Case No. S242034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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; SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO,
Real Parties in Interest.

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

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE SAN DIEGO TAXPAYERS EDUCATIONAL FOUNDATION IN SUPPORT OF THE CITY OF SAN DIEGO

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The San Diego Taxpayers Educational Foundation is a 501(c)(3) non-profit corporation dedicated to raising awareness about economic and quality-of-life issues affecting local taxpayers. The Foundation pursues that mission by conducting fiscal and economic research and analysis of governmental revenue and expenditure policies in San Diego County. Founded in 1987, the Foundation is the research arm of the San Diego County Taxpayers Association.

This appeal involves a citizens' initiative on pension reform, which the Public Employment Relations Board effectively invalidated because the Mayor of San Diego had spoken vigorously on its behalf. That initiative responded to a significant financial crisis facing the City's public-pension system, and helped place that system on sounder financial footing by reducing its $2 billion funding gap. By undoing the initiative, the Board's decision will have significant adverse consequences for the City of San Diego, its public-pension system, and its citizens.

Over the past several years, the Foundation has done extensive research on precisely these issues. Specifically, the Foundation has researched the root causes of public-pension instability, as well as the

specific causes of this instability in the San Diego region. Much of that research formed the basis of the reforms that made up the citizens' initiative at issue. As a result, the Foundation has an acute interest in seeing that initiative upheld.

The Foundation's brief thoroughly discusses the First Amendment rights of elected officials, and applies those principles to this case. The parties have raised this First Amendment issue, but this brief addresses it in greater detail. Given the importance of the question presented, the Court would benefit from considering the additional perspective of the Foundation.

For these reasons, the Foundation respectfully requests permission to file the attached brief in support of the City of San Diego. Cal. R. Ct. 8.520(f)(1).

The Foundation confirms that no party or its counsel authored this brief in whole or in part, or made a monetary contribution to fund its preparation or submission. Cal. R. Ct. 8.520(f)(4)(A). The Foundation acknowledges that the Laura and John Arnold Foundation has made a monetary contribution to fund the brief's preparation and submission. Cal. R. Ct. 8.520(f)(4)(B).

Dated: December 1, 2017.

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INTRODUCTION AND SUMMARY

This appeal presents the question whether a citizens' initiative on pension reform may be invalidated because an elected official—namely, a mayor—spoke vigorously on its behalf. Because the mayor had a First Amendment right to advocate on behalf of pension reform, the answer to that question is unequivocally no.

1. Beginning in the late 1990s, the City of San Diego made a series of ill-advised decisions regarding its public-pension fund. In 1996, the City reduced its annual contribution to the fund while simultaneously increasing benefits. *San Diego Firefighters, Local 145 v. City of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M, at 2 (2010). In 1997, the City allowed employees to buy "service credits," which increased the size of their monthly retirement benefit. Although this program was supposed to be revenue neutral, the City lost $147 million due to an underestimation of its long-term costs. *Id.* at 3. In 2002, the City again reduced its annual contribution to the fund while simultaneously increasing benefits. *Id.* at 2.

These decisions significantly contributed to the City's pension fund becoming "grossly underfund[ed]." *Id.* In 2011, the shortfall was about $2 billion. R. Vol. XI, at 3050. In 2012, the City was spending

20% of its annual budget just to keep up on payments due to pensioners. *Id.* at 3049.

In early 2011, three private citizens—Catherine A. Boling, T.J. Zane, and Stephen B. Williams—decided to address this problem through a citizens' initiative. They hired a law firm to draft a proposal that (among other things) replaced the City's defined-benefit retirement plan with a defined-contribution one. *Id.* at 3066–67. They then spent the next several months taking all of the steps legally necessary to get their initiative on the ballot. First, Boling, Zane, and Williams filed with the City Clerk a "notice of intent," which explained that they planned to circulate an initiative petition in the City. *Id.* at 3067; *see also* Cal. Elec. Code §§ 9202(a), 9256. Second, they filed a request that the City Attorney prepare a ballot title and summary for the petition. R. Vol. III, at 682; *see also* Cal. Elec. Code §§ 9203, 9256. Third, they circulated the petition and gathered signatures in its support. *See* R. Vol. III, at 697–99; *see also* Cal. Elec. Code §§ 9257–64. Fourth, they filed the petition—along with approximately 145,000 signatures—with the City Clerk. R. Vol. III, at 697–99; *see also* Cal. Elec. Code § 9265.

At that point, various city officials took ministerial, legally mandated actions to place the petition on the ballot. The City Clerk forwarded the petition to the San Diego County Registrar of Voters, which verified that the petition had enough valid signatures. R. Vol. III, at 697–99; *see also* Cal. Elec. Code §§ 9266, 9114–15. Then, the Registrar certified the results of its examination, and the City Clerk forwarded that certification to the City Council. R. Vol. XVI, at 4067; *see also* Cal. Elec. Code § 9115(d), (f). Finally, the City Council enacted Ordinance O-20127, which placed the initiative on the June 5, 2012 primary ballot. R. Vol. XVI, at 4071–89; *see also* Cal. Elec. Code § 9255(b)(2) (2012).

2. Throughout this process, Boling, Zane, and Williams had a vocal and influential supporter: San Diego Mayor Jerry Sanders. The Mayor did not take any of the official steps that were necessary to get the citizens' initiative on the ballot—he did not, for example, sign or file the notice of intent, request the ballot title and summary, or file the final petition. But at each step of the way, the Mayor strongly urged the public to support pension reform in general, and the initiative of Boling, Zane, and Williams in particular.

