D061724

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,
Respondent,

CITY OF SAN DIEGO,
Defendant/Real Parties in Interest,

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Plaintiff/Real Parties in Interest,

PETITION FROM THE SUPERIOR COURT, SAN DIEGO COUNTY
(CASE NO. 37-2012-00092205-CU-MC-CTL)
HON. LUIS R. VARGAS, JUDGE

REAL PARTY IN INTEREST CITY OF SAN DIEGO'S PETITION FOR REHEARING

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I.

INTRODUCTION

Nearly 116,000 registered voters amounting to some 20 percent of the electorate signed a petition qualifying Proposition B, the Comprehensive Pension Reform Initiative (CPRI), for the ballot as a citizen initiative. Under the California Constitution a citizen initiative is a power reserved to the people and bypasses the legislative body and rules that would otherwise apply if it were a legislative enactment, such as the California Environmental Quality Act (CEQA) and state labor laws.

The California Public Employee Relations Board (PERB) and four labor unions contend that Proposition B is a "sham" initiative that should lose constitutional status as a citizen initiative due to support by the Mayor of San Diego and two individual Councilmembers. The City of San Diego (City) argued that upon the CPRI qualifying for the ballot as a citizen initiative through the petition process, it is a citizen initiative and PERB has no jurisdiction over a citizen initiative. Two Superior Court judges heard motions. One judge denied PERB's motion to remove the CPRI from the ballot and the other issued a stay of the PERB hearings pending the election.

This Court set aside the stay of PERB hearings, firmly rejecting City's argument that an initiative that qualifies through sufficient number of signatures as a citizen initiative is a constitutionally protected citizen

initiative. In a reported decision, the Court recognizes for the first time a so-called "nominal" citizen initiative placed on the ballot by use of "strawmen." The Court's recognition of a "nominal" citizen initiative is contained in one sentence rejecting the City's central legal position:

> Because MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using strawmen to avoid its MMBA obligations, the UPC does allege City engaged in activity *arguably* prohibited by public employment labor law, giving rise to PERB's initial exclusive jurisdiction. (*San Diego Municipal Employees Ass'n v. Superior Court*, 2012 WL 2308142 *7 (June 19, 2012), emphasis in original.)

The Court does not define a "nominal" citizen initiative, but simply sends the matter back to PERB to decide. Since there is nothing in the Constitution, statutes or case law that defines a "nominal" citizen initiative or "strawmen" used to put such an initiative on the ballot, the Court is leaving to a state quasi-judicial administrative agency the task of rewriting constitutional law as to what is and is not a citizen initiative, a task that runs far astray from its labor law expertise. Creating such a new constitutional concept and deferring to PERB for substance is comparable to sending a jury to deliberation without jury instructions.

As a simple matter of due process, City does not know what evidence is relevant for a determination as to whether an initiative that qualifies for the ballot through voter signatures is a real citizen initiative

entitled to bypass the legislature and rules such as CEQA and labor laws, or a "nominal" citizen initiative that is taken from the citizens' reserved right to initiative.

There are a few clues that can be gathered from the opinion, but they raise more questions than they clarify on such a new constitutional concept:

First, a "nominal" citizen initiative can be one that otherwise qualifies through a voter petition to be a real citizen initiative. The election official, the San Diego County Registrar of Voters, duly certified that approximately 116,000 signatures had been collected to place the CPRI before the voters as a citizen initiative. (3 Petitioner's Exhibits (PE) 705.) Thus, the notion that a citizen initiative is necessarily a citizen initiative is gone.

Second, it appears that a "nominal" citizen initiative can be triggered by actions of an elected official who does not otherwise have the power to participate in the decision to place a government-sponsored measure on the ballot. So, the category of elected officials can include all elected officials, presumably of the subject entity. It is unclear, however, whether the "nominal" label can also be triggered by the actions of unelected officials/employees, and, if so, what level of unelected officials/employees. PERB has issued subpoenas requiring seven unelected City employees to testify and produce documents relating to their decision on whether or not to support the CPRI. (11 PE 2931, 2942-70.)

Third, the Court determined San Diego Municipal Employees Association (MEA) provided "some evidence" to support its allegation, but City does not know what that evidence was. (*San Diego Municipal Employees Ass'n*, 2012 WL 2308142 *7.) MEA provided news articles showing that the Mayor referred to a future initiative and that the Mayor used his title in promoting the CPRI. Is this evidence that the CPRI is a "nominal" citizen initiative placed on the ballot through "strawmen," thereby discounting the constitutional rights of the nearly 116,000 registered voters who signed the petition?

Fourth, what are "strawmen" used to put a citizen initiative on the ballot? Are these signature gatherers? Are they some portion of the approximately 116,000 registered voters who, together, qualified the measure for the ballot?

