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 BRIEF ON THE MERITS 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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ANSWER BRIEF ON THE MERITS

I. INTRODUCTION.

By leave of the Chief Justice, this Combined Answer Brief on the Merits by Petitioners, Catherine A. Boling, T.J. Zane and Stephen B. Williams (Proponents/Petitioners) addresses the Opening Briefs on the Merits filed by AFL-CIO, Local 127, and San Diego City Firefighters Local 145 (collectively Unions or Real Party Unions) and Respondent, Public Employment Relations Board (PERB) in support of their Petitions for Review 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*).

The *Opinion* correctly annulled PERB's Administrative Decision, issued on December 29, 2015 (PERB Decision) in a consolidated case involving four PERB Unfair Practice Charges and complaints filed by the Unions[1], invalidating the Citizens' Pension Reform Initiative (CPRI or Proposition B[2]) — a voter-approved, citizen-circulated initiative measure

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[1] San Diego Municipal Employees Association (SDMEA) (Case No. LA-CE-746-M) (AR 1:1:000002-000237 (UPC and exhibits); AR 3:13:000572-000573 (complaint)); Deputy City Attorneys Association of San Diego (DCAASD) (Case No. LA-CE-752-M) (AR 3:15:000579-000589 (UPC); AR 3:27:000835-000836 (complaint)); American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME Local 127) (Case No. LA-CE-755-M) (AR 3:22:000607-000613 (UPC); AR 5:48:001180-0001183 (complaint)) and San Diego City Fire Fighters IAFF, Local 145 (San Diego Local 145) (Case No. LA-CE-758-M) (AR 4:33:000934-000941 (UPC); AR 5:62:001407-001408 (complaint)).

[2] The pension initiative at issue is generally referred to as "CPRI" prior to certification for placement on the ballot and as "Proposition B" after placement on the ballot.

— 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.

The *Opinion* correctly answers the question left open in Footnote 8 of this Court's decision in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (*Seal Beach*) (1984) 36 Cal.3d 591, as to whether the MMBA meet and confer requirements applied to "charter amendments proposed by initiative." (*Seal Beach*, fn. 8.) That answer is a resounding "no". (*Opinion*, p. 29-40.) PERB's and the Unions' attempts to weave the Reserved Right of the People to propose legislation into the MMBA find no support in Government Code sections 3504.5 or 3505.

Proponents are the legal proponents who circulated the CPRI and obtained over 145,000 signatures. (Elec. Code, § 342; *Perry v. Brown* (*Perry*) (2011) 52 Cal.4th. 1116, 1127, 1141, 1144 (fn. 14).) Proponents are not a "governing body" or a "public agency" to which the MMBA applies. (See, *California Cannabis Coalition v. City of Upland* (*Upland*) (2017) 3 Cal.5th 924.) When the Proponents follow the "content" and "viewpoint" neutral steps in California election law, they have a fundamental right to ballot placement and implementation. The MMBA does not – and was never intended to – supersede these mandates.

Thus, the City Council of Real Party in Interest, City of San Diego (City) properly exercised its mandatory duty to place the CPRI on the ballot[3].

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[3] PERB and the Unions argue that the City should have met and conferred over a competing measure. (PERB Brief, pp. 73 – 75; Unions Brief, pp. 63-64.) The Unions never proposed a competing measure, only meeting and conferring over the CPRI/Proposition B. (See, II. A below.) Moreover, PERB and the Unions cite no authority for the proposition that the City was required to propose a competing measure. The comparison to the City's actions in *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, cited in the Unions' Brief at p. 64, is misleading as the

The Charter Measure was adopted by the San Diego voters on June 5, 2012 with an approximately 65.81% affirmative vote.

Since the CPRI was first drafted, and consistently thereafter for five years, the Proponents have taken the firm position that the MMBA, which requires the City to meet and confer on employment terms propounded by the City Council, has no application to the terms of a citizen-sponsored initiative. The Constitutional right of the Proponents to initiate direct legislation is immune from interference by PERB in its exercise of authority under the MMBA.

Notwithstanding the correctness of the Proponents' position, PERB and the Unions have made the CPRI the subject of multiple lawsuits and extended administrative actions, none of which attacked the substance of the measure, but challenged the processes pursuant to which it was advanced. For better or worse, the Unions were allowed to file with PERB Unfair Practices Charges, an incredibly simple interference vehicle, which PERB processed at its leisure for forty-one months. The Proponents were systematically excluded by PERB from all these legal and administrative proceedings.

PERB struggled with the issues. As to the core issue of interference with the rights of the Proponents under California Constitution, Article XI, sections 8 and 11, PERB acknowledged its lack of expertise regarding matters of Constitutional law. (AR 11:186:003006; 11:186:003017.) Although the literal grounds for the UPC were found to be lacking, PERB issued a decision purporting to invalidate the CPRI.

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facts, issues and procedures pertaining to a supermajority two–thirds vote for approval of general tax bear no similarity to this case.

The record of administrative interference with the rights of the Proponents was complete. The Proponents brought the matter before the Fourth District Court of Appeal which issued the *Opinion* prompting the Petitions for Review before this Court.

With review granted, this Court has identified two issues of significance:

> (1) When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov. Code, §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?
>
> (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?[4].

Both Opening Briefs (respectively Real Party Unions' Brief and PERB Brief; collectively Briefs) spend most of their effort on Question One, standard of review. Proponents agree with the *Opinion*, that the *de novo* standard applies where PERB attempts to apply the MMBA to issues beyond PERB's expertise. Little briefing space in the Opening Briefs is spent on Question Two, MMBA application to CPRI, an admittedly citizen-circulated charter initiative measure. The answer to that question is "yes", because the

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[4] Supreme Court of California News Release, July 28, 2017 "Summary of Cases Accepted and Related Actions During Week of July 24, 2017", #17-232 *Boling v. Public Employment Relations Bd.*, S242034; see also, Issues Pending Before the California Supreme Court in Civil Cases, published July 28, 2017.

meet and confer duty does not extend to voter initiatives that the public agency has no discretion to negotiate or modify.

