate PERB from the applicable standard of review that applies to other state administrative agencies. (See, *Yamaha, supra.*) Respondent and Real Parties want review by this Court to change

the law so PERB can decide which initiatives are "pure" and/or to impose special pre-election procedural impediments based on the *viewpoint* of the Proponents.[6]

V. RESPONDENT AND REAL PARTIES SEEK TO REINTERPRET MMBA TO EXTEND ITS COVERAGE TO CITIZEN-CIRCULATED BALLOT MEASURES

The relief sought by PERB and the Charging Parties amounts to an attempt to create unconstitutional election barriers in California. (Cal. Const. Art. II, §§ 1 and 8(a); Art. XI, § 3(c); Gov. Code § 3209; *Associated Home Builders etc., Inc. v. City of Livermore* ("*Associated Homebuilders*") (1976) 18 Cal.3d 582, 591.) Respondent and Real Parties seek to have the Court override the "jealously guarded" right to direct democracy. (*Rossi, supra,* at at 695.) If upheld, PERB's Decision would broadly apply to all labor-related initiatives, citizen or legislative body generated. (AR 11:186:003040 Sub. (B)(1).) It would create a situation where MMBA trumps the citizen's right to propose ballot box legislation under the Election Code, City Charter and the California Constitution.

It would be unprecedented since in California there are no other pre-election procedural barriers except "content neutral" election laws. (Cal. Const. Art. II, §§ 1 and 8(a); Art. XI, § 3(c); Gov. Code § 3209; *Associated*

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[6] As discussed herein, only public-sector bargaining groups or employees may file PERB complaints ("Unfair Practice Charges"). Proponents or citizen groups have no standing to file PERB claims. While a public agency can file PERB complaints, they could not use this tool to stop an initiative that the "governing body" has a mandatory duty to place on the ballot. Only one "side" of an argument over a citizen ballot measure, which controls "wages, hours and working conditions", has access to the PERB remedy if preserved by this Court. The **viewpoint** of the speaker determines if the PERB remedy is available.

Homebuilders, at 591.) Charging Parties and PERB seek to fundamentally change the way ballot measures are treated in California.

PERB and the Charging Parties wish to reinstate the rule under *Hurst v. Burlingame* (1929) 207 Cal. 134, *overruled, Associated Homebuilders,* allowing non-election procedural rules to apply to initiatives.[7] They try to stretch the application of Government Code sections 3504.5 and 3505 from just governing bodies to include citizen initiatives. (PERB Petition for Review pp. 19-35; Charging Parties Petition for Review. 39-45.)

Each Petition describes actions by a "public agency" that should have been subject to "meet and confer", proposed by the "governing body". (*i.e. Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521, 540; PERB Petition for Review, pp. 23-24, ns. 6 and 7; Charging Parties Petition for Review, p. 42, fn. 15).) None of their examples explain how actions of city departments that change "wages, hours or working conditions" apply to proponents of a citizen initiative. Certainly, a unilateral change by a public entity should have been submitted as a proposal to the "meet and confer" process under MMBA, but how this applies to a citizen initiative is never explained.

Each of the cases cited by PERB and the Charging Parties involve a local government department, under the control of the "governing body". Because the "governing body" controlled the department, it had the duty to bargain. However, a "governing body" does not have control over the citizen

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[7] The application of MMBA to an initiative should not be an open question. (Since 1992, this Court has not applied non-election procedural rules to initiatives. (*Associated Homebuilders*, at 594.) It overruled *Hurst* and has applied that rule to other non-election procedures. For instance, CEQA is of statewide concern and the compliance with it is not required for a citizen initiative despite the significant potential implications. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187.)

initiative process. It is a passive actor that takes no discretionary action. The "governing body", its officers and employees only perform ministerial actions when initiative proponents meet the required electoral standards. (Cal. Const. Art. XI, §§ 3(c) and 5(b); *Blotter, supra*; San Diego Municipal Code §§ 27.1034, 27.1035[8], 27.2808.[9]) Since the CPRI is a charter amendment, the City Council did not have the option of adopting the measure. As opposed to a regular initiative, the only action to be taken is to place the measure on the next ballot.

