Case No. _____

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

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, CATHERINE A. BOLING, T.J. ZANE and STEPHEN B. WILLIAMS,
Real Parties in Interest,

PETITION FOR WRIT OF MANDATE; APPLICATION FOR STAY; AND SUPPORTING MEMORANDUM

IMMEDIATE STAY REQUESTED OF ALL RELATED ACTIONS BY JUNE 22, 2012

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ATTORNEYS FOR PETITIONER
CITY OF SAN DIEGO

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I certify that the following entities/persons are interested parties:

(1) San Diego Municipal Employees Association;

(2) Deputy City Attorneys Association;

(3) American Federation of State, County and Municipal Employees, AFL-CIO, Local 127;

(4) San Diego City Firefighters, Local 145, IAFF, AFL-CIO;

(5) Catherine A. Boling;

(6) T.J. Zane; and

(7) Stephen B. Williams.

Dated: June 6, 2012

JAN I. GOLDSMITH, City Attorney

By _____
Walter C. Chung, Dep. City Attorney
Attorneys for Petitioner
CITY OF SAN DIEGO

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I.

PETITION FOR WRIT OF MANDATE

Petitioner the City of San Diego ("City") brings this Petition for a writ of mandate under Art. VI, section 10 of the California Constitution, and by this verified Petition alleges:

1. Petitioner the City is a municipal entity established by the City of San Diego's Charter ("Charter") pursuant to Art. XI, section 3 of the California Constitution. Pursuant to section 11 of the Charter, the City's legislative powers, except such legislative powers reserved to the people by the Charter and the California Constitution, are vested in the City Council.

2. Respondent the California Public Relations Board ("PERB") is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering public employees and employers.

3. Real Party in Interest the San Diego Municipal Employees Association ("MEA") is an employee organization within Gov. Code section 3501(a). The MEA is the recognized exclusive representative of the City employees in the professional, supervisory, technical and administrative support and filed service units.

4. Real Party in Interest the Deputy City Attorneys Association ("DCAA") is an employee organization within Gov. Code section 3501(a).

The DCAA is the recognized exclusive representative of the City's deputy city attorneys.

5. Real Party in Interest the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 ("Local 127") is an employee organization within Gov. Code section 3501(a). Local 127 is the recognized exclusive representative of the City's blue collar employees.

6. Real Party in Interest the San Diego City Firefighters, Local 145, IAFF, AFL-CIO ("Local 145") is an employee organization within Gov. Code section 3501(a). Local 145 is the recognized exclusive representative of the City's employees in the Fire Fighter Unit.

7. MEA, DCAA, Local 127 and Local 145 are collectively referred to as the "unions."

8. Real Parties in Interest Catherine A. Boling, T.J. Zane and Stephen B. Williams ("Proponents") filed a notice with the City's Clerk of their intent to circulate a petition to place the Comprehensive Pension Reform Initiative ("CPRI.") The CPRI amends the City's Charter with regard to various provision related to the City's pension plans.

9. On November 8, 2011, the Registrar of the County of San Diego confirmed that 115,991 citizens of the City signed the petition to place the CPRI on the ballot. (Exhibit "A," attached hereto and incorporated by reference.)

10. Pursuant to Elections Code section 9255(a)(3), the City has a ministerial duty to place any qualified citizens' initiative on the ballot as authored and worded by the citizens themselves.

11. Therefore, once the City was notified by the county's registrar of voters and the City's Clerk that the CPRI had received the required number of signatures, the City had a mandatory duty to place the CPRI on the ballot.

12. Based on Elections Code section 9255(a)(3), the City did not engage in any meet and confer with any of the real parties in interest as it lacked the authority to change any of the wording of the CPRI. Rather, the City placed the CPRI on the June 5, 2012 ballot exactly as worded by the Proponents.

13. PERB and the real parties in interest contend that the MMBA applies to citizens' initiatives such that the City was required to meet and confer regarding the language of the CPRI prior to the City placing the initiative on the June 5, 2012 ballot.

14. Accordingly, this case concerns the issue of whether or not the Meyers-Milias-Brown Act ("MMBA"), Gov. Code section 3500 *et. seq.* applies to a citizens' initiative to amend the City's Charter with regard to pension benefits such that the City was required to meet and confer with its labor organizations prior to placing such initiative on the June 5, 2012 ballot.

15. As a result of the City not negotiating over the terms of the CPRI prior to the initiative being placed on the ballot, MEA, the DCAA, Local 127 and Local 145 have all filed unfair labor practice charges against the City with PERB. (Exhibits "B," "C," "D" and "E," respectively, attached hereto and incorporated by reference.) PERB intends to conduct administrative hearings on all of these unfair labor practice charges.

16. Additionally, as a result of the MEA's unfair practice charge against the City, PERB has filed a complaint for temporary and permanent injunctive relief against the City in the San Diego Superior Court. (Exhibit "F," attached hereto and incorporated by reference.)

17. No statutory law or decisional case law supports PERB or the real parties in interest contention that the City had a duty to meet and confer over the language of the CPRI prior to the City placing the initiative on the ballot.

18. The City has no plain, speedy and adequate remedy at law other than this Petition. PERB intends to conduct administrative law hearings on each of the unions' unfair labor practice charges, despite no law requiring the City to meet and confer pursuant to the MMBA over a citizens' initiative. Therefore, PERB has a clear and present ministerial duty not to conduct administrative hearings that will effectively stall the implementation of the CPRI.

19. PERB's administrative process will also be too slow to be effective. PERB intends to conduct an administrative hearing of each of the four unions' unfair labor practice charges. Each of these four decisions is appealable to PERB itself. PERB's decision on these four matters is then appealable to this Court. As the issue is a question of law, this Court will review any decision of PERB *de novo*. This process will be lengthy and time consuming.

20. PERB's administrative hearing process cannot result in any meaningful decision without this Court providing the parties with the proper interpretation of the law on the sole question of whether or not the City was required to meet and confer with its labor unions prior to the City placing the CPRI, a duly qualified citizens' initiative, on the June 5, 2012 ballot.

21. PERB's complaint filed with the San Diego Superior Court will, like PERB's administrative process, will not result in a speedy decision. Just like PERB's administrative hearing decisions, the Superior Court's ruling is reviewable by this Court. As the issue is a question of law, this Court will review any decision of the Superior Court *de novo*.

22. While the unions' administrative hearings, PERB's superior court action and potential other yet-to-be filed actions are ongoing, the needed savings sought to be achieved by the CPRI will be lost.