While the Opening Briefs focus on review standards, several key legal factors are missing or downplayed. First, the Briefs admit that Proponents are the legal proponents of CPRI. (Real Party Unions' Brief, p. 15; PERB Brief, p. 19.) Despite this legal admission, PERB and the Unions ignore impacts on the legal rights of Proponents. Second, PERB's administrative decision finds that the City's Mayor Jerry Sanders had no control over the actions of Proponents. (AR 11:186:003089.) While the Opening Briefs devote significant briefing space to PERB's agency theory that allegedly binds the actions of the "governing body" (City Council) to the Mayor's actions, the only finding in PERB's Decision on the actions of Proponents is that they were not under Mayor or City control. (AR 11:186:003089.) The *Opinion* notes, with a certain degree of irony, that the PERB Decision does not find a link between the Proponents and the Mayor. (*Opinion*, fn. 18.) According to PERB and the Unions, somehow agency principles between City actors bind the legal proponents of a circulated initiative. They fail to point out any legal precedent where acts of an elected official supersede the constitutional rights of initiative proponents. In fact, the question of whether or not the Proponents associated with elected officials who were frustrated with the actions of the City is legally irrelevant.

Third, PERB's and the Unions' Briefs fail to explain how the alleged "agency" between the Mayor and the City Council eliminates the mandatory duty of the City Council to place a qualified citizen charter initiative on the ballot under content-neutral election laws. Charter cities, general law cities, counties and special districts all have mandatory ballot placement laws that grant no leeway which would allow time for labor bargaining. Upholding the administrative decision would upset the content-neutral election process for all local governments under PERB's jurisdiction.

If this Court recognizes that the statutory bargaining rights of public employees outweighed the reserved power to propose laws through the initiative process, how would it work? Neither Brief even attempts to explain the process they advocate. Do public sector bargaining groups have a special right to amend a citizen-sponsored measure before ballot placement? Can they bargain to conclusion over placement of a competing measure on the ballot, possibly changing ballot timing to their benefit? Public sector bargaining groups would hold rights denied to other groups based solely on viewpoint. No other group opposing a ballot measure has the right to ask to "meet and confer". There is little or no explanation of how the mechanics of their request would work or why this special ballot box status should be granted.

Real Party Unions and PERB seek to erase the bright line between governing body and the electorate with the reserved power to circulate citizen-sponsored initiatives for the benefit of a statutory right such as public-sector bargaining. This Court has consistently refused to apply governing body procedural rules to citizen-sponsored ballot measures. (See, *Upland.*) If PERB and the Unions prevail, an administrative body would determine which measures pass the initiative "purity" test. Proponents would stand on the sidelines while the fate of their proposal is decided. If the law was changed to allow their full participation, Proponents would be subject to cross-examination about their political ties to elected officials, possibly during an election campaign. If Proponents prevailed, they would spend the post-election period defending their electoral gains through the courts because of their associations during the process.

PERB's Decision acknowledged that PERB had no expertise regarding constitutional issues. (AR 11:186:003006; 11:186:003017.) If PERB prevails, it will change the face of election law. Based on the filing of a one-page unfair practice form, PERB could weigh in on local citizen

initiative campaigns involving "wages, hours and other terms and conditions of employment". (Gov. Code, § 3505.) Any attempt to establish uniform rules to control the operation of local government would face the threat of bargaining delays and possible invalidation. Yet, if an employee bargaining group supported a ballot measure, no member of the public could request a similar process. PERB and Real Party Unions seek a viewpoint-based advantage at the ballot box.

The *Opinion* protects initiative rights and declines to extend the MMBA beyond its legislatively intended reach, consistent with *Seal Beach,* and *Upland.* Proponents respectfully request that this Court affirm the *Opinion* of the Court of Appeal, and its content-neutral application of election procedures.

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 (Exhs. A and B to the City's Initial Position Statement Regarding UPC).) During signature gathering, SDMEA asked the City to "meet and confer" on the "Pension Reform Ballot Initiative". (AR 1:1:000018-000019 (Exh. 1(A) to SDMEA UPC (Demand dated July 15, 2011).) The demand asked for bargaining on the terms and conditions of a circulating citizen measure. The letter stated that SDMEA would treat CPRI "as your opening proposal on the covered subject matter." (AR 1:1:00018.) A second demand was sent on August 10, 2011. (AR 1:1:00021 (Exh. 1(B) to SDMEA UPC).) The City Attorney responded on August 16, 2011. (AR 1:1:00022-00024 (Exh. 1(C) to SDMEA UPC).) In its response, the City Attorney pointed out that the City could not meet and confer on the contents of a circulating citizen initiative. (*Id.*) A third demand by SDMEA, asking

again to bargain on a circulating ballot measure, was dated September 9, 2011. (AR 1:1:00025-00028 (Exh. 1(D) to SDMEA UPC).)

None of these requests asked to bargain over a competing measure or any other action that the City could legally take at the time. On September 19, 2011, the City Attorney's Office responded to the latest request to "meet and confer" over the terms of CPRI. (AR 1:1:00043-00047 (Exh. 1(G) to SDMEA UPC).) The letter pointed out the inability to bargain over a circulating initiative and the lack of legal authority to amend the circulating measure. Throughout the circulation period, SDMEA was asking to bargain over the fate of CPRI even though no party who would sit at the bargaining table could require the proponents to amend or withdraw their measure during circulation. (*See:* Elec. Code, §§ 18620, 18621 (criminal penalty for improper solicitation of an initiative proponent to abandon signature gathering for any "thing of value).) It is a misdemeanor to offer a proponent of a circulating initiative any sort of bargaining.

On September 30, 2011, Proponent T.J. Zane delivered to the City Clerk a petition containing 145,027 signatures. (AR 3:26:000697-000699 (Exh. C to the City's Initial Position Statement Regarding UPC).) On October 5, 2011, while the signatures were being counted, SDMEA sent a final demand to the City to "meet and confer" about CPRI. (AR 1:1:00048-00053 (Exh. 1(H) to SDMEA UPC).) Except for claiming the Mayor was the true proponent, SDMEA offered no legal reason for attributing any discretionary authority to the City over a citizen-circulated initiative during the signature counting process.

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 (Exh. D to the City's Initial Position Statement Regarding UPC).) 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 3:26:000735-000738 (Exh. E the City's Initial Position Statement Regarding UPC).) 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 3:26:000740-000759 (Exh. F the City's Initial Position Statement Regarding UPC).)

B. Initiation of the PERB Action.

On January 20, 2012, SDMEA filed its Unfair Practice Charge (UPC) (No. LA-CE-746-M) with PERB. (AR 1:1:000002-000237.) The UPC alleged conduct of the Mayor and two of seven Council members related to pension efforts starting several years before the placement of CPRI on the ballot.[5] None of the allegations showed actual expenditures of funds allocated to support placement of CPRI on the ballot. All allegations pre-date the placement of CPRI on the ballot and relate to individual actions of personnel that indicated support for pension reform.

