CASE NO. S203478

IN THE SUPREME COURT
FOR
THE STATE OF CALIFORNIA

IMMEDIATE STAY REQUESTED

In the Matter of

CITY OF SAN DIEGO

Petitioner

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent.

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

REPLY OF CATHERINE A. BOLING, T.J. ZANE and STEPHEN B. WILLIAMS TO RESPONSES TO PETITION FOR REVIEW

Of an Order Summarily Denying a Petition for Writ of Mandate
and Application for Stay
of the
Court of Appeal, Fourth Appellate District, Division One
Case No. D062090

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I.

INTRODUCTION

Citizen Initiative

The five Answers to the Petition for Review all claim that the Public Employee Relations Board ("PERB") has jurisdiction to determine that a publically circulated initiative can be turned into a City Council-sponsored measure based on who supported the measure. Respondents argue that if a citizen-circulated measure receives the support of the Mayor and two of eight City Council members, it is somehow transmuted into a city-sponsored measure.

Since Governor Hiram Johnson championed direct democracy, there has been a bright line between procedural rules for citizen-sponsored and legislatively-sponsored measures. Even if elected officials support a citizen-sponsored measure at any stage of the process, as long as it follows the signature gathering process, it is still a citizen-sponsored measure.

The only relevant facts here are found in Attachment "B" to the Petition for Review: the certification from the San Diego County Registrar of Voters which shows that the *San Diego Comprehensive Pension Reform Initiative* Proposition "B" ("CPRI" or "Proposition "B") qualified for the ballot by receiving 115,991 signatures and was thereafter approved by 67% of the voting electorate. Proposition B was, is, and will always be, a citizens' initiative.

Constitutional Jurisdiction

The enactment of Proposition B was the product of an initiative process guaranteed by the California Constitution. It is a process over which PERB has neither Constitutional nor statutory jurisdiction. PERB cannot change the nature of the citizen initiative process. PERB only has the authority to respond to unfair labor practice claims. Simply stated, a

citizens' initiative is not an unfair labor practice. There is no fact-set that could be produced by PERB hearings that would alter the outcome of the Proposition B election.

PERB Interference

Despite its lack of jurisdiction, PERB persists in a course of interference with the Proposition B election.

From the perspective of these Petitioners, PERB's interference is a profound incursion upon the Proponents rights, with drastic consequences. If PERB hearings are allowed to proceed, Proponents will be called as witnesses in the proceedings. They will be forced to testify about their contacts with elected officials during the drafting, signature gathering, fund raising and campaign phases of the process. Such an intrusion into the election process is unprecedented and unwarranted.

The bias that PERB has demonstrated heightens Proponents' concerns about its ability to act as a hearing body. Before hearings were even set, PERB attempted to seek a stay of implementation of Proposition "B" in the Superior Court. (*PERB v. City of San Diego, et. al.* (filed February 14, 2012) San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL.) (*See also, San Diego Municipal Employees Association v. Superior Court et. al.* (filed June 19, 2012) Fourth District, Division One No. D061724.) [1]

In neither case were Proponents permitted to participate as parties. Requests for intervention were opposed by Respondents who, in their Answers, continue to urge that the Proponents, who wrote, circulated petitions and campaigned for Proposition B, should have no role in defending their measure.

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[1] In the Fourth District Opinion the measure was characterized as "nominally a citizen initiative." (*Id*, at p. 16; *contra*, *Perry v. Brown* (2011) 52 Cal.4th 1116, 1125-1126.)

Immediate Relief Imperative

The imminent administrative hearing process and the potential stay of implementation by the Superior Court make it pointless for Petitioners to seek review of the Fourth District Writ instead of seeking relief through this Petition. First, Proponents were not parties in that case and the Writ case only involved one of the four bargaining groups. Second, the administrative hearings authorized by the ruling would begin before finalization of a decision on rehearing. This Petition is the only possible way to avoid a multiplicity of actions with conflicting results at three different judicial and administrative levels.

The Elections Code[2] process for qualification and placement of citizen-sponsored measures is content neutral. Allowing PERB to hold hearings on Proposition B would mean that measures dealing with "compensation" issues would be treated differently than any other initiative subject matter. Further, the door will be opened for pre-election vetting of countless other topics. The Legislature will have a "green light" to establish any number of bureaucratic roadblocks to citizen-initiatives for the benefit of preferred political constituencies. If it is allowed to ignore the plenary authority given to Charter Cities to control the "compensation" of its employees, the Legislature could put *ad hoc* roadblocks in front of any category of citizen-sponsored measures.