In November 2010, before Boling, Zane, and Williams began to pursue their initiative, Mayor Sanders had informed his staff that he wanted to replace the City's defined-benefit retirement plan with a defined-contribution plan. R. Vol. XI, at 3057. The Mayor also had stated that this reform should occur through a citizens' initiative rather than through the City Council. *Id.* The Mayor believed that the reform was "necessary for the financial health of the City." *Id.* He did not believe, however, that the City Council "would use its authority to put the measure on the ballot." *Id.* at 3057–58. The Mayor therefore concluded that the voters themselves should "voice their opinion by signing petitions to put that on the ballot." *Id.* at 3058.

On November 19, Mayor Sanders started making his views public. The Mayor held a press conference in City Hall to explain that he wanted to reform public pensions through a citizens' initiative. *Id.* at 3059. The Mayor's staff created a "Fact Sheet" describing his ideas, which was issued to the media and posted on the City's website. *Id.* The staff also sent an email to several thousand community leaders, explaining how the Mayor planned "to address the City's budget issues." *Id.* at 3060.

Over the next several months, Mayor Sanders continued sharing his ideas about pension reform. He met with civic and business leaders to discuss the initiative. *Id.* at 3060–61, 3066. He did interviews for KUSI News, MSNBC, and a local radio show. *Id.* at 3061–62, 3066. He held another press conference and issued additional press releases describing his position. *Id.* And he devoted a large portion of his annual State of the City speech to the issue of pension reform. *Id.* at 3061–62.

After Boling, Zane, and Williams filed their notice of intent, Mayor Sanders began championing their proposal. He held a press conference to express his support. *Id.* at 3068. He encouraged people to sign their petition. *Id.* at 3068–69. And once the citizens' initiative was put on the ballot, he urged people to vote for it. *Id.* at 3096. In June 2012, after months of public debate, the City's voters overwhelmingly approved the initiative—with nearly 67% voting in favor. *Id.* at 3072.

As these facts show, Mayor Sanders played an important role—maybe even a critical one—in the public debate over pension reform.

3. Normally, it would be a constitutional virtue that an elected official took a consistent, principled stand on an important public

issue pending before the electorate. As the U.S. Supreme Court has explained, elected officials "have an *obligation* to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office." *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966) (emphasis added). By sharing his views on pension reform, Mayor Sanders was simply fulfilling that obligation.

But the Public Employment Relations Board transformed constitutional virtue into vice. Under state law, the City has a duty to "meet and confer" with unions regarding "wages, hours, and other terms and conditions of employment ... prior to arriving at a determination of policy." Cal. Gov't Code § 3505. In the decision below, the Board held that the City violated that duty when Mayor Sanders "launch[ed] a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it." R. Vol. XI, at 3096. In other words, the Board held that the City violated state law because the Mayor spoke up regarding an important citizens' initiative. Thus, in the Board's view, Mayor Sanders did not have an

"obligation to take positions on controversial political questions"; to the contrary, he had an obligation to remain silent.

4. The Court of Appeal correctly annulled the Board's decision. *Boling v. Pub. Employment Relations Bd.*, 10 Cal. App. 5th 853, 856 (2017). The court recognized that, under state law, the City did not have a duty to meet and confer with the unions "when a proposed charter amendment is placed on the ballot by citizen proponents through the initiative process." *Id.* The court also recognized that the Board "erred when it applied agency principles to transform the [initiative] from a citizen-sponsored initiative, for which no meet-and-confer obligations exist, into a governing-body-sponsored ballot proposal." *Id.* And the court recognized that Mayor Sanders's public support for the initiative "is ... protected under both statutory law and under the Constitution." *Id.* at 891 n.50 (citations omitted).

5. Before this Court, the Board argues that the Mayor acted as an "agent of the City," rather than as a private citizen, when he supported the initiative. PERB Br. 64–66. On that basis, the Board argues that the Mayor enjoyed little if any First Amendment protection. PERB Reply Br. 35–44. For the reasons explained in the Court of Appeal's decision, the Foundation disagrees with the premise

that Mayor Sanders was speaking as an agent of the City rather than as a citizen. But there is a deeper problem with the Board's decision: it violates the First Amendment either way. As explained more fully below, the First Amendment equally protects the speech rights of elected officials and private citizens. It is therefore irrelevant whether Mayor Sanders was speaking as any other citizen or as the mayor; either way, the First Amendment protected his right to express his views on a matter of obvious public concern.

With that critical premise established, the First Amendment analysis is straightforward. For at least three different reasons, the Board's restriction of the Mayor's speech must receive strict scrutiny. First, the restriction is content-based: even the Board acknowledges that it applies only to speech about "wages, hours, and other terms and conditions of employment." Cal. Gov't Code § 3505. Second, and even worse, the restriction is viewpoint-based: Mayor Sanders could have advocated *against* a citizens' initiative on pension reform, but not *in its favor*. Third, the restriction is a prior restraint: by requiring the Mayor to go through the meet-and-confer process before being able to speak in favor of pension reform, the Board effectively

required the Mayor to obtain the City Council's approval of what he could say prior to speaking.

In sum, the Board's decision imposes a viewpoint-based prior restraint on a mayor's speech on a matter of urgent public concern to his city and his constituents. No governmental interest can justify such a restriction. On that ground alone, the Court of Appeal's decision should be affirmed.

STANDARD OF REVIEW

California agencies have no power to decide whether a state statute violates the federal Constitution. The California Constitution itself provides that an administrative agency has no power to "declare a statute unconstitutional," or "refuse to enforce a statute" on constitutional grounds, "unless an appellate court has made a determination that such statute is unconstitutional." Cal. Const. art. III, § 3.5. Here, the Board itself recognized that it lacked the power to decide the First Amendment question before it. "Even if we were to agree with the City and conclude that [§ 3505's] meet-and-confer requirement is unconstitutional," the Board explained, "we would lack authority to overturn or refuse to enforce the statute, absent controlling appellate authority directing that result." R. Vol. XI, at

3007–08. The Board continued: "If the parties believe that our decision fails to resolve any underlying constitutional issues, or that our decision intrudes on constitutional rights, they are free to seek redress in the courts[.]" *Id.* at 3017.