On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (AR 2:4:000246-000249.) The request alleged that CPRI was a "sham" initiative that did not have "true" initiative proponents. (*Id.*) 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, 1451-1456 (history of the action brought by PERB and a writ brought by SDMEA to remove a stay issued preventing PERB's administrative proceedings).) Proponents

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[5] Pre-ballot placement activities alleged include press releases and emails to media outlets by the Mayor's staff about his pension reform efforts. (*i.e.* AR 1:1:00005 (Exhs. 11, 12 & 13: AR 1:1:000164-000172).) The Mayor is shown to have mentioned pension reform efforts in his January 12, 2011 State of the City Address. (AR 1:1:00005 (Ex. 9 (AR 1:1:000150-0001161.)

were not named as a party to this action even though their initiative was the target of the suit. Proponents and the Unions participated in the election campaign for the CPRI while litigation continued to challenge the 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 16:193:004096.) No substantive challenges to CPRI were filed in the aftermath of the public vote. In a writ proceeding brought by SDMEA litigated without Proponent participation, 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" theory alleged that the Proponents were acting at the exclusive direction and control of the Mayor and not as citizens throughout the initiative process. Proponents were purportedly the secret agents of the City with no independent authority.

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 11:186:003057-003063 (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.) SDMEA submitted the Proponents' Notice of Intent to Circulate CPRI and the full language of CPRI to be part of the administrative record. (AR 1:1:00054-00065 (Exh. 2 to SDMEA UPC).) Proponents' work product contained elements of previous pension reform ideas, but was a stand-alone document that Proponents submitted to the San Diego City Clerk to receive a title and summary for circulation. (*Id.*)

C. The ALJ's 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" nature of the initiative. (AR 10:157:002667.)

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 10:161:002731-002732; AR 10:162:002736-002760.) Instead, on September 20, 2013, PERB granted Proponents the right to submit an "informational" brief in support of the City's exceptions, limiting the scope of Proponents' appearance despite acknowledging that Proponents were "**interested individuals**" in the proceeding. (AR 10:178:002891-10:178:002892; AR 10:179-002895-002897; emphasis added.) 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. (AR 11:180:002899-002927.)

Proponents argued that PERB had excluded Proponents from defending the CPRI. (AR 11:180:002899-002927.)

D. PERB's Decision.

The PERB Decision 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.)

PERB concluded that the City violated the MMBA and PERB Regulations and ordered the City to cease and desist from refusing to meet and confer with the Unions before adopting "ballot measures affecting employee pension benefits," and to meet and confer, upon request, with the unions before adopting "ballot measures affecting employee pension benefits." (AR 11:186:003039-003040.) PERB also ordered the City to join in and/or reimburse the unions' reasonable attorneys' fees and costs for litigation to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before Proposition B was adopted. (AR 11:186:003040.)

The interference by PERB with the citizens' initiative could not have been more graphic. 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 initiative, binding the

Proponents, and preventing the Proponents from using the elected officials' "idea". Even though the Court of Appeal found jurisdiction vested in PERB to determine if the measure was a city measure, drafted and circulated using city resources and authority, PERB expanded its reach to include citizen measures that are not "pure" enough.

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 (Case No. D069626), and the City filed its Petition the next day (Case No. D069630). PERB almost immediately filed Motions to Dismiss Proponents' Writ and a Motion to Dismiss the Proponents, named as Real Parties in Interest, from the City's Writ. Proponents and the City opposed.

On March 9, 2016, the Court of Appeal issued an Order on the Motions to Dismiss filed in both cases, stating that the Motions to Dismiss will be considered concurrently with the Writ Petitions. Proponents filed an opening brief in their Writ 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.

The Court subsequently consolidated Proponents' Writ Petition with that of the City and issued its *Opinion* on April 11, 2017. Both PERB and the Unions 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 MEET AND CONFER REQUIREMENTS OF THE MMBA CANNOT TRUMP THE RESERVED INITIATIVE POWER.

A. This Court's Opinion in *California Cannabis Coalition v. City of Upland* Affirms the Broad Power of the Voter's Initiative, Especially at the Local Level.

In its recent decision in *California Cannabis Coalition v. City of Upland,* this Court determined that the procedural requirements of California Constitution, Article XIII C, section 2 **do not apply** to the imposition of taxes via citizens' initiative. (*Upland*, 3 Cal.5th 924; emphasis added.)

In *Upland*, this Court compared the merits of two constitutional provisions, each enacted by the electorate. In a delicate exercise, it found one to be immune from the impacts of the other. The interference with the reserved power of the initiative process presented to this Court in *Upland* was potential but largely hypothetical due to mootness. Yet, the principle was so important, the Court seized the opportunity to make its point. In this case, the impact is tangible – the facts present a glaring example of interference with the Constitutional rights of the Proponents.

The task before the Court in this case is less difficult than in *Upland*, the solution more clear-cut. Here, we compare the imperatives of Article XI against a statutory scheme – the formation by the Legislature of a complex and bewildering administrative structure. The impact of MMBA is being matched against the dignity of the Constitution.

Yet, this analysis invites more than a test of unequal dignities. The impact of the MMBA on the CPRI is the true measure of the case. In every sense of the word, the MMBA, on its face, and as applied herein by PERB, has seriously impeded the integrity of the citizen's initiative process by denying the Proponents of Proposition B the right to exercise the guarantees

assured by the terms of Article XI. The history of this case is a primer on interference with the Constitutional rights of electors:

- From July to October, 2011, the Unions filed five demands to meet and confer regarding the terms of the initiative petition. (AR 1:1:000019-000021; 1:1:000025-000028; 1:1:000035-000037.)
- In the Spring of 2012, four Unions filed Unfair Practices Charges with PERB, which filed four complaints against the City. (SDMEA: AR 1:1:000002-000237 (UPC and exhibits); AR 3:13:000572-000573 (complaint); DCAASD: AR 3:15:000579-000589 (UPC); AR 3:27:000835-000836 (complaint); AFSCME Local 127: AR 3:22:000607-000613 (UPC); AR 5:48:001180-0001183 (complaint); and San Diego Local 145: AR 4:33:000934-000941 (UPC); AR 5:62:001407-001408 (complaint).)
- On January 31, 2012, one Union filed with PERB a request for injunctive relief, which PERB granted. (AR 2:4:000246-000249.)
- On February 10, 2012, PERB filed a Complaint for injunctive relief and a petition for writ of mandate with the San Diego Superior Court seeking to stop the placement on the ballot of the initiative measure; the request and writ were denied. (San Diego Court Central Division Case No. 37-2012-00092205-CU-MC-CTL, entitled *PERB v. City of San Diego*.)
- The City cross-complained in the PERB case seeking an order to stay the PERB administrative proceeding requesting injunctive relief. Proponents moved to intervene. The court ordered the PERB proceedings stayed. (San Diego Court

Central Division Case No. 37-2012-00092205-CU-MC-CTL, entitled *PERB v. City of San Diego*.)