Beyond presenting problems for City at an evidentiary hearing before PERB, creation of a "nominal" citizen initiative without a definition or parameters in a published decision opens a proverbial "Pandora's Box" from which will arise challenges to other citizen initiatives across California. California's Governor has led the effort to qualify a citizen tax initiative for the November 2012 ballot, designed to bypass the legislature. If that measure qualifies as a "nominal" citizen initiative, it would presumably need to proceed through the legislature since a "nominal" citizen initiative is treated as a government-sponsored initiative. There are

other citizen initiatives throughout the state that could, if they qualify as citizen initiatives, be subject to legal attack as "nominal" citizen initiatives as well.[1]

City requests that this Court rehear this matter on the issue raised and reconsider its recognition of a "nominal" citizen initiative and "strawmen." City understands it was discussed just as an "arguable" basis for PERB action. But, the mere recognition of a "nominal" citizen initiative is a sweeping new concept that, hopefully, this Court did not intend to create.

The power reserved to the people for initiatives is not qualified by who supports it. A citizen initiative that qualifies for the ballot through sufficient signatures of registered voters *is* a citizen initiative. The constitutional rights of those registered voters cannot be forfeited based upon such a nebulous legal fiction.

If the Court is not inclined to reconsider, City requests a hearing to determine the elements or parameters of what constitutes a "nominal" citizen initiative and "strawmen" and a stay of PERB hearings until the Court provides the law for PERB to apply.

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[1] The Mayor of Los Angeles, while attending the recent annual U.S. Conference of Mayors, stated he was prepared to take public pension reform directly to the voters. Barbara Liston, *LA mayor eyes possible referendum on pension reform*, Reuters U.S. Edition (June 14, 2012) <http://www.reuters.com/article/2012/06/15/us-usa-cities-pensions-idUSBRE85E01220120615>.

II.

ARGUMENT

A. Legal Grounds for Rehearing

On petition of a party or on its own motion, a reviewing court may order a rehearing of any decision that is not final. (Cal. Rules of Court, rule 8.268(a)(1).) The Court may grant rehearing to correct a legal error it may have made in its opinion when correction would likely produce either a different result or different reasoning. (*Alameda County Mgmt. Employees Ass'n v. Superior Court* (2011) 195 Cal.App.4th 325, 337.) Rehearing may also be granted to address legal issues that only became relevant in light of the opinion. (See, e.g., *Milo Equip. Corp. v. Elsinore Valley Mun. Water Dist.* (1988) 205 Cal.App.3d 1282, 1285.)

Additionally, rehearing may be granted to obtain the Court's guidance on remand and/or clarification of ambiguities in directions contained in its order. (See, e.g., *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1444, in response to petition for rehearing, court provided guidance on allowable scope of expert testimony.)

B. Reasons for Rehearing

i. Holding PERB Has Jurisdiction to Determine When a Certified Citizen Initiative is Truly a Citizen Initiative is Unprecedented and Outside the Scope of PERB's Expertise

This Court in a published decision which can be cited as precedent has created a new category of initiatives in this State nowhere found in the Constitution—so-called "nominal citizen initiatives" placed on the ballot by using "strawmen." Under this Court's ruling, a "nominal" citizen initiative is one that is so closely associated with a government official that it is deemed government rather than citizen sponsored. California law has never before recognized a "nominal" initiative, nor rendered a citizen initiative into a government-sponsored proposal because of public official involvement in its conception and support.

Pursuant to the California Constitution, "The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body." (Cal. Const., art. XI, § 3(b).) Thus, under current law, there are two, and *only* two, distinct methods to propose amendments to the City's Charter: (1) a proposal made through a citizen initiative, or (2) a proposal by a vote of the City's "governing body," the City Council. If a sufficient number or registered voters sign a petition to place an initiative on the ballot, a city council must perform its ministerial duty, which the California

Constitution and Elections Code mandate, to place it on the ballot without change and without compliance with procedural prerequisites usually attached to city council sponsored measures, such as CEQA,[2] or in this case, the meet-and-confer requirements of the Meyers-Milias-Brown Act (MMBA). (*See* Cal. Elec. Code § 9255(b)(2).)

Citing to *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*San Jose*), this Court's opinion holds that "Because MEA's UPC alleges (and provides some evidence to support the allegations) that the CPRI (while nominally a citizen initiative) was actually placed on the ballot by City using strawmen to avoid its MMBA obligations, the UPC does allege City engaged in activity *arguably* prohibited by public employment labor law, giving rise to PERB's initial exclusive jurisdiction." (*San Diego Municipal Employees Ass'n*, 2012 WL 2308142 *7, emphasis in original.)