Because the Board did not decide, and could not have decided, whether the speech restrictions at issue violate the First Amendment, it cannot receive any deference on that point. Instead, this Court must decide the constitutional questions de novo. *See American Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570, 575 (2013).

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE MAYOR'S RIGHT TO SHARE HIS VIEWS ON PUBLIC ISSUES SUCH AS A CITIZENS' INITIATIVE ON PENSION REFORM.

A. The First Amendment Fully Protects Speech On Public Issues.

In categorical terms, the First Amendment to the United States Constitution states that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment extends that prohibition to the States. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664 (2015).

At its core, the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern

without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quotation marks omitted). It therefore protects "the free discussion of governmental affairs," including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218–19 (1966).

By protecting speech on public issues, the First Amendment "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). When people "seek by petition to achieve political change ... their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer*, 486 U.S. at 421.

Because speech on public issues is essential to the political process, it is "more than self-expression; it is the essence of self-government." *Garrison v. State of La.*, 379 U.S. 64, 74–75 (1964). As a result, any restriction on speech about public issues "trenches upon an area in which the importance of First Amendment protections is at its zenith." *Meyer*, 486 U.S. at 425 (quotation marks omitted). This

speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation marks omitted).

Under these principles, speech about the citizens' initiative was entitled to the highest degree of First Amendment protection. When Mayor Sanders announced his views on pension reform, the City's pension fund had an unfunded liability of about $2 billion, and the City was spending 20% of its annual budget on pensions. R. Vol. XI, at 3049–50. Those are undoubtedly issues of grave public concern. In addition, the citizens' initiative addressed them by proposing a change in "the manner in which government is operated," which is also a core public concern. *Mills*, 384 U.S. at 218–19. Speech about these issues "occupies the highest rung of First Amendment values." *Connick*, 461 U.S. at 145.

B. The First Amendment Fully Protects Speech By Elected Officials.

The Mayor's speech is entitled to heightened First Amendment protection not only because of its content, but also because of the Mayor's role as an elected official—indeed, as the City's highest elected official. At least twice, the U.S. Supreme Court has held that elected officials must receive "the widest latitude to express their

views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966).

In *Wood v. Georgia*, an elected sheriff had been held in contempt "for expressing his personal ideas on a matter that was presently before the grand jury." 370 U.S. 375, 376 (1962). The State of Georgia argued that, because the sheriff "owe[d] a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." *Id.* at 393. The Supreme Court disagreed. As for "the fact that petitioner was a sheriff," the Court "d[id] not believe this fact provide[d] any basis for curtailing his right of free speech." *Id.* at 394. The Court explained that the sheriff "was an elected official and had the right to enter the field of political controversy." *Id.* Moreover, "[t]he role that elected officials play in our society makes it *all the more imperative* that they be allowed freely to express themselves on matters of current public importance." *Id.* at 395 (emphasis added). Far from vitiating the First Amendment rights at issue, the sheriff's status as an elected official only reinforced them.[1]

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[1] The Board argues that *Wood* is irrelevant because the speech at issue there "was made in the sheriff's individual capacity." PERB

In *Bond v. Floyd*, the Georgia House of Representatives refused to seat an elected individual who had publicly "criticiz[ed] the policy of the Federal Government in Vietnam and the operation of the Selective Service laws." 385 U.S. at 118. In defense of that refusal, Georgia argued that "the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government." *Id.* at 136. Once again, the Supreme Court disagreed. It explained that "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." *Id.* Thus, it concluded that "[t]he manifest function of the First Amendment in a representative

(continued...)

Reply Br. 39. But the Supreme Court put little weight—if any—on that point. To be sure, the Supreme Court noted that "there was no finding by the trial court that the petitioner issued the statements in his capacity as a sheriff" and that the Georgia Court of Appeals "d[id] not articulate any specific reliance on this fact." *Wood*, 370 U.S. 393–94. But the Court then "assum[ed] that the Court of Appeals *did* consider to be significant the fact that petitioner was a sheriff," and expressly held that this fact *did not* provide "any basis for curtailing his right of free speech." *Id.* at 394. Thus, it did not matter whether the sheriff spoke as an elected official or as a private citizen—the First Amendment applied either way.

government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135–36.[2]

Together, *Wood* and *Bond* make clear that the First Amendment prohibits the government from silencing elected officials on matters of public concern.

There are many sound reasons for this rule. For one thing, were it otherwise, "debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990). Constituents elect representatives not only for their individual votes, but also for their ability to persuade others—to use the bully pulpit of their office in order to rally public support for important public undertakings. Elected officials are therefore "expected as a part of the democratic process to represent

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[2] The Board argues that *Bond* applies "only to 'legislators' not generally to 'elected officials.'" PERB Reply Br. 40. But the Board has not cited a single case suggesting that the First Amendment singles out legislators for such special treatment. And courts have repeatedly extended the First Amendment's protection to other elected officials. *See, e.g.*, *Wood*, 370 U.S. at 394–95 (holding that the First Amendment applies to an elected sheriff); *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007) (holding that the First Amendment applies to an elected judge); *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *18 (W.D. Tex. Aug. 30, 2017) (holding that the First Amendment applies to an elected sheriff).

and to espouse the views of a majority of their constituents." *Id.* at 12. If the First Amendment did not protect such speech, citizens would lose the right to "be represented in governmental debates by the person they have elected to represent them," *Bond*, 385 U.S. at 136–37. "With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process." *Keller*, 496 U.S. at 12.