- The unions filed a writ petition with the Court of Appeal seeking to vacate the order staying the PERB proceedings. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447.) Proponents filed their own complaint with the Superior Court for a TRO to prevent interference with the electoral process and moved to consolidate the two cases. PERB moved to strike Proponents' complaint on anti-SLAPP grounds. The Proponents' complaint was ordered stricken. (San Diego Court Central Division Case No. 37-2012-00093347-CU-MC-CTL, entitled *Boling v. PERB et al.)*
- On June 5, 2012, Proposition B was passed by the voters. (AR 16:193:004096.)
- The PERB administrative hearing was held in July of 2012. (AR 11:186:003047.) Proponents sought to intervene as real parties in interest and were denied intervention by PERB. The City called Proponents' counsel, as a witness, who testified in the proceedings. (AR 15:192:003994, line 13-15:192:003995, line 11.)
- PERB issued its final ruling on December 29, 2015, forty-one months after the administrative hearing. (AR 11:186:002979-003103.)
- Proponents and the City filed writ petitions at the Court of Appeal; Proponents also moved to join the City's petition. PERB and the Unions moved to dismiss the Proponents' writ and to dismiss the Proponents from the City's writ. (Court of Appeal, Fourth District, Case Nos. D069626 and D069630.)

- PERB and the Unions requested review by this Court, which the Proponents opposed.

The conduct by PERB and the Unions in their opposition to the CPRI is a text book example of calculated, methodical, relentless interference with Proponents' Constitutional rights. All the weight of a State administrative agency has been brought to bear against the exercise of the citizen's initiative rights. At every juncture, for five years, Proponents have been forced to spend incalculable hours and money just to exercise a right guaranteed to them.

B. The Meet and Confer Requirements of the MMBA Cannot Be Applied to Voter's Initiatives, Because They Cannot Be Altered Before Being Placed on the Ballot.

The *Opinion* creates consistency in the law by answering the question left open in Footnote 8 of *Seal Beach* and confirming that the meet and confer requirements of the MMBA do not apply to voter's initiatives[6].

This Court's Decision in *Upland* cements the importance of the voter's initiative, by stating that the initiative power is '"one of the most precious rights of our democratic process."' (*Upland*, at 930; quoting *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d. 582, 591.) The people's reserved initiative power must be "jealously"

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[6] PERB's and the Unions' argument that the *Opinion* creates inconsistency misconstrues the caselaw interpreting PERB's jurisdiction over the MMBA. For example, PERB quotes *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090 on pp. 54 and 60 (fn. 16) of its Brief, for the proposition that the Legislature intended "a coherent and harmonious system of public employment relations laws". PERB omits the remainder of the sentence, making it clear that the Court was addressing the statute of limitations pertaining to unfair practice charges. (*Id.*)

guarded and "liberally" construed "so that it 'be not improperly annulled.'" (*Upland,* at 934, quoting *Perry,* at 1140.) Accordingly, "when weighing the tradeoffs associated with the initiative power," this Court has "acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible." (*Id.*)

This Court explained that California's "Constitution was amended to include the initiative power in 1911." (*Upland*, at 934.) The initiative power encompasses "the ability of the electorate of a charter city to legislate on compensation issues by initiative." (*Opinion*, p. 39; citing *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77-79; *Kugler v. Yocum* (*Kugler*) (1968) 69 Cal.2d 371, 374-377.)

This Court explained that Elections Code provisions were established by the Legislature to set up "procedures for city and county voters to exercise the [initiative] right." (*Upland*, at 934-935.) "Collectively, the intended purpose of these statutes is to require public officials **to act expeditiously on initiatives**." (*Id;* emphasis added.) This Court also reinforced charter cities' right to "set their own initiative procedures." (*Upland,* at 934-935, citing Cal. Const. Art. II, § 11, subd. (a); Elec. Code, §§ 9247; 9255.)

Consistent with the policies of prompt action embodied in the Elections Code, the City's Charter, Article III, section 23 (Amendment voted November 8, 1988; effective April 3, 1989[7]), required the City to follow "an **expeditious and complete procedure** for the exercise by the people of the initiative." (emphasis added.) Additionally, the CPRI specified a July 1, 2012 date for pension benefit calculations, and the date on which an initiative

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[7] City of San Diego Charter, Article III, § 23 (Amendment voted 11/8/1988; effective 04/03/1989) is available online at the City of San Diego's webpage at available at http://docs.sandiego.gov/citycharter/charter_amendments/articleIII/sec23.pdf)

is placed on the ballot must respect the deadlines set forth therein. (AR 16:193:004076 (City's Exh. E); *Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 9-10.)

The most fundamental part of the voter initiative procedure, which renders the MMBA's meet and confer obligation inapplicable, is a City's total lack of discretion to "do anything other than to place a properly qualified initiative on the ballot." (*Opinion*, at p. 30, citing *Farley v. Healy* (1967) 67 Cal.2d. 325, 327; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148; see *Native Am. Sacred Site & Env'l Protection Ass'n v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966 [governing body must place the initiative on the ballot without alteration].)

Accordingly, on November 8, 2011, the San Diego County Registrar of Voters certified the CPRI petition as having received a "SUFFICIENT" number of valid signatures requiring it to be presented to the voters as a citizens' initiative. (AR 3:26:000731-000733 (Exh. D to the City's Initial Position Statement Regarding UPC).) On January 30, 2012, the City Council introduced and adopted an ordinance that set the CPRI on the Tuesday, June 5, 2012 ballot as Proposition B, **without change**, in accordance with the timelines and requirements of Elections Code sections 1201 and 9255(b)(2). (San Diego Ordinance O-20127.) (AR 3:26:000735-000738; 3:26:000740-000759.)

The City properly refused to meet and confer with the Unions regarding the CPRI's terms on the grounds that "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot." (Unions' Brief, p. 31; *Opinion,* at 63 and fn. 14.) Moreover, the City acted expeditiously, in compliance with the timelines and policies of the Elections Code and the City's Charter, while operating within the CPRI's internal

deadlines, which the City was required to respect, and lacked any power to modify.

