Case No. S203478

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN DIEGO,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent;

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

ANSWER TO PETITION FOR REVIEW

After an Order by the Court of Appeal,
Fourth Appellate District, Division One, Denying a Petition for Writ of Mandate
Court of Appeal Case No. D062090

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

The Petition for Review asks this Court to remand the case so the Court of Appeal can settle an important question of law. The problem is that the Court of Appeal cannot settle anything at this early stage of the dispute. No fact-finder has heard evidence or made any findings of fact, and critical factual disputes remain. The Court of Appeal's refusal to decide a case in a vacuum, without a record, or to make factual assumptions about the case, does not warrant this Court's intervention. The Court of Appeal simply and appropriately declined to intervene when there is no factual record, instead requiring the dispute to work its way through the normal process of fact-finding and, thereafter, appellate review.

The central controversy implicated by this case is the claim by the unions for the employees of the City of San Diego (collectively, "Unions") that the City violated its obligation to meet and confer with the Unions over the Comprehensive Pension Reform Initiative ("Initiative"). The Initiative, among other things, changes the employee retirement system, freezes salaries, and dictates the opening bargaining position of the City. The City claims that it was not required to meet and confer because the Initiative is a citizen's initiative, not a City action. The Unions disagree and contend that the Initiative was a sham designed to circumvent the meet and confer requirement. Because it was truly a City-sponsored initiative,

the Unions contend the meet and confer requirements apply. No fact-finder has yet heard these arguments or taken any evidence.

The Petition for Review arises from the summary denial of the City of San Diego's writ petition, which invoked the Court of Appeal's original jurisdiction. The City asked the Court of Appeal to decide whether a citizen's initiative is subject to the Meyers Milias Brown Act ("MMBA"), the law that governs collective bargaining between public entities and their employees. This is apparently the same question the Petition for Review asks this Court to remand to the Court of Appeal. But the Court of Appeal could not resolve the controversy even by deciding that question. A central dispute here is whether the Initiative is a genuine citizen's initiative. Thus, even if the Court of Appeal had ruled as the City requested—that citizen's initiatives are not subject to the MMBA—this dispute would continue. A trier of fact still would need to determine how the new rule applied in this case: that is, whether *this* Initiative is a citizen's initiative not subject to the MMBA.

The Court of Appeal had only two other options, both of which it appropriately declined to exercise. The first was to find, as a factual matter (or a matter of mixed fact and law), that this Initiative was legitimate. Of course, appellate courts are not fact-finders, so the Court of Appeal's refusal to make that finding was proper. Alternatively, the Court could have held that it is legally impossible for a citizen's initiative ever to be a sham, meaning that this Initiative necessarily is a "citizen's initiative." But that would have ignored the Unions'

factual allegations and would effectively gut the MMBA. Under such a rule, public employers easily could circumvent the MMBA's meet and confer requirements. Employers would simply develop a document that formally complied with the "citizen's initiative" rules, even if the employer wrote the measure and used official resources to get it passed. The Court of Appeal appropriately declined to make the sweeping assumption that all initiatives are automatically legitimate.

Absent a factual record, an appellate court is faced with Hobson's choice of issuing a decision that will not resolve the case, making factual findings, or making factual assumptions that will gut the MMBA. The Court of Appeal's decision not to intervene without a record does not warrant Supreme Court review. This Court should deny review and permit the dispute to proceed through the statutorily prescribed administrative proceedings and normal appellate review.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Related Cases For Which Review is Not Sought

The Initiative seeks to amend the City of San Diego's charter by, among other things, changing retirement benefits for certain current and future City employees. (2 City Exhibit to Petition for Writ of Mandate ["CE" 276-283.)[1] It also defines the terms the City must use when it begins labor negotiations. (2 CE

[1] References to the exhibits filed in support of the City's Petition for Writ of Mandate as follows: **volume number** CE **page number.**

277-278.) The Initiative was placed on the June 2012, ballot and passed by the voters.

The sponsorship and authorship of the Initiative is a hotly contested factual (or mixed legal and factual) issue. The Unions argue that the initiative is not a genuine citizen's initiative, but is rather a City sponsored initiative. (See, e.g., 1 CE 4, 7-9 [MEA arguing that City officials, acting in their official capacity, created and sponsored the Initiative]; 2 CE 237-240 [DCAA outlining evidence and argument that the Mayor in his official capacity sponsored the Initiative].) They argue that the Initiative "is merely a sham device which City's 'Strong Mayor' has used for the express purpose of avoiding the City's MMBA obligations to meet and confer." (1 CE 4.) The Unions have gathered hundreds of pages of evidence, none of which has been heard by a fact-finder, to support their position that the Initiative is not a legitimate citizen's initiative. (1 CE 18-234 [evidence supporting MEA's Unfair Practice Charge]; 2 CE 237 [DCAA Unfair Practice Charge incorporating by reference the evidence gathered by MEA].)

