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Case No. S242034

**IN THE SUPREME COURT FOR
THE STATE OF CALIFORNIA**

Deputy

**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

**REPLY BY CATHERINE A. BOLING, T.J. ZANE AND STEPHEN
B. WILLIAMS IN SUPPORT OF PETITION FOR REVIEW**

Of the Order Rejecting Petitioners' Motion for Attorneys' Fees of the Court
of Appeal, Fourth Appellate District, Division One, Case No. D069626
Consolidated with Case No. D069630

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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

I. PROPONENTS HAVE PROPERLY STATED THE GROUNDS FOR REVIEW.

Proponents properly brought their Petition for Review pursuant to California Rules of Court, Rule 8.500(b)(2), on the grounds that the Court of Appeal improperly rejected Proponents’ timely submitted Motion for Attorneys’ Fees on the basis of lack of jurisdiction. Proponents further brought their Petition pursuant to Rule 8.500(b)(4), for the purposes of transferring and/or remanding the matter to the Appellate Court for hearing and briefing. (Cal. Rules of Court, Rule 8.500(b)(2) and (4); 8.528(a), (c), (d).)

While PERB argues that the basis for review set forth in Rule 8.500(b)(2) is obsolete, the error is the basis on which the Court of Appeal

itself recommended that Proponents seek review. (See, Proponents' Petition for Review and Declaration of Yana Ridge in support of Application for Oversized Petition, filed May 19, 2017.)

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

Proponents also properly seek review, remand or transfer, of this matter back to the Court of Appeal to hear and decide the Motion for Attorneys' fees. (Cal. Rules of Court Rules 8.500(b)(4) and 8.528(c) and (d).) Rule 8.500(b)(4) "recognizes the Supreme Court's long-standing practice of ordering review not to decide the case itself but for the purpose of transferring the case to the Court of Appeal with instructions to conduct certain further proceedings." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal § 918.) In addition to such remand or transfer being common, it eliminates the basis for PERB's objections, as it provides more than ample time for PERB and the Charging Parties to compose and file their oppositions to Proponents' Attorneys' Fees motion.

PERB's citation of *People v. Davis* (1905) 147 Cal. 346, as a basis for denying review is inapposite. As a preliminary matter, by asking for remand or transfer, Proponents are not asking this Court to delve into the underlying

facts of the case. (*People v. Davis* (1905) 147 Cal. 346, 349.) Rather, Proponents seek to have this Court correct an admitted clerical error by the Court of Appeal.

Nor is this an issue that is relevant only to the parties in this case. (*People v. Davis*, at 347.) Proponents seek attorneys' fees for opposing a series of related actions in which PERB and the Charging Parties sought to keep Proponents' Charter Proposition B off the June 2012 ballot and ultimately invalidate its adoption in contravention of Proponents' reserved rights guaranteed by the California Constitution. At each stage of the multiple proceedings culminating in this Court's judgment vindicating the right of the citizens to propose legislation, PERB and the Charging Parties have failed and refused to recognize the constitutional, statutory and Charter rights of Proponents and the people. Proponents have conferred a significant benefit, both pecuniary and nonpecuniary, on the citizens of the City of San Diego and the State of California by defending the public's right to vote and to control public employee compensation. The necessity and financial burden of private enforcement placed on Proponents, as the representatives of the electorate, are such as to make the award appropriate. The interests of justice require that the fees be borne by the governmental entity, PERB, and those Charging Parties who made false claims of a "sham" initiative while providing no evidence of a sham or any legal connection between Proponents and the City Council of the City of San Diego.

The Court of Appeal's rejection of Petitioners' Motion without consideration, for the sole reason of having no jurisdiction, deprives Petitioners of the only forum they had available to bring the Motion, forcing them to bear the disproportionate financial burden of protecting the rights of the voters of San Diego in a case ridden with unreasonable and harassing litigation tactics by PERB and the unions. Petitioners' Motion for Attorneys'

Fees in an election case is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time.

II. PROPONENTS' MOTION WAS TIMELY AND PROPER.

A. No Rule Governs the Deadline to File the Motion.

PERB's argument that the Motion should have been filed on April 26, 2017 has no basis in law or fact. (PERB Answer p. 17-21.) Unlike the express 15-day filing deadline for a Petition for Rehearing, set forth in California Rules of Court, Rule 8.268(b), there is no rule setting a deadline to file a Motion for Attorneys' Fees, or any other motion. (see, Cal. Rules of Court, Rule 8.54)

In the absence of applicable rules, Proponents' Counsel conferred with the Court before filing the Motion. The Court did not indicate that the Motion must be filed by April 26, 2017. Likewise, the Court of Appeal's May 12, 2017 letter stated that the Court's only reason for rejecting the Motion filing was that the Court "no longer has jurisdiction in this matter." (See, Exhibit A to Proponents' Petition for Review.)