Thus, the *Opinion* correctly holds that "a governing body has no obligation to meet and confer before placing **a duly qualified citizen-sponsored initiative on the ballot.**" (*Opinion*, p. 41; emphasis added.) In addition to correctly applying the law, the practicality of that conclusion cannot be denied. How can the MMBA be applied where the City must act promptly to place the initiative measure on the ballot and has no power to alter the measure? Bargaining is futile in the context of voter initiatives.

C. The Procedures of the MMBA Should Not Be Allowed to Interfere with the Reserved Initiative Power.

There is no basis for allowing the MMBA to override the reserve power of initiative. The broad scope of initiative power is subject to "precious few limits" and not constrained by "procedural requirements imposed on the Legislature and local governments.... **without evidence that such was their intended purpose.**" (*Upland,* at 935, citing *Rossi v. Brown* (1995) 9 Cal.4th 688, 695; see also *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775; *Associated Home Builders,* at 588, 593-596*; and Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 251-252; emphasis added.) Evidence of intent to restrict the initiative power must be clear and cannot be implied. **"Only by approving a measure that is unambiguous in its purpose to restrict the electorate's own initiative power can the voters limit such power...**" (*Upland,* at 948; emphasis added.)

The Unions and PERB have failed to show any inference in the MMBA, much less a clear and unambiguous intent, to override the citizens' initiative power, and the procedures protecting that power, with the MMBA's meet and confer requirements. There is no evidence that the

Legislature intended to slow down or halt the "jealously guarded" petitioning process to protect public sector labor bargaining.

D. The MMBA Does Not Apply to Voter Initiatives.

PERB and the Unions have pointed to nothing in the MMBA showing a Legislative intent for the Act to apply to voter initiatives, proponents of those initiatives, or any other procedural aspect thereof. Like California Constitution, Article XIII C, section 2, analyzed by this Court in *Upland*, the MMBA, "by its terms....only applies to actions taken by" a government and not to the electorate. (*Upland*, at 936, discussing Article XIII C, section 2.)

Government Code section 3505, on its face, applies to "the governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." (Gov. Code, § 3505.) Section 3504.5 is likewise applicable to the "governing body of a public agency." (Gov. Code, § 3504.5.) The Unions, in their Opening Brief on the Merits, acknowledge that the duty to meet and confer set forth under the MMBA is "expressly applicable to *public agencies*." (Real Party Unions' Brief, p. 39; emphasis in document.) There is no dispute that "[t]he City is a 'public agency' subject to the MMBA." (PERB's Brief, p. 19; 8 Cal. Code. Regs, § 32016.) However, the electorate, is not part of the "governing body" of that public agency. (*Upland*, at fn. 11.) A voter's initiative is by definition within the power of the electorate; it is thus outside the scope of the MMBA and beyond the jurisdiction of PERB.

PERB and the Unions extensively dissect what they describe as the *Opinion's* use of Section 3504.5 to limit the application of Section 3505, as to who must meet and confer and when. (Union's Brief, pp. 44-45.) The reality is that neither section applies to a voter's initiatives because the governing body of the public agency has no discretion to bargain as to the

initiative's' terms. Thus, the MMBA's meet and confer obligation set forth in Sections 3504.5 and 3505 does not, and cannot, extend to the voter's initiative, which may not be altered before placement on the ballot. **Moreover, PERB and the Unions have failed to cite any case, or statute, extending the MMBA or PERB's jurisdiction, to voter initiatives.**

The MMBA's inapplicability to voters' initiatives is further underscored by the MMBA's exclusion of any reference to proponents of a voter initiative from the regulations governing its administrative proceedings. PERB admitted before the Court of Appeal that the MMBA does not apply to the CPRI, by arguing that allowing "non-parties," such as Proponents, to seek judicial review runs contrary to the legislative intent behind the MMBA, to address issues "between public employers and public employee organizations." (PERB's Resp. Brief, Case No. D069626, pp. 41-42.)

PERB also argued that that "Proponents did not have a right under the MMBA or PERB Regulations to participate in the administrative proceedings" confirming that the Regulations were not intended to apply to a citizen's initiative. (PERB's Resp. Brief, Case No. D069626, pp. 72-73.) PERB's Motion to Dismiss in Court of Appeal Case No. D069630 asserts that the PERB Regulations "would not have permitted Proponents to participate as a party in the administrative proceedings" because "PERB's regulatory scheme delineates clearly between the rights of parties and the more limited rights of non-parties in PERB proceedings." (PERB's Motion to Dismiss, p. 17; citing 8 Cal. Code Regs., §§ 32210, 32410, 32602, 32603 and 33210.) For example, an unfair practice charge may be filed "by an employee, employee organization, or employer against an employee organization or employer." (8 Cal. Code Regs., § 32602, subd. (b).) The electorate, and proponents of a voter's initiative, are excluded from

that administrative scheme. By PERB's own admission, its rules were not designed to regulate a citizens' initiative. The Court of Appeal denied PERB's Motion to Dismiss Proponents as Real Parties in Interest in Case No. D069630, and deemed the Motion in Case No. D069626 moot. (*Opinion*, p. 22.)

PERB's misguided attempt to expand its jurisdiction to a voter's initiative, while expressly and actively excluding the initiative proponents from its administrative proceedings, flies in the face of the law. (See, *Opinion,* p. 20-21 ["We conclude official proponents of a ballot initiative have a sufficiently direct interest in the result of the proceeding [citation] to join as real parties in interest in an action, either by intervention or because they are named by other parties as real parties in interest, which is directed at the evisceration of the ballot measure for which they were the official proponents."] citing *Perry,* at 1125 and *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250.)

PERB's focus on the importance of collective bargaining is appropriate (see, PERB Brief, pp. 55-58), as a matter within PERB's expertise and jurisdiction. However, PERB's attempt to extend its authority by diminishing the jealously guarded initiative power as less important than the collective bargaining provisions of the MMBA is unsupported by the law.

IV. PERB'S, AND THE UNIONS', AGENCY THEORIES IMPROPERLY ATTEMPT TO CONVERT THE PURITY OF A VOTER'S INITIATIVE BASED ON INDEPENDENT SUPPORT OF GOVERNMENT OFFICIALS[8].