Catherine Boling, T.J. Zane, and Stephen B. Williams (collectively "Citizens") and the City contend the Initiative was a legitimate citizen's initiative. (See, e.g., City's Writ Pet. at 14-18; Exhibits to MEA Petition for Writ of Mandate

["MEA Ex."] 11, 115;[2] Pet. for Review at p. 11-12.) The City has argued that there is "no evidence" to support the Unions' charge that because no "official action" has been taken by the City of San Diego Council acting "as a body." (MEA Ex. 10, 102-106, 11, 107 [City's response to MEA's unfair practice charge and injunctive relief request].) The City has denied the following factual allegations:

> "3. From approximately April 2011 to date, Respondent, through its agents include chief labor negotiator San Diego City Mayor Jerry Sanders, has co-authored, developed, promoted, funded, and implemented a pension reform initiative referred to as the Comprehensive Pension Reform Initiative for San Diego.
>
> 4. Commencing on or about August 16, 2011, Respondent, through its agent City Attorney Jan I. Goldsmith, has refused to meet and confer with Charging Parties regarding the provisions of the CPR Initiative that impact wages and retirement benefits for bargaining unit members." (MEA Exs. 11, 115.)

In short, Citizens and City argue that Citizens authored the Initiative and garnered support for it, with the help of Mayor Sanders and two City Councilmen acting in their private capacities.

The legal battle over the Initiative began when the Municipal Employees Association ("MEA") filed an unfair practice charge with the PERB. (1 CE 2-13.) MEA alleged that the City had violated the Meyers-Milias-Brown Act ("MMBA"), Gov. Code, sec. 3500, et seq., by failing to meet and confer over the

[2] The Exhibits supporting the MEA Petition for Writ of Mandate are the subject of the accompanying Request for Judicial Notice, filed by the MEA and joined by the DCAA.

Initiative. (1 CE 4.) The MMBA requires the City to meet and confer over changes in wages and the terms and conditions of employment. (See Cal. Gov. Code § 3505.) Because the Initiative was really a City initiative, the MMBA required the City to meet and confer. (1 CE 4-7; 2 CE 238-240.)

The MEA also filed a request for injunctive relief under California Government Code, section 3541.3 and PERB regulations, section 32560. (MEA Exs. 9, 98-99; 10, 100.) This request asks PERB to file a complaint in superior court for injunctive relief. PERB may pursue injunctive relief when it concludes that there is "reasonable cause" to believe that an unfair practice has been committed and that injunctive relief is "just and proper." (*PERB v. Modesto City School Dist.* (1982) 136 Cal.App.3d 881, 895.)

The PERB issued a formal complaint to MEA's charge, after having reviewed the City's opposing position statement. (MEA Ex. 11, 107, 109-110.) PERB also granted the MEA's request to pursue injunctive relief in superior court. (MEA Ex. 11, 108 & 111.)

After several hearings and many months, the City finally moved in the superior court for a stay of the PERB proceedings, without filing a noticed motion. (MEA Ex. 6, 72-82, 7, 83, 8, 84.)[3] Judge Luis Vargas granted the City's request. (MEA Ex. 8, 92.) MEA filed a writ of mandate on the stay order.

[3] MEA's Petition for Writ of Mandate explains in detail the procedural history of this related cases.

In a published opinion that is the subject of the accompanying joint request for judicial notice, the Court of Appeal granted MEA's writ, holding that the stay order was erroneous and the PERB hearings should proceed. (*San Diego Municipal Employees Ass'n v. Superior Court*, Court of Appeal Case No. D061724, 2012 WL 2308142 at *5, 11 ["*San Diego Municipal Employees Ass'n*"].) The Court reasoned that PERB has exclusive initial jurisdiction over the claim that the City violated the MMBA. (*Id.* at *4.) The Court further concluded that the City was not excused from exhausting the PERB administrative process. (*Id.* at pp. *6-10.) Finally, the Court observed that the "resolution of MEA's UPC arguably involves factual elements, because MEA alleges the [Initiative] was not a true citizen-sponsored initiative but was instead a sham . . ." (*Id.* at * 9.)