Perversely, an elected-officials exception to the First Amendment would also silence people who often have the greatest insight into the public issue under consideration. As the U.S. Supreme Court has explained, government employees "are often in the best position to know what ails the agencies for which they work," and thus "public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). The same goes for elected officials: their job is to study and address public problems, and in doing so they may acquire unique or at least important insights. For example, the mayor of a city, as its chief executive officer, may have particularly important insights into the city's budgeting issues and long-term financial sustainability. Thus,

"[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the [elected official's] own right to disseminate it." *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004) (per curiam).

Because the First Amendment fully protects speech by elected officials, the capacity in which Mayor Sanders shared his views on pension reform simply does not matter. If he was speaking as a citizen, the applicability of the First Amendment would be beyond question. And if he was speaking as the Mayor, it would be "all the more imperative that [he] be allowed freely to express [himself] on matters of current public importance." *Wood*, 370 U.S. at 375.

C. *Garcetti* Does Not Deprive Elected Officials Of Their First Amendment Rights.

The Board responds by arguing that "[t]he First Amendment does not protect activities undertaken in the course of a government employee's official duties." PERB Reply Br. 38 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). The Board therefore concludes that the First Amendment does not protect the Mayor's speech about the citizens' initiative. But *Garcetti* does not stretch that far.

In *Garcetti*, a non-elected deputy district attorney wrote a memo to his superiors about possible government misconduct. 547

U.S. at 414. The superiors then took a number of adverse employment actions against him, allegedly in retaliation for the views expressed in the memo. *Id.* at 415. The attorney argued that this violated the First Amendment, but the Supreme Court disagreed. The Court acknowledged that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* at 417. The Court held, however, that public employees did not have First Amendment protection for speech made as part of their official duties: "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

Contrary to the Board's argument, *Garcetti* is inapplicable for two reasons: first, because Mayor Sanders was an elected official, rather than an ordinary public employee; and second, because the Board, in restricting the Mayor's speech, was not acting as his employer. For these reasons, *Garcetti* does not justify eliminating or even diminishing the First Amendment rights of Mayor Sanders.

1. *Garcetti* applies to public employees, not elected officials.

The Board errs in extending *Garcetti* from non-elected public employees such as a deputy district attorney to elected officials such as a mayor. That extension is squarely foreclosed by *Wood* and *Bond*. As explained above, *Garcetti* held that "public employees" receive no First Amendment protection for statements made "pursuant to their official duties." 547 U.S. at 421. Yet in *Wood*, the Supreme Court held that "an elected official" has "the right to enter the field of political controversy, particularly where his political life was at stake." 370 U.S. at 394–95. And in *Bond*, the Court further held that elected officials "have an obligation to take positions on controversial political questions so that their constituents can be fully informed," and that the "manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." 385 U.S. at 135–36.

Moreover, extending *Garcetti* to elected officials would make little sense, as "there is a meaningful distinction between the First Amendment's protection of public employees' speech and other speech, including that of elected government officials." *Rangra v.*

Brown, 566 F.3d 515, 523–24 (5th Cir.), *vacated on other grounds*, 584 F.3d 206 (5th Cir. 2009). Because of that distinction, "[m]any of the reasons for restrictions on employee speech appear to apply with much less force in the context of elected officials." *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 178 (3d Cir. 2015).

For example, *Garcetti* held that restriction of a public employee's job-related speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." 547 U.S. at 421–22. But an elected official's job-related speech is "neither 'controlled' nor 'created' in the same way that an employer controls the speech of a typical public employee." *Werkheiser*, 780 F.3d at 178. On the contrary, "debate and diversity of opinion among elected officials are often touted as positives in the public sphere." *Id.* at 178.

Likewise, *Garcetti* gave government employers broad latitude to restrict the job-related speech of employees based on the need of any employer for "sufficient discretion to manage [its] operations," 547 U.S. at 422, and to do so with "efficiency," *Waters*, 511 U.S. at 674–75. But the government neither hires nor manages elected officials; rather, the people do. Thus, when the "'employee' is an

elected official, ... the 'employer' is the public itself." *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). And the people elect officials such as a mayor to *set* government policy, not merely to carry it out. Thus, when elected officials are discussing what goals the government should pursue, or how it should pursue them, it makes no sense to justify speech restrictions in the name of workplace efficiency.

On the other side of the balance, *Garcetti* reasoned that speech by public employees regarding their official duties is more likely to implicate matters of "private" concern to the employee or his office, rather than "public" concern to the citizenry at large. *See* 547 U.S. at 422–23; *see also Connick*, 461 U.S. at 148 (speech at issue "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre"). The same cannot remotely be said for speech of elected officials on pending legislative initiatives—particularly the speech of a mayor on a matter as important as pension reform.

Along the same lines, *Garcetti* stressed that, "[w]hen a public employee speaks pursuant to employment responsibilities, ... there is no relevant analogue to speech by citizens who are not government

employees." 547 U.S. at 424. But there is an obvious "relevant analogue" here—*all* residents of San Diego could freely advocate for or against the citizens' initiative on pension reform, *except* for the Mayor. None of this makes sense, because the Mayor cannot be analogized to an employee like a deputy district attorney hired to do a specific job and subject to the direction of office supervisors.