23. This Petition is being filed in this Court as an original matter because of the City and statewide importance of the issues presented. As noted above, a petition for writ of mandate in the superior court will not afford the City timely relief.

24. This Petition is based on the Memorandum, the exhibits and declarations that follow, all of which are incorporated herein by reference.

WHEREFORE, the City prays that:

1. This Court issue an alternative writ of mandate and/or order to show cause ordering PERB to refrain from continuing their administrative hearings on any of the unions' unfair labor practice charges, stay PERB's superior court action and stay any and all other proceedings or actions encompassing the CPRI or to show cause why a peremptory writ as set forth below should not issue;

2. Upon return of the alternative writ and/or the hearing on the order to show cause, or alternatively, in the first instance, a peremptory writ issue ordering PERB to refrain from conducting any administrative hearing regarding the City's alleged failure to meet and confer with the real parties in interest prior to placing the CPRI on the ballot as the MMBA placed no duty upon the City to meet and confer over the terms of the CPRI prior to the City placing said initiative on the June 5, 2012 ballot, stay PERB's superior court action and stay any and all other proceedings or actions encompassing the CPRI;

3. This Court order stayed any PERB administrative hearings related to the CPRI and any superior court actions involving the CPRI pending disposition of this Petition;

4. The City be awarded their costs of suit, including reasonable attorneys' fees; and

5. The City be awarded such further relief as may be just and proper.

Dated: June 6 2012

JAN I. GOLDSMITH, City Attorney

By _____
Walter C. Chung, Dep. City Attorney
Attorneys for Petitioner
CITY OF SAN DIEGO

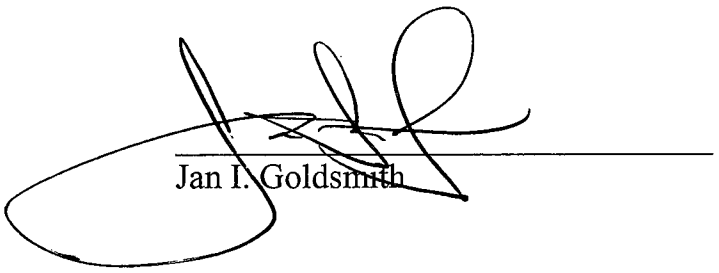
II.

VERIFICATION

I, Jan I. Goldsmith, hereby declare as follows:

I am the City Attorney of the City of San Diego, Petitioner herein. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and this verification was executed on June 6, 2012 at San Diego, California.



Jan I. Goldsmith

III.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE CITY'S PETITION

A. Introduction

For the last several years, the City's annual pension related costs have been skyrocketing. Since the City's pension contribution is made from the same funds used to provide general services to its citizens, the increase in pension costs directly correlates to a decrease in general services to its citizens.

In April 2011, three private citizens fed up with the ever rising pension costs began circulating a petition entitled the Comprehensive Pension Reform Initiative. The CPRI amends the City's Charter in an effort to reduce the City's pension costs.

By September 2011, the Proponents of the CPRI gathered 115,991 verified signatures, substantially more than the required 94,346 signatures necessary to qualify the initiative for the ballot.

As a result of the CPRI receiving the requisite number of signatures, pursuant to the City's duty under the Elections Code, the City placed the CPRI on the June 5, 2012 Presidential primary election ballot.

PERB and the unions contend that the City should not have placed the CPRI on the ballot without the City first meeting and conferring with the City's labor organizations over the terms of the CPRI.[1]

The CPRI is an initiative of 115,991 citizens of the City. The City has found no law, statutory or case law, that supports PERB or the unions' claims. As a result, the City contends that because the CPRI was not a Charter change proposed by the City Council, the City was not required to meet and confer with the unions prior to placing the CPRI on the ballot. To do so, would deprive the citizens of their reserve power guaranteed to them by the California Constitution to seek legislative change through the initiative process.

Consequently, this Petition involves a sole legal question. That sole legal question is whether or not the City was required to meet and confer over the terms of a duly qualified citizens' initiative that amends the City's Charter and aspects of the City's pension plans prior to placing that initiative on the June 5, 2012 ballot.

B. Statement of Facts

On April 4, 2011, three private citizens, Catherine A. Boling, T.J. Zane and Stephen B. Williams, the Proponents, filed a notice with the City's Clerk of their intent to circulate a petition for the purpose of

[1] Since the CPRI passed, the City has offered to meet and confer with is labor unions over the implementation of the Charter amendments contained in the CPRI.

amending the City's Charter. (Exhibit "G," attached hereto and incorporated by reference.) The notice identified the CPRI as the proposition these three individuals intended to circulate a petition for in an effort to qualify the measure for presentment to the electorate.

The CPRI seeks to make changes to the City's retirement benefits for certain current and future City employees as well as define the terms the City must use when it begins labor negotiations with the City's labor unions. To make these changes, the CPRI amends certain provisions of the City's Charter.

In order for the CPRI to have qualified for the June 5, 2012 ballot, the Proponents needed to obtain verified signatures from at least 15% of the registered voters of the City. (Elections Code section 9255(b)(2).)

During the signature gathering phase of the CPRI, several City elected officials publicly supported and encouraged City residents to sign the petition in favor of the CPRI. These officials included Mayor Jerry Sanders, Councilmember Kevin Faulconer and Councilmember Carl DeMaio.

On September 30, 2011, the Proponents submitted signed petitions in support of the CPRI to the Clerk of the City. The City's Clerk then submitted the petitions to the San Diego County Registrar of Voters to determine the actual number of valid signatures.

On November 8, 2011, the San Diego County Registrar of Voters issued a Certification stating that the petition had received a sufficient number of valid signatures so as to require the CPRI to be presented to the voters. (Exhibit "A.")

The Clerk of the City submitted the San Diego County Registrar of Voters' Certification to the City Council on December 5, 2011. That same day, as required by the law, the City Council passed a resolution of intention to place the CPRI on the June 5, 2012 Presidential primary election ballot. (Exhibit "H," attached hereto and incorporated by reference.)

On January 30, 2012, the City Council enacted Ordinance O-20127 which placed the CPRI on the June 5, 2012 Presidential primary ballot. (Exhibit "J," attached hereto and incorporated by reference.)

On January 31, 2012, MEA filed an unfair practice charge against the City with PERB. (Exhibit "B.")

Based on MEA's unfair practice charge, on February 10, 2012, PERB's Office of the General Counsel issued a PERB complaint against the City alleging that the City had violated Gov. Code sections 3503, 3505, 3506 and California Code of Regulations section 32603(c). (Exhibit "J," attached hereto and incorporated by reference.)