The DCAA filed its own unfair practice charge. (2 CE 235-243.) The DCAA alleges, as does MEA, that the Initiative was actually City-sponsored. (2 CE 237 [incorporating MEA's charge and evidence]; 2 CE 238-239.) The DCAA makes the additional argument that the Initiative is not a valid exercise of the initiative power because it is preempted by the MMBA. (2 CE 240-243.) The DCAA's unfair practice charge will be consolidated with the MEA charge pursuant to an order from PERB issued on June 29, 2012. The City again denied the factual allegation that the City had "co-authored, developed, sponsored, promoted, funded, and implemented" the Initiative. (DCAA Request for Judicial Notice, Exs. 1, 2.)

Citizens—who filed the instant Petition for Review—were not parties to any of the above matters. They moved to intervene and to file an amicus curiae brief in the MEA writ proceedings, but their requests were denied. (Court of Appeal Case No. D061724, May 4 and 11, 2012, Orders.) Their motion to intervene in the *PERB v. City* superior court action has not been decided. They have filed their own superior court action, against PERB and all the PERB Board Members in their individual and official capacities. (MEA Ex. 4, 38-44 [San Diego Super. Ct. Case No. 37-2012-00093347-CU-MC-CTL].)

There has not been a trial in any of the above cases, nor has any trier of fact made findings on the merits.

B. The Petition Seeks Review of a Summary Denial of the City's Writ Petition, Which Invoked the Court of Appeal's Original Jurisdiction

Separate from the proceedings discussed above, the City filed a petition for writ of mandate in the Court of Appeal, invoking the Court of Appeal's original jurisdiction under California Constitution Article VI, section 10. (City's Petition for Writ of Mandate ["City's Writ Pet."] at 1, 41.) The City asked the Court of Appeal to decide what the City called a legal question that would resolve the above-described cases: 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 [Initiative] prior to placing it on the ballot." (City's Writ Pet. at 10, 43.)

The City urged the Court of Appeal not to be disturbed by the admitted "lack of a factual record being developed by proceedings before either the superior

court or PERB" because the Court could assume that certain public officials championed the Initiative. (City's Writ Pet. at p. 42.) Critically, the Unions allege that City officials did far more than merely champion the Initiative; the Unions argue that City officials sponsored, wrote, and promoted the Initiative using City resources and using their official positions. (See, e.g., 1 CE 7-10; 2 CE 238-39.)

The City further argued that it should not be required to exhaust its administrative remedies before PERB because PERB had pre-decided the case, PERB lacked jurisdiction, and PERB's process is to too slow to be effective. (City's Writ Pet. at 28-41.) Citizens did not participate in the City's writ petition.

The Court of Appeal summarily denied the City's writ. (Ex. A to Petition for Review.) It is this summary denial that Citizens ask the Supreme Court to review.

III. REVIEW SHOULD BE DENIED BECAUSE THE APPELLATE ORDER DOES NOT IMPLICATE AN IMPORTANT QUESTION OF LAW

As an initial matter, this Court would have good reason to dismiss the Petition for Review for technical reasons. First, the Citizens' status as a "party" is questionable, and only parties may seek this Court's review. (Cal. Rules of Court. rule 8.500(a)(1).) The Citizens are not parties to the PERB proceedings or to the *PERB v. City* action, and the Court of Appeal refused to permit their participation in MEA's writ. (Court of Appeal Case No. D061724, May 4, 2012 and May 11, 2012 Orders.) Nor did they support or join the City's writ petition. (Court of

Appeal Case No. D062090, Docket.) Second, the Petition for Review wholly fails to cite the record. (Cal. Rules of Court, rule 8.504(a) [Petitions for Review must comply with rules governing appellate briefs]; Cal. Rules of Court, rule 8.204(a)(1) [requiring appropriate references to the record].) Briefs that fail to cite the record may be stricken. (E.g., *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.)

On the merits, the Petition for Review should be denied because the Court of Appeal simply declined to issue an advisory opinion, hardly a decision that is based on unsettled law. Granting the City's writ would have required the Court of Appeal to choose between three inappropriate options. It could have issued an advisory order that would not have resolved the dispute; it could have conducted fact-findings; or it could have assumed that all purported citizens initiatives are automatically legitimate. Instead of choosing any of these improper options, the Court of Appeal simply decided to give the parties the opportunity to develop the record and required the dispute to proceed as virtually all disputes must: first, to a trier of fact (which in this case the Legislature has mandated be the PERB), and only thereafter to the Court of Appeal. The Supreme Court need not intervene when a Court of Appeal simply requires a case to be heard by a trier of fact before it renders an opinion.

A. The Court of Appeal Declined to Issue a Decision Without a Factual Record

Proponents claim that their Petition for Review presents a matter of "statewide importance." (Pet. for Review at 2.) But a Court of Appeal declining to decide an issue in the absence of any factual record is hardly remarkable. To the contrary, it is a fundamental tenet of the Court of Appeal's institutional structure not to decide cases where there is no factual record.