In any event, even if there were some tension between *Garcetti* on the one hand and *Wood* and *Bond* on the other—which there is not—*Wood* and *Bond* remain good law and cannot be disregarded. *Garcetti* by its terms involved unelected employees reporting up a chain-of-command within a government office, whereas *Wood* and *Bond* involved elected officials. And *Garcetti* did not even mention *Wood* or *Bond*, much less overrule those cases. Accordingly, *Wood* and *Bond* remain controlling as to elected officials. As the Supreme Court has instructed time and again, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237

(1997) (first alteration in original); *Rodriguez de Quilas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

For all of these reasons, the overwhelming majority of courts to address the question have held that elected officials are entitled to full First Amendment protection. For example, the Second Circuit has held that a State cannot "oust an elected representative of the people on the bald ground that she voices unsympathetic political views—that is, that she engages in an activity that is at the core of what is protected by the First Amendment." *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005). "Such an action by a state official," the court concluded, "would offend the basic purposes of the Free Speech clause—the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people's views to those charged with decision making." *Id.* at 97–98 (citing *Bond*, 385 U.S. at 135–36).

Likewise, the Fifth Circuit has held that, when considering restrictions on elected officials' speech, the governing doctrine is not "the *Pickering-Garcetti* line of cases," but rather "strict scrutiny of the government's regulation of the elected official's speech to his constituency, requiring such regulations to be narrowly tailored to

address a compelling government interest." *Jenevein*, 493 F.3d at 558; *see also Rangra*, 566 F.3d at 518 ("The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general. Furthermore, when a state seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny[.]").

The Third Circuit has also strongly suggested that *Garcetti* does not apply to elected officials. In *Werkheiser*, that court held that the controlling law was not clearly established for purposes of qualified immunity, but nonetheless stressed that *Garcetti*'s rationales "appear to apply with much less force in the context of elected officials" and that "Supreme Court precedent prior to *Garcetti* suggests that [elected officials'] speech may be entitled to some degree of First Amendment protection." 780 F.3d at 178–79.

In addition, many federal district courts have rejected the argument that the Board makes here. *See, e.g.*, *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *18 (W.D. Tex. Aug. 30, 2017) ("The State has also suggested that the First Amendment should not apply to government officials acting in their official capacity. This argument is antithetical to the law.");

Nordstrom v. Town of Stettin, No. 16-CV-616-JDP, 2017 WL 2116718, at *3 (W.D. Wis. May 15, 2017) ("Neither the Supreme Court nor the Seventh Circuit has directly addressed whether *Garcetti* applies to elected officials' political speech, but most of the courts that have addressed the question have held that Garcetti does not apply. This court will follow the majority." (citation and footnote omitted)); *Werkheiser v. Pocono Twp.*, 210 F. Supp. 3d 633, 639 (M.D. Pa. 2016), *aff'd sub nom. Werkheiser v. Pocono Twp. Bd. of Supervisors*, No. 16-3975, 2017 WL 3429037 (3d Cir. Aug. 10, 2017) ("*Garcetti* did not address the speech rights of elected officials, nor did it expand the speech limitations on public employees to include elected officials."); *Hoffman v. Dewitt Cty.*, No. 15-3026, 2016 WL 1273163, at *10–11 (C.D. Ill. Mar. 31, 2016) (rejecting the argument that an elected member of a County Board was a "public employee and ... falls under the holding of *Garcetti*"); *Holloway v. Clackamas River Water*, No. 3:13-CV-01787-AC, 2014 WL 6998084, at *3 (D. Or. Dec. 9, 2014) ("Plaintiff in this case is a publicly elected official, not a public employee. As such, *Garcetti*'s analysis ... does not apply."); *Willson v. Yerke*, No. 3:10-CV-1376, 2013 WL 6835405, at *9 (M.D. Pa. Dec. 23, 2013), *aff'd*, 604 F. App'x 149 (3d Cir. 2015) ("*Garcetti*

addressed the free speech rights afforded to public employees, not publicly elected officials."); *Carson v. Vernon Twp.*, No. 09-6126 (DRD), 2010 WL 2985849, at *14 (D.N.J. July 21, 2010) ("Political expression such as Plaintiff's positions and votes on Township matters is unquestionably protected under the First Amendment."); *Pistoresi v. Madera Irr. Dist.*, No. CV-F-08-843-LJO-DLB, 2009 WL 256755, at *8 n.1 (E.D. Cal. Feb. 3, 2009) ("Here, Mr. Pistoresi is an elected official, rather than a public employee .... Defendants cite no authority to support the position the First Amendment does not apply to Mr. Pistoresi as an elected official."); *Conservation Comm'n of Town of Westport v. Beaulieu*, No. 07-11087-RGS, 2008 WL 4372761, at *4 (D. Mass. Sept. 18, 2008) (rejecting the defendants' argument that, "for purposes of *Garcetti* there is no distinction between a public official and a public employee.").

To be sure, a few courts have suggested that *Garcetti* applies to elected officials. But these decisions are almost entirely unreasoned—none analyzes *Wood* or *Bond*, and none explains how *Garcetti*'s rationales apply in this context. For example, in *Parks v. City of Horseshoe Bend*, the Eighth Circuit suggested in a footnote that an elected official's speech "would not be protected under the First

Amendment if it was made in the course of her official duties." 480 F.3d 837, 840 n.4 (8th Cir. 2007). But the court devoted only a single sentence to the point, and the court had already rejected the claim at issue on the ground that the defendant was not the cause of the plaintiff's alleged injury. *Id.* Likewise, in *Miller v. Davis*, the Sixth Circuit suggested in an unpublished order that *Garcetti* might apply to an elected county clerk. No. 15-5880, 2015 WL 10692640 (6th Cir., Aug. 26, 2015). But the court did not include even a single sentence of analysis about *Garcetti*, *Wood*, or *Bond*. *Id.* And in any event, the appeal was from a denial of a preliminary injunction, so the court held only that the clerk was unlikely to prevail on appeal. *Id.* Thus, these decisions provide the Board with no support.[3]