PERB's reasoning and attempt to blur the lines between a citizen and governing body initiative conflicts with the reasons for direct democracy. The 1911 Ballot Pamphlet declared what the voters' intent was as follows:

> The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt. The 1911 ballot pamphlet argument in favor of the measure described the initiative as "that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures *which the legislature either viciously or negligently fails or refuses to enact* . . ." (Sect. of State, Proposed Amends. To 25 Const. with Legis. Reasons, Gen. Elec. (Oct. 10, 1911) Reasons why Sen. Const. Amend. No. 22 should be adopted, italics, added.) (*Perry, supra,* at 1140-1141, quoting the 1911 Ballot Pamphlet.)

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[8] San Diego Municipal Code § § 27.1034, 27.1035: (http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division10.pdf).

[9] San Diego Municipal Code § § 27.2808: (http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division28.pdf).

The bright line was established to act as a counter-balance to the legislative body, not to be an extension of them. The PERB Decision would allow public sector bargaining groups to either eliminate or interfere with petitioning efforts. All it takes is the filing of a four-page complaint with PERB and the electoral process would be subject to administrative regulation and scrutiny. (Case No. LA-CE-746-M.) (AR 3:13:000572-000573).) Signature gathering efforts would occur under a dark cloud because a pending administrative investigation/hearing could make the democratic process grind to a halt.

For Government Code sections 3504.5 and 3505 and "agency" arguments to work as intended, the Mayor and/or the City Council must have discretion to amend the measure or refuse to place the measure on the ballot. If they do not have discretion, what would be the purpose of bargaining? MMBA only requires bargaining for agreements within an agency's discretionary authority. (*American Federation of State etc. Employees v. County of San Diego* (1992) 11 Cal.App.4th 506, 517.) In a case where a County was asked to negotiate over matters involving the courts, who are exempt from MMBA, it held:

> 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. 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, supra*, at at 517 [citing *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336.)

Here, the same "meaningless acts" would occur if bargaining is required. As the County Board of Supervisors had no control over matters involving the Courts, the Mayor and City Council of San Diego had no legal control over

the contents and implications of CPRI. The law does not require idle acts. (Civ. Code § 3532.)

Each step in the charter initiative is ministerial if the Proponents meet the standards. With a Charter measure, the City Council just places it on the ballot so there is no chance to alter it. (Elec. Code § 9255(c).) With a non-charter measure, the City Council must either adopt without alteration or place it on the ballot. (San Diego Municipal Code §§ 27.1034-27.1035.) General law cities must either adopt or place it on the ballot without alteration. (Elec. Code §§ 9214, 9215.) If there is no room to make changes, there is no purpose for bargaining. Most "governing bodies" have these short ten-day ballot placement time restrictions: general law cities (Elec. Code § 9214(b)); general law counties (Elec. Code §§ 9116(c), 9118(c); special districts (Elec. Code § 9310(a)).

In San Diego, it would violate similar time deadlines found under San Diego Municipal Code § 27.1035 that apply to charter and ordinance amendments. Regardless of the type of jurisdiction (charter or general law), the MMBA bargaining would interfere with the content-neutral election process. It would violate a long-standing legal maxim: "Superfluidity does not vitiate." (Civ. Code § 3537.) The "jealously guarded" petitioning process could be slowed down or halted based on a legislative priority to protect public sector labor bargaining.

Under the normal city initiative process, a Notice of Intent to Circulate Petition is filed. (See, 83 Ops. Cal. Atty. Gen. 139 (2000).) A proof of publication of the measure is required before circulation. (*i.e.* Elec. Code § 9206.) After signature collection, the Proponents file the signed petitions. (*i.e.* Elec. Code § 9208.) After it is certified to have enough signatures, the "governing body" must place it on the ballot without alteration. (*Native Am. Sacred Site & Env'l Protection Ass'n v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966.) Even if it has perceived

legal defects, it must be placed on the ballot. (*Save Stanislaus Area Farm Econ. v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 147-148.) If adopted, it must be implemented. To date, there have been no challenges to the actual substance of any provision of CPRI filed in any forum.

PERB and the Charging Parties ask this Court to review a matter where the bargaining would be futile. While the Court of Appeal went into detail with the "agency" arguments, Respondent and Real Parties cannot get over two threshold questions. What good would bargaining do? How can a citizen's charter initiative be turned into the discretionary action of the "agency" or "governing body"?