On that same day, PERB, by and through its General Counsel, notified the City that PERB's Board had authorized the initiation of an

action in the San Diego Superior Court seeking injunctive and writ relief against the City. (Exhibit "K," attached hereto and incorporated by reference.)

Four days later, on February 14, 2012, PERB, filed its verified Complaint seeking temporary and permanent injunctive relief prohibiting the CPRI from being presented to the voters of the City of San Diego and a permanent injunction and peremptory writ of mandate ordering the City to comply with the City's alleged meet and confer obligations relating to the CPRI and any future citizens' initiatives. (Exhibit "F.")

On February 15, 2012, the DCAA filed an unfair practice charge against the City with PERB. (Exhibit "C.")

On February 27, 2012, Local 127 filed an unfair practice charge against the City with PERB. (Exhibit "D.")

On March 5, 2012, Local 145 filed an unfair practice charge against the City with PERB. (Exhibit "E.")

On June 5, 2012, California's Presidential primary election was held. The CPRI received 110,738 votes in favor and 56,559 votes against.[2] The CPRI passed.

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[2] As of the date of this filing, the San Diego County of Registrar had yet to complete its counting of all absentee and provisional ballots.

C. Legal Argument

1. The CPRI is a Citizens' Initiative

The CPRI garnered nearly 116,000 verified signatures of registered City of San Diego voters, of that there can be no argument. PERB and the unions contend that some of those signatures were gathered only as a result of the City's Mayor and two councilmembers supporting and championing the CPRI. Therefore, PERB and the unions contend that the CPRI is not a true citizens' initiative, but rather, the CPRI is a "City sponsored initiative."

By calling the CPRI a "City sponsored initiative," PERB and the unions contend that the City had a duty under the MMBA to meet and confer with its labor unions over the language and terms of the CPRI prior to the City placing the CPRI on the June 5, 2012 ballot. PERB's and the unions' contention has no support in the law.

a. The CPRI Can Only Be a Citizens' Initiative

On April 4, 2011, the Proponents, filed a notice with the City's Clerk of their intent to circulate a petition for the purpose of amending the City's Charter. (Exhibit "G.") In that letter, the Proponents requested that the City Attorney prepare a title and summary for the petition pursuant to California Election Code sections 9255, 9256, 9202 and 9203.[3]

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[3] City charter amendments are a matter of statewide concern governed exclusively by state law. (*Jarvis Taxpayers Association v. City of San Diego* (2004) 120 Cal.App.4th 374, 387, citing *District Election Etc. Committee v. O'Connor* (1978) 78 Cal.App.3d 261, 266-67.) The

Under the California election laws, the three individuals, the Proponents, are the only proponents of the CPRI. Elections Code section 342 defines the proponent of an initiative measure as "the elector or electors who submit the text of a proposed initiative or referendum to the [City Clerk] with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure . . . ." Elections Code section 9001 states that "[t]he electors presenting the request [to the City Clerk] shall be known as the 'proponents.'" Accordingly, the three individual Proponents who filed the required letter with the City Clerk are the only proponents of the CPRI.

After gathering signatures in support of the CPRI, the Proponents were also the only individuals that could have submitted the petition to place the CPRI on the ballot to the City Clerk. Elections Code section 9032 specifies that, after signatures have been collected, "[t]he right to file the petition [with the designated election officials] ***shall be reserved to its proponents,*** and any section thereof presented for filing by any person or persons other than the proponents of a measure or by persons duly authorized in writing by one or more of the proponents shall be disregarded by the elections official." (Emphasis added.)

California Constitution and Elections Code govern the charter amendment process. (*District Election Etc., supra,* 78 Cal.App.3d at 271.)

Under the law, the only proponents of the CPRI are the three individual Proponents. Whether or not Mayor Sanders and Councilmembers Faulconer and DeMaio spoke in favor of or helped gather signatures for the CPRI did not and cannot change the identities of the proponents of the CPRI.

Per the Elections Code, the City cannot legally be a proponent of the CPRI. Therefore, the CPRI cannot be a "City sponsored initiative" as PERB and the unions contend. The CPRI was and is an initiative of the Proponents, and thus, a citizens' initiative.

b. The City's Charter Cannot Be Amended by a "City Sponsored Initiative" as PERB and the Unions Contend

PERB's and the unions' contention that Mayor Sanders and Councilmembers Faulconer and DeMaio's outspoken support for the CPRI converted the CPRI from a citizens' initiative into a "City sponsored initiative" is also without justification, as the City's Charter cannot be amended through a "City sponsored initiative." Rather, there are two, and only two, distinct ways to propose amendments to the City's Charter: (1) a proposal made through a citizens' initiative, or (2) a proposal by a vote of the City's governing body, the City Council.

The California Constitution provides, "[t]he 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, section 3(b); emphasis added.) There is no third way of amending the City's Charter through a "City sponsored initiative."

The City and its City Council did not propose the CPRI. (Declaration of Mayor Jerry Sanders, Exhibit "L," ¶¶ 2-3; Declaration of Council President Pro Tem Kevin Faulconer, Exhibit "M," ¶¶ 1-3; Declaration of Council President Anthony Young, Exhibit "N," ¶¶ 1-2; Declaration of Councilmember Carl DeMaio, Exhibit "O," ¶¶ 1-2; Declaration of Councilmember Lorie Zapf, Exhibit "P," ¶¶ 1-2. All the declarations are attached hereto and incorporated by reference.) Therefore, the CPRI is a voter-sponsored initiative.

Even accepting all of PERB's and the unions' allegations in their respective complaints and unfair practice charges to be true regarding Mayor Sanders and Councilmembers Faulconer and DeMaio's support for the CPRI, none of these three individuals acting individually or in concert could have made the CPRI an initiative of the City's governing body. This is because the Mayor is not the governing body of the City; the City Council is. In fact, the Mayor is not even a member of the City Council. Nor do Councilmembers Faulconer and DeMaio represent a majority of that body. Accordingly, the actions and statements of these officials could not alter the CPRI into an initiative of the City's governing body.

Nor, for the same reasons, could the actions of these three officials cause the three individual citizen Proponents of the CPRI to become agents or surrogates of the City such that the CPRI changed from a citizens' initiative to a City Council initiative. This is because the three individuals acting alone or in concert did not and do not represent a majority of the City Council.

The City's Charter cannot be amended via a "City sponsored initiative" as PERB and the unions suggest. The law does not recognize such a method. Therefore, the CPRI is an initiative of the Proponents, and thus, a citizen's initiative.