1. The Court of Appeal Declined to Issue a Decision That Would Not Resolve the Dispute

Courts do not issue academic opinions. (See, e.g., *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1215.) Courts decide only actual controversies "which can be carried into effect, and [do] not give opinions on . . . abstract propositions." (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 120; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117 [discussing in context of declaratory actions that courts make decisions that "admit[] of definitive and conclusive relief. . . as distinguished from an advisory opinion upon a particular or hypothetical state of facts.")

In this case, the Court of Appeal merely declined to issue a decision that would not resolve the case. Imagine the Court of Appeal had granted the City's writ and ruled exactly as the City requested, holding that a citizen-sponsored charter initiative is not subject to the MMBA. That ruling would not resolve the controversy because the Unions contend that, as a factual matter, the Initiative was

not a citizen-sponsored initiative. (See, e.g., 2 CE 237, 238-240 [DCAA Unfair Practice Charge].) The City denies the Unions factual allegations. (DCAA Request for Judicial Notice Exs. 1, 2 [City denying allegation that "Respondent, through its agents include chief labor negotiator San Diego City Mayor Jerry Sanders, has co-authored, developed, promoted, funded, and implemented a pension reform initiative referred to as the Comprehensive Pension Reform Initiative for San Diego."]; MEA Ex. 11, 115 [same].) The Unfair Practice Charges would remain to be decided under the new rule of law because a fact-finder would still have to determine whether *this* Initiative is a citizen-sponsored initiative or a sham that is truly a City sponsored initiative.

Thus, the Court of Appeal's opinion would have been academic, applying to a hypothetical initiative that was undisputedly a genuine citizens' initiative. It would not have decreed what the parties must do. Deciding hypothetical cases or issuing advisory opinions that do not resolve matters is, of course, not what courts do.

2. The Court of Appeal Could Not Do What Would Be Necessary to Issue a Decision That Would Resolve the Dispute

There were only two ways the Court of Appeal could resolve the dispute at this stage, when there has been no hearing. One would be to make factual findings about the nature of the Initiative itself; that is, to find that it is a genuine citizen's initiative. The other would be to hold that, as a matter of law, it is legally impossible for a purported citizen's initiative ever to be a sham. The first—

making factual findings—is institutionally inappropriate. And the second—forever precluding the possibility of a sham initiative—would gut the MMBA. The Court of Appeal appropriately refused to do either, and this Court should not remand to require it to choose between these improper alternatives. Instead, the Supreme Court should deny review and permit the case to proceed as cases usually do: for development of the record, and then appellate review.

a. The Court of Appeal Properly Declined to Make the Findings of Fact That Would Be Necessary for a Ruling to Resolve the Dispute

The Court of Appeal could have issued a decision that resolved the dispute if it made a finding of fact that the Initiative is actually a citizen's initiative. But it is fundamental that Courts of Appeal are not fact-finders. (See, e.g., *Tupman v. Haberken* (1929) 208 Cal. 256, 257; *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [resolution of factual issues is the sole province of the trial court]; see also *People v. Peevy* (1998) 17 Cal.4th 1184, 1205 [Supreme Court's policy is to not review issues that depend on a factual record that has not been made].) Nor do courts of appeal take evidence. (E.g., *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.)[4] Thus, the Court of Appeal

[4] Civil Procedure Code section 909, which permits Courts of Appeal to take evidence and find facts on rare occasions, does not apply. It presumes that a trial court has already made *some* findings. (Code Civ. Proc., § 909 ["reviewing court may make factual determinations *contrary to or in addition to* those made by the trial court."] [emphasis added].) No trial court has made any findings in this case. Section 909 enables Courts of Appeal only to affirm judgments, not to render

appropriately declined to determine the nature of the Initiative. The Unions are entitled to present evidence of about the true nature of the Initiative.

The City argues that no findings of fact are necessary because the Court of Appeal can simply assume that the Mayor and Councilmembers "supported and championed" the Initiative and that some of the signatures received on the petition were the result of this support. (City's Writ Pet. at 42.) But the Unions argue that City officials did far more than "support and champion" the Initiative. For example, the Unfair Practice Charges allege that "[a]s the City's CEO and Chief Labor Negotiator, this Mayor has used his City-paid time, resources, power, prestige, visibility, and 'good offices' to inspire, write, negotiate, and sponsor the proposed 'citizen's initiative' which he has described as his 'legacy as Mayor.'" (1 CE 4.) The Mayor negotiated the language of the Initiative. (1 CE 7.) The Office of the Mayor, on City stationary, put out a media alert about the Initiative; the Mayor in his "State of the City" address stood behind a podium with the City seal and promised that he and the City Attorney would "soon bring to voters an initiative to enact a 401K-style plan." (1 CE 8.) The Mayor used his City-paid press staff to publicize the Initiative and to answer media questions about it. (1 CE 9-10.) In short, the untested allegations are that City officials did far more than support the measure as private citizens.