As stated above, PERB never found any control by the Mayor over the CPRI election process. This meant that the initiative was not a "sham" and Proponents were never, in any way, shape or legal form, the "agents" of the Mayor. Rather than going through the painstaking process of explaining how "agency" law did not apply in this situation; the Court of Appeal could have stopped its analysis at this point.

The attempts to weave the Reserved Right of the People to propose legislation into MMBA find no support in Government Code sections 3504.5 or 3505. First, the Proponents are not a "governing body" or an "agency". Second, when they follow the "content" and "viewpoint" neutral steps in California election law, they have a fundamental right to ballot placement and implementation. MMBA does not supersede these mandates. It is a procedural rule that is not "qualitatively different" than CEQA; public hearing requirements; or other "governing body" procedural rules. (*Opinion,* at p. 35, n. 28.) The arguments about "governing body" and "agency" under Sections 3504.5 and 3505 do not change the result. The Court of Appeals properly applied the law.

VI. THE IMPLICATIONS OF REVIEW AND REVERSAL WOULD CREATE FUNDAMENTAL HARM TO THE ELECTORAL PROCESS

If review is granted, PERB and the Charging Parties will have to explain how to weave MMBA bargaining rules into the citizen initiative process. While not mentioned in either Petition, PERB's Decision, and accompanying Order, require bargaining on all future ballot measures that effect "wages, hours and working conditions" regardless of their origin or circumstances. (AR 11:186:003040 Sub. (B)(1).) The prospective application of PERB's authority over all circulated initiatives is at stake if review is granted.

At present, there is a bright line, established in the Constitution between a council-sponsored and citizen-sponsored charter amendment. (Cal. Const. Art. XI, § 3(c).) This distinction applies to all initiative subjects. (*i.e. Friends of Sierra Madre, supra.*) In *Sierra Madre*, this Court reasoned that CEQA applies to a council-sponsored measure because the act of placing the measure on the ballot is a discretionary act. CEQA applies to "discretionary acts" of a "public agency" unless exempted. (Public Resources Code § 21080(a).) The term "public agency" includes charter cities. (Public Resources Code § 21063.) As such, CEQA is a matter of "statewide concern". CEQA, as discussed earlier, is not applicable to a circulated citizen initiative. (*See, Friends of Sierra Madre, supra.*)

MMBA is also of "statewide concern". (*Seal Beach, supra.*) It applies its "meet and confer" obligation when a "governing body" makes a discretionary decision that affects the "wages, hours or working conditions" of its represented employees. (Gov. Code § 3505; *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

Both CEQA and MMBA are procedural rules required to be followed before a local agency acts on matters within the scope of each law. However,

neither apply to a citizen-circulated initiative because, as described above, the implementation of election laws makes each step ministerial.

PERB and the Charging Parties want this Court to consider making an exception to this bright line rule in the case of a citizen's measure that has the political support of an elected official. It would be the first non-election procedural rule to apply to a citizen initiative since this Court overturned *Hurst.* (see, *Associated Homebuilders.*)

If the Court were to agree with PERB and the Charging Parties, how would it be implemented? In this case, the request to bargain was received while CPRI was still circulating. (AR 1:1:000019-000020.) Each request asked to bargain over the terms of CPRI. There was no request to meet about any other subject, such as a competing ballot measure. At what stage would the "meet and confer" process start? When a title and summary is given to the measure? During circulation? After signatures are certified to be sufficient? When it is received by the "governing body" for action? After it is approved? None of these questions are answered by PERB or the Charging Parties.

PERB jurisdiction over labor initiatives would limit application of pre-election procedural rules based on the viewpoint of the speaker. If an initiative that benefited public sector bargaining groups was circulated, the labor groups would not ask to "meet and confer". If it qualified for the ballot, the governing body would have a mandatory duty to place it on the ballot and could not delay it to bargain. If a measure was opposed by labor, they could request to "meet and confer" and delay placement to the election of labor's choosing and/or require amendments to the measure. If the PERB decision was reinstated, the viewpoint of circulators would determine procedures for access to the ballot. In the alternative, if PERB is given authority to determine when an initiative is a "pure" initiative, it would be able to question labor's political opponents during hearings in the middle of

a political campaign. This would chill speech, discouraging support from elected officials. It would become a tribunal with the power over who gets to petition the government.