2. The MMBA Cannot and Does Not Trump the Constitution

PERB and the unions sole contention for application of the MMBA's meet and confer obligations to the CPRI prior to the City placing it on the June 5, 2012 ballot is based on the fact that Mayor Sanders and Councilmembers Faulconer and DeMiao outwardly supported and championed the initiative. Therefore, if each of these elected officials had remained silent and not supported the CPRI in any way, neither PERB nor the unions would or could complain that the City violated the MMBA when it placed the CPRI on the ballot without first meeting and conferring with the unions. That being the case, the crux of PERB's and the unions' argument is that the MMBA takes precedence over Mayor Sanders and

Councilmembers Faulconer and DeMaio's Constitutionally guaranteed right of free speech.

In order for PERB and the unions contention to succeed, the right of Mayor Sanders and Councilmembers Faulconer and DeMaio to exercise their right of free speech as guaranteed by the United States and California Constitutions would have to subordinated to the meet and confer obligations of the MMBA. This is not and cannot be the state of the law. Rather, the opposite conclusion is the rule of law. To hold otherwise would impermissibly limit or negate Mayor Sanders and Councilmembers Faulconer and DeMaio's right of free speech as guaranteed to them by the supreme law of this nation and this State. (See e.g. *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291, "A statute does not trump the Constitution.")

Elected City officials do not lose their rights to free speech as a result of being elected to their respective positions in the City. Each elected individual retains the same rights of free speech as a private citizen. In fact, the United States Supreme Court has forbidden the imposition of stricter "free speech" standards on legislators than on the general public. (*Bond v. Floyd* (1966) 385 U.S. 116.) In Chief Justice Warren's words, "[t]he First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." (*Id.* at 136.)

"The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times v. Sullivan* (1964) 376 U.S. 254, 270, is that 'debate on public issues should be uninhibited, robust, and wide-open.' " (*Bond v. Floyd, supra*, 385 U.S. at 135-36.) As a result, the United States Supreme Court has ruled that, "***Legislators 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; also so they may be represented in governmental debates by the person they have elected to represent them." (*Id.* at 136-37; emphasis added.)

There is no denying that the City's financial stability and the ever rising cost of the City's pensions are issues of public concern involving controversial political questions. These controversial issues have dominated the news in this region for some time. Numerous City officials publicly stated their positions on the CPRI. These various elected officials voiced both support and criticism of the CPRI.

Elected officials stated their position on the CPRI because the citizens of San Diego have a right to know what positions their elected officials have on this very important issue. City officials have knowledge and information that may have been helpful to their constituents and the citizens of the City as these individuals decided whether or not to support the CPRI.

Indeed, as elected City officials in a representative democracy, it is incumbent on City officials to publicly champion certain causes like the CPRI. They may not be muzzled by the threat of an unfair labor practice, as PERB and the unions argue by implication these officials should have been.

Under PERB's and the unions' logic, if a constituent had asked Mayor Sanders or Councilmembers Faulconer or DeMaio whether or not they supported the CPRI, they should not have answered. If they did answer with wholehearted support for the CPRI, then such speech automatically created a duty upon the City to meet and confer with its labor organizations over the terms of the CPRI prior to the City placing the initiative on the ballot. PERB's and the unions' illogical and unreasonable chilling effect on free speech cannot be condoned.

Mayor Sanders and Councilmembers Faulconer and DeMaio have publicly supported and championed the CPRI. As a direct result, PERB and the real parties in interests' unfair practice charges against the City is based solely on Mayor Sanders and Councilmembers Faulconer and DeMaio's actions and speech. Consequently, PERB and the real parties in interest actions attempt to infringe unconstitutionally on Mayor Sanders' and Councilmembers Faulconer and DeMaio's First Amendment rights as individuals and elected officials with regard to the CPRI. As the Constitution guarantees these individuals, both in their capacities as citizens

and as elected officials of the City, the right to speak out in support of the CPRI, Mayor Sanders and Councilmembers Faulconer and DeMaio's public support does not and cannot convert the CPRI from a citizens' initiative into a City Council sponsored initiative.

3. Harmonizing the Constitutional Reserved Power of the People with the MMBA Results in Only One Conclusion – The MMBA is Not Applicable to a Citizens' Initiative

Wherever possible, a court must interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize the Constitution and statute. (*People v. Superior Court* (2000) 23 Cal.4th 183, 193.) Reconciling the history of the citizens' Constitutional right to direct democracy with the fact that, under the Elections Code, the City has a mandatory duty to place a duly qualified citizens' initiative on the ballot exactly as worded by the citizens themselves, leads to only one logical and legal conclusion, that the MMBA cannot have required the City to meet and confer over the CPRI before it placed this initiative on the June 5, 2012 ballot.

The initiative power refers to the authority of the people to propose statutes and constitutional amendments to be submitted to a vote of the electorate, and the authority of the electorate to adopt or reject the proposed measure. (Cal. Const., art. II, section 8.) The initiative power was added to the California Constitution in 1911. The relevant provision specified that the initiative afforded the people authority to propose and adopt statutes

and "amendments to the constitution." (Cal. Const., former art. IV, section 1, as adopted Oct. 10, 1911, now art. II, section 8(a) and art. XVIII, section 3.)

This initiative power reserved to the citizens placed no subject-matter limitation on the initiative process and did not exempt any provision of the existing Constitution from amendment through the initiative process. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 456-57.) As a number of past California Supreme Court decisions have explained:

> [T]he progressive movement in California that introduced the initiative power into our state Constitution grew out of dissatisfaction with the then-governing public officials and a widespread belief that the people had lost control of the political process. (See, e.g., *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1041-1043; *Strauss, supra,* 46 Cal.4th 364, 420-421.) In this setting, "[t]he initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." (*Strauss, supra,* at p. 421.) The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt. The 1911 ballot pamphlet argument in favor of the measure described the initiative as "that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures *which the legislature either viciously or negligently fails or refuses to enact. . . .*" (Sect. of State, Proposed Amends. to Const. with Legis. Reasons, Gen. Elec. (Oct. 10, 1911) Reasons why Sen. Const. Amend. No. 22 should be adopted.)

(*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140-41; italics in original.)

"The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt." (*Id.*) Moreover, "[d]uring the nearly 100 years since adoption of the statewide initiative process in California . . . no provision purports to place any section or segment of the state Constitution off-limits to the initiative process or to preclude the use of the initiative with respect to specified subjects." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 456-57.)