This basic constitutional issue was never raised in other proceedings sought to be stayed since the Proponents have been shut out of timely entry into those proceedings. PERB's actions attack the very reason Governor Johnson championed the direct democratic process early in the 20th Century. The process, for all its flaws, allows citizens to go around entrenched interests and appeal directly to the People. For the Proponents

[2] All references shall be to the Elections Code unless otherwise noted.

and citizens of San Diego, this Petition is necessary to vindicate their use of this reserved power of the People.

II.

ARGUMENT

A. The Reserved Right of Initiative and the Plenary Authority of Charter Cities to Control "Compensation" Preclude PERB Jurisdiction.

The initiative power is granted directly from the California Constitution. (Cal. Const. Art. XI § 3.) With initiatives addressing "compensation", the duty is even more specific. The Constitution grants plenary authority to charter cities allowing them to amend their charter, without alteration, and to regulate compensation, which includes pension benefits (Cal. Const. Art XI § 5(b) ; *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 629.) When a charter city's enactment falls within one of these core areas governed by 5(b), including compensation, it supersedes any conflicting state statute. (*Cobb v. O'Connell* (2005) 134 Cal.App.4th 91; *in re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 335.)

Whether a subject matter is within the Home Rule authority of a Charter City is a question of law. (*State Building and Construction Trades Council of California, AFL-CIO v. City of Vista* (filed July 3, 2012) Cal. Supreme Court No. S173586, Slip Op. pp. 8-10 (*Vista*).) Here, the question is whether PERB has the jurisdiction to overrule the authority of a Charter City and determine that the gathering of enough signatures to place a measure on the ballot can be ignored by a state administrative agency. Can the participation of three elected officials (Mayor and two of eight Council members) nullify approximately 115,991 valid signatures and 67% of the vote of the People?

Employee benefits, as a category of compensation, is exclusively controlled by Article XI, § 5(b) of the California Constitution. (*City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 629.) This section grants plenary authority to charter cities to control the compensation, including employee benefits, of their officers and employees.

Section 5(b) gives charter cities a broader grant of authority. This section directly grants to charter cities the power and plenary authority to legislate in four core areas that are, by definition, municipal affairs and not subject to state control. The four areas are: (1) city police force, (2) sub-government in all or part of the city, (3) conduct of city elections, and (4) compensation. When a charter city's enactment falls within one of these core areas, it supersedes any conflicting state statute. (*Cobb v. O'Connell* (2005) 34 Cal.App.4th 91.) The fourth area of authority is control over the manner and method of payment of compensation to the officers and employees of charter cities. (*In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 335, *rev. den.*)

This plenary authority, under 5(b), gives the citizens the right to control the manner of compensation for public employees. Charter Cities can "*provide therein or* ***by amendment thereto****, the manner in which, the method by which, and the times by which, and the terms per which these several municipal officers and employees*" shall be compensated. This provision provides an exclusive method for determining how a charter impacts one of these four areas of plenary authority. If the city charter is in place, the change can be made to "*compensation*" "*by amendment thereto*". **In other words, either compensation is regulated in the original charter or changed by amendment to the charter according to the express terms of 5(b).** PERB is seeking to strip charter cities of this right and the right of their citizens to seek amendments to the charter without undue

interference. As stated in *Vista,* the determination of charter powers under the Constitution is a question of law. If it is not subject to interpretation by the Legislature, it is certainly not subject to administrative review by a statutorily created state agency.

B. The "Meet and Confer" Process Cannot Be Grafted onto the Right of Proponents to Promulgate an Election.

The circulation of an initiative is "core political speech" which is "at the zenith" of free speech protections. (*Meyer v. Grant* (1988) 486 U.S. 414, 422, 425.) This Petition is brought to protect this fundamental right from interference. The applicable standard is strict scrutiny to prevent the impairment of the right to petition the government for redress of grievances.

At the heart of the five Answers to the Petition, the four bargaining groups and PERB argue that **who** participates in the initiative process can determine **whether** a measure is allowed to proceed to the ballot. Their argument is an exercise in misdirection. Citing the process that the Meyer, Milias, Brown Act ("MMBA") requires **cities** to follow, the Respondents fail to recognize that such process has no application to the **citizens**. It is not the obligation of a city that is at stake here. Rather, it is the Constitutional right of the Proponents to promulgate an election that is the issue. The procedural requirements that cities must follow to put a proposition directly on the ballot are irrelevant. The relevant issue is the procedure required for a citizen's initiative. The signatures of 115,991 petition signers, and a vote of 67% of the voting electors, are the rights to be protected here.