In *San Jose*, the issue was whether the City needed to first seek relief from PERB before asking a superior court for injunctive relief to prevent a threatened strike by public employees performing services essential to public health and safety. (*San Jose*, 49 Cal.4th at 603.) The City of San Jose contended PERB lacked jurisdiction "because no provision of the MMBA either 'arguably protect[s] or prohibit[s]' threatened strikes by

[2] A citizen initiative with a potential environmental impact is exempt from CEQA. (14 Cal. Code Regs. § 15378(b)(3); *Stein v. Santa Monica* (1980) 110 Cal.App.3d 458, 460-61.)

employees whose services are essential to public health and safety." (*Id.* at 606, citation omitted.) In determining that PERB did have initial jurisdiction over public employee strikes wherein unfair labor practices were alleged, the California Supreme Court pointed to two cases involving the Educational Employment Relations Act (EERA)[3] which clearly established PERB's jurisdiction over such strikes. (*Id.* at 606-07, citing *San Diego Teachers Ass'n v. Superior Court* (1979) 24 Cal.3d 1, invalidating contempt orders arising out of an injunction against a strike by a teachers' association on the ground PERB had initial jurisdiction over the matter, and *El Rancho Unified School Dist. v. National Education Ass'n* (1983) 33 Cal.3d 946, holding a complaint for damages arising out of a strike by a teachers' union was within PERB's exclusive initial jurisdiction over the matter.)

Here, unlike in the *San Jose* case, no law exists supporting PERB's jurisdiction. No case has ever recognized PERB jurisdiction over a duly certified citizen initiative, nor has any court recognized a "nominal" citizen initiative.

The key facts here are undisputed: 115,991 registered City voters signed the petition exercising their constitutional right to amend the Charter

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[3] The EERA is a statutory scheme subject to PERB's jurisdiction that like the MMBA generally prohibits unfair labor practices. (*San Jose*, 49 Cal.4th at 603-04, 607.)

via initiative indicating their desire to place the CPRI on the ballot. (3 PE 705.) The San Diego County Registrar of Voters certified that sufficient signatures had been collected to place the CPRI before the voters as a citizen initiative. (*Id.*) As required by Elections Code section 9522(b)(2), the City Council performed its ministerial duty to place a qualified citizen initiative on the ballot unchanged.[4] **The "governing body" of the City, the City Council, did *not* propose the CPRI.**[5]

Therefore, the Supreme Court's decision in *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach* (1985) 36 Cal.3d 591 (*Seal Beach*), which this Court's opinion relies on for support that the complained of activities are "*arguably* protected or prohibited" by MMBA, does not apply to the CPRI. In fact, the Supreme Court stated in *Seal Beach* that "[n]eedless to say, this case does not involve the question whether the meet-and-confer requirement was intended to apply to the charter amendments proposed by initiative." (*Id.* at 599, n.8.)

In the 28 years since its *Seal Beach* decision, the Supreme Court has *never* applied the meet-and-confer requirement of the MMBA to a citizen

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[4] "A local government is not empowered to refuse to place a duly certified initiative on the ballot." (*Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149.)

[5] For the City Council to act, it may do so *only* as a body. (San Diego Charter §§ 15, 270(c).) The City Council cannot delegate its legislative power or responsibility to the City's Mayor, individual Council members, or anyone else. (*Id.* at § 11.1.)

initiative. Nor has it ever recognized that the involvement of city officials in the support of a citizen initiative rendered it "nominal" so that it became a government-sponsored proposal for MMBA purposes.

In fact, the United States Supreme Court has made it clear that elected officials do not lose their rights to free speech once they are elected. (*Bond v. Floyd* (1966) 385 U.S. 116.) Rather, it has been held that "Legislators have an obligation to take positions on controversial political questions," such as pension reform. (*Id.* at 136-37.)

MEA's counsel, on behalf of the firefighters union whom they also represent, has stated: "The heart of the MEA complaint is that the CPR initiative is merely a sham device which the City's 'Strong Mayor' has used for the express purpose of avoiding the City's obligation to meet and confer under the MMBA. The CPR initiative was sponsored by Mayor Jerry Sanders ('Mayor'). Such sponsorship is legally considered as acting with apparent governmental authority and required the City to meet and confer with employee organizations."

California political leaders for decades have openly led initiative movements to bypass legislatures and other obstacles to reform.[6] Indeed, the citizen initiative is a power reserved to the people for just that purpose.

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[6] It has even been held that the expenditure of public funds in the development and drafting of, and search for a private sponsor for, an initiative measure is not unlawful. (*League of Women Voters of California*

Under this Court's reported decision, government officials – elected or not – who want to become involved in a citizen initiative movement run the risk that an otherwise qualified citizen initiative will be deemed a "nominal" citizen initiative. Thus, a Mayor's support for a citizen initiative on pension reform would trigger state labor laws requiring meet and confer over the initiative's terms. And, a Governor's advocacy for a citizen initiative to increase taxes would trigger the requirement of 2/3 support of the State Legislature. The Court's ruling, that a "nominal" citizen initiative may be treated as a government proposal, defeats citizen efforts to bypass the legislative process, as initiatives are historically meant to do.

