Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 EXTRAORDINARY RELIEF, INCLUDING A WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE STAY REQUESTED OF PERB'S PROCEEDING BY JULY 17, 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: July 11, 2012

JAN I. GOLDSMITH, City Attorney

By _____

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

NOTICE OF RELATED CASES

Pursuant to California Rules of Court rule 3.300, counsel for Petitioner City of San Diego hereby advises the Court and all parties to this Petition of the following related cases. These cases are related to the instant matter as parties to this matter are parties in some or all of the below related matters. Additionally, the below listed related matters all involve the subject of this Petition, the Comprehensive Pension Reform Initiative.

(1) *City of San Diego v. California Public Employment Relations Board,* California Supreme Court case number S203478. This Court denied the petition for review.

(2) *California Public Employment Relations Board v. City of San Diego*, San Diego Superior Court case number 37-2012-00092205-CU-MC-CTL. This matter is currently still pending.

(3) *San Diego Municipal Employees' Association v. Superior Court*, Fourth District Court of Appeal, Division One, case number D061724. On June 13, 2012, the Court of Appeal issued an opinion in this matter and certified that opinion for publication. The citation to that opinion is (2012) 206 Cal.App.4th 1447.

(4) *Boling v. California Public Employment Relations Board,* San Diego Superior Court case number 37-2012-00093347-CU-MC-CTL. This matter is currently still pending.

(5) *San Diego Municipal Employees' Association v. City of San Diego*, PERB case number LA-CE-746-M. This matter is currently still pending.

(6) *Deputy City Attorneys' Association v. City of San Diego,* PERB case number LA-CE-752-M. This matter is currently still pending.

(7) *AFSCME, Local 127 v. City of San Diego*, PERB case number LA-CE-755-M. This matter is currently still pending.

(8) *San Diego City Firefighters, Local 145 v. City of San Diego*, PERB case number LA-CE-758-M. This matter is currently still pending.

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I.

PETITION FOR WRIT OF MANDATE

Petitioner the City of San Diego ("City") brings this Petition for extraordinary relief, including a writ of mandate under Art. VI, section 10 of the California Constitution and Code Civ. Proc. section 1085, 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 had 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 Meyers-Milias-Brown Act ("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, the dispute between the parties concerns the sole issue of whether or not the 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. The City sought and received a stay of the PERB proceedings from the trial court.

18. The Fourth District Court of Appeal, Division One, reversed the trial court's decision in *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447.

19. The City intends to appeal that decision. However, the City cannot file a notice of appeal until July 19, 2012, 30 days after the Court of Appeal filed their decision. In the interim, and unless and until this Court accepts that petition for review, City officials and private individuals are being subpoenaed to testify in the PERB administrative matter. The testimony sought to be elicited by these subpoenas violate the Constitutional rights of each of these individuals.

20. 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 violate the Constitutional rights of numerous individuals.

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

WHEREFORE, the City prays that:

1. Until this Court has had a chance to review and decide the City's petition for review of *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447, 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 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 until this Court has had a chance to review and decide the City's petition for review of *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447;

3. This Court order stayed any PERB administrative hearings related to the CPRI pending disposition of the City's petition for review of *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447;

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: July 11 2012

JAN I. GOLDSMITH, City Attorney

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

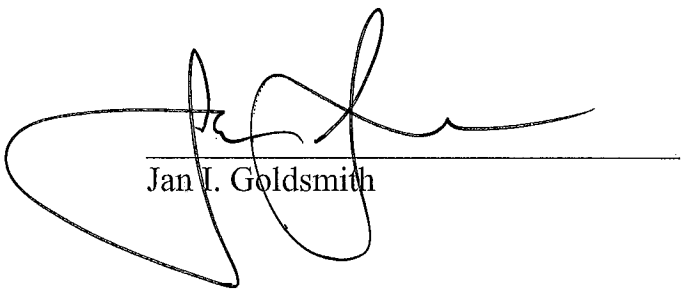
II.

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 Extraordinary Relief 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 July 11, 2012 at San Diego, California.



Jan I. Goldsmith

III.

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

A. 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 inclusion on the June 5, 2012 Presidential primary ballot as a citizens' initiative. Under the California Constitution, a citizens' 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.

PERB and the 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 contends that the law holds 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.

The Court of Appeals in, *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447, 2012 WL 2308142 ("*SDMEA v. Sup. Ct.*"), 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 of Appeal recognized 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.