The "MMBA" specifically regulates the actions of "legislative bodies" while they conduct labor relations. Under Government Code § 3505, the "governing body of a public agency" is required to "meet and confer" with recognized employee representatives. There is no allegation

in any of the PERB unfair practice charges, however, that the City Council sponsored CPRI.

By claiming that a citizen's initiative is also subject to the "meet and confer" required for cities, all of the Answers challenge the application of the normal charter amendment process to Proposition "B". This process is a "statewide concern" and is controlled by the Constitution and state implementing election laws working in concert with the Constitution. (*District Election, etc., Com. v. O'Conner* (1978) 78 Cal.App.3d 261, 271.)

The basic requirements for charter elections are found in the Elections Code. (Elections Code §§ 9255-9269.) The Elections Code also has general rules applicable to all initiatives, including charter measures. (Elections Code §§ 9200-9226; *see, generally, Jeffery v. Superior Court (City of Huntington Beach)* (2004) 102 Cal.App.4th 1, 7 (applying Elections Code § 9214 to a charter amendment.).)

One of the Elections Code requirements is that the City Council **must** either adopt a circulated initiative or place it on the ballot **without alteration**. (Elections Code §9255(b).) For a pure Charter Amendment, the process is divided into procedures for Council-sponsored measures (Elections Code § 9255(b)(1) & (4)) or Citizen-sponsored ones (9255(b)(2) & (3)). This subsection states as follows:

> (b) The following city or city and county charter proposals **shall be submitted** to the voters at an established statewide general, statewide primary, or regularly scheduled municipal election, pursuant to Section 1200, 1201, or 1301, provided that there are at least 88 days before the election:
>
> (1) **An amendment or repeal of a charter proposed by the governing body of a city or a city and county on its own motion.**
>
> (2) *An amendment or repeal of a city charter proposed by a petition signed by 15 percent of the registered voters of the city.*

> (3) *An amendment or repeal of a city and county charter proposed by a petition signed by 10 percent of the registered voters of the city and county.*
>
> (4) **A recodification of the charter proposed by the governing body on its own motion, provided that the recodification does not, in any manner, substantially change the provisions of the charter.** (Elections Code § 9255(b).) (*emphasis added*)

Despite PERB's argument to the contrary, the Charter Amendment process does not limit the process to an implementing "ordinance". It also allows for amendments to the Charter itself. If the city is going to place it on the ballot, it must do so "immediately" and without alteration. (Elections Code § 9214(b).) The "**shall be submitted**" language in 9255(b) is mandatory. The Petition cannot be altered through "meet and confer", but shall be placed on the ballot if it meets the requirements of 9255(b)(2) or (3). Here, the certified record shows that the city did.

How could the "meet and confer" process be grafted onto the election process? The "meet and confer" process requires that both sides bargain in good faith; mutually exchanging proposals; and trying to work out compromises. (*i.e. City of Fresno v. People ex. rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 91.) Bargaining in good faith cannot be done when there is a duty to honor the exact terms of the measure during circulation. (Elections Code §§ 9202, 9214(b) & 9255(b).) The Proponents have no standing to "meet and confer", bargain in good faith, and at the same time honor the constitutionally based, statutory duty to submit a petition that is to remain unchanged.

The same would be true of a requirement that the City "meet and confer" either during the signature gathering process or after the measure has been certified for placement on the ballot. Since section 9255 requires

charter amendments to follow the process in section 9202, the version that is published before circulation is the version that must be placed on the ballot if it qualifies.

At what point would the City be able to bargain in "good faith" since it does not have the power to change the text of the measure? Who would have the authority to compromise the terms of the measure? Nothing in the Elections Code allows this kind of "flexibility" when dealing with "core political speech". (*Meyer v. Grant* (1988) 486 U.S. 414, 422.)

The same rule of law binds PERB. What would give PERB the power to force bargaining when the measure cannot be changed? Since a city council has no authority to amend the text of a charter measure, could PERB force a city to agree to make the proponents abandon an already qualified petition and go through the signature gathering process again? Clearly not.

Allowing PERB to hear unfair labor practices charges claiming that a citizen-sponsored measure should be subject to pre-election bargaining is inconsistent with the procedures set out in the Election Code. These procedures are content-neutral and are meant to implement the Constitutionally reserved right of citizens to propose ballot measures.

In the end, what relief could PERB impose? Regardless of whatever "facts" it may propound, PERB would have no authority to invalidate a citizen-sponsored measure. (*See, People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 599.) PERB cannot force the City to "meet and confer" regarding a measure in which the terms are bound by the signature-gathering process.