California Rule of Court 8.77(b) provides that if a filing is rejected, the Court must "promptly send notice of the rejection of the document for filing to the electronic filer." The Court of Appeal's "notice **must state the reasons that the document was rejected for filing.**" (Cal. Rules of Court, Rule 8.77(b); emphasis added.) The only reason for rejection set forth in the May 12, 2017 letter was lack of jurisdiction. (See, Exhibit A to Petition.) Had there been any other basis for rejecting the Motion, including timeliness, the Court of Appeal would have so indicated in accordance with Rule 8.77(b).

Furthermore, PERB's reasoning is flawed. If Proponents had filed the Attorneys' Fee Motion on April 26, 2017, the application of Rule 8.54(a)(3) would have required PERB and the Charging Parties to file their oppositions

on May 11, 2017, the date on which the Court of Appeal lost jurisdiction. Thus, even if Proponents had been “timely”, according to PERB, under Rule 8.54(b)(1) the Court of Appeal would have needed to extend the finality deadline to consider, and rule on the Motion. The Attorneys’ Fee Motion, as evidenced by Exhibits C through F to Proponents’ Petition for Review, is a detailed and fact intensive motion that took time to prepare, and that the Court of Appeal would need time to decide.

B. The Motion Should Have Stayed the Finality of Court of Appeal’s *Opinion*.

As indicated in PERB’s Answer, Court of Appeal has the ability to modify its decision until it loses jurisdiction, absent any express extension in the rules. (*Sparrows Real Estate Service, Inc. v. Appellate Dept. of Superior Court of Kern County* (1965) 236 Cal.App.2d 739,743.) California Rule of Court 8.499(c)(5), in turn, expressly provides that an order modifying the Court of Appeal’s opinion or judgment extends the “finality period”, and in effect, Court of Appeal’s jurisdiction. (Cal Rules of Court, Rule 8.499(c)(5).)

There is no dispute that the Court of Appeal had jurisdiction to decide Proponents’ Motion for Attorneys’ Fees at the time the Motion was submitted for filing on May 10, 2017. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 607; addressing an attorney fee award in a matter involving PERB.) If granted, Proponents’ Motion would modify the Court of Appeal’s judgment, to the extent it would award Proponents their attorneys’ fees.

Thus, had the Court of Appeal timely accepted the Motion for filing, under Rule 8.499(c)(5) the Court should have stayed the finality of the case to allow oppositions to be filed, in accordance with Rule 8.54(a)(3) and (b)(1), and to permit the Court of Appeal to rule on whether it would modify

its judgment to issue an attorneys' fees award to Proponents. A stay of the finality deadline would likewise have been required if Proponents filed the Motion sooner, as PERB's argues Proponents were required to do. Any result other than a stay allowing Proponents' Motion to be decided would have unjustly deprived Proponents of the only forum they had available to bring the Motion.

C. Proponents Properly Filed a Motion for Attorneys' Fees, Not a Petition for Rehearing.

In order to impose on Proponents, the 15-day filing deadline applicable to those Petitions under California Rule of Court 8.268, PERB argues that Proponents was required to file a Petition for Rehearing, rather than a Motion for Attorneys' Fees. (PERB Answer p. 21-22.) That argument is incorrect. Proponents do not challenge the Court of Appeal's *Opinion*. Nor do Proponents contend that the Court of Appeal's statement that "[e]ach party shall bear its own costs of this proceeding" was erroneous, deficient or requiring correction. (Slip *Opinion*, p. 65.) Proponents' Motion is in fact consistent with the *Opinion* because attorneys' fees are treated as separate from, and not included in, costs. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923; see also Cal. Rules of Court, Rule 8.278(d)(2).)

Additionally, Proponents do not dispute that the Court of Appeal, and this Court, are the only courts that can hear this Motion. (*Cumero v. Public Employment Relations Bd.*, at 607) Code of Civil Procedure section 1021.5 provides that upon motion a court may award attorneys' fees. The procedural posture of this case is such that there was no trial court proceeding. The Charging Parties initiated an unfair practice charge with PERB after Petitioners, the proponents of Proposition B, submitted Proposition B with the sufficient number of signatures to the City and before the voters of San Diego approved Proposition B on June 5, 2012. PERB held an administrative

hearing, at which Proponents were excluded, and ultimately issued its decision. Proponents, and the City, then petitioned to the Court of Appeal for Writ of Extraordinary Relief from PERB's decision.

Proponents properly filed their Motion for Attorneys' Fees with the Court of Appeal as the prevailing party in this action. The Motion was timely, and would have been considered but for clerical error on the part of the Appellate Court. *Proponents must not be penalized by such error.* Their constitutional rights need to be restored by this Court.

III. THE RELIEF PROPONENTS REQUEST WILL ALLOW PERB THE OPPORTUNITY TO BRIEF ITS OPPOSITION, WHETHER BEFORE THIS COURT, OR THE COURT OF APPEAL.