The *Opinion* correctly holds that "PERB erred when it applied agency principles to transform the CPRI from a citizen-sponsored initiative, for which no meet-and-confer obligations exist, into a governing-body-

[8] Proponents refer the Court to the argument in the City's Answer on the Merits rebutting the agency allegations.

sponsored ballot proposal within the ambit of *People ex rel. Seal Beach Police Officers Assn. v City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*)." (*Opinion*, p. 4.) The validity of a citizens' initiative does not depend upon who supported it, or where the idea for the initiative started. PERB's and the Unions' request that this Court deem the Mayor the "other representative" of the City, within the meaning of Government Code section 3505 (PERB Brief, pp. 45-47, 50-58, 64- 66; Unions Brief, pp. 50-53), is merely part of continuing attempt to dilute the reserved initiative power in order to impermissibly expand PERB's reach and the MMBA's scope.

PERB and the Unions cannot explain how the alleged "agency" between the Mayor and the City Council eliminated the mandatory duty of the City Council to place a qualified citizen charter initiative on the ballot under content-neutral election laws. Charter cities, general law cities, counties and special districts all have mandatory ballot placement laws that grant no leeway which would allow time for labor bargaining. Upholding PERB's Decision would upset the content-neutral election process for all local governments under PERB's jurisdiction.

Whether or not the Proponents associated with elected officials who were frustrated with the actions of the City is legally irrelevant. PERB does not have the authority to decide the associational rights of Proponents, without their participation. (See, *Perry.*) Moreover, municipal employees may join citizen groups supporting or opposing initiatives. (See *League of Women Voters v. Countywide Criminal Justice Coordination Comm.* (1988) 203 Cal.App.3d 529, 555.) The contrary argument by PERB and the Unions strikes at the heart of the purpose behind the adoption of direct democratic methods. They would have this Court conclude that political figures have no constitutional rights. (See, Unions' Brief, p. 48, fn. 20, which misstates the holdings in the cases cited therein.) It has been said by this Court that the purpose behind the reserved right of initiative is to serve as a "legislative

battering ram" to break through the normal legislative process. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228.) PERB would require the public to cease associating with like-minded elected officials. Under PERB's logic, it is illegal to use ideas developed by government officials; seek elected official support; or urge like-minded officials to offer contrary ideas[9].

The *Opinion* correctly concludes that each of the agency theories fails. With respect to the "statutory agency" theory, the *Opinion* correctly states that, "PERB cites no law suggesting Sanders was in fact (or even could have been) statutorily delegated the power to place a City Council-sponsored ballot proposal on the ballot without submitting it to (and obtaining approval from) the City Council." (*Opinion*, pp. 47-48.) The City's Charter directly contradicts PERB's and the Unions' statutory agency theory.

> The City Charter specifically provides *all* legislative powers of the City are vested in the City Council (San Diego City Charter, art. III, § 11) as City's legislative body (*id.*, art. XV, § 270(a)), and provides such legislative power may not be delegated (*id.*, art. III, § 11.1) but

[9] PERB and SDMEA rely upon an opinion issued by a former City Attorney that opines that the Mayor of San Diego has no right to be a ballot measure proponent. (AR 1:1:00091-00101 (Exh. 5 to SDMEA UPC), Opinion of Michael J. Aguirre (June 19, 2008) (Aguirre Memo).) As a preliminary matter, the *Opinion* correctly found that the Memo is not binding on the City and has been superseded by a later Memo. (*Opinion*, p. 49.) In addition, while the Aguirre Memo opines that a sitting San Diego Mayor may not be a proponent of a citizen's ballot measure that addresses MMBA subject matter, it also opines that citizen proponents are not subject to MMBA. (AR 1:1:00093, 1:1:00100.) Here, the legal proponents are three citizens. Even the questionable limitation on the First Amendment rights of a San Diego "Strong Mayor" does not transfer to the legal proponents. The Unions and PERB cannot legally rely on a legal opinion that fails to address the facts developed by PERB at a hearing where the Proponents could not even defend their measure.

> must be exercised by a majority vote of the elected councilmembers. (*Id.*, art III, § 15 & art. XV, § 270(c).) (*Opinion*, p. 47.)

There is likewise no evidence for the proffered common law agency theories, that the Mayor had apparent authority as agent of the City Council, or the City Council ratified the Mayor's actions - to pursue the CPRI, or any pension reform ballot measure - or that the Mayor believed he had such authority. (Civ. Code, §§ 2316, 2330, 2338; see *Inglewood Teachers Association v. Public Employment Relations Board* (1991) 227 Cal.App.3d 767, 781.) The Mayor was required to obtain approval from the City Council in advance of making bargaining proposals and pursuing ballot measures on behalf of the City. Mayor did not believe he had such authority; there was no basis for a finding of actual authority. The Mayor was not purporting to act on behalf of the City Council; he made it publicly known that he was pursuing a pension reform initiative as a private citizen. There is likewise no evidence that the City Council "affirmatively did or said anything that could have caused or allowed a reasonable employee to believe Sanders had been authorized to act on behalf of the City Council in promoting the CPRI." (*Opinion*, p. 56.)

Similarly, PERB and the Unions cannot establish the creation of a common law agency relationship by the City Council's purported ratification to the Mayor's conduct. As stated in the *Opinion*,

> ... absent a majority vote of the elected councilmembers (City Charter, art. III, § 15 & art. XV, § 270(c)), it is improper to find that Sanders's support for a citizen-sponsored initiative could convert the CPRI into a City Council-sponsored ballot proposal under ratification principles. (*Kugler*, supra, 69 Cal.2d at p. 375; First Street Plaza Partners v. City of Los Angeles, supra, 65 Cal.App.4th at p. 667 [where city charter prescribes procedures for

> taking binding action, those requirements may not be satisfied by implication from use of procedures different from those specified in charter]; cf. *Stowe v. Maxey* (1927) 84 Cal.App. 532, 547-549 [declining to apply ratification principles to validate act where act was one county board was incapable of delegating].) (*Opinion*, p. 63.)

The "agency" theories proffered by PERB and the Unions – statutory and common law – are a legally erroneous ruse designed to improperly extend the application of the MMBA and the jurisdiction of PERB. The *Opinion* properly rejected PERB's and the Unions' attempt to undermine the reserve initiative power by creating an "impure" category of voter initiative.

V. THE *DE NOVO* STANDARD OF REVIEW OF PERB'S DECISION IS PROPER.

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

Proponents do not dispute that PERB'S expertise lies in the application of the MMBA to labor relations between public employees and public employers. (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d. 1, 12; *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, 539; Unions Brief, pp. 37-38.) Nor do Proponents dispute, as discussed above, that the MMBA establishes a duty on **public agencies**, and their **governing bodies** to meet and confer, placing such issues within PERB's purview. (See, Gov. Code, §§ 3504.5 and 3505.) But this is not a case where a governing body of a public agency had discretion to meet and confer over labor issues under the MMBA. This is a case involving the CPRI, a voter's initiative which the City was required to place on the ballot without alteration.