Any scheme of regulation that singles out initiatives that regulate public employee "compensation", even if it is not "viewpoint-based", is invalid because the restriction is based on the content of the message, public employee compensation. (*Boos v. Barry* (1988) 485 U.S. 312, 319;

Consolidated Edison Co. v. Public Service Comm'n (1980) 447 U.S. 530, 537.) PERB jurisdiction would wall off the entire topic of public employee compensation and subject it to different standards than other initiative subjects.

This case proves the point. The labor bargaining unit sought a PERB hearing on the unfounded theory that a public official participated in the initiative process. PERB is now trying to bring the entire pre-election process to a halt while it determines if the measure is a "true" citizen measure. (*San Diego Municipal Employees Association v. Superior Court et. al.* (filed June 19, 2012) Fourth District, Division One No. D061724 at p. 16.) Bargaining groups are trying to use the process to delay votes on an initiative that affects their members. The PERB hearing will delve into the political activities of the proponents, elected officials and citizens under the pretext of shedding light on the allegations. All the while, the Proponents will be forced to stand by and watch their election rights dissipate.

The California electoral process has never been subject to pre-election, administrative review. PERB seeks to create hurdles never applicable to initiatives based on the content of the measure and the support it received from a minority of the elected officials. Assume that the Governor were to support a measure to raise taxes to avoid the two-thirds vote requirement of the Legislature. Assume that he or she used their office and bully pulpit to promote signature gathering for the measure. Why would that situation be any different than this one?

C. Alternative Remedies Available to Respondents.

PERB unsuccessfully sought to hold hearings before the election. Now, through several venues PERB seeks to invalidate the CPRI and prevent any future measure in San Diego from being placed on the ballot

unless PERB pre-clears it. There are other more appropriate remedies, however, which Respondents could use to address their issues.

As shown in the Petition for Review on pages 12-14, the five answering parties claim that the City of San Diego "funded" Proposition "B" and that they have no other remedies at law except through PERB hearings. However, there are two other remedies available which apply to all similar situations, regardless of the "content" of the measure. First, for the alleged illegal expenditure of public funds, Code of Civil Procedure § 526(a) provides a remedy. Second, now that the election has occurred, any challenge to a charter amendment must follow the *quo warranto* procedure. (*People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 595, fn. 3; *City of Fresno v. People ex. rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 89; 76 Ops.Cal.Atty.Gen. 169 (1993).) Both remedies are available but have not been used by the Respondents. These remedies are "content neutral" and would provide the relief necessary if the allegations and law are in their favor. Further, in the interest of due process, either of these methods would also allow the Proponents to participate in the actions.

1. Taxpayer Waste Action.

All of the public sector bargaining groups involved have filed unfair practice complaints with PERB alleging that the City of San Diego "funded" Proposition "B". (*i.e. Petition for Review,* Attachment "C", ¶ 3.) Even under a hypothetical situation where a city drafted, circulated and funded an initiative, PERB still does not have jurisdiction. While there are no facts in the record of this Petition or any other related judicial or administrative matter that "B" was drafted, signatures gathered, or petitions submitted to the City Council at City expense, what would be the remedy in such a case?

The remedy would be a gift of public funds action against the City and the officials if they approved the funding in violation of the Constitution. (Cal. Const. Art. XVI § 6; Code Civ. Proc. § 526(a).) There is an adequate remedy at law to prevent this kind of conduct, regardless of the subject matter of the initiative. (*Stanson v. Mott* (1976) 17 Cal.3d 206.) *Stanson* found that "campaign" materials and activities may not be paid for by public funds. This would include funding the circulation of any initiative, referendum or recall. Such actions could invalidate the initiative measure for wasting taxpayer funds. (*Vargas v. City of Salinas* (2009) 46 Cal. 4th 1, 23-26.)

If the purpose of the unfair labor charges is to determine whether the Proponents were agents of the City of San Diego and acting on the City's behalf, the proper pre-election remedy would have been to seek an injunction for wasting taxpayer funds. If Proponents are truly agents of the City, the Code of Civil Procedure § 526a action would be the appropriate pre-election remedy.

2. *Quo Warranto* is the Exclusive Post-Election Remedy.

After an election, the exclusive remedy to challenge a charter amendment is *quo warranto.* (Code of Civil Procedure §§ 803-811.) The Answering public sector bargaining groups have the right to bring a post-election request to the Attorney General to address all the issues raised in their unfair labor practice charges. (*People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 595, fn. 3; *City of Fresno v. People ex. rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 89; 76 Ops.Cal.Atty.Gen. 169 (1993).)