Turning to the MMBA, as this Court noted, "[i]t is the rule under the MMBA 'that a public agency is bound to so 'meet and confer' *only* in respect to '*any agreement that the public agency is authorized* [by law] *to make* . . . .' (citation.)" (*American Federation of State etc. Employees v. County of San Diego* (1992) 11 Cal.App.4th 506, 517, citing, *San Francisco Fire Fighters v. Board of Supervisors* (1979) 96 Cal.App.3d 538, 545; italics in original.)

Requiring the City to meet and confer with the unions regarding the terms of the CPRI necessarily assumes that the City has the power to change the language of the CPRI. It does not. Pursuant to Elections Code section 9255(a)(3), the City has a ministerial duty to place any qualified citizens' initiative on the ballot as authored and worded by the citizens themselves.

In fact, if the City had done as PERB and the unions contend, the Proponents very likely would have filed a petition for writ of mandate against the City arguing that it has the ministerial duty of placing the initiative, as worded, on the ballot. The Proponents would have argued, "[t]he law is clear: A local government is not empowered to refuse to place a duly certified initiative on the ballot." (*Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149.) In fact, "[t]he courts have uniformly condemned local governments when these legislative bodies have refused to place duly qualified initiatives on the ballot." (*Id.* at 148; citations omitted.) Consequently, the City was without authority to change the proposition proposed by the Proponents.

Thus, as this Court noted in *American Federation of State etc. Employees* and which is appropriate here, "[a]s a practical matter, it would be inappropriate to attribute to the Legislature a purpose of requiring the [City] to make very substantial negotiating expenditures on subjects over which the [City] has no authority to act. Nothing in the statutory language calls for this result. As in other areas of the law, the MMBA is not to be construed to require meaningless acts." (*American Federation of State etc. Employees, supra,* 11 Cal.App.4th at 517, citing *Glendale City Employees' Association., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336.)

Requiring the City to meet and confer and potentially change the terms of a citizens' initiative severely constrains, if not destroys, the

citizens' right of direct democracy. By harmonizing the language of the Constitution with the MMBA, it makes little sense, logically or legally, that the City should be required to meet and confer over a proposition that it is not the proponents of as the City was without authority to change even one word of the CPRI.

The decision of the California Supreme Court in *Friends of Sierra Madre* (2001) 25 Cal. 4th 165, by analogy, supports this conclusion. In *Friends of Sierra Madre*, the California Supreme Court explained that placing a voter-sponsored initiative measure on the ballot is "a ministerial act compelled by law." (*Id.* at 189.) A city council does not have discretion to modify or reject a duly qualified citizen initiative; rather, it has a "constitutional and statutory obligation to place a properly qualified voter-sponsored initiative on the ballot." (*Id.* at 190, fn. 16.)

In *Friends of Sierra Madre*, the Court examined an earlier decision of the Court of Appeal, which held that a charter amendment proposed by a citizens' initiative is not subject to environmental review under the California Environmental Quality Act ("CEQA") because it "involve[s] no discretionary activity directly undertaken by the City." (*Stein v. City of Santa Monica* (1980) 110 Cal. App. 3d 458, 460-462.) The *Stein* court explained that a proposal to amend a city charter by initiative is "an activity undertaken by the electorate and did not require the approval of the governing body. The acts of placing the issue on the ballot and certifying

the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA." (*Id.* at 461.)

Just as there is no mandate on the part of the City to comply with the procedural requirements of CEQA when faced with the ministerial duty to place a duly qualified charter amendment by voter initiative on a City ballot, there was no duty to comply with the MMBA prior to placement of the CPRI on the June 5, 2012 ballot.

The Constitution protects the authority of citizens to amend a city charter by initiative. (*See* Cal. Const. art. I, section 3(a), people have the right to petition government for redress; *Id.* at art. II, section 1, "All political power is inherent in the people . . . they have the right to alter or reform it when the public good may require.") "The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them." (*MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal. App. 4th 1372, 1381, quoting *Rossi v. Brown* (1995) 9 Cal. 4th 688, 695.) These reserved powers are "one of the most precious rights of our democratic process." (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 135, quoting *Associated Home Builders, Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d.582, 591.)

Because this power is constitutionally vested in the people, courts are suspicious of any restrictions placed on it. "[I]t has long been our judicial policy to apply a liberal construction to [initiative] power whenever

it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 776-77, quoting *Associated Home Builders, Etc., Inc., supra,* 18 Cal.3d.at 591.)

Thus, if a citizens' initiative to amend the Charter qualifies for the ballot, there is no legal basis for the City's Council to modify the proposed language. (*See Save Stanislaus Area Farm Economy v. Board of Supervisor, supra*, 13 Cal. App. 4th at 149, "The law is clear: A local government is not empowered to refuse to place a duly certified initiative on the ballot.") Accordingly, the initiative power reserved to the citizens of the City by the Charter and the state Constitution can only be harmonized with the MMBA by finding that the City was not required to meet and confer with the real parties in interest prior to the CPRI being placed on the ballot. Any other conclusion would lead to the impermissible result that the MMBA effectively limits the citizens' reserved power to amend the City's Charter by initiative.

4. The City is Excused from Exhausting Administrative Remedies

The California Supreme Court has held "that a public entity must exhaust its administrative remedies at PERB before seeking judicial relief *unless* one of the recognized exceptions to the exhaustion of administrative

remedies requirement is established." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 601; italics in original.) Futility is one exception. (*Id.* at 1080-1081.) Another exception, "when a party claims that 'the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.' " (*Id.* at 1081-1082.) The doctrine also does not apply when the administrative remedy is inadequate. (*Glendale City Employees' Association., Inc. v. City of Glendale, supra*, 15 Cal.3d at 342.) All three of these exceptions to the exhaustion of remedies doctrine apply in this case.

a. A PERB Hearing Would Be Futile in Light of PERB Having Already Decided that the City Violated the MMBA

"The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." (Gov. Code section 3509(b).)

In this case, PERB has already made their initial determination and decided the appropriate remedy with regard to the City. In their Superior Court Complaint and Petition, PERB describes the controversy as being between PERB and the City. (Exhibit "F" at 3:11.) As part of PERB's controversy with the City, "PERB contends that the City has engaged in conduct in violation of the MMBA by refusing to negotiate with the MEA over the provisions of the [CPRI] before placing it on the ballot for the June

5, 2012 election . . . ." (*Id.* at 6:9-11.) Consequently, "PERB brings this [Superior Court] action . . . to enforce the City's clear, present, and ministerial duties under the MMBA, including the duty to negotiate in good faith with the MEA before placing on the ballot [the CPRI]. . . ." (*Id.* at 7:2-7.)