It is true that Mayor Sanders was an employee of the City of San Diego. But it is equally true that, "as an elected holder of [City] office, his relationship with his employer differs from that of an ordinary state employee." *Jenevein*, 493 F.3d at 557. Because *Garcetti*

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[3] A handful of federal district courts have likewise extended *Garcetti* to elected officials. *See, e.g.*, *Dyer v. Maryland State Bd. of Educ.*, 187 F. Supp. 3d 599, 621 (D. Md. 2016), *aff'd on other grounds*, 685 F. App'x 261 (4th Cir. 2017); *Shields v. Charter Twp. of Comstock*, 617 F. Supp. 2d 606, 615 (W.D. Mich. 2009). But their analysis is similarly scant.

does not apply to elected officials, it does not deprive Mayor Sanders of his First Amendment rights.

2. *Garcetti* applies only when the government acts in its role as employer.

Garcetti does not apply here for a second reason: when the Board effectively invalidated the citizens' initiative, the Board was not acting as the Mayor's employer.

In *Garcetti*, the Court reasoned that, when citizens enter government service, they "by necessity must accept certain limitations on [their] freedom" with regard to what they may say and do within the scope of their employment. 547 U.S. at 418. The Court thus concluded that public employees enjoy no First Amendment protection for speech "pursuant to their official duties." *Id.* at 421. At the same time, however, the Court also stressed that the First Amendment "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419. And it confirmed that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.* at 413.

Under this reasoning, "the government as employer indeed has far broader powers than does the government as sovereign." *Id.* at 418 (quoting *Waters*, 511 U.S. at 671)). Thus, lesser protections may be justified when the government restricts speech "in its role as employer." *Id.* In contrast, when the government restricts speech in its role "as sovereign," then the normal First Amendment standards apply. *See id.*

The government acts as an employer when disciplining employees. *Garcetti* repeatedly stressed that "the First Amendment does not prohibit *managerial discipline* based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424 (emphasis added); *see also id.* at 413 (question presented is "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties."); *id.* at 421 ("When public employees make statements pursuant to their official duties, ... the Constitution does not insulate their communications from employer discipline."); *id.* at 426 ("We reject ... the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.").

In addition, the Court's cases involving government employers have "consistently involved government's regulation or punishment of speech within the context of that employment relationship, such as through termination or other adverse personnel actions, as opposed to the imposition of criminal penalties or other remedies that government administers in its sovereign capacity." *Ex parte Perry*, 471 S.W.3d 63, 108 (Tex. App. 2015), *aff'd in relevant part*, 483 S.W.3d 884 (Tex. Crim. App. 2016) (emphasis omitted). For example, *Pickering v. Board of Education* involved the dismissal of a public employee for writing and publishing a letter. 391 U.S. 563, 566 (1968). Likewise, *Connick* involved the dismissal of a public employee for refusing to accept a transfer. 461 U.S. at 141. And *Garcetti* itself involved several adverse employment actions—a public employee's reassignment to a different position, a transfer to a different location, and denial of a promotion. 547 U.S. at 415.

Here, the Board was not acting as an employer but rather as a sovereign. To begin with, the Board did not itself employ the Mayor of San Diego. It did not seek to discipline any of its own employees; for example, it did not fire, demote, or deny a promotion to anyone. Instead, the Board effectively invalidated a citizens' initiative that

amended the San Diego City Charter, acting as the California agency with sovereign authority to administer state labor law as applied to public employees. Because the Board acted as a sovereign, *Garcetti* does not apply.

II. THE BOARD'S DECISION VIOLATES THE FIRST AMENDMENT BY IMPOSING A CONTENT- AND VIEWPOINT-BASED PRIOR RESTRAINT ON THE MAYOR'S SPEECH.

A. The Actions That the Mayor Took in Support of the Citizens' Initiative Qualify as Speech Under the First Amendment.

In late 2011 and early 2012, Mayor Sanders supported pension reform in several different ways. For example, the Mayor:

- held press conferences to describe his position, R. Vol. XI, at 3059, 3062, 3066, 3068;
- did interviews regarding pension reform on local television and radio shows, *id.* at 3061–62, 3066;
- shared his views in the State of the City speech, *id.* at 3061–62;
- held meetings to discuss the citizens' initiative with civic and business leaders, *id.* at 3060–61, 3066;
- had his staff issue press releases and send emails about his position, *id.* at 3059–61;
- started a committee to raise money for pension reform, *id.* at 3061, 3069–70;
- had his staff provide comments on Boling, Zane, and Williams's proposal, *id.* at 3067; and

- urged people to sign Boling, Zane, and Williams's petition, *id.* at 3068–69.

The Unions argued below that these actions are unprotected "conduct" rather than protected "speech." Unions' COA Br. 64. But the Supreme Court repeatedly has held that such actions qualify as speech under the First Amendment. For example, the Court has held that "sending e-mails ... clearly involve[s] speech." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). Likewise, the Court has held that urging people to sign a petition is "core political speech." *Meyer*, 486 U.S. at 421–22. And the Court has held that the First Amendment protects against "limitations on contributions to committees formed to favor or oppose ballot measures." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 297 (1981) (emphasis omitted). The Mayor's actions clearly qualify as speech.

The Unions also argue that "[t]here is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is the first step in an act of law-making." Unions' Br. 48 n.20. As the City of San Diego points out, Mayor Sanders did not take any of the official steps necessary to place the initiative on the ballot. San Diego Br. 44 n.14. Rather, Mayor Sanders *said* that he wanted to

pursue a citizens' initiative and *said* that voters should support the initiative of Boling, Zane, and Williams. The Mayor's spoken words were core protected speech.