If PERB and the Charging Parties are granted review, it raises the possibility that future measures will undergo PERB's "purity" test. Future proponents who do not want to be delayed by the "meet and confer" process would not solicit support from elected officials. This would put them at a disadvantage in the marketplace of ideas. The possible consequences would be a PERB complaint that they would have to sit on the sidelines while their fate is decided. If PERB lets them participate, they would have to spend time and money in administrative hearings rather than gathering signatures or campaigning.

The threat of speech impairment is real with PERB deciding whether a circulating initiative is "pure" enough. Filing a PERB complaint is one of the easiest processes in law. The mere filing of a complaint can grind the ballot process to a halt. The MMBA application to the citizen ballot process will chill the process and favor one side in matters involving "compensation" of public employees. Public employee compensation is a plenary authority of charter cities. (Cal. Const. Art. XI, § 5(b).) This authority would be weakened by PERB jurisdiction over citizen petitioning.

The exception to the election procedures only rule would only apply to benefit one group in California, public sector labor bargaining groups. It would set up PERB as "electoral purity" police. If a City were to violate the law and fund a citizen initiative, there are other remedies that are content neutral. (See, Gov. Code § 54964; Penal Code § 424.) The expenditures by the City would have been subject to an injunction and criminal sanctions. (*i.e. Vargas v. City of Salinas* (2009) 46 Cal.4th 1; *Stanson v. Mott* (1976) 17 Cal.3d 206.)

Public sector labor would be the only group that could hold up placement on the ballot while they bargain for the right to get free access to the ballot box. No other group could force a governing body to bargain about use of its legislative discretion to place a charter amendment on the ballot. "Good faith" bargaining drags on and changes the election date of the citizen ballot measure by as much as two years to the next general election. No other group has that power, no matter how long it takes.

VII. CONCLUSION

The Petitions seek to erase the bright line between citizen initiatives and council-sponsored measures put in place by a 1911 Progressive Era Constitutional Amendment. The Petitions claim the line is erased if elected officials support the citizen effort. However, the administrative decision never linked any city money to the initiative campaign. It never linked the "agent" Mayor to the campaign except based on his political support. The Court of Appeal allowed the administrative hearing to go forward only on the "sham" argument that the Proponents were really acting on behalf of the City. This was false and even PERB rejected the argument. As a result, any bargaining would have been an exercise in futility. The City had no authority to amend or delay placement of CPRI on the ballot.

Failure to deny the Petitions for review would establish new "purity" tests for initiatives and completely disrupt the established procedures, requirements and schedules governing citizens initiatives. This Court, in establishing the rule to prohibit non-election procedural rules from applying to initiatives, stated as follows:

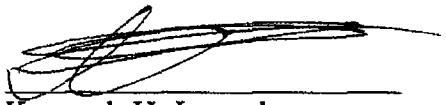
> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the

> amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' . . . , the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' . . . . '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' (*Associated Homebuilders,* at 591 [citing *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563-564; *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 258].)

PERB and the four Unions that filed the Petitions for Review seek to fundamentally change the relationship between citizens and the bodies that govern them. An administrative agency would be given the authority to determine what initiatives can be presented to the voters. The Proponents of these future measures would be forced to sit on the sideline while their fate is decided by the executive branch of government. Proponents respectfully request that the Petitions for Review seeking to reinstate PERB's Decision be denied, and that Proponents' Petition addressing their Motion for Attorneys' Fees be granted.

DATED: June 6, 2017

LOUNSBERY FERGUSON ALTONA & PEAK, LLP



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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d), I certify that this Combined Answer to Petitions for Review is proportionally spaced, has a typeface of 13 points or more, and contains 7,881 words, excluding the cover, the tables, the signature block and this certificate, which is less than permitted by the Rules of Court. Counsel relied on the word count feature of the word processing program used to prepare this brief.

DATED: June 6, 2017

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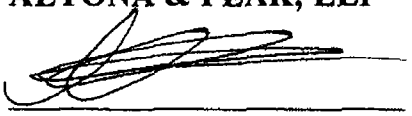

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SUPREME COURT NO. S242034

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 June 7, 2017, I served the **Combined Answer by Catherine A. Boling; T.J. Zane and Stephen B. Williams to Petitions for Review by the Public Employment Relations Board and the Union Real Parties in Interest** 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.

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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 June 7, 2017 at Escondido, California.

Kathleen Day