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

Consolidated Case Nos. D069626 and D069630

CATHERINE A. BOLING; T. J. ZANE AND STEPHEN B. WILLIAMS
Petitioners,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

SUPPLEMENTAL BRIEF OF PROPONENTS', BOLING, ZANE AND WILLIAMS RESPONDING TO THE JOINT OPENING SUPPLEMENTAL BRIEF BY UNION REAL PARTIES

Petition for Writ of Extraordinary Relief
From Public Employment Relations Board Decision No. 2464-M.
(Case Nos. LA-CE-746-M; LA-CE-752-M; LA-CE-755-M;
and LA-CE-758-M)

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I. INTRODUCTION.

This case has been remanded to the Fourth District Court of Appeal to determine the proper remedy for a violation of the Meyers-Milias-Brown Act (MMBA) committed by the Mayor of San Diego in 2011 and 2012. The Supreme Court was clear that the violation was the Mayor's alone and not the Proponents, April Boling, T. J. Zane and Stephen B. Williams (jointly referred to as Proponents).

As this Court parses through the list of potential remedies, one remedy **cannot** be on that list: invalidation, directly or indirectly, of the citizen's initiative measure. Proponents also object to the meet and confer and "make whole" remedies ordered by PERB as they likewise undercut citizen initiative rights.

A. The Initiative Cannot be Invalidated.

It is clear that administrative agency, with statutory jurisdiction over collective bargaining, cannot issue a remedy directing invalidation of a citizen's initiative that was drafted, circulated and approved at the ballot by private citizens and that received over 65% voter approval. (hereinafter referred to as CPRI or Prop B.) Do the constitutional rights of citizens take a back seat to the statutory procedural rules applicable only to the "governing body" and "officers" of a local "public agency"? Proponents ask this Court to protect the reserved powers of initiative and prevent the improper invalidation of a citizen's measure.

In a manner befitting San Diego's nautical history, this case continues to be one akin to ships passing in the night. The Opening Supplemental Brief (Unions' OSB) filed by the Real Parties in Interest, 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 (jointly Unions) argue that the Supreme Court applied public bargaining rules and

Public Employment Relations Board (PERB) legal authority in a way that completely ignores the constitutionally-based rights held by Proponents. The Unions argue that actions of the Mayor taken before, during and after Proponents campaign are remedied by paralyzing the Proponents. (Union's OSB; *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 916 (Opinion).)

Proponents must not be made to pay the consequences for the mistakes of a local official. The Unions argue the Proponents' right to petition be thrown overboard because the Mayor did not follow a rule applicable to only public officers and legislative bodies. The constitutional rights associated with citizens' initiatives cannot be so easily swept aside. (*See, California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-936 (*Upland*); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 599, fn. 8 (*Seal Beach*).)

B. PERB has no Authority over Voter Initiatives.

Despite all of the arguments in the Union's OSB about deference to PERB, the Unions continue to ignore the fact that PERB claims no expertise in constitutional election law. (PERB Administrative Record (AR) XI:186:003006; 186:003017.) The Court's deference to PERB relates to PERB's authority over labor issues arising in the context of a "public agency," not election rights of private citizens. (*Boling, supra*, at pp. 911-912 ["PERB is the agency empowered by the Legislature to adjudicate **unfair labor practice claims under the MMBA and six other public employment relations statutes.** ... It is settled that "[c]ourts generally defer to PERB's construction **of labor law provisions** within its jurisdiction '... PERB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." We follow PERB's interpretation unless

it **is clearly erroneous. ... [I]nterpretation of a public employee labor relations statute" 'falls squarely within PERB's legislatively designated field of expertise,' " dealing with public agency labor relations.**"]; citations omitted, and emphasis added.)

The Unions' OSB fails to explain how a breach by the Mayor, in the performance of his MMBA responsibilities, could allow PERB to penalize the non-party Proponents of a Charter Amendment. PERB in fact found that the Mayor had no control over Proponents. (AR XI:186:003088-89.) PERB has no statutory authority over local initiative proponents.

C. Constitutional Rights of the Proponents.

In an OSB that argues for invalidation of Prop B; there is only one citation to the Constitution. (Union's OSB, at p. 38.) The Unions' OSB does not discuss the mandatory duties of the legislative body to place a qualified measure on the ballot. In stark contrast, Proponents discuss the reserved constitutional powers of Proponents and the duty of the Courts to "jealously guard" the rights of the legal Proponents. (*Id.*: Elec. Code, § 342 [defining "proponent"]; San Diego Municipal Code (SDMC) § 27.0103.)

The Supreme Court did not question or modify its most recent pronouncement on the respective powers held by citizens. (*See*, *Upland, supra*, 3 Cal.5th 924.) No language in the Opinion overturns initiative precedent.

By seeking invalidation of Prop B in this case, Unions argue against established election law. The California Supreme Court's decision in *Upland* acknowledges that the initiative power is '"one of the most precious rights of our democratic process."' (*Upland*, *supra*, 3 Cal.5th at p. 930; quoting *Associated Home Builders etc, Inc. v. City of Livermore* (1976) 18 Cal.3d. 582, 591 (*Associated Home Builders*).) The people's reserved initiative power must be "jealousy" guarded and "liberally" construed "so that it "'be not improperly annulled.'" (*Upland,* at p. 935, quoting *Perry v. Brown* (2011)

52 Cal.4th. 1116, 1140 (*Perry*).) Accordingly, "when weighing the tradeoffs associated with the initiative power," this Court has "acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible." (*Ibid.*)

D. The City had to send Prop B to the Voters.

Irrespective of the judgment of the Mayor's conduct; the City had no choice but to send the citizens' initiative measure to a vote of the people. Yes, the City could have met and conferred but it could not change the terms of the CPRI. And, it could do nothing other than put the measure on the ballot, It's the law. (Elec. Code, § 9255(c).)

E. The Supreme Court's Ruling Was Limited to Meet and Confer; the Remedy is Meet and Confer.

This case has two silos; one containing the citizen initiative and the other containing the procedural duties of the officers and governing body of San Diego. The Opinion only addresses the procedural duties of local officers.

The Court found the Mayor's procedural duties to have been unmet – he failed to meet and confer with the Unions before supporting the initiative measure propounded by the Proponents. The case has been remanded for the purpose of remedying the Mayor's oversight. If it is error not to have met and conferred, the straightforward remedy is for the Parties to meet and confer.

Is an order to meet and confer remedial, now? Most certainly. In fact, the meet and confer process, undertaken now, would be no less effective than it might have been in 2012. In that year, the City and the Unions were helpless to negotiate the terms of any labor agreement that violated or contradicted the CPRI. The Parties might have negotiated the language of a contradictory measure to be voted on by the people, although the Unions never made that request. The same Parties have the same rights, today.