This point is confirmed by *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011). There, the Supreme Court explained that "[a] legislator *voting* on a bill is not fairly analogized to one simply *discussing* that bill or expressing an opinion for or against it. The former is performing a governmental act as a representative of his constituents; only the latter is exercising personal First Amendment rights." *Id.* at 128 n.5 (emphases added and citation omitted). The Court therefore held that a legislator's *vote* is not speech, but a legislator's *advocacy* for or against a legislative proposal is speech. *See id.* So too here: Mayor Sanders's *advocacy* for the citizens' initiative is speech.

Finally, the Unions argued below that treating the Mayor's speech as speech would undermine *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal.3d 591 (1984). Unions' COA Br. 69–70. In that case, the California Supreme Court held that a city council must meet and confer with unions before exercising "its constitutional power to propose charter amendments" regarding the

terms and conditions of public employment. 36 Cal.3d at 1146 (citing Cal. Const. art. XI, § 3(b)); *see also id.* at 1152 ("We conclude that the city council was required to meet and confer with the relators before it proposed charter amendments which affect matters within their scope of representation."). If a city council has to meet and confer before placing a charter amendment on the ballot, the Unions contended, then Mayor Sanders must meet and confer before speaking in favor of one.

Again, however, the Unions blur the line between conduct and speech. *Seal Beach* addressed only whether a city council could exercise "its constitutional power to propose charter amendments," not whether individual members of the city's government could speak in favor of such amendments. As in *Carrigan*, a city council *voting* to place a charter amendment on the ballot "is not fairly analogized to one simply *discussing* that [amendment] or expressing an opinion for or against it." 564 U.S. at 128 n.5 (emphasis added). The former is unprotected conduct, whereas the latter is protected speech. Thus, *Seal Beach* does not apply here.

For its part, the Board contends that the Mayor's actions were not "speech" for First Amendment purposes under the reasoning of

NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941). PERB Br. at 36. In *Virginia Electric*, an employer "posted a bulletin throughout its operations appealing to the employees to bargain with the Company directly without the intervention of an 'outside' union." 314 U.S. at 471–72 (footnote omitted). The employer then held a series of meetings at which "high Company officials ... read identical speeches" urging the employees to bargain with the company directly. *Id.* at 473. The NLRB later found that the bulletin and the speeches "interfered with, restrained and coerced the Company's employees in the exercise of their rights guaranteed by the [National Labor Relations Act]." *Id.* at 476–77. The Supreme Court upheld that finding on the ground that "conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion." *Id.* at 477. The Court stressed, however, that neither the NLRA nor the NLRB's order "enjoins the employer from expressing its view on labor policies or problems," and that "[t]he employer in this case is as free now as ever to take any side it may choose on this controversial issue." *Id.*

The Board's own authority thus cuts against its position. Just as there would be no legitimate basis for prohibiting a private

corporation from urging Congress to modify the NLRA so as to eliminate the duty of private employers to bargain collectively with employees, *see id.*, so too the Mayor cannot be prevented from, or penalized for, taking a position on a pending citizens' initiative regarding a proposed amendment to the City charter.

B. The Board's Interpretation of Gov. Code § 3505 Imposed a Restriction on the Mayor's Speech That Is Content-Based, Viewpoint-Based, and a Prior Restraint.[4]

Under state law, the City has a duty to "meet and confer" with unions regarding "wages, hours, and other terms and conditions of employment ... prior to arriving at a determination of policy or course of action." Cal. Gov't Code § 3505. And under the City Charter, the

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[4] The Board argued below that the Foundation's discussion of these issues "represents an inappropriate attempt to raise new issues to help the City's burden of demonstrating error by the Board." PERB Answer Br. 34. Not so. Throughout this litigation, the City has consistently argued that the Board restricted the Mayor's speech in violation of the First Amendment. *See, e.g.*, City of San Diego's COA Br. 22–27; City of San Diego's Br. 41–46. The Foundation's brief simply elaborates on why that speech restriction violates the First Amendment. In any event, this Court "has discretion to consider new issues raised by an amicus" if "the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 503 (2003) (quotation marks omitted). Whether the Mayor has a First Amendment right to publicly support a citizens' initiative on pension reform satisfies that standard.

Mayor is the City's designated representative for all labor negotiations. R. Vol. XI, at 3048. Thus, the Mayor must meet and confer with the unions "prior to arriving at a determination of policy or course of action" on all labor-related matters.

In the decision below, the Board concluded that the Mayor made a policy decision when he publicly supported the citizens' initiative, and that he did so as an agent of the City. As the Administrative Law Judge put it:

> The Mayor under the color of his elected office ... undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it, all while denying the unions an opportunity to meet and confer over his policy determination .... By this conduct the Mayor took concrete actions toward implementation of the reform initiative, the consequence of which was a unilateral change in terms and conditions of employment[.]

R. Vol. XI, at 3096. Thus, under the Board's interpretation of section 3505, the Mayor was barred from publicly sharing his views on pension reform until he went through the meet-and-confer process.