(*SDMEA v. Sup. Ct, supra*, 2012 WL 2308142 at *7; italics in original.)

The Court of Appeal, however, did not define what constitutes a "nominal" citizens' initiative, but simply sent 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 of Appeal is leaving to a state quasi-judicial administrative agency the task of interpreting and rewriting

constitutional law to define what is and is not a citizens' 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.

The problem inherent with the decision in *SDMEA v. Sup. Ct.* and the upcoming PERB proceedings is that, as a simple matter of due process, the 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 propose initiatives.

There are a few clues that can be gathered from the Court of Appeal's decision. Rather, the decision, the City submits, raises more questions than it clarifies on such a new and novel constitutional concept.

For example, despite the San Diego County Registrar of Voters duly certifying that 115,991 individuals signed the petition to place the CPRI on the ballot, is the initiative only "nominally" a citizens' initiative if elected officials, who otherwise do not have the power to individually or collectively place a government-sponsored measure on the ballot, support and/or champion the measure?

While the Court of Appeal determined that the MEA provided "some evidence" to support its allegations, the City does not know what

that "evidence" the Court found persuasive. (*SDMEA v. Sup. Ct, supra*, 2012 WL 2308142 at *7.) In its unfair practice charge to PERB, 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?

Another question the Court of Appeal's opinion leaves unresolved is what constitutes "strawmen" for purposes of placing a citizens' 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" citizens' initiative without a definition or parameters in a published decision opens a proverbial "Pandora's Box" from which will arise challenges to other citizens' initiatives across California. For example, 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" citizens' initiative, it would presumably need to proceed through the legislature since a "nominal" citizens' initiative is treated as a government-sponsored initiative. There are other citizens' initiatives throughout the

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

B. The CPRI is not a "Nominal Citizens' Initiative;" the CPRI is a Citizens' Initiative

Until the Court of Appeal issued its decision in *SDMEA v. Sup. Ct.*, California law had never before recognized the concept of a "nominal" citizens' initiative, nor rendered a citizens' initiative into a government-sponsored proposal because of public official involvement in its conception and support.

Prior to the Court of Appeal's decision, the law was clear, pursuant to the California Constitution, there were 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

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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>.

council sponsored measures, such as CEQA,[2] or in this case, the meet-and-confer requirements of the MMBA. (*See* Elec. Code § 9255(b)(2).)

Despite the Constitution providing only two methods to place an initiative on the ballot, citing to *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*San Jose*), the Court of Appeal in *SDMEA v. Sup. Ct.*, held 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 employees whose services are essential to public health and safety." (*Id.* at 606, citation omitted.) In determining that PERB did have initial

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[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.)

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 via initiative indicating their desire to place the CPRI on the ballot. (Exhibit "A.") The San Diego County Registrar of Voters certified that sufficient

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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.)

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, this 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 the Court of Appeal'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, this 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 this Court's decision in *Seal Beach*, this Court, nor any Court of Appeal, has *ever* applied the meet-and-confer requirement of the MMBA to a citizens' initiative. Nor has any court ever recognized that the involvement of city officials in the support of a citizens' initiative

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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.)

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. See also Gov. Code section 3203 holds that "no restriction shall be placed on the political activities of any officer or employee of a state or local agency.") 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.)

California political leaders for decades have openly led initiative movements to bypass legislatures and other obstacles to reform.[6] Indeed, the citizens' initiative is a power reserved to the people for just that purpose. Yet, the Court of Appeal's decision, that a "nominal" citizen initiative may be treated as a government proposal, defeats citizens' efforts to bypass the legislative process, as initiatives are historically meant to do.

C. *SDMEA v. Sup. Ct.* Improperly Vests PERB with the Power to Determine New Constitutional Standards

Although this Court of Appeal's decision in *SDMEA v. Sup. Ct.* creates a new category of initiatives, the so-called "nominal" citizen

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

initiative, it does not describe the legal standards that would transform a citizens' 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.

While the Court of Appeal stated that 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.) If the PERB proceedings are allowed to continue, for purposes of defending itself, 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.

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. 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. (See e.g. Exhibit "G," Subpoena Duces Tecum to Mayor Jerry Sanders.) Being forced to testify about these issues at a PERB proceeding, will have a chilling effect on public official advocacy on important public issues.

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.)