In both the *Seal Beach* and *Fresno* situations, the *quo warranto* process was used to examine the failure to "meet and confer". In *Seal Beach*, this Court determined that use of this procedure was

"unquestioned". (*People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 595, fn. 3.) Here, the requests of all the Answering parties in their legal and administrative claims were to invalidate CPRI because it did not go through a pre-election MMBA "meet and confer" process. However, PERB has been allowed to proceed with its administrative hearings by the Fourth District Court of Appeals and the Superior Court despite this obvious and available alternate remedy.

Quo warranto is a "content neutral" remedy that has been put in place by the Legislature as the exclusive vehicle to deal with election issues. If allowed to proceed, PERB will be given free reign to question persons on their political speech in a forum not equipped to handle charter amendment or election challenges. It is a forum run by a state agency that has already sought permanent relief to bar all future San Diego initiatives unless they are subject to PERB pre-screening. In *quo warranto* proceedings, the Attorney General would not have such impermissible latitude.

III.

CONCLUSION

This Petition is brought to prevent an unprecedented encroachment into the local electoral process by a state agency. PERB intends to hold fact-finding hearings to discover whether politicians participated in an initiative campaign. As this Court just stated in the *Vista* decision, the determination of whether the State may assume jurisdiction over a municipal affair is a question of law to be decided by the courts. Both the substance of this charter amendment and the subject matter of local employee compensation are municipal affairs.

PERB has already decided it has permanent authority over San Diego initiatives that affect public employees. It seeks to "create"

jurisdiction based on the "content" of the Charter Amendment. If the argument of Respondents is accepted, MMBA rules would suddenly supersede Election Code rules controlling a citizen-circulated measure in California. Under MMBA, PERB would have the ability to hold up elections; force changes in measures after they have been circulated; and invalidate measures retroactively. Any bargaining group could thwart valid signature gathering by claiming city involvement. The Courts would not be able to review the measure or procedures until PERB finishes its process. All the while, the proponents would be shut out of the process.

The Stay is necessary to prevent multiple actions, judicial and administrative, to continue including a potential stay of implementation of Proposition "B" while PERB goes through its process.

It is respectfully requested that this Court stay all related proceedings and either (1) order PERB to discontinue any hearing scheduled to investigate claims related to the conduct of the Proposition B election; (2) accept full review of this matter; (3) accept review of this matter and remand to the Fourth District Court of Appeal, Division One for consideration consistent with this request; or (4) order all actions stayed until the Attorney General determines whether to grant *quo warranto* status.

DATED: July 9, 2012

LOUNSBERY FERGUSON ALTONA & PEAK, LLP

Kenneth H. Lounsbery
James P. Lough, Attorneys for
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and Stephen B. Williams

CERTIFICATE OF WORD COUNT

I certify pursuant to CRC § 8.204(c)(1) that Real Parties in Interest, Catherine A. Boling, T.J. Zane and Stephen B. Williams' Opposition to the San Diego Municipal Employees Association's Petition for Writ of Mandate and Immediate Stay is proportionally spaced, has a typeface of 13 points or more, and contains 4,006 words, excluding the cover, the tables, signature bloc and this certificate, which is less than permitted by the Rules of Court. Counsel relies on the word count feature of the word processing program used to prepare the brief.

DATED: July 9, 2012

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Supreme Court No. S203478

SUPREME COURT OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

In the Matter of

City of San Diego, *Petitioner*

v.

California Public Employment Relations Board, *Respondent.*

San Diego Municipal Employees Association; Deputy City Attorneys Association; American Federation of State, County and Municipal Employees, AFL-CIO Local 127; San Diego City Firefighters Association Local 145, IAFF, AFL-CIO, Catherine A. Boling, T.J. Zane, and Stephen B. Williams
Real Parties in Interest

PETITION FOR REVIEW

I, Kathleen Day, declare that:

I am a resident of the State of California and over the age of eighteen years, and am not a party to the above-referenced action. My business address is 960 Canterbury Place, Ste. 300, Escondido, California 92025. On July 9, 2012, I served the following documents listed below:

PETITION FOR REVIEW

IMMEDIATE STAY REQUESTED

I served the documents described above on the parties listed below by causing them to be delivered via **email,** and either **U.S. Mail** or **FedEx overnight delivery** service to the persons at the addresses set forth below, as indicated:

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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 July 9, 2012 at Escondido, California.

_____
Kathleen Day