The extensive discussion by PERB and the Unions of the MMBA requirements, and PERB's jurisdiction to enforce them, is misdirected. Voter initiative measures are outside the scope of the MMBA and beyond PERB's expertise. Thus, the *Opinion* properly applied to PERB the *de novo* standard set forth in *Yamaha Corp. of America v. State Bd. of Equalization (Yamaha)* (1998) 19 Cal.4th 1.

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

PERB has acknowledged that it is the duty of the reviewing court to "construe the meaning of the statute at issue." (PERB Brief, p. 37; citing *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d. 575, 587.) This Court's holding in *Cumero*, supports the proposition that it is "the duty of this court, ... to state the true meaning of the statute ... even though this

requires the overthrow of an earlier erroneous administrative construction." (*Cumero*, at 587; *City of Palo Alto v. California Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1288.) And as stated in *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, cited on pp. 38 and 61 of PERB's Brief, "[h]ow much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a "'comparative interpretive advantage over the courts.'" (*American Coatings Assn.*, at 431, citing *Yamaha*.)

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,* p. 26, fn. 21).)

Accordingly, the *Opinion* reasons 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*, 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*, pp. 43-44.) Unlike the cases PERB cites, PERB's Decision reaches beyond its expertise and experience in an attempt to override a reserved constitutional right. (See, e.g. *Hoeschst Celanese Corporation v. Franchise Tax Bd.* (2001) 25 Cal.4th 508 and *San Diego Teachers Assn v. Supr. Ct*, supra at 24 Cal.3d 1, *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d. 335 cited by PERB.)

The Opinion correctly holds that 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,* pp. 43-44.) PERB admits it has no experience in deciding constitutional issues. (AR 11:186:003006; 11:186:003017.) PERB and the Unions cite no law establishing PERB's expertise over voter initiatives, or related constitutional and election issues. (see, *Opinion*, p. 41, fn. 32, appropriately distinguishing the decision in *City of Palo Alto v. California Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, which acknowledged PERB's discretion regarding meet and confer obligations associated with a city sponsored initiative, not a voter's initiative.) Moreover, the PERB Decision was made in the context of a statutory and administrative scheme not intended by the Legislature to

apply to voter's initiatives. (*Upland,* at 945-946; *see* discussion in Section III. D. herein.)

As evidenced by the inaccuracy of PERB's conclusions, it likewise has no "comparative interpretive advantage over the courts" in deciding agency principles in the context of constitutional issues associated with voter's initiatives. (See, *California State Teachers' Retirement System v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 55.) PERB's lack of expertise regarding applicable agency principles 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, subd. (c); see generally *Perry v. Brown* (2011) 52 Cal.4th 1116; *Rossi v. Brown* (1995) 9 Cal.4th 688.) The PERB Proposed 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 10:157:002660, emphasis added.)

Thus, 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. (See, *Native Am. Sacred Site & Env'l Protection Ass'n v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966 [governing body must place the initiative on the ballot without alteration]; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 147-148.]

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.)

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.

Beyond lack of expertise, PERB was acting outside the bounds of its jurisdiction by deciding the fate of a voter's initiative based on the inapplicable meet and confer procedures of the MMBA. PERB and the Unions want this Court to change the law so PERB can decide which initiatives are "pure" and/or to impose the MMBA's pre-election procedures to undermine the electorate's reserved initiative power.

B. PERB's Decision Does Not Warrant the Greater Deference to PERB Accorded by *Banning Teachers Assn. v. PERB.*

PERB and the Unions strenuously argue that the Court of Appeal did not adequately defer to PERB's extensive expertise as required by *Banning*

Teachers Assn. v. PERB (Banning) (1988) 44 Cal.3d. 799, 804. The greater deference afforded to PERB under *Banning* would apply where the matter is properly within the purview of PERB and the MMBA; not in a case such as this one.

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 (EURA). The Court stated that "[t]he 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.*)

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).) The Court of Appeal in this case was being asked to interpret laws and issues outside the expertise of PERB. (*Banning*, at 804.) This is evidenced, among other things, by PERB ignoring City's mandatory duty to place a qualified measure on the ballot because an elected official gave it political support. (Cal. Const. Art. XI, §§ 3, subd. (c) and 5, subd. (b); *Upland*, at 934-935, *Farley v. Healy* (1967) 67 Cal.2d 325, 327; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th at 148; *Native Am.*

Sacred Site & Env'l Protection Ass'n v. City of San Juan Capistrano (2004) 120 Cal.App.4th at 966; *Blotter v. Farrell* (1954) 42 Cal.2d 804.)

The Unions and PERB also argue PERB's factual findings are deemed conclusive under Government Code section 3509.5 (Unions Brief, p. 40; PERB Brief pp. 62- 64) and that Section 3509.5 mandates application of the substantial evidence standard of review. (PERB Brief, p. 43; Unions Brief, p. 41.) On the contrary, Section 3509.5, as part of the MMBA, further demonstrates the lack of Legislative intent to apply the MMBA to voter initiatives. (*Upland*, at 945-946.) As PERB argues, statutory interpretation begins with the language of the statute. (PERB Brief, p. 45, citing *People v. Castillolopez* (2016) 63 Cal.4th 322, 329.) On its face, Section 3509.5, subd. (a) makes no reference to initiative proponents among the list of parties authorized to bring a petition for extraordinary relief. (See, Gov. Code, § 3509.5, sub. (a) listing the "charging party, respondent, or intervenor".)

PERB in fact refused to allow Proponents to participate in its administrative proceedings, and later used Section 3509.5's omission of any reference to proponents as a basis for its Motion to Dismiss Proponent's Writ action (Court of Appeal Case No. D069626) and to dismiss Proponents as Real Parties in Interest from the City's Writ action (Court of Appeal Case No. D069630). Thus, Section 3509.5 underscores the very reason why PERB should not be afforded deference, as citizens initiatives are beyond the scope of PERB's expertise and, as demonstrated by PERB's efforts to exclude Proponents in violation of *Perry*, beyond its jurisdiction.

C. The Deference Argument Is a Red Herring.

Applying the clearly erroneous standard, the Court of Appeal found that PERB's Decision merited reversal. The deference argument is a red herring.

The *Opinion* defers to PERB's dispositive factual findings. (*Opinion*, 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*, 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*, 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*, pp. 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*, p. 43.)