PERB has already conclusively determined the outcome of its case against the City. PERB states, "[i]f the City is allowed to proceed with its plan to present the [CPRI] to the electorate without having first met and conferred with the MEA and other affected employee organizations, the policy, spirit, and bargaining mandates established by the Legislature and codified in the MMBA will be circumvented and thwarted." (*Id.* at 8:16-19.) As a direct result of the City's actions, PERB goes on to allege that it is important to restrain the City's acts in violation of the MMBA because "[t]he City's ***unlawful*** attempt to avoid its obligations under the MMBA is also likely to be replicated elsewhere and, will cause irreparable harm to collective bargaining rights provided by California's public sector labor laws to employees of local governmental agencies statewide." (*Id.* 8:19-22; emphasis added.)

Based on PERB's determination that the City acted unlawfully, PERB has also determined the appropriate remedy that should be imposed on the City. That remedy, in their view, is for the trial court to issue a permanent injunction against the City with regard to the CPRI and all future

citizens' initiatives. In their verified Complaint, PERB seeks a permanent restraining order seeking to direct the City to meet and confer with the MEA "regarding the CPRI ***and any future initiatives with proposed provisions that may affect current and future bargaining unit members' wages and retirement benefits, before placing any such initiative on the ballot for any subsequent election.***" (*Id.* at 9:24-10:4; emphasis added.) By concluding in their verified Complaint that the City had acted unlawfully with regard to the CPRI and seeking a permanent injunction, PERB attempts to force the City to meet and confer pursuant to the MMBA over the CPRI and all future citizens' initiatives that may affect bargaining unit members' wages and retirement benefits.

PERB has already made its determination on the unions' unfair practice charges that the City violated the MMBA and reached the conclusion that the City should be permanently enjoined from further violating the MMBA with regard to the CPRI and all future citizens' initiatives. Any argument to the contrary would necessitate a finding that PERB has committed a ***fraud on the superior court*** when it filed its verified Complaint and Petition. PERB simply cannot allege in a verified complaint that the City acted unlawfully, violated the MMBA, and seek a permanent injunction with regard to the CPRI and all future citizens' initiatives as a result of said actions, and at the same time argue that it has

made no final determination on the actions of the City with regard to the unions' unfair practice charges.

Therefore, it would be futile for the City to participate in a PERB administrative hearing. Indeed, if the City prevailed at the administrative hearing, the unions would simply appeal such adverse decision to PERB, the entity who, via a verified complaint, has already declared that the City acted unlawfully and seeks a permanent injunction against the City based on that declared violation. Accordingly, having the City follow through with PERB's administrative process would be futile.

b. PERB Lacks Authority in this Matter

PERB has exclusive initial jurisdiction over claimed violations of the MMBA. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) To warrant PERB's jurisdiction, the conduct at issue must implicate the MMBA. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 957.)

In this case, the CPRI is a citizens' initiative, not an initiative sponsored by the governing body of the City, the City Council. This is because, as noted above, under the California election laws, the three individual proponents are the owners of the CPRI.

On the other hand, the purpose of the MMBA is to "promote full communication between public employers and their employees. . . ." (Gov.

Code section 3500.) Since the City Council did not initiate the CPRI and prior to June 5, 2012 it was unknown if the terms of that initiative would even become effective, the MMBA was not implicated as no communication between the City and the unions could have changed the terms of the CPRI. Therefore, PERB has no jurisdiction over this issue.

As the California Supreme Court explained in the *Coachella Valley* case: "In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue." (*Coachella Valley, supra,* 35 Cal.4th at 1082.)

With regard to the first factor, requiring the City to exhaust PERB's administrative procedures will create an inordinate delay in implementing the CPRI. If there is any delay in implementing the mandates of the CPRI, the value of the savings sought to be achieved by the CPRI will be lost, thus negating the will of the voters. For example, the CPRI amends the City's Charter to add Section 70.2 which requires the City, in future labor negotiations with all the City's unions to propose and work to achieve no increase in City employee base compensation. (Exhibit "Q," attached hereto and incorporated by reference.) No increase in employee base compensation directly relates to lower pension costs as an employee's

pension is based on his/her highest salary. This provision sunsets on June 30, 2018. (*Id.*) Therefore, any delay in implementing this feature will severely decrease the intended fiscal effectiveness of the CPRI.

Every dollar squandered is a dollar lost for other public services. Therefore, the City is not the only party affected by a lengthy and timely administrative process. The City's citizens, including the nearly 116,000 that signed the petition to qualify the CPRI for placement on the ballot and the at 110,738 citizens who voted in favor of the CPRI on June 5, 2012 will continue to bear the burden of the lost savings while PERB conducts its administrative hearings and appeals. Thus, there is a significant public interest to both the City and its citizens in obtaining a definitive resolution of this matter. (See *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 170-171, where exhaustion was excused because of the urgent need for a judicial determination. See also *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 615.)

Exhaustion is also excused because the case raises "important issues of public policy." (*Lindeleaf v. Agricultural Labor Relations Board* (1986) 41 Cal.3d 861, 871.) PERB attempts to obtain a permanent injunction against the City with regard to the CPRI and all future citizens' initiatives. (Exhibit "F" at 9:24-10:4.) PERB alleges that "[t]he City's unlawful attempt to avoid its obligations under the MMBA is also likely to be

replicated elsewhere and, will cause irreparable harm to collective bargaining rights provided by California's public sector labor laws to employees of local governmental agencies ***statewide***." (*Id.* at 8:19-22; emphasis added.) In as much as PERB intends to use its prosecution of the City as a deterrent to all other local government agencies in the state, the issue presented in this case is one that raises important public policies upon which a quick decision is required. Otherwise, every single municipality, county and public agency all over this state is at risk of prosecution by PERB if their citizens qualify an initiative for the ballot that affects wages and/or pension benefits of said entities' employees.

Exhaustion is also excused because, under the law, it is presumed that First Amendment conduct, even if harmed for a small amount of time, is entitled to protection and is considered irreparable harm. (*Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 480.) In this case, PERB and the unions attempt to curtail the First Amendment rights of current and future City officials with regard to all future citizens' initiatives that may affect City employee wages and/or retirement benefits. Therefore, the Constitutional implications of PERB and the unions' charges against the City require a prompt resolution.

Accordingly, the first factor, the burden and injury exhaustion will pose, weighs heavily in favor of judicial intervention by this Court.