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decrees in the absence of any fact-finding. (E.g., *Phillipine Export & Foreign Loan Guarantee Corp., supra,* 218 Cal.App.3d at p. 1090.)

Thus, even accepting the City's offer to stipulate that the Mayor supported the Initiative would not determine whether this Initiative is a true citizen-sponsored initiative. The Court of Appeal would have had to make additional findings of fact (or the City would have had to make additional stipulations) for the rule of law the City requested to resolve the dispute.

It is true that appellate courts occasionally review questions of statewide importance where the issues must be resolved promptly. (See, e.g., *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 130.) It is apparently this authority the City hoped the Court of Appeal would exercise. The problem is, of course, that a decision by the Court of Appeal would not speed the resolution of the dispute. Whether this particular initiative is a sham would still need to be adjudicated. Moreover, PERB proceedings will not be inadequately slow: hearings are scheduled to occur in a few weeks, and can adjudicate all of the unfair labor charges. In contrast, a superior court action would be subject to discovery and motion practice, which could push a trial out over a year. In any case,"[a] remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an extraordinary writ." (*Hogya, supra,* 75 Cal.App.3d at p. 129.)

b. Ruling Without Factual Findings Would Foreclose the Possibility That an Initiative Ever Could Be a Sham, Which Would Gut the MMBA

The City contends that, as a matter of law, the Initiative "can only be a Citizens' initiative" because three citizens who are not City officials are the legally defined "proponents" of the initiative. (City's Writ Pet. at 14-15.) Under this view, a technically compliant initiative always and automatically is legitimate.

It is naïve and unrealistic for the City to believe that just because private citizens submit the text of an initiative to the City Clerk, City officials cannot be the true proponents of the measure. Documents often comply with technical requirements, but are still shams. A counterfeit bill is not real money simply because it looks like a genuine bill. Courts do not ignore such schemes and, more importantly, courts do not refuse to submit alleged shams to fact-finders. At the very least, the Unions are entitled to their day in front of PERB to adjudicate whether this Initiative is a sham.

If the Court of Appeal were to *assume* that this is a valid citizens' initiative without ever permitting the evidence to be considered by a fact-finder, it would effectively be holding that, as a matter of law, any time an initiative is certified, it is a valid citizens' initiative, regardless of the actual facts. That would be a permission slip for employers to violate the MMBA. Employers would merely need to find citizens to sponsor an initiative (maybe even paying them), which the City officials could secretly draft, and publicly support, even using official resources. Public employers could circumvent the MMBA's meet and confer requirements easily. The MMBA's effectiveness depends on the availability of a forum to determine whether initiatives are legitimate.

Citizens now ask this Court to remand the City's writ to the Court of Appeal so that it can issue an advisory opinion. The Supreme Court should decline to require the Court of Appeal to do so. There is still no factual record and still no way that the Court of Appeal can resolve the dispute without making findings of fact and taking evidence.

B. By Declining to Rule, the Court of Appeal Simply Required the Dispute to Follow the Statutorily Prescribed (and Typical) Procedure of an Administrative Hearing Before Appellate Review

The Court of Appeal's denial of the City's writ petition means, in effect, that PERB initially will hear the unfair practice charges. There was nothing significant about the Court of Appeal requiring this dispute to be developed before it issued a rule of law in a vacuum. Evidence must be developed, facts found, and hearings held; only then should appellate courts make decisions about issues of law. That PERB will have initial jurisdiction reflects long-settled and clear law.