By the tone of its Opening Brief, PERB claims the right to continue with its course of interference. Its Brief simply complains of the potential loss of its procedural comfort zone. It completely ignores the point of this case – the preservation of the Constitutional right of California voters. Such rights have been ignored by PERB and the Unions for five years and they continue to be ignored in these proceedings.

PERB and the Unions focus on the red herring of deference, but this is not a case of changing the rules of the MMBA; this is not a new twist on labor law. Rather, it's simply the first time that PERB has used its rules and procedures to trample on an old law – a 1911 Constitutional enactment.

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

If the *Opinion* is reversed, PERB and the Unions will have to explain how to weave the 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).)

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, subd. (c).) This distinction applies to all initiative subjects. (*i.e., Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165.) 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. (Pub. Res. Code, § 21080(a).) The term "public agency" includes charter cities. (Pub. Res. 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.*)

The 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 Unions 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 v. City of Burlingame* (1929) 207 Cal. 134. (See, *Associated Homebuilders*.)

If the Court were to agree with PERB and the Unions, how would the application of the MMBA procedures to voter initiatives be implemented? In this case, the request to bargain was received while the CPRI was still circulating. (AR 1:1:000019-000020.) Each request asked to bargain over the terms of the 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 Unions.

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 unions, 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.

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, subd. (b).) This authority would be weakened by PERB jurisdiction over citizen petitioning.

The exception to the election procedures 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, § 54964.5; 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.

During "good faith" bargaining, what control would the governing body and the bargaining groups have over the measure? Here, the initial request to bargain was filed while the ballot measure was in the circulation phase. The Elections Code puts significant legal restrictions on influencing a circulating initiative. (Elec. Code, §§ 18620, 18621.) It is a crime for anyone to offer any "thing of value" to an initiative proponent in exchange for withdrawing their measure from circulation. Elections Code section 18620 states as follows:

> **Every person** who seeks, solicits, **bargains for**, or obtains any money, **thing of value, or advantage of or from any person**, firm, or corporation for the purpose or represented purpose of fraudulently inducing, persuading, or **seeking the proponent or proponents of any initiative or referendum measure or recall petition to (a) abandon the measure or petition, (b) fail, neglect, or refuse to file in the office of the elections official or other officer designated by law, within the time required by law, the initiative or referendum measure or recall petition after securing the number of signatures required to qualify the measure or petition, (c) stop the circulation of the initiative or referendum measure or recall petition, or (d) perform any act that will prevent or aid in preventing the initiative or referendum measure or recall petition from qualifying as an initiative or referendum measure**, or the recall petition from resulting in a recall election, is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months or two or three years, or in a county jail not exceeding one year, or by both that fine and

> imprisonment. (Elec. Code, § 18620; emphasis added.)

It is a misdemeanor to offer "to bargain" with a proponent of a circulating initiative. If the City had accepted the SDMEA's request to bargain over CPRI, while circulating, it would put the City in a tenuous legal position. First, it is clear that a City has no legal authority over a circulating initiative. In fact, PERB found "no evidence" that the San Diego Mayor had any control over the Proponents. (AR 10:157:002660.)

For the sake of argument, let us assume that Mayor Jerry Sanders had the ability to control the actions of the Proponents. Further assume that the City agreed to bargain with SDMEA. SDMEA "assumed" the CPRI was the City's open bargaining position. The City would be bargaining over whether the CPRI could be amended and/or withdrawn. (AR 1:1:00018 (SDMEA first request to bargain, July 15, 2011).)

Since a proponent cannot amend a measure during signature gathering, the Mayor would have to bargain with the official proponents to either withdraw their initiative petition from circulation or fail to submit it to the City Clerk. To get the Proponents to withdraw or fail to submit, inducement would be required. Either money, "thing of value" or some "advantage" over the Proponents would be necessary. Any of these steps would subject Mayor Sanders, a former police chief, to potential criminal liability under Elections Code section 18620. If accepted by the Proponents, they would also be potentially liable under Elections Code section 18621 for improperly halting the initiative process. While a proponent may stop gathering signatures or fail to turn them in, a proponent cannot take these actions in exchange for a "thing of value" or based on an "advantage" gained. (*People v. Colver* (*Colver*) (2008) 107 Cal.App.3d 277.) A request from a City representative to an "agent" of the City would likely fall into one of these prohibited categories.

By seeking to force bargaining while an initiative circulates, it is clear that PERB lacks expertise in election law, constitutional law or the legal conditions for holding a public office. The relief sought by the Unions and PERB creates a direct conflict with these laws. In their zeal to prevent the public from exercising their electoral rights, PERB and the Unions have attempted to expand the reach of an administrative body far beyond its statutory foundation. They seek to allow an administrative body to regulate outside of their expertise to the detriment of the electorate. The consequences of the granting of new powers to the administrative body, PERB, would create special limitations on circulated initiatives based on the viewpoint of the proponent.

VII. CONCLUSION.

PERB and the Unions seek to impose the procedural requirements of the MMBA to undermine the initiative power reserved under the Constitution. They claim the reserved power is lost if elected officials support the citizen effort. PERB and the Unions seek to fundamentally change the relationship between citizens and the bodies that govern them by providing administrative agencies with the authority to determine what initiatives can be presented to the voters.

PERB proves the truth of the adage – if all you have is a hammer – the MMBA - everything looks like a nail. When presented with the Constitutional North Star of Article XI, PERB ignores the true compass and keeps wielding its hammer. It is time for a course correction. The homage this Court has paid to the initiative rights of the electorate must be enunciated, yet again, to prevent the use by PERB of the MMBA to inhibit the rights of citizen voters.

The Proponents were prescient. Their facts predated *Upland*, yet they clearly saw and announced the constitutional issue. PERB and the Unions have been dodging the core question for five years. This case gives the Court the chance to apply the principles of *Upland* to redress a very dramatic intrusion upon the Constitutional rights of the Proponents.

DATED: October 9, 2017

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.520(c), I certify that this Combined Answer Brief on the Merits is proportionally spaced, has a typeface of 13 points or more, and contains 12,104 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: October 9, 2017

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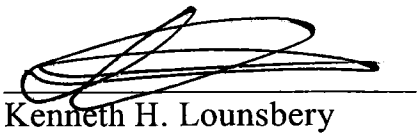

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SUPREME COURT NO. S242034

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 October 9, 2017, I served **COMBINED ANSWER BRIEF ON THE MERITS 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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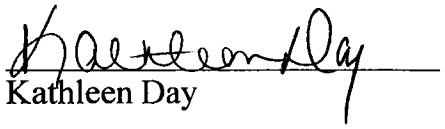
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 9, 2017 at Escondido, California.



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