As to the second factor, there is no existing law that supports PERB's position that the City was required to meet and confer over the CPRI, a citizens' initiative. PERB, in prior pleadings before the Superior Court, has misrepresented the holding in *People ex rel. Seal Beach Police Officers' Association v. City of Seal Beach* (1984) 36 Cal.3d 591 ("*Seal Beach*") in an effort to try and bring the CPRI within the ambit of the MMBA. Specifically, PERB asserts that the "Supreme Court ruled that local government must satisfy the 'meet and confer' requirements of the MMBA before proposing to the electorate a charter amendment that would impact a subject within the scope of representation." (Exhibit "R," attached hereto and incorporated by reference, at 1:24-2:15.)

The California Supreme Court did no such thing. The Supreme Court, in *Seal Beach,* identified the only issue it was ruling upon as "whether the ***city council*** of a charter city must comply with the Meyers-Milias-Brown Act's (MMBA) 'meet-and-confer' requirement before ***it*** proposes an amendment to the city charter concerning terms and conditions of public employment. (citations.)" (*Id.* at 594, emphasis added.) The issue of a ***citizen's initiative petition*** seeking to amend a city charter with an alleged duty to meet and confer under the MMBA was not before the California Supreme Court in *Seal Beach*. In fact, that Court stated, "[n]eedless to say, ***this case does not involve the question whether the***

meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." (*Id.* at 559, fn. 8; emphasis added.)

Additionally, even accepting all of PERB's and the unions' allegations to be true regarding Mayor Sanders and Councilmembers Faulconer and DeMaio's support for the CPRI, none of these three individuals acting individually or in concert could have made the CPRI an initiative of the City's governing body. This is because, as noted above, there are only two distinct ways to propose amendments to the City's Charter. The two methods include, (1) a proposal by and through a citizens' initiative, or (2) a proposal by a majority vote of the City's whole governing body, the City Council. (Cal Const. art. XI, section 3(b).) There is no third method, such as a proposal sponsored by a minority of the City's governing body as PERB and the unions suggest.

Therefore, PERB and the unions cannot legally seek to penalize the City for the Mayor and certain councilmembers exercising their right to free speech. As noted above, an elected official does not lose his/her status as a citizen and the liberties guaranteed to him/her by the Constitution simply because he/she was elected to serve. Therefore, Mayor Sanders and Councilmembers Faulconer and DeMaio, as guaranteed to them by the First Amendment of the Constitution, were free to take a position, speak on that position, and thus, promote the CPRI. Since PERB and the unions' sole basis for the City's alleged violation of the MMBA is based on an

impermissible attempt by PERB and the unions to sanction protected free speech of Mayor Sanders and Councilmembers Faulconer and DeMaio, and PERB and the unions have no statutory or case law to support their position, the City has demonstrated a very strong likelihood of success on the merits that PERB lacks jurisdiction over the unions' claimed violations of the MMBA.

Finally, with regard to the third factor, PERB's administrative expertise will not aid in resolving the jurisdiction issue as the issue involves a pure question of law, the interpretation of a California Supreme Court decision, *Seal Beach*. The sole question of law is whether or not *Seal Beach* stands for the proposition that the City is required to meet and confer about a duly qualified citizens' initiative that affects City employee wages and retirement benefits prior to placing that initiative on the ballot. This is because PERB and the unions contend that *Seal Beach* required the City to meet and confer. The City contends that *Seal Beach* did not require the City to meet and confer. Therefore, the decision in this matter does not depend on PERB receiving evidence and weighing the evidence in order to determine if a violation of the MMBA has occurred. This is because PERB acknowledges, "the factual issues, actually, in some respects are not in dispute." (Exhibit "S," attached hereto and incorporated by reference, at 21:10-11.) And even if there were some facts still arguably in contention, PERB has already determined that the City has violated the MMBA.

(Exhibit "F," at 8:19-22.) The jurisdiction issue, thus, is not the type of issue with which PERB has any expertise. Rather, the jurisdiction issue revolves around the interpretation of a single California Supreme Court decision, an issue within the particular expertise of this Court.

Having demonstrated that requiring the City to exhaust PERB's administrative process will cause great burden to the City and its citizens, infringe on current and future City officials' First Amendment rights, that PERB's sole determination for the City's violation of the MMBA is impermissibly based on Constitutionally protected free speech, and that PERB's administrative expertise cannot resolve a pure question of law, the City has adequately shown that PERB has no jurisdiction over the allegations that the City was required to meet and confer over the terms of the CPRI prior to placing it on the June 5, 2012 ballot.

c. PERB's Administrative Process is Too Slow to Be Effective

The doctrine of exhaustion of remedies also does not apply when the administrative remedy is inadequate. (*Glendale City Employees' Association, Inc. supra*, 15 Cal.3d at 342.) For example, it does not apply when the administrative procedure is too slow to be effective. (*Los Angeles County Employees Association. v. Los Angeles* (1985) 168 Cal.App.3d 683, 686.)

In this case, requiring the City to follow through with PERB's administrative process will result in a slow and arduous process that will result in the CPRI losing its effectiveness. As noted above, any delay in implementing the mandates of the CPRI results in a direct loss of savings sought to be achieved by the CPRI.

PERB must agree that its own administrative process, followed by judicial review, will result in a process that is too slow to be effective. In seeking a permanent injunction and a peremptory writ of mandate against the City, PERB alleges that "any proposed decision of the ALJ [administrative law judge] will be subject to an appeal to the [PERB] Board itself, followed by possible judicial review of by the Court of Appeal and the California Supreme Court – a process that, in the best of circumstances, can take a year or more to complete...." (Exhibit "F," at 8:5-8.) Thus, PERB argues, "the Board will not be able to meaningfully aid those new employees who in the meantime have been excluded from the city's existing Defined Benefit Plan and forced into a Defined Contribution Plan, or those current employees who in the meantime have been forced to pay higher employee contributions to the Defined Benefit Plan, or those who have retired with diminished benefits, or those City employees whose wages have been frozen as a result of the Initiative." (*Id.* at 8:9-14.)

The City and PERB are in agreement that requiring the City to exhaust PERB's administrative remedies will result in process that is too

slow to be effective. Too many people will be left in "limbo" until there is a definitive decision by this Court on the sole legal question – was the City required to meet and confer pursuant to the MMBA prior to placing the CPRI on the June 5, 2012 ballot. Therefore, the City is excused from having to exhaust any of PERB's administrative remedies.