1. PERB Has Exclusive Initial Jurisdiction to Adjudicate Unfair Practice Charges

Per statute, PERB has exclusive initial jurisdiction to adjudicate unfair practice charges under the MMBA. (Gov. Code, § 3509 ["The initial determination of whether the charge of unfair practice is justified and, if so, the appropriate remedy . . . shall be a matter within the exclusive jurisdiction of [PERB]."].) The Legislature has expressly removed from the courts their initial jurisdiction over MMBA unfair practice charges. (See *Coachella Valley Mosquito*

and Vector Control Dist. v. California Public Employment Relations Board (2005) 35 Cal.4th 1072, 1089.) Thus, it is unremarkable and not an important question of state law for the Court of Appeal to permit PERB to exercise its exclusive initial jurisdiction over the Unions' unfair practice charges. (See, e.g., *Cumero v. Public Relations Bd.* (1989) 49 Cal.3d 575, 583; *PERB v. Superior Court* (1993) 13 Cal.App.4th 1816, 1830-32 [PERB held exclusive initial jurisdiction despite claim that PERB's jurisdiction would violate separation of powers.) Indeed, in granting MEA's writ, the Court of Appeal expressly held that the PERB has initial jurisdiction over the MEA unfair practice charge. (*San Diego Municipal Employees Ass'n*, 2012 WL 2308142 at *5.)

The presence of Constitutional or election law issues does not strip PERB of its jurisdiction. (See, e.g., *Cumero, supra,* 49 Cal.3d at p. 583 [PERB may construe statutes under its jurisdiction in light of constitutional standards]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 74 [collecting numerous cases holding that the presence of constitutional issues does not eliminate administrative exhaustion requirements] [abrogated on other grounds].) PERB "has the authority to harmonize provisions of the laws under its jurisdiction with other laws." (See *International Union of Operating Engineers v. State Personnel Board* (2002) PERB Dec. No. 1491-S, at p. 10.) It has done so on many occasions. (See, e.g., *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 175 [PERB has authority to harmonize its jurisdiction with statutes that arguably grant another agency jurisdiction over same matter]; *San Ysidro School*

District (1980) PERB Dec. No. 134, at pp. 10-12 [PERB resolved claim that it lacked jurisdiction because a different entity had jurisdiction].) The core of the Unions' claims is a violation of the MMBA, a statute over which the PERB has jurisdiction. (Gov. Code, § 3509, subd. b.) The fact that other laws may be involved in the case does not change the PERB's jurisdiction.

Challenges to the PERB's jurisdiction should be raised during the PERB proceedings, not preemptively adjudicated. (E.g., *Int'l Union of Operating Engineers, supra,* PERB Dec. No. 1491-S, at p. 4 [party may move to dismiss for lack of jurisdiction so that a court can determine Constitutional questions]. Tribunals routinely determine their own jurisdiction, and PERB is no exception. (See, e.g., *Bernardi v. City Council* (1997) 54 Cal.App.4th 426, 435 [trial court had jurisdiction to determine its own jurisdiction]; *San Ysidro School District, supra*, PERB Dec. No. 134 [PERB had jurisdiction to adjudicate its jurisdiction].) And where two or more tribunals may have concurrent jurisdiction—as the City and Citizens apparently believe the courts and PERB do—the tribunal where the action was first filed has authority to determine the jurisdiction question first. (See, e.g., *Scott v. Industrial Accident Commission* (1956) 467 Cal.2d 76, 81 [holding that the doctrine of priority of the first court applies to jurisdiction to determine jurisdiction]; *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 976 [same].) Thus, even if the City and Citizens are right that the superior court has concurrent jurisdiction over some issues (which seems doubtful), the PERB must have the first opportunity to address the jurisdictional question

because it is where the first action was filed. "The mere possibility of [that another body may have jurisdiction] does not call for a drastic or inflexible rule totally curtailing [PERB's] jurisdiction at the expense of [a court's or another agency's]." (*Pacific Legal Foundation*, *supra,* 29 Cal.3d at p. 175, 199-200.)

Citizens apparently believe that PERB cannot exercise jurisdiction because the administrative proceedings would investigate the conduct of private citizens. (Pet. for Review at 1.) Even assuming that Citizens have relevant privacy rights, which is dubious, privacy rights must give way to the extent necessary to accommodate a compelling public interest, such as ascertainment of the truth in judicial proceedings. (*Hooser v. Super. Ct.* (2000) 84 Cal.App.4th 997, 1004.)[5] Thus, the PERB—not an appellate court—would need to balance claimed privacy rights against the need for truth. An appellate court cannot adjudicate Citizens' alleged privacy rights in a vacuum.

Citizens also claim that PERB cannot have jurisdiction because they, the "proponents" of the initiative, have a right to participate in any challenge to the purported initiative. This Court need not consider this argument because no person or entity raised it before the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1); *Jiminez v. Super. Ct.* (2002) 29 Cal.4th 473, 481 [Supreme Court

[5] It is not clear that Citizens have any protected privacy rights, and they have not identified any relevant privilege. A private citizen can have no expectation of privacy in communications with public officials, as such communications are subject to disclosure under the Public Records Act. (See Gov. Code, § 6252 [public records include any writing relating to the conduct of the public's business prepared, owned, used, or retained by a local agency].)

normally will not consider issues that was not timely raised in the Court of Appeal].)