Accordingly, this Court should rehear this matter and reconsider its recognition of a "nominal" citizen initiative.

ii. This Court's Decision Vests PERB with the Power to Determine New Constitutional Standards

Although this Court's decision creates a new so-called "nominal" citizen initiative, it does not describe the legal standards that would transform a citizen initiative into a "nominal" one, other than to note that the citizens involved in actual signature gathering are "strawmen." The decision leaves it to a state quasi-judicial administrative agency, PERB, to fill in the substance of this new concept, when it really is a ***constitutional election law*** issue, not something within PERB's expertise to resolve.

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v. Countywide Criminal Justice Coordination Comm. (1988) 203 Cal.App.3d 529, 540-41, 550.)

While the decision states MEA provided "some evidence" to support its allegation, it did not identify what "evidence" it was referring to. (*San Diego Municipal Employees Ass'n*, 2012 WL 2308142 *7.) The City is completely in the dark as to whether evidence the Mayor referred to a future initiative in a state of the City speech could support a finding that a later citizen initiative is really a "nominal" citizen initiative? Can evidence concerning the use of City facilities or personnel to help draft the initiative, or evidence that the title "Mayor" was used in promoting the initiative, transform a certified citizen initiation into a "nominal" citizen initiative? Can the support of an unelected City official/employee trigger a finding that a citizen initiative is "nominal"? Also, when do private citizens lose their constitutional rights to initiative and become classified as "strawmen" for the government? Without having these legal parameters defined, the City will be severely prejudiced in its defense before PERB.

The effect of this Court's ruling is that every citizen initiative hereafter adopted is in jeopardy of being deemed a "nominal" citizen initiative. In labor law, such initiatives would be in jeopardy of invalidation by PERB, rather than the courts, contrary to the 28-year old decision of the California Supreme Court in *Seal Beach*.

Moreover, public employee unions can now subject public officials of jurisdictions where such initiatives are adopted to subpoenas and questioning on their public statements and contacts with initiative

supporters, to the severe detriment of the officials' and supporters' constitutional rights. This will have a chilling effect on public official advocacy on important public issues. In the underlying administrative action, PERB has issued subpoenas to two elected City officials as well as seven unelected City employees requiring them to testify and turn over documents concerning their decision of whether or not to support the CPRI. (11 PE 2931, 2942-70.)

This scenario could easily run afoul of these witnesses' first amendment right of association as PERB and the labor unions engage in fishing expeditions as to who said what, to whom, and why. In *Perry v. Schwarzenegger* (9th Cir. 2009) 591 F.3d 1126 the Ninth Circuit noted "participation in campaigns is a protected activity" and "disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights." (*Id.* at 1141-42.)

This Court's decision, without providing standards for determining what quality or quantity of public official involvement renders an initiative "nominal" and strips it of its constitutional protection, would allow PERB to rewrite the California Constitution.

The decision would drive a stake through the heart of citizen initiatives in California. It would transform a right reserved to the people into a qualified right that depends upon who was in support. Administrative hearings would be taken up with evidence of who supported the idea, who spoke to whom, who helped raise money, etc. This would eviscerate the First Amendment right to free association and impose a chilling effect upon public officials throughout California.

If the Court is not inclined to reconsider its decision, the City requests a hearing to determine the elements or parameters of what constitutes a "nominal" citizen initiative and "strawmen" and a stay of PERB hearings until the Court provides the law for PERB to apply.

III.

CONCLUSION

The City of San Diego respectfully requests that this Court reconsider its holding that there is such a concept as a "nominal" citizen initiative placed on the ballot through "strawmen," when no case or statute in California recognizes such a thing, or, at least, requests a stay of the

PERB hearings until the Court can provide legal standards for making the determination of "nominal" and "strawmen."

Dated: June 28 2012

JAN I. GOLDSMITH, City Attorney

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CERTIFICATE OF WORD COUNT

The text of this brief, excluding the title page, table of contents, table of authorities, and this certificate of word count consists of 3,406 words as counted by the Word 2007 word-processing program used to generate the brief.

Dated: June 28 2012

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

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San Diego Municipal Employees' Association v. Superior Court of the State of California, County of San Diego

4th Civil No. D061724
SDSC Case No. 37-2012-00092205-CU-MC-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On June 28, 2012, I served the within document described as:

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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 this 28th day of June 2012, at San Diego, California.

Marci Bailey

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