5. This Court Can and Should Exercise Its Original Jurisdiction to Hear This Case

Under the California Constitution, the Supreme Court, the Courts of Appeal and the superior courts "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." (Cal. Const., art. VI, section 10.) When the issues presented are of great public importance and should be resolved promptly, the Court of Appeal has invoked its original jurisdiction to hear the matter in the first instance. (See e.g. *County of Fresno v. Malstrom* (1979) 94 Cal.App.3d 974, 978, citing *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 580; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 598; Cal. Civil Writs (Cont.Ed.Bar 1970) section 8.5, pg. 154.)

The issues presented herein are of great public importance and should be resolved quickly. This is because the CPRI contains cost cutting measures that will not be effective until the measures called for are fully implemented. Some of these measures have a sunset provision. Therefore, PERB and the unions, by tying up the implementation of the CPRI for years

in litigation before PERB and the courts, can undermine the will of the electorate and the fiscal effectiveness sought to be achieved by the CPRI.

The need for prompt resolution is also urgent for another reason. The position of all the parties hinges on a single question of law. That question is: does the MMBA apply to a duly qualified citizens' initiative, such that the City had a duty to meet and confer over the terms of the CPRI prior to placing it on the ballot? Not only does the City seek this Court's guidance on this question. PERB does also. Just recently, PERB sought and received a delay on the City's pending Demurrer to PERB's Complaint and Petition arguing that this Court, in deciding MEA's Petition for Writ of Mandate filed with this Court, case number D061724, may provide guidance on this question. (Exhibit "T.")

The determination of this Court to exercise its original jurisdiction should not be constrained by the lack of a factual record being developed by proceedings before either the superior court or PERB. This is because the development of a factual record is not necessary to the determination of the sole legal question in this case. This Court can assume for purposes of deciding this question of law that certain public officials of the City outwardly supported and championed the CPRI and that some of the signatures received on the petition to place the CPRI on the ballot was received as a result of this support. The degree of the public officials support is inconsequential. Indeed, the City submits that, even if this Court

were to require the parties to proceed before the Superior Court or PERB in the first instance, neither PERB nor the unions will be able to quantify whether 1 or all 115,991 of the citizens who signed the petition that ultimately qualified the CPRI for inclusion on the ballot did so in whole or part as a result of the support and encouragement of Mayor Sanders, Councilmember Faulconer and/or Councilmember DeMaio.

This Court should also exercise its original jurisdiction to hear this matter since this Court will be the court that hears any and all appeals involving the CPRI, whether they originate from the Superior Court or PERB. (Gov. Code section 3509.5(b).) As the sole issue of whether the MMBA applies to a duly qualified citizens' initiative, such that the City had a duty to meet and confer over the terms of the CPRI prior to placing it on the ballot, is a question of law, this Court will review that question of law *de novo*. Thus, the answer to this question of law by this Court in the first instance will expeditiously resolve any and all litigation over the CPRI and save the taxpayers who fund PERB and the City a lot of time and costs.

Finally, this Court is not without precedent in exercising its original jurisdiction to determine a question of law regarding the applicability of the meet and confer provisions of the MMBA. In *American Federation of State etc. Employees v. County of San Diego* (1992) 11 Cal.App.4th 506, this Court exercised its original jurisdiction to hear and determine an unfair labor practice charge against the County of San Diego for failing to meet

and confer with recognized bargaining representative of employees of superior court. Relying on a similar case, *Service Employees International Union v. Superior Court* (1982) 137 Cal.App.3d 320, 322, this Court found its exercise of its original jurisdiction to be proper to answer questions of law, including, was the superior court a public agency for purposes of the MMBA and whether or not the County of San Diego had any obligation to negotiate over benefits it had no authority to agree upon. (In *American Federation of State etc. Employees, supra,* 11 Cal.App.4th at 513, 518.)

So, too, are the same types of legal questions concerning the MMBA involved in this case. Specifically, the parties need to know if the meet and confer provisions of the MMBA apply to a citizens' initiative that was supported by a select group of public officials of the City. Or stated another way, was the City required to meet and confer over the terms of the CPRI, when the Elections Code grants the City no authority to change or modify the text of the CPRI prior to placing it on the ballot?

Based on the urgent need to resolve an issue of great public importance, the fact that this Court will ultimately decide this issue on a *de novo* review standard, and the Court has previously invoked its original jurisdiction in a case involving similar legal questions, the City respectfully urges this Court to once again exercise its original jurisdiction to expeditiously resolve the question of whether or not the City was required

to meet and confer with the unions over the terms of the CPRI prior to the City placing the CPRI on the June 5, 2012 ballot.

6. This Court Should Issue a Stay of Proceedings

This Court should issue a stay of all current and future proceedings involving the CPRI whether they are before PERB or the Superior Court. This is because no lower tribunal can determine whether or not, as a matter of law, the City was required to meet and confer over the terms of the CPRI prior to placing the initiative on the ballot. No lower tribunal can make this determination because there is no statutory law or case precedent on point. This is an issue of first impression.

Accordingly, this Court should issue a stay to protect the status quo while it considers whether or not to exercise its power of jurisdiction. This prevents a duplication of efforts over the same issue by multiple tribunals. The stay also helps save tax dollars. PERB and the City are both funded by the public's tax dollars.

Finally, if this Court exercises its original jurisdiction, the stay should be extended until this Court makes a final decision on the matter.

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IV.

CONCLUSION

The City's Petition for Writ of Mandate should be granted finding that the MMBA placed no duty to meet and confer over the terms of the CPRI prior to the City placing the initiative on the June 5, 2012 ballot. A stay should also issue for all current and future proceedings involving the CPRI, whether they are before PERB or the Superior Court.

Dated: June 6 2012

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CERTIFICATE OF WORD COUNT

The text of this brief, excluding the title page, table of contents, table of authorities, the certificate of interested parties and this certificate of word count consists of 10,423 words as counted by the Word 2007 word-processing program used to generate the brief.

Dated: June 6, 2012

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COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

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City of San Diego V. California Public Employment Relaltions Board, et al.
Court of Appeal Case No. D _____

I, Ginger Botha, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled actions; my business address is 1200 Third Avenue, Suite 1100, San Diego, California 92101. On June 7, 2012, I served the following documents described as

PETITION FOR WRIT OF MANDATE; APPLICATION FOR TEMPORARY STAY; AND SUPPORTING MEMORANDUM

I served the documents described above on the parties listed below by causing them to be delivered by hand to the persons at the addresses set forth below.

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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 7, 2012 at San Diego, California.

Ginger Botha