On the merits, Citizens' argument reflects a misunderstanding of administrative procedure and law. Citizens claim that an administrative proceeding must provide notice and hearing rights to "those affected." Their authorities, however, involve a failure to provide hearings and notice to the people specifically granted hearing rights by the legislature. (See *Petrillo v. Bay Area Rapid Transit Dist.* (1988) 197 Cal.App.3d 798 [plaintiff had due process right in disability benefits; no dispute that plaintiff had right to participate in a hearing); (*Morgan v. United States* (1938) 304 U.S. 1, 3-4 [agency failed to notify parties against whom claims were made].)

Administrative agencies are created by and limited by the Legislature. When the Legislature has not granted a particular party the right to present claims to the agency, neither the courts nor the agency may permit that person to become a party to the administrative process. (See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 936 [where Legislature had not granted class of people right to bring claims before agency, hearing officer would clearly exceed his authority by permitting class action]; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 575 [City was not indispensable party in administrative proceeding when governing statute did not include it in definition of proper

parties].)[6] In any case, Citizens have not yet tried to join as parties or intervene in the PERB, and it is not certain the PERB would reject such an effort. (*Service Employees International Union, Local 817 v. County of Monterey* (2004) PERB Dec. No. 1663-M [granting application to be joined as party filed by organization in representation case].) If PERB were to invalidate the Initiative, then Citizens could move to intervene in judicial review of the decision. (Gov. Code, § 3509.5 ["any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case . . . may petition for a writ of extraordinary relief"].)

2. Exhaustion of Administrative Remedies is Appropriate, As It Almost Always Is

Because this Petition seeks review of a writ invoking the original jurisdiction of the Court of Appeal, the exhaustion of remedies issue is not the same as in most cases, when a party seeks to proceed directly to superior court. Here, Citizens and the City wish to proceed directly to an appellate decision. As discussed above, such a decision is inappropriate without a factual record.

In any event, the Court of Appeal's decision to require exhaustion is not a matter of particular importance; exhaustion is the norm. Exhaustion is a

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[6] Citizens' citation of *Perry v. Brown* (2011) 52 Cal.4th 1116 is misplaced because that case involved participation in court proceedings, not administrative proceedings where the Legislature has determined the proper parties. Moreover, *Perry* decided whether proponents could participate when the government was not defending the matter. (*Id.* at p. 1005.) Here, the City is vigorously defending the Initiative.

procedural prerequisite because complex issues like labor relations are best adjudicated by "expert bodies, familiar with the subject matter through long experience." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 289, 306.) "[T]he initial consideration of these matters by the courts would not only preclude the efficient operation of the acts, which would overwhelm the courts . . . ." (*Ibid.*) Of particular importance here, the exhaustion doctrine "facilitates the development of a complete record prior to resort to the courts." (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240-41.) The Legislature decreed that claims under the MMBA were precisely the kind of technical issue best decided, in the first instance, by the agency. (Gov. Code, § 3509.) There is no reason to deviate from that legislative rule here.

Citizens' primary claim that exhaustion should be excused is that PERB has pre-decided the case, rendering exhaustion futile. (Pet. for Review at 20-21 [claiming that PERB has showed the "finality of its determination even before an administrative hearing"].) Citizens base this argument on PERB's decision to file a complaint in superior court seeking an injunction. (Pet. for Review at 20-22.) But the MMBA expressly grants PERB discretion to "petition the court for appropriate temporary relief or restraining order." (Gov. Code, § 3541.3, subd. (j).) PERB does not decide the merits of a case before seeking an injunction; it merely decides whether there is "reasonable cause" to believe an unfair practice *may* have occurred. (*Modesto City School Dist., supra,* 136 Cal.App.3d at p. 895.) PERB's decision to exercise its authority to seek temporary relief to preserve the

status quo cannot prove that its impartiality is compromised. If it did, PERB would effectively be stripped of its statutory power to seek injunctive relief: anytime it did so, exhaustion of remedies would become futile. (See *San Diego Municipal Employees Ass'n*, 2012 WL 2308142 at *7.)

Citizens also argue that exhaustion should not be required because it and the City question PERB's jurisdiction. It is true that exhaustion of administrative remedies sometimes may be excused when a party claims that "the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties." (*Coachella Valley, supra,* 35 Cal.4th at pp. 1081-82.) Courts apply a three-part test to determine if the exception applies: the 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. (*Id.* at p. 1082.)