The rights of the Proponents, as the sponsors of the CPRI, are superior to, and are immune from, the duties and responsibilities of PERB under the MMBA. The Opinion does not make any change in the law regarding the rights of Proponents to petition their government. Any order of this Court must be limited in a way that does not impinge on the reserved power held by private citizens to petition their government for redress.

F. Proposition B is only Subject to Quo Warranto.

The Unions' OSB argues that its failure to file a request with the Attorney General for quo warranto authority six years ago, or at present, should be excused by empowering the Court to invalidate Prop B in the present action. Quo Warranto was, and is, the sole remedy available to invalidate a City Charter amendment. (*Seal Beach, supra,* 36 Cal.3d 51.) Instead, the Unions proceeded through PERB in a manner that prevented Proponents from defending their work product. The Unions chose to work with PERB to chart a course that avoided the unwanted "interference" by the legal representatives of Prop B. The Unions compiled a record that, while it may be applicable to the City of San Diego, does not and cannot apply to citizen proponents. The Unions simply cannot impair electoral rights.

The scope of the Supreme Court decision was narrow and precise. It found that the Mayor's declination to meet and confer to in be error and his mistake was imputed to the City. The Court meticulously avoided mixing the Mayor's mistake with the Constitutional Rights of the Proponents. As stated, the Court identified the requirements of the MMBA as one silo and the right of the citizen's retirement as another. The extensive briefing by the proponents of their Constitutional Rights under *Perry* and *Upland* were left undisturbed.

II. BACKGROUND FACTS

A. The Proponents' Initiative.

The Supreme Court decision acknowledges that Proponents submitted the Notice of Intent to Circulate the CPRI in April 2011. (*Boling, supra*, 907-908; see, AR XIX:196:005009, 5012.) The proposed Charter Measure was a combination of elements of a proposal by City officials. Mayor and two Council Members considered their own plans but ultimately supported the San Diego County Taxpayers Association (SDCTA) plan. (AR XI:186:003060-003063 [Sanders/Falconer plan]; XI:186:003064 [Councilmember DeMaio plan]; XI:186:003065-003070 [SDCTA/Proponents private pension reform plan (CPRI)].) And uncontradicted testimony by Counsel for the Proponents, showed that Lounsbery Ferguson Altona & Peak prepared the initiative for the Proponents, and SDCTA, who paid for the work; not the City. (*Boling, supra*, at p. 907; AR XIII:190:003482:13-19; 192:003994:13-3995:11.) No law prevents the use of another's public policy ideas.

During signature gathering, Real Party San Diego Municipal Employees Association (SDMEA) asked to "meet and confer" on the "Pension Reform Ballot Initiative". (*Boling, supra,* at p. 908; AR XIX:196:005109-5110 [July 15, 2011 Demand].) The demand asked for bargaining on the terms and conditions of a circulating citizen measure. The letter stated that SDMEA would treat the Comprehensive Pension Reform Initiative (CPRI, later Prop B) "as your opening proposal on the covered subject matter." (*Ibid.*) A second demand was sent on August 10, 2011. (AR XIX:196:005112.) The City Attorney responded on August 16, 2011. (AR XIX:196:005115-5117.) In it, the City Attorney pointed out that the City could not about the contents of a circulating citizen initiative. (*Ibid*; *Boling, supra*, at p. 908.) A third demand by SDMEA, asking again to

bargain on a circulating ballot measure, was dated September 9, 2011. (AR XX:197:005123-5126.)

On September 30, 2011, Proponent T.J. Zane delivered to the City Clerk a petition containing 145,027 signatures. (AR XVI:193:004065.) On October 5, 2011, while the signatures were being counted, SDMEA sent a final demand to the City to "meet and confer" about CPRI. (AR XX:197:005157-5162.)

On November 11, 2011, the City Clerk received a letter from the County Registrar of Voters certifying that Proponents had submitted the requisite number of signatures to qualify the CPRI for the ballot. (AR XX:197:005164.) On December 5, 2011, the City Council adopted a resolution declaring its intent to submit the CPRI to the voters. (AR XVI:193:004067-4069 [San Diego Resolution R-307155 (December 5, 2011)].) On January 30, 2012, the City Council introduced and adopted an ordinance that set CPRI on the Tuesday, June 5, 2012 ballot as Proposition B. (AR XVI:193:004071-4089 [San Diego Ordinance O-20127]; see, *Boling*, at p. 908 ["The proponents gathered sufficient signatures, and the registrar of voters certified the measure in November 2011. The city council then passed a resolution of intent to place the Initiative on the June 2012 election ballot."].) Each of these steps was mandated by state and local election procedures.

B. Initiation of the PERB Action.

Ten days before the City Council adopted the ordinance calling the election, SDMEA filed its Unfair Practice Charge (UPC) (No. LA-CE-746-M) with PERB. (*Ibid.*; AR I:1:000002-000237.) The UPC alleged conduct of the Mayor and two of seven Council members related to pension efforts starting several years before the placement of CPRI on the ballot. The UPC also alleged that CPRI was a "sham" initiative that did not have "true" initiative proponents. (AR I:1:00004.)

The day after the City Council placed CPRI on the ballot, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (AR II:4:000246-000249.) PERB then filed a superior court action seeking to enjoin the City from placing CPRI on the ballot. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1451-1456 [history of the action brought by PERB and a writ brought by SDMEA to remove a stay issued preventing PERB's administrative proceedings]; *Boling, supra*, at 908-909.)

The Unions chose to litigate this issue rather than seek Council approval to place a competing measure on the ballot. And the Supreme Court declined to opine as to whether a competing ballot measure was the subject of bargaining, at the time the CPRI was circulating for signature or ballot placement. (*Boling*, at fn. 9.)

Proponents and the Unions participated in the election campaign while litigation continued to challenge CPRI only on procedural grounds. Proponents raised only private funds to conduct their campaign. (AR XXI:198:005432-005456.) On June 5, 2012, the voters of the City of San Diego approved CPRI with a 65.81% affirmative vote. (AR XVI:193:004058; 004096.) After the election result, the Court of Appeal issued a writ allowing PERB to hold hearings on CPRI. In issuing the Writ, the Court of Appeal stated, in part, as follows:

> (SD)MEA contended the meet and confer procedures applied to the CPRI because the CPRI was a "sham device" used by City officials to circumvent the meet and confer obligations imposed on City by the MMBA. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th, at p. 1463.)

The essence of SDMEA's "sham" claim was that the Proponents were merely the City's agents, making Proposition B the City's measure (CPRI). The "sham" theory alleged that the Proponents were acting at the exclusive direction and control of the Mayor and not as citizens throughout the initiative process. Proponents were, allegedly, secret agents of the City with no independent authority.