Proponents have petitioned this Court for review, and have requested remand, or transfer, of this matter back to the Court of Appeal to hear the Motion for Attorneys' Fees. (Cal. Rules of Court Rules 8.500(b)(4) and 8.528(c) and (d).) Either of those dispositions will allow Respondent and Charging Parties to file the Oppositions to which PERB claims they are entitled under Rule 8.54, mooting PERB's objections on that point. In fact, as a result of this Petition, PERB and the Charging Parties will have a far greater amount of time to prepare their oppositions, as they were served with the Motion papers on May 10, 2017.

As stated in Proponents' Petition, this Court's "review" power is broad. It is the power to review in the Court's discretion any decision or order rendered by the Court of Appeal. (See, Cal. Const., art. VI, § 12(b); Cal. Rules of Court, Rule 8.500 [emphasis added].) This Court's power of review extends to any or all issues in the case, whether or not raised in the court below, if this Court deems it appropriate. (*Cedars-Sinai v. Sup. Ct.* (1998) 18 Cal.4th 1, 5-7 n.2.)

This Court should extend its review power to the Court of Appeal's belated rejection of Petitioners' timely Motion for Attorneys' Fees. This Court is the only forum in which Proponents can seek redress.

IV. THE ENTITLEMENT TO PRIVATE ATTORNEY GENERAL ATTORNEYS' FEES IS PROPERLY RAISED IN AN ATTORNEY FEE MOTION.

Proponents timely filed their Motion for Attorneys' Fees, and raised the issue of private attorney general fees. PERB's argument that Proponents should have pled their entitlement to private attorney general fees before the *Opinion* was issued shows a misunderstanding of the law¹. (PERB Answer, pp. 12-20.)

There is no requirement that the intent to seek attorney fees under section 1021.5 must be pleaded in the underlying action. [Citation.] Such fees are not part of the underlying cause of action, but are incidents to the cause and are properly awarded after entry of a ... judgment[.] (Snatchko v. Westfield LLC (2010) 187 Cal.App.4th 469, 497, as modified on denial of reh'g (Sept. 3, 2010); emphasis in document.)

This holding is consistent with the rule that a motion for attorneys' fees, at the trial court level, must be filed after notice of entry of judgment and "within the time for filing a notice of appeal". (Cal. Rules of Court, Rule 3.1702.)

¹ There is a clear record of Proponents' demand for attorneys' fees. Proponents timely raised their request for attorneys' fees, first raising the issue in their Petition for Writ of Extraordinary Relief, filed with the Court of Appeal, in Case No. D069626 on January 26, 2016, by praying for "attorneys' fees incurred in this matter and other proceedings related hereto." All parties were on notice that Proponents would be seeking their attorneys' fees.

There is no reason for litigants to argue their entitlement to private attorney general fees until they know what their efforts have accomplished. To recover attorneys' fees under Code of Civil Procedure section 1021.5, a litigant must show that the lawsuit "has resulted in the enforcement of an important right affecting the public interest" and that "a significant benefit, ... has been conferred on the general public or a large class of persons." (Code Civ. Proc. § 1021.5; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1290-1292.) These questions can only be evaluated after a matter is decided.

V. CONCLUSION

Petitioners respectfully request the Court grant this Petition for Review, to allow Proponents to pursue the attorneys' fees, in the amount \$635,740, plus the cost of bringing this Petition and defending against PERB's and the Charging Parties' Petitions for Review. Proponents' ability to pursue a Motion for Attorneys' Fees in an election case is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time.

Date: June 14, 2017

LOUNSBERY FERGUSON
ALTONA & PEAK

By: 

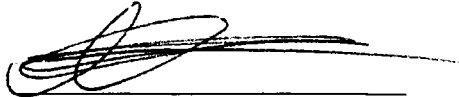
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d), I certify that this Reply in Support of Petition for Review is proportionally spaced, has a typeface of 13 points or more, and contains 2,572 words, excluding the cover, the tables, the signature block and this certificate, which is less than permitted by the Rules of Court. Counsel relied on the word count feature of the word processing program used to prepare this brief.

DATED: June 14, 2017

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Real Parties in Interest

California Fourth District Court of Appeals Case No. D069626

I, Kathleen Day, declare that I am over 18 years of age, employed in the City of Escondido, and am not a party to the instant action. My business address is 960 Canterbury Place, Ste. 300, Escondido, California. On June 15, 2017, I served the **Reply by Catherine A. Boling, T.J. Zane and Stephen B. Williams in Support of Petition for Review;** to the recipients listed below via the following methods:

VIA EMAIL: Pursuant to California Rules of Court, Rule 8.71, I sent the documents via email addressed to the email address listed for each recipient, and in accordance with the Code of Civil Procedure and the California Rules of Court. I am readily familiar with the firm's practice of preparing and serving documents via email, which practice is that when documents are to be served by email, they are 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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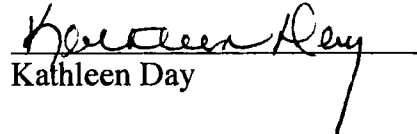
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 15, 2017** at Escondido, California.


Kathleen Day