The Court of Appeal applied *Coachella* in the related case involving the MEA writ. It held that exhaustion was required despite the argument that PERB lacks authority. (*San Diego Municipal Employees Ass'n*, 2012 WL 2308142 at **7-9.) Citizens' exhaustion arguments are simply arguments that the Court of Appeal wrongly applied exhaustion cases in a different case. But a simple disagreement with a Court of Appeal ruling—particularly a ruling in a different case—does not justify Supreme Court review. If it did, the losing party in every case would have grounds for review.

It is worth highlighting that proceeding through the PERB does not create an inordinate burden or delay. PERB proceedings will be faster than any other procedure because a hearing on the consolidated unfair practice charges of all the Unions is set for July 17-23, 2012. Proceeding in the trial courts would take far longer, as any case would have to start from scratch and be subject to discovery and motion practice. Indeed, administrative proceedings are generally considered to be *more* efficient than judicial proceedings. (Cf. *In Re Electric Refund Cases* (2010) 184 Cal.App.4th 1490, 1501 [administrative agencies have specialized expertise and purpose of exhaustion is to take advantage of administrative efficiency].) Moreover, the administrative expertise of PERB is likely to be useful, as it is skilled in determining when meet and confer is required. Finally, as the Court of Appeal concluded in a related case, the legal argument that PERB has no jurisdiction is not strong enough to strip it of its authority. In any case, the City can present all of its arguments against jurisdiction to PERB, which is perfectly competent to adjudicate its own jurisdiction, as it regularly does. (See, e.g., *Cumero, supra,* 49 Cal.3d at p. 583; *Public Employment Relations Bd. v. Super. Ct.* (1993) 13 Cal.App.4th 1816, 1830-32 [claim that PERB's jurisdiction would violate separation of powers did not warrant judicial intervention prior to determination by the Board].)

The Court of Appeal merely directed the controversy to the statutorily mandated body, nothing which demands this Court's review.

C. The Request for a Stay Should be Denied

Because there is no reason to remand for the Court of Appeal to issue a decision, and because review should be denied, the related proceedings should not be stayed.

IV. CONCLUSION

The Petition for Review should be denied. There is no important question of law to settle. The Court of Appeal merely declined to decide a case in a vacuum, without a record or in a way that would not resolve the dispute.

DATED: July 3, 2012

Respectfully submitted,

MAYER MANGAN, PLC

Copy

By:_____
Katherine Mayer Mangan
Attorney for Real Party in Interest
Deputy City Attorneys Association

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I certify that this Answer to Petition for Review contains 6,515 words, including footnotes, as calculated by the Microsoft Word application used to produce this document.

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Katherine Mayer Mangan

City of San Diego v. California Public Employment Relations Board, et al.
Supreme Court Case No. S203478

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I, Katherine Mayer Mangan, declare:

I am a resident of the State of California employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action. My business address is Mayer Mangan, A Professional Law Corporation, 10755 Scripps Poway Parkway, Suite 367, San Diego, California 92131.

On **July 3, 2012**, I served the following document(s):

1. Answer to Petition for Review

2. Request for Judicial Notice

on the following:

James P. Lough Lounsbery Ferguson Altona & Peak, LLP 960 Canterbury Place, Suite 300 Escondido, CA 92025 Fax: 760-743-9926	*Attorneys for Real Parties in Interest Catherine Boling, T.J. Zane, and Stephen B. Williams*

on the above date:

X	***By Facsimile***. On the above date at San Diego, California, I served the above-referenced document(s) on the above-stated addressee(s) by facsimile transmission pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 858.947.4015. The receiving facsimile number(s) are listed above. A transmission report was properly issued by the sending facsimile machine and the transmission report was complete and without error.

and on the following people:

M. Suzanne Murphy Public Employment Relations Board 1031 18th Street, Room 102 Sacramento, CA 95811 [By US Mail Only]	*Counsel for Respondent, Public Employment Relations Board*

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Office of the Clerk California Court of Appeal, Fourth District Division One 750 B Street, Suite 300 San Diego 92101 [By U.S. Mail only]	
Jan. I. Goldsmith, City Attorney Walter Chung, Deputy City Attorney 1201 Third Avenue, Suite 1300 San Diego, CA 92101 Email: WChung@sandiego.gov	*Respondent City of San Diego*

on the above date by:

X	***By U.S. Mail or Express Mail*** [Code Civ. Proc. §1013(a)] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.
X	***By E-Service, as a courtesy***. As a courtesy, I caused the documents to be sent to the person at the email address listed above. I did not receive, within a reasonable time after the transmission, a notice that the transmission was unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **July 3, 2012** at San Diego, California.

copy

Katherine Mayer Mangan