As can be seen, the decision in *SDMEA v. Sup. Ct.* will drive a stake through the heart of all citizens' initiatives in California. It would transform a right reserved to the people into a qualified right that depends upon who supported the initiative. Administrative hearings would be conducted and individuals forced to testify regarding who supported the idea of an initiative, 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.

D. The City Intends to Seek Review of the Court of Appeal Decision in *San Diego Municipal Employees Association v. Superior Court*

As can be discerned from above, respectfully, the City disagrees with the Court of Appeal's decision. The City intends to seek this Court's review of that decision. However, a petition for review can only be filed within the ten day period following the Court of Appeal decision becoming final. (Rules of Court rule 8.500(e)(1).) As the Court of Appeal has denied the City motion for rehearing, the decision in *San Diego Municipal Employees Association v. Superior Court* will become final on July 19, 2012. Therefore, the earliest the City could file a petition for review of that decision with this Court is July 19, 2012.

E. This Court Should Issue a Stay of Proceedings

Before the City can file its petition for review with this Court, administrative hearings before PERB will commence on July 17, 2012. (Exhibit "H.") This Court should issue a stay of the PERB proceedings to protect the status quo and protect against impermissible invasions into various individuals constitutional rights until this Court has had a chance to review the City's to-be-filed petition for review of the novel and ground breaking decision in *San Diego Municipal Employees Association v. Superior Court.*

A stay of the PERB proceedings are warranted 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.) Absent this Court stepping in to stop the PERB administrative hearings, PERB and the unions will have the power to conduct McCarthy-era type hearings into determining who supported the CPRI, their reasons for their support, who said what to whom, what did certain individuals "really" believe about the initiative, etc. Individuals will be required to divulge their private emails and correspondence regarding the initiative. Only after this impermissible intrusion into the private lives of countless individuals, will PERB then adjudge whether the CPRI is a "sham" based on the mere allegation of the unions that the City's Mayor and two councilmembers openly supported

and championed the initiative. If you think the City's position is too unbelievable to be true, don't take the City's word for it, simply review the subpoena duces tecum PERB has already issued to the Mayor. (Exhibit "G.")

The Court of Appeal's decision has statewide implications. Under the newly created decisional case law contained in *San Diego Municipal Employees Association v. Superior Court*, all any party need do to attack future citizens' initiatives is allege that the initiative is a "nominal" or "sham" citizens' initiative. Upon making those allegations, the party may then invade any supporter of that initiative's constitutionally protected rights in an attempt to overturn the initiative. This is not and cannot be the state of the law. Accordingly, this Court should issue a stay to protect the status quo while it considers whether or not to grant the City's to-be-filed petition for review.

IV.

CONCLUSION

The CPRI, a citizens' initiative that has indisputably garnered the required verified signatures for qualification on the ballot is a citizens' initiative, is constitutionally protected as a power reserved to the 115,991 individuals who signed the petition. The Court of Appeal's decision that holds that the support and the City's Mayor and two councilmembers

somehow transformed the independent act of 115,991 signing a petition to place the CPRI on the ballot into an act of the City is preposterous.

If this Court allows PERB to proceed with its scheduled hearings, the constitutional right of direct democracy through a citizens' initiative, one of the most precious rights of our democratic process, becomes a qualified right subject to government review and, itself, becomes a sham. No individual should be required to tolerate and no court should allow such invasion of privacy.

Accordingly, the City's Petition for Writ of Mandate should be granted staying the proceedings before PERB unless and until this Court has had a chance to review the City's petition for review of *San Diego Municipal Employees Association v. Superior Court.*

Dated: July 11 2012

JAN I. GOLDSMITH, City Attorney

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

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 4,775 words as counted by the Word 2007 word-processing program used to generate the brief.

Dated: July 11, 2012

JAN I. GOLDSMITH, City Attorney

By _____

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

PROOF OF SERVICE
Cal. Rules of Court, Rule 2.251, C.C.P. 1013a

COURT NAME: In the Supreme Court for the State of California

CASE NAME: *City of San Diego v. California Public Employment Relations Board*

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within entitled cause. My business address is 1200 Third Avenue, Suite 1100, San Diego, CA 92101. I am readily familiar with the ordinary practice of electronic service requirements and the service requirements of service by messenger service.

On July 11, 2012, I served the **PETITION FOR EXTRAORDINARY RELIEF, INCLUDING A WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES** in the above-reference case on the parties listed below by the manner 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 11, 2012 at San Diego, California.

Ginger Botha

Ginger Botha