That is a substantial restriction on the Mayor's right to speak. Once a union submits a meeting request, the Mayor has an obligation "personally to meet and confer" with that union. Cal. Gov't Code § 3505. The Mayor also has an obligation to continue meeting "for a

reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement." *Id.* If the parties reach an impasse, they then must exhaust the City Council's impasse procedures. *Id.* To do so, they must first attend an "impasse meeting," San Diego Council Policy 300-6(VII)(A), and then an "impasse hearing" before the City Council, *id.* § 300-6(VII)(B). At the hearing, the Mayor must present his "last, best, and final offer" to the Council, which can then vote on whether to implement it. Cal. Gov't Code § 3505.4 (2011). If the Council refuses to implement the offer, the Mayor does not have authority to do so on his own. *See id.*

Under this process, the Mayor is required to devote significant time and energy to negotiations *before* he can publicly support a citizens' initiative. And if the Mayor fails to follow through on these procedures, the Board will effectively invalidate the initiative if it passes. That is a substantial restriction on the Mayor's right to speak.

In addition, this restriction is both content-based and viewpoint-based, which makes the First Amendment violation "all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A law is content-based if it "applies to particular

speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). Content-based laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. A law is viewpoint-based if it targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* Viewpoint-based restrictions are almost always unconstitutional, because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Here, the Board's restriction on the Mayor's speech is content-based. Section 3505 requires the City to meet and confer in good faith "regarding wages, hours, and other terms and conditions of employment." In the Board's view, under these circumstances, this law requires the Mayor to meet and confer with the unions before publicly supporting a citizens' initiative regarding pension reform. But the Board admits that this law would *not* require the Mayor to

meet and confer with the unions before publicly supporting a citizens' initiative regarding a non-labor subject, such as tax reform. PERB COA Br. 70 n. 15. In other words, the restriction applies to speech about pension reform and other labor-related matters, but not to speech about other topics. That makes the restriction content-based and thus "presumptively unconstitutional." *Reed*, 135 S. Ct. 2226.

The meet-and-confer requirement is also viewpoint-based. It prevents Mayor Sanders from publicly *supporting* pension reform, as when he "undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it." R. Vol. XI, at 3096. But the Mayor could have *opposed* pension reform without meeting with anyone. Because the restraint applies to speech taking one view but not another, it is viewpoint-based. Accordingly, the First Amendment "forbids" its enforcement. *Taxpayers for Vincent*, 466 U.S. at 804.

Not only is the Board's interpretation of section 3505 content- and viewpoint-based, it also functions as a prior restraint. A restriction is a prior restraint if it has four elements: "(1) the speaker must apply to the decision maker before engaging in the proposed

communication; (2) the decision maker is empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the communication; (3) approval of the application requires the decision maker's affirmative action; and (4) approval is not a matter of routine, but involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the decision maker." *Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046, 1051 (7th Cir. 2008) (citing *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975)). Such a restriction is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Here, the Board's interpretation of section 3505 imposes a prior restraint on the Mayor's speech. As explained above, the Mayor cannot publicly support a citizens' initiative on pension reform without first going through the meet-and-confer process—a process that requires negotiations with the unions and exhausting the City Council's impasse procedures. Cal. Gov't Code § 3505. At the conclusion of those procedures, the Mayor must present his "last, best, and final offer" to the Council, which then votes on whether to implement it. Cal. Gov't Code § 3505.4 (2011). And if the Council

refuses to implement that offer, the Mayor does not have the authority to do so on his own. *See id.*

In other words, if the Mayor wanted to publicly support a citizens' initiative on pension reform, he would need to meet and confer with the unions, exhaust the City's impasse procedures, present his "last, best, and final offer" (i.e., supporting the initiative) to the City Council, and request the Council's approval. The Council would then have the discretion whether to grant or deny the Mayor's request. And if the Council denied the Mayor's request, the Mayor would not be allowed to implement the offer (i.e., support the initiative) on his own authority. The Board's interpretation of section 3505 thus prohibits the Mayor from publicly supporting a citizens' initiative on pension reform unless and until the City Council permits him to do so. Accordingly, the Board's interpretation functions as a prior restraint.

The Board responds that its decision "regulates the City's economic conduct as an employer, not the Mayor's—or anyone else's—private political speech." PERB Reply Br. 35. Its brief seeks to focus attention on the City itself, rather than the Mayor: "Because *the City* in this case refused to meet and confer, the Board found that the City violated the MMBA, ordered the City to make employees

whole, and directed the City to refrain from refusing to negotiate before adopting future measures affecting employees' terms and conditions of employment." *Id.* at 36 (emphasis in original). Nonetheless, throughout this case, the Board's theory has been that the Mayor was an *agent* of the City, and therefore that the Mayor's speech *is* the City's speech. *See, e.g., id.* 64–73; R. Vol. XI, at 2987–3005; *id.* at 3081–88. Having strenuously defended the proposition that the Mayor's speech and the City's speech are one and the same, the Board cannot fairly contend that its decision regulates only the City.

Moreover, the Board ignores the practical consequences of its decision. That decision forces *the Mayor* to meet and confer with the unions and ultimately to obtain the City Council's approval before *he* can speak in favor of pension reform. And that decision effectively invalidated the citizens' initiative because *the Mayor* publicly supported it. In substance and in form, the Board's decision restrains the Mayor's speech.

CONCLUSION

No government interest could possibly justify what is at issue here: a viewpoint-based prior restraint on the speech of a high elected

official regarding a crucial public issue of the day. Because the Board's decision violates the First Amendment, the Court of Appeal's annulment of that decision should be affirmed.

Dated: December 1, 2017. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 9,117 words, excluding the cover, the tables, the signature block, and the certificates. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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CERTIFICATE OF SERVICE

I, Rebecca Kjos, declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 4655 Executive Drive, Suite 1500, San Diego, CA 92121-3134. On December 1, 2017, I served a copy of the amicus letter of the Application for Permission to File Amicus Brief and Amicus Brief of the San Diego Taxpayers Educational Foundation in Support of the City of San Diego by placing the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below:

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

Executed on December 1, 2017, at San Diego, California.

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