PERB held an administrative hearing before Administrative Law Judge Ginoza (ALJ) on July 17, 18, 20, and 23, 2012. (AR VIII:147:002303-13; AR IX:148:002315-2423; 150:002428-2474.) Testimony at the hearing showed that the Mayor and two Council Members considered their own plans but ultimately supported the San Diego County Taxpayers Association (SDCTA) plan. (AR XI:186:003060-003063 [Sanders/Falconer plan]; XI:186:003064 [Councilmember DeMaio plan]; XI:186:003065-003070 [SDCTA/Proponents private pension reform plan (CPRI)].) Counsel for the Proponents prepared the initiative for the Proponents, and SDCTA, who paid for the work; not the City. (*Boling*, at p. 908; AR XIII:190:003482:13-19; 192:003994:13-3995:11.) Proponents' work product contained elements of previous pension reform ideas but was a stand-alone document that Proponents submitted to the San Diego City Clerk to receive a title and summary for circulation. (*Id.*)

C. The ALJ's Proposed Decision.

Following the hearing, the ALJ issued a Proposed Decision on February 11, 2013. (AR X:157:002613-002675.) The Proposed Decision found that the City's actions had nullified the "private" initiative. (*Boling*, at p. 909; AR X:156:002667.) On March 6, 2013, the City filed a Statement of Exceptions objecting to the Proposed Decision. (AR X:159:002684-002729.) Proponents also applied to PERB to submit exceptions to the Proposed Decision, but their request was denied. (AR X:161: 002731-2760.) Instead, on September 20, 2013, the PERB granted Proponents the right to

submit an "informational" brief, limiting the scope of Proponents' appearance despite acknowledging that Proponents were "interested individuals" in the proceeding. (AR X:178:002891-2893.) Proponents filed a Brief objecting to PERB's jurisdiction over a Citizen Sponsored Initiative and objecting to the very procedures and Regulations PERB cited in the Motions to Dismiss filed by PERB before the Court of Appeal. (AR XI:180:002899-002927.) Proponents argued that PERB had excluded them from defending the CPRI. (*Ibid.*)

D. PERB's Decision.

The PERB Decision was not issued until December 29, 2015, thirty-three plus months after the Proposed Decision. (AR XI:186:002979-003103.) It abandoned the "sham" argument. Rather, the final decision found the Mayor's actions were taken as an "agent" of the City Council, finding:

> Because the ALJ found that **the impetus for the pension reform measure originated within the offices of City government**, he rejected the City's attempts to portray Proposition B (CPRI) as a ***purely "private" citizens' initiative*** exempt from the MMBA's meet-and-confer requirements. (AR XI:186:002986; emphasis added.)

This Decision was based on the actions of city officials, but the remedy virtually gutted the adopted Prop B and ordered that future ballot measures, including citizen measures, follow "meet and confer" procedures. It also ordered the City to "join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B..." (AR XI:186:003040.)

E. The Appeal.

Proponents filed their Petition for Writ of Extraordinary Relief with the Fourth District Court of Appeal on January 25, 2016, challenging PERB's Decision, and the City filed its Petition the next day. The Court of Appeal subsequently consolidated Proponents' Writ Petition with that of the City and issued its opinion on April 11, 2017. (*Boling*, at pp. 910 – 911.) Both PERB and the Unions filed rehearing petitions with the Court of Appeal, seeking the Court's reconsideration of its opinion, which the Court denied. Thereafter, the Unions filed Petitions for Review with the California Supreme Court.

F. Supreme Court Decision.

The Supreme Court has decided that the Mayor was at fault for not having met and conferred with the Unions, irrespective of two facts; that the CPRI language was fixed as the petition was being circulated, and the City had no right to negotiate to change the terms of the initiative measure, although that was exactly what the Unions requested. So, the task of this Court, on remand, is to define the "remedy;" what is to be done to correct the Mayor's oversight?

One point is certain. The Supreme Court did not consider as one possible remedy the invalidation of Proposition B. If that had been the Court's intent, it could have ordered invalidation. It did not; the Court's ruling left the measure fully intact. And the reason for the ruling is clear. The rights of the Proponents to engage in their Constitutional right of direct legislative redress is superior to the obligations of the Mayor and the City to comply with the requirements of the MMBA.

It is now the chore of this Court, and the Parties, to fashion a suitable remedy, keeping in constant mind, the rights of the voters of the City of San Diego.

III. THE MEET AND CONFER REQUIREMENTS OF THE MMBA DO NOT APPLY TO A CITIZEN INITIATIVE.

A. Proponents Rights in their Charter Amendment are Personal and Constitutionally Based.

The right of initiative is in the California Constitution. (Cal. Const. art. I, §2 [speech]; art. I, §3 [petitioning rights]; art. II, §1 [political power inherent in the People]; art. II, §11 [local initiative power]; art. XI, §3 [charter formation]; art. XI, §5, subd. (b) [citizen charter authority over public employee compensation].) A Proponent's rights are personal and fundamental. (*Perry, supra,* 52 Cal.4th at pp. 1148-1149.) These rights cannot be abridged without due process of law. While explaining the *Perry* decision, one Court explained the pre-election interest of a Proponent as follows:

> The court stated: "In the preelection setting, when a proposed initiative measure has not yet been adopted as state law, **the official proponents of an initiative measure who intervene or appear as real parties in interest are properly viewed as asserting their own personal rights and interests**—under article II, section 8 of the California Constitution and the California statutes relating to initiative proponents—to propose an initiative measure and have the measure submitted to the voters for approval or rejection. **In pre-election cases, the official initiative proponents possess a distinct interest in defending the proposed initiative because they are acting to vindicate their own rights** under the relevant California

> constitutional and statutory provisions to have their proposed measure—a measure they have submitted to the Attorney General, have circulated for signature, and have the exclusive right to submit to the Secretary of State after signatures have been collected—put to a vote of the people." (*Perry, supra*, 52 Cal.4th at p. 1146. (*italics omitted*) ... Once again, however, *Perry* teaches us that initiative proponents have a constitutional stake in pre-election litigation over their initiative that is distinct from the general public's stake in post-enactment litigation over a statute. (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 906-907; emphasis added.)

It was at the pre-election phase that the "meet and confer" obligation began. (*Boling v. Public Employment Relations Board, supra*, 5 Cal.5th at p. 918, fn. 9.) This was when Proponents are "properly viewed as asserting their own personal right and interest." (*Perry,* at p. 1146.) However, this was the point at which the Unions claim that CPRI had no right to be placed on the ballot. While the Unions filed no substantive challenge to CPRI, they claim that PERB had the power of ordering the City to join in, and fund an invalidation proceeding. The law asserted (MMBA) gives Proponents no standing or due process rights. Preelection bargaining over the contents of CPRI; timing of its ballot placement; or whether it can even be placed on the ballot at all clearly implicate the "personal" constitutional rights of Proponents.

The Supreme Court's Opinion recognized deference to PERB's interpretation of law in the labor relations context. (*Boling, supra*, at pp. 903,

911-912.) However, no deference is given to an administrative agency's interpretation of the First Amendment. (*McDermott v. Ampersand Publ'g, LLC* (9th Cir. 2010) 593 F.3d 950, 961; *see* also *Ampersand Publ, LLC v. NLRB* (D.C.Cir. 2012) 702 F.3d 51, 55.) By granting deference to PERB, the Supreme Court only applied those preferences to discretionary actions of the City and its officers, with respect to labor related matters.

In order to follow the Unions' invalidation argument, this Court would have to assume that the Supreme Court remanded this matter with the intent of impacting the preelection rights of Proponents without saying it. The Supreme Court would have to ignore its previous decisions on citizen petitioning rights; reinterpret its duty to "jealously guard" the power of citizen initiative; and reinterpret Proponents as being a "governing body", "public agency."

A citizen initiative does not follow the procedural requirements applicable to a "governing body" or its designated representative. (Gov. Code., § 3505; *Upland, supra*, 3 Cal.5th at pp. 933-936; *Seal Beach*, at. p. 599, fn. 8; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 190.) The Supreme Court's Opinion in *Boling* made no effort to distinguish this situation from its previous precedent on the subject of citizens' initiatives. Citizens exercising reserved rights are not "public officials" or a "public agency."

The duty of the Courts is to protect the people's reserved powers. (Cal. Const. art. II, § 1; *Associated Home Builders,* at p. 591.) This duty is applicable even when great change is the result, as the Supreme Court stated, when considering the validity of Proposition 13:

> Yet, as we have recently acknowledged, it is our solemn duty "'to jealously guard'" the initiative power, it being "'one of the most precious rights of our democratic process.'" (*Associated Home*

> *Builders etc., Inc. v. City of Livermore, supra,* 18 Cal.3d 582, 591, quoting from earlier cases.) Consistent with our own precedent, in our approach to the constitutional analysis of article XIII A if doubts reasonably can be resolved in favor of the use of the initiative, we should so resolve them. (*Ibid.*) This we have done. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 248 (*Amador Valley*).)

In one way, this case is like *Amador Valley* case in that both implemented significant change creating challenges for the *status quo*. However, *Amador Valley* differs from *Boling* in that *Amador Valley* considered both substantive and procedural challenges. Here, only the application of procedural "public agency" rules are at issue. Procedures applicable to a "public agency" are used to restrict citizen rights. Six plus years with no substantive challenge, this Court is asked to ignore basic constitutional protections of petitioning rights. The doubts must all be resolved in favor of exercise of the reserved power of the People.

B. PERB does not have the Authority to Interfere with Mandatory Election Duties.

The Supreme Court remanded this case to set the parameters for PERB's remedy. (*Boling v. Public Employment Relations Board,* 5 Cal.5th, at p. 916.) While the Proponents used concepts championed by the Mayor, CPRI was created by Proponents. (AR XV:192:003994:13-15 - 192:003995:11 [July 23, 2012 PERB Transcript].)

The Supreme Court was clear that the actions of the Mayor violated MMBA. However, the Supreme Court did not question the City Council action of placing the CPRI on the ballot under mandatory election duties.

(AR XVI:193:004071-4089 [San Diego Ordinance O-20127].) Here, San Diego Citizen Charter Amendments are submitted to the City Council in a manner similar to other initiative elections. (SDMC §§ 27.2801 and 27.2808.) After the sufficient number of signatures are verified, the City Clerk must present the Charter Amendment at the next regularly scheduled City Council meeting. (SDMC § 27.1027.) The City Clerk's duties are purely ministerial. (*Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 579.) There is no room for bargaining about whether CPRI should have been placed on the ballot or whether its terms were subject to negotiation. It was never City legislation.

Ballot placement of a qualified initiative, referendum, recall or charter petition have long been considered a mandatory duty for a City Council. (*Good v. Common Council of San Diego* (1907) 5 Cal.App. 265.) If the City Council had delayed acting on the CPRI, the failure to act would have been subject to a writ of mandamus compelling the City Council to act. (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 211.) Any court would have ordered the City Council to exercise its duty to place it on a statewide general election ballot. (Elec. Code, § 9255(c).)

As opposed to other types of citizen initiatives, a charter amendment cannot be adopted by a City Council. It must be put on a statewide general election ballot. (*Ibid.*) This statute places a mandatory duty on the city council to act. (*Upland, supra*, 3 Cal.5th at pp. 979–980; *Farley v. Healey* (1967) 67 Cal.2d 325, 327, 329; *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 254–255.)

Here, the San Diego City Council performed a clear, present and ministerial duty under various state statutes and local laws. While the Unions argue that PERB has the power to invalidate Prop B, they do not explain how city bargaining obligations control mandatory election duties. The Supreme Court's Opinion grants no authority to take such a drastic step. The

Supreme Court's Opinion only discussed the Mayor's actions and determined that, while CPRI was circulating, the City had a duty to "meet and confer." The Supreme Court discussed various options in a footnote:

> We need not decide precisely when the mayor's duty to meet and confer was triggered here because **it clearly arose at least by the time the unions submitted their first demand letter.**[1] Although the Initiative was circulating for signatures by that time, PERB and the unions suggest the parties could have discussed circulating an alternative, less drastic, pension measure or delaying the Initiative's placement on the ballot[2] to permit consideration of other alternatives. (*See Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 6 [Elections Code imposes no maximum time limit on when

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[1] During signature gathering by Proponents.

[2] The Court's reference to potential delay in ballot placement is separate from its list of options. There were two statewide general election dates in 2012, June and November. (Elec. Code, § 9255(c).) The City Council made its determination in the face of "meet and confer" requests that did not ask to discuss a competing measure. The request assumed that CPRI was the City's opening bargaining position. (AR XIX:196:005109-5110 [July 15, 2011 Demand].) However, the City could not use CPRI in typical give-and-take bargaining fashion since it was not adopted by the City at the time of the request. The manner of SDMEA's request was impractical and infringed upon citizen voting rights if the text was amended or the election delayed to 2014 solely based on the viewpoint (pension reform) of the Proponents. Proponents should not have rights taken away because the Unions want to change strategies. Any remedy ordering bargaining over potential ballot measures must be prospective. Otherwise, any retroactive action would constitutionally impair citizen electoral rights.

> initiatives to amend city charters must be placed on ballot].) We express no view on the viability of these topics as subjects of bargaining. (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th, at p. 918, fn. 9; emphasis added.)

The options discussed by the Supreme Court did not include invalidation of Prop B . Even without "meet and confer", the Unions could "circulat(e)... an alternative, less drastic, pension measure", now or in the future. (*Boling*, fn. 9) However, at the time, the Unions were pursuing their PERB Unfair Practice Charge, they did not propose a competing measure or request to bargain over such measure. (See, e.g., XXIII AR 200:005908 ["[t]he purpose of this letter is to request that the City meet and confer with Local 145 on the Comprehensive Pension Reform Initiative, as required under the [MMBA]; *Id.* at 200:005913 ["the City is obligated to meet and confer over the proposed charter amendment [the CPRI], . . ."]; AR I:1:000011 [SDMEA UPC, stating that the City rejected SDMEA's "demands for meet and confer over the CPR Ballot Initiative, . . ."].)

Considering the margin of victory (65.81%) of Prop B, the Unions were wise to choose litigation and administrative action rather than rely on their opposition at the ballot box. (AR XVI:193:004094—004096.) An alternative measure would have likely failed. Delay to the November 2012 election would not have changed the result. Years later, the Unions can still bargain over the language of an amendment to CPRI. Nothing has ever prevented the Unions' options. However, the Unions were never entitled to have an administrative agency interfere with a mandatory duty of ballot placement. Nothing in the Opinion requires retroactively taking away Proponents' electoral rights.

The failure of the Supreme Court to suggest invalidation of Prop B is telling. If invalidation was an appropriate remedy, the Supreme Court would

have said so. Instead, it made clear PERB's acknowledgement that such a remedy was not within its discretion, but within the "province of courts alone." (*Boling*, at p. 920.) The Supreme Court's Opinion in *Boling* contains no other reference to invalidation. The Opinion considered only the duties of the City and its officers. It did not overturn or question applicable precedent which clearly protects citizen petitioning rights. Footnote 8 of *Seal Beach* is still intact, as discussed below.

C. The Available PERB Remedies

A key factor in the choice of possible options is that they all can be done prospectively and within the parameters of Section 32325 of the California Code of Regulations, which delineates PERB's remedial power. Section 32325 provides that "[t]he Board shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of the applicable statute." (Cal. Code. Regs, tit. 8, § 32325.) In this case, PERB is applying the MMBA, the purpose and policy of which is described in Government Code section 3500 (a), as promoting "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations" and to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California..." (Gov. Code, § 3500(b).) PERB therefore must issue "the appropriate remedy necessary to effectuate" the MMBA's "purpose". (Gov. Code, § 3509(b).)

Among the prospective remedial options is a Cease and Desist Order, which PERB properly issued[3], prohibiting the City from "[i]nterfering with bargaining unit members' right to participate in the activities of an employee organization of their choosing" (Order A.2) and "[d]enying the Unions their right to represent employees in their employment relations with the City" (Order A.4.). (AR 186:003040.) Additional prospective remedies include orders to 1) post at work sites a notice detailing the violation and the remedy along with information to report future violations; 2) meet and confer on present pension options, to discuss possible ballot measures for placement on the 2020 June or November ballots; or 3) issuance of an order enjoining the City from proposing changes to public employee wages, hours and working conditions without bargaining, which would be posted along with the notice identified in No. 1.)

D. The CPRI was the Province of Proponents, Not the City or PERB

The legal authority over CPRI, under state and local law, resided in the hands of Proponents. The Proponents were not city officials. PERB found they were not City "agents." (*San Diego Municipal Employees Assn. v. Superior Court*, *supra*, 206 Cal.App.4th at pp. 1452, 1463; AR 21:198:005432-005456 [*i.e.* raising only private funds].) It is the Proponents who have the direct legal interest in CPRI and not the Mayor. (*Perry, supra,* 52 Cal.4th at pp. 1148-1149; *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250.) An order of invalidation would have the effect of eliminating the Proponents' petitioning rights.

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[3] Subject to objections to Part A.1. of PERB's Order, prohibiting the City from "[r]efusing to meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects" which impinges on the law pertaining to Charter Amendments and constitutional initiative rights, as discussed further in Section V.A. of this Brief.

Counsel for the Proponents prepared the initiative for the Proponents, and SDCTA, who paid for the work; not the City. (*Boling, supra,* at p. 907; AR XIII:190:003482:13-19; 192:003994:13-3995:11.) Proponents' work product contained elements of previous pension reform ideas, but was a stand-alone document that Proponents submitted to the San Diego City Clerk to receive a title and summary for circulation. (*Ibid.*; Boling, at p. 907)

As to the core issue of constitutional interference with the rights of the Proponents, PERB acknowledged its lack of expertise regarding matters of Constitutional law. (AR XI:186:003006; XI:186:003017; Cal. Const. art. I, §2 [speech]; art. I, §3 [petitioning rights]; art. II, §1 [political power inherent in the People]; art. II, §11 [local initiative power]; art. XI, §3 [charter formation]; art. XI, §5(b) [citizen charter authority over public employee compensation].) Its lack of expertise makes it an improbable candidate to have administrative control over a citizen's initiative. To use the silo analogy, PERB does not have authority over a citizen's initiative measure in the election "silo", only the MMBA "silo" relating to meet and confer.

Proponents had an absolute right to ballot placement and implementation of Prop B. They also have the ability to defend. (see, *Perry v. Brown, supra.*) It is a right that PERB has consistently denied them from the beginning. The Supreme Court's remand did not affect the standing of Proponents. They still have a right to defend the Measure. While the City and its officers are bound by the factual determinations of PERB, these were made without the participation of Proponents. PERB's rules do not allow outside party participation. PERB accepted and ignored Proponents' "interested person" informational brief. The prospect of invalidating Prop B based on factual findings made without direct participation of Proponents would turn election law on its head.

It is ironic that the Unions are being given an option of a competing measure when they did not ask for one in the first place. The Unions wanted

to bargain over the terms of CPRI and keep it off the ballot. During signature gathering, SDMEA asked the City to "meet and confer" on the "Pension Reform Ballot Initiative." (*Boling, supra*, at p. 908; AR XIX:196:005109-5110 [July 15, 2011 Demand].) The letter stated that SDMEA would treat CPRI "as your opening proposal on the covered subject matter." (*Ibid.*) The City's opening proposal, not Proponents'. A second demand was sent on August 10, 2011. (AR XIX:196:005112.) A third demand by SDMEA, asking again to bargain on a circulating ballot measure, was dated September 9, 2011. (AR XX:197:005123-5126.) None of the Unions' meet and confer demands asked for a chance to circulate a competing measure or to have the City put on one favorable to the Unions' interests.

While the City can be compelled to "meet and confer" about the public actions of the Mayor, there is no authority for the Court to take away a citizen's initiative rights. The mandatory electoral duties cannot be superseded by an administrative body. The subject matter was legislative and within the scope of authority under the San Diego City Charter. This Court can allow the City and bargaining groups to "meet and confer" over a prospective measure only.

E. The Supreme Court's Opinion in *California Cannabis Coalition v. City of Upland* Affirms the Broad Power of the Voter's Initiative.

There is no basis for allowing the MMBA to override the reserve power of initiative. The broad scope of initiative power is subject to "precious few limits" and not constrained by "procedural requirements imposed on the Legislature and local governments... without evidence that such was their intended purpose." (*Upland, supra*, 3 Cal.5th at p. 935, citing *Rossi v. Brown* (1995) 9 Cal.4th 688, 695; *see* also *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775; *Associated Home Builders*, at pp. 588, 593-596; and *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 251-252.) Evidence of intent to restrict the initiative power must be

clear and cannot be implied. "Only by approving a measure that is unambiguous in its purpose to restrict the electorate's own initiative power can the voters limit such power," (*Upland, supra*, 3 Cal.5th at p. 948; emphasis added.) In its *Boling* Opinion, the Supreme Court does not discuss the "sham" argument or give any credence to the claim that the Proponents were acting on behalf of the City. MMBA's purpose is to control the actions of "public agencies". (Gov. Code, § 3500.) The definition of a "public employee", covered by the Act, states, in part, as follows:

> "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of **counties, cities, cities and counties, districts, and other political subdivisions of the state**, excepting those persons elected by popular vote or appointed to office by the Governor of this state." (Gov. Code, §3501(d); emphasis added.)

Proponent, a legislatively-defined term, is not included in the scope of MMBA coverage. (Elec. Code, § 342; SDMC § 27.0103.) While the Supreme Court Opinion in *Boling* did not specifically address the terms used in the MMBA as they relate to Proponents, it has recently reaffirmed the strict reading of such terms in an election law context in order to protect petitioning rights of citizens.

In *California Cannabis Coalition v. City of Upland,* the Supreme Court determined that legislative definitions must be read to protect petitioning rights of private citizens. (*Upland, supra*, 3 Cal.5th 924.) In *Upland*, the Supreme Court compared the merits of two constitutional provisions, each enacted by the electorate. In a delicate exercise, it found one to be immune from the impacts of the other. The interference with the reserved power of the initiative process presented to this Court in *Upland*

was potential but largely hypothetical due to mootness. Yet, the principle was so important, the Supreme Court seized the opportunity to make its point. Here, the impact is tangible – the facts present a glaring example of interference with the Constitutional rights of the Proponents.

The task before this Court is less difficult than in *Upland*. We compare the imperatives of California Constitution Articles II, sections 1 and 11, XI, sections 3 and 5 and others against a statutory scheme – the formation by the Legislature of a complex and bewildering administrative structure. MMBA is being matched against the dignity of the Reserved Power of the People under the Constitution.

Yet, this analysis invites more than a test of unequal dignities. The impact of the MMBA on the CPRI is the true measure of the case. In every sense of the word, the MMBA, cannot be construed to impede the integrity of the citizen's initiative process by denying the Proponents of Prop B the right to exercise the guarantees assured by the terms of Articles II and XI of the California Constitution.

Government Code section 3505, on its face, applies to "the governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." (Gov. Code, § 3505.) There is no dispute that the City is a 'public agency' subject to the MMBA. (Cal. Code. Regs, tit. 8, § 32016.) However, the electorate is not a "governing body." (*Upland*, at fn. 11.) Nor is the electorate a representative of such governing body or public agency within the meaning of Section 3505.

A voter's initiative is by definition within the power of the electorate; it is thus outside the scope of the MMBA and beyond the jurisdiction of PERB.

F. The Meet and Confer Requirements of the MMBA Cannot Be Applied to the Terms of Voter's Initiatives, Because They Cannot Be Altered Before Being Placed on the Ballot.

The Supreme Court's Decision in *Upland* cements the importance of the voter's initiative. The people's reserved initiative power must be "jealously" guarded and "liberally" construed "so that it 'be not improperly annulled.'" (*Upland,* at p. 934, quoting *Perry, supra,* at p. 1140.) Accordingly, "when weighing the tradeoffs associated with the initiative power," this Court has "acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible." (*Ibid.*)

The Supreme Court explained that California's "Constitution was amended to include the initiative power in 1911." (*Ibid.*) It further explained that Elections Code provisions were established by the Legislature to set up "procedures for city and county voters to exercise the [initiative] right." (*Upland*, supra, 3 Cal.5th at pp. 934-935.) "Collectively, the intended purpose of these statutes is to require public officials to act expeditiously on initiatives." (*Ibid.*; emphasis added.) The Court also reinforced charter cities' right to "set their own initiative procedures." (*Ibid.* citing Cal. Const., art. II, § 11(a); Elec. Code, §§ 9247, 9255.)

Consistent with the policies of prompt action embodied in the Elections Code, the City's Charter, Article III, section 23 [Amendment voted November 8, 1988; effective April 3, 1989], required the City to follow "an expeditious and complete procedure for the exercise by the people of the initiative." Additionally, the CPRI specified a July 1, 2012 date for pension benefit calculations, and the date on which an initiative is placed on the ballot must respect the deadlines set forth therein. (AR XIX:196:005015-5016 [proposed Charter section 70.2]; *Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 9-10 [regarding which the Supreme Court in *Boling* expressed no opinion, see *Boling, supra*, ft. 9.)

The CPRI was a citizen's initiative. The most fundamental part of the voter initiative procedure, which renders the MMBA's meet and confer obligation inapplicable to the initiative's terms, is a City's total lack of discretion to "do anything other than to place a properly qualified initiative on the ballot." (*Farley v. Healy* (1967) 67 Cal.2d., at p. 327; see also *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148; see *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966 [governing body must place the initiative on the ballot without alteration].)

Accordingly, on November 8, 2011, the San Diego County Registrar of Voters certified the CPRI petition as having received a "sufficient" number of valid signatures requiring it to be presented to the voters as a citizens' initiative. (see, *Boling, supra* at 908; AR XX:197:005164.). And on January 30, 2012, the City Council introduced and adopted an ordinance that set the CPRI on the Tuesday, June 5, 2012 ballot as Proposition B, without change, in accordance with the timelines and requirements of Elections Code sections 1201 and 9255(b)(2). (AR XVI:193:004071-4089 [San Diego Ordinance O-20127].) As the CPRI was a Charter Amendment, the action of the City Council that placed CPRI on the June 2012 Ballot did not approve CPRI. Under applicable election law, the City Council cannot adopt a charter amendment. (Elec. Code, § 9255(c).) Only the People can adopt a Charter Amendment.

The City properly refused to meet and confer with the Unions regarding the specific terms of the CPRI, on the grounds that "there is no legal basis upon which the City Council can modify the [CPRI], if it qualifies for the ballot." (Opening Brief On The Merits By All Union Real Parties In Interest, before the California Supreme Court, at p. 31.) Moreover, the City acted expeditiously, in compliance with the timelines and policies of the

Elections Code and the City's Charter, while operating within the CPRI's internal deadlines, which the City was required to respect, and lacked any power to modify. How can the MMBA be applied to initiative terms where the City must act promptly to place the initiative measure on the ballot and has no power to alter the measure? Bargaining over the terms of a voter initiative is futile.

Thus, the actions of the Mayor, for the purposes of MMBA, do not and cannot, eliminate the rights of initiative proponents. As discussed in *Seal Beach* footnote 8, the ministerial act of placing a citizen's initiative on the ballot does not fit into the definition of Government Code section 3500 or any other MMBA provision. Since *Seal Beach,* the Supreme Court has not called footnote 8 into question and the Legislature has not passed any legislation thrusting PERB into the election business. (*Seal Beach*, *supra*, 36 Cal.3d at p. 59.) *Seal Beach* only applied a "meet and confer" obligation to the terms of a council-sponsored measure. The Court stated in *Seal Beach* that:

> No such conflict exists between the city council's power to propose charter amendments and section 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency -- **here the city council -- retains the ultimate power to refuse an agreement and to make its own decision. This power serves the council's rights under article XI, section 3, subdivision section (b) -- it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise.** (*Seal Beach*,

at p. 601; emphasis added; internal and parallel citations omitted.)

While the MMBA procedural rules do not unduly hinder a city council from proposing a charter amendment, the same cannot be said for a citizen's measure. The Supreme Court held in *Seal Beach* that a city council's exercise of discretion is in putting a labor-related charter measure on the ballot is a legislative act subject to PERB jurisdiction by the terms of the MMBA. (*Seal Beach*, *supra*, 36 Cal.3d at pp. 598-599; *Boling, supra*, at 314 ["[*Seal Beach*] involved a related **but distinct issue: whether the meet-and-confer provisions of section 3505 applied when a city exercised its own constitutional power to propose charter amendments to its voters.**"; emphasis added].)

The Supreme Court carefully skirted citizens' initiative rights when deciding that meet and confer obligations under Section 3505 attached to the City under the facts of the *Boling* case. The Court held that the Mayor's meet and confer obligations arose "**prior to arriving** at a determination of policy or course of action" on matters affecting the "terms and conditions of employment." (*Boling*, at p. 918; emphasis added.) The Court went on to state that the policy the Mayor determined to pursue was "pension reform." (*Id.* at p. 919.) However, the Supreme Court's Opinion **did not** create a right to meet and confer over the terms of the citizens' initiative itself. The meet and confer obligation that the Court applied to the facts of this case pre-dated the initiative and would not have impacted its terms. At most, the meet and confer would have resulted in a competing measure.

What would be the purpose of "meet and confer" over the terms of a citizens' initiative? During "good faith" bargaining, what control would the governing body and the bargaining groups have over the measure? Here, the initial request to bargain was filed while the ballot measure was in the circulation phase. The Elections Code puts significant legal restrictions on

influencing a circulating initiative. (Elec. Code, §§ 18620, 18621.) It is a crime for anyone to offer any "thing of value" to an initiative proponent in exchange for withdrawing their measure from circulation.

The Mayor, whether or not he was the agent of the City Council, had no legal control over the final terms of the CPRI. The fact that Proponents may defend the measure does not turn them into "*de facto*" public officials. (*Perry*, *supra*, 52 Cal.4th at p. 1159.) Yet, Proponents have a definite and concrete interest in protecting their work product. *Perry* states that the official proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure... ." (*Id.* at p. 1142.) The Mayor's "support" for CPRI does not turn him into a proponent any more than Proponents becoming "*de facto*" public officials for their efforts to protect CPRI.

IV. THE VALIDITY OF PROP B CANNOT BE DECIDED ON REMAND.

A. Invalidation Would Violate The Constitutional Rights Of Proponents and San Diego Voters.

The Unions assert that "[t]he issue is not whether an invalidation order must eventually be entered under *Seal Beach* and *Boling*; the issue is what court will enter it and when." (Unions' OSB, p. 27.) That is an incorrect interpretation of the Supreme Court's Opinion in *Boling*. The question of whether Prop B/CPRI was properly placed on the ballot remains an open issue. The Supreme Court did not rule on this point. The Court merely distinguished the remedy of invalidation as being within the "province of the court," as opposed to the make whole remedy. (*Boling, supra,* at p. 920.)

Allowing the Unions to obtain invalidation of Prop B in the present action will result in the improper judicial invalidation of a voter drafted and approved charter amendment. Such a result would be a blatant violation of Proponents' due process rights and a violation of the rights of the voters who

approved Prop B by a 65% margin. (AR XVI:193:004094-4096.) Such horrible precedent would wholly eviscerate the constitutional initiative right, and make a mockery of the right to vote.

The voters' initiative power is immense and likened "to a 'legislative battering ram' because [initiatives] 'may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.'" (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035 [quoting *Amador Valley, supra,* 22 Cal.3d., at p. 228.]) A legislative body cannot even pass laws that undercut the purpose of an initiative, the "'constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025, quoting *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483; additional internal citations and quotation marks omitted.)

Accordingly, no California Court has ever approached the potential nullification of constitutional citizen's initiative and voting rights as "besides the point" in cases challenging the procedures by which such measures reached the ballot. The impact on constitutional rights has been central in the courts' analysis of any potential procedural defect. (See, e.g., *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1006-1007 ["[O]nce a measure has been placed on the ballot and has been voted upon by the electorate, California decisions have been most reluctant to overturn the results of an election on the basis of a procedural defect that has occurred at the petition-circulation stage of the process, inasmuch as such a defect ordinarily will have no effect on the material that is before the voters or on the fairness or accuracy of the election result; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649 ["the postelection context is significantly different from a preballot-

qualification setting. An election is a completed act, a fait accompli. In contrast, the circulation and qualification of referendum petitions are part of an ongoing process that portends, at most, the potential of an election".].

The Unions are correct that "[t]here is no constitutional right to place an invalid initiative on the ballot." (*See City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389; Unions' OSB, at p. 38.) But there has been no finding of invalidity as to Prop B, and the present action is not the proper setting in which to make a validity determination.

B. None of the Cases Cited by the Unions in Support of Restoration of the Status Quo dealt with a Citizen's Initiative.

None of the cases the Unions cite in support of PERB's right to issue a remedy that restores the status quo by voiding Prop B deal with citizen's, or voter's rights. The Unions' attempt to diminish those rights should not be condoned by this Court.

For example, *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, on which the Unions extensively rely, dealt with a City Council sponsored initiative. There were no official proponents, and no associated constitutional or legal issues were involved. In that context, the Court of Appeal appropriately found PERB could appropriately issue "a declaration that the City Council's resolution is void" in order to return "the parties to the status quo ante." (*Id.* at 1317.) But such a remedy would not be appropriate in this instance, where a citizens' initiative is implicated.

The Union's argument that PERB has discretion to order effectively invalidating a citizens' initiative equates the rights of Proponents to a third-party private bus company, or other outside government contractor. (*Folsom-Cordova Unified School District* (2004) PERB Dec. No. 1712; *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, 1135, 1137-1138; see Unions OSB, pp. 27-28.) Such a comparison is not appropriate and

blatantly attempts to diminish the constitutional rights of Proponents, as well as the right to defend articulated in *Perry v. Brown*, supra.

As discussed above, the Court deferred to PERB in the labor relations context only. (*Boling, supra,* at pp. 911-912 ["It is settled that "[c]ourts generally defer to PERB's construction of labor law provisions within its jurisdiction....We follow PERB's interpretation unless it is clearly erroneous. ... [I]nterpretation of a public employee labor relations statute" 'falls squarely within PERB's legislatively designated field of expertise,' " dealing with public agency labor relations."]; citations omitted, and emphasis added.) But, no deference is given to an administrative agency's interpretation of the First Amendment. (*McDermott v. Ampersand Publ'g, LLC*, supra, 593 F.3d at p. 961; see also *Ampersand Publ, LLC v. NLRB*, supra, 702 F.3d., at p. 55.) Restoration of the status quo cannot include a remedy that tramples on the constitutional rights of Proponents and the electorate.

C. Proponents Did Not Waive Their Right To Object To Invalidation Of Prop B.

The Unions' argument that Proponents waived their right to object to the remedies in PERB's Remedial Order have no merit. Proponents have at all times objected to the invalidation of Proposition B/CPRI on the grounds that it is a validly enacted citizens' initiative and have provided "adequate analysis and authority" in support of their position. (*City of Palo Alto v. Public Employment Relations Bd., supra*, 5 Cal.App.5th 1271.) Since this argument has consistently, and repeatedly been raised by Proponents, it is not waived. (*Carian v. Agric. Labor Relations Bd.* (1984) 36 Cal.3d 654, fn. 6; *Franklin Mint Co. v. Manatt, Phelps & Phillips,* LLP (2010) 184 Cal.App.4th 313, 332.)

Nor could any alleged failure by Proponents to object to PERB's remedy constitute a waiver. (Unions' OSB, p. 30.) The record is clear that

Proponents were not parties to the administrative proceeding before PERB, and had no ability to object or be heard in violation of *Perry v. Brown*, *supra*.

More specifically, PERB's 2015 Order directed the City, upon request by the Unions, to:

> [J]oin in and/or reimburse the Unions' reasonable attorneys' fees and costs for **litigation undertaken to rescind the provisions of Proposition B** adopted by the City, and to restore the prior status quo as it existed before the adoption of Proposition B. (AR XI:186:3040 [Order B.2]; emphasis added.)

The present consolidated action does not constitute "litigation undertaken to rescind the provisions of Proposition B." On the contrary, these consolidated actions were initiated by the City and Proponents to challenge the PERB Decision under Government Code section 3509.5. Accordingly, the remedy of invalidation **in this action** is outside the scope of PERB's Order. Proponents could not have objected to a remedy that was never ordered by PERB; thus no waiver could have occurred.

In addition, Courts have uniformly rejected attempts to secure the invalidation of an initiative through a "friendly action for declaratory relief", contemplated by PERB's Order. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69 ["Permitting the validity of a voter-enacted initiative to be determined in a lawsuit in which both parties and their attorneys not only believe, but have affirmatively stated in prior judicial proceedings, that the measure is unconstitutional makes a mockery of 'one of the most precious rights of our democratic process' and breeds disrespect for the integrity of the judicial process"; internal citation to *Associated Home Builders, supra,* at 18 Cal.3d, p. 591; citations omitted]; *People v. Kelly, supra* 47 Cal.4th, at p. 1025 ["We begin with the observation that '[t]he purpose of California's

constitutional limitation on the Legislature's power to amend initiative statutes is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent."', citing *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th, at p. 1483)].)

D. Quo Warranto is the Exclusive Judicial Means to Challenge the Validity of a Charter Amendment.

The Unions' request for judicial invalidation of the CPRI – akin to the remedy in *Seal Beach* – is not properly before this Court[4]. Unlike this action, *Seal Beach* was brought, and heard, as a writ in quo warranto. (*See Seal Beach, supra,* 36 Cal.3d 591.) That is because the quo warranto writ (now governed by Code Civ. Proc., §§ 803-811 [Actions for the Usurpation of an Office or Franchise]) is the **exclusive judicial proceeding** to obtain the remedy of invalidating a voter-approved ballot measure where a violation of the MMBA is alleged. (*City of Palo Alto v. Public Employment Relations Bd., supra,* 5 Cal.App.5th at p. 1320; *Int'l Ass'n of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698.) Actions for declaratory and injunctive relief will not stand where quo warranto is available. (*Id.* at p. 693.)

The court **may not** hear a quo warranto action unless it is brought or authorized by the Attorney General. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633.) This requirement is jurisdictional. (*San Ysidro Irrigation*

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[4] This Court, in deciding *San Diego Municipal Employees Assn. v. Superior Court*, in 2012, acknowledged that PERB had initial jurisdiction over "[w]hether an employer's refusal to satisfy its alleged meet and confer obligations is an unfair labor practice under the MMBA." (*San Diego Municipal Employees Assn. v. Superior Court, supra,* 206 Cal.App.4th, at p. 1457) The Court also acknowledged that the trial court decided, with respect to the CPRI, that "**any alleged invalidity could be challenged in quo warranto proceedings**." (*Id.* at p. 1454, emphasis added; see Unions' OSB, p. 42.)

District v. Superior Court of San Diego County (1961) 56 Cal.2d 708, 715–716.) The Court of Appeal, in *International Assn. of Fire Fighters v. City of Oakland*, dismissed - on jurisdictional grounds - an action challenging the validity of charter amendments because the matter was not brought as a quo warranto and the Attorney General was not the real party in interest. (*Int'l Ass'n of Fire Fighters v. City of Oakland*, *supra*, 174 Cal.App.3d at p. 698.) Thus, no matter how significant an interest an individual or entity may have, **there is no independent right to sue in *quo warranto***. (*Oakland Municipal Improv. League v. City of Oakland* (1972) 23 Cal.App.3d 165.)

The "sole exception" to Attorney General control over quo warranto proceedings is expressed in Code of Civil Procedure, section 811, which authorizes legislative bodies of local governmental entities to maintain an action, without the Attorney General's consent, against those holding locally authorized franchises within local entities' jurisdiction. (Code Civ. Proc., § 811; *San Ysidro Irrigation Dist. v. Superior Court of San Diego County*, supra; see Cal. Att'y Gen. Office, "Quo Warranto, Resolution of Disputes -- Right to Public Office", Section II, "Nature of the Remedy of Quo Warranto", p. 4-5, available online at https://oag.ca.gov/sites/all/files/agweb/pdfs/ag_opinions/quo-warranto-guidelines.pdf.)

If there is no ambiguity in the language of a statute, the Court is to presume that the Legislature meant what it said and that the plain meaning of the statute governs. (*Int'l Ass'n of Fire Fighters v. City of Oakland*, *supra*, 174 Cal.App.3d at p. 694; *People v. Loeun* (1997) 17 Cal.4th 1.) And as articulated by the United States Supreme Court, "a general statement ... is qualified by an exception, [the Court] usually read[s] the exception narrowly in order to preserve the primary operation of the provision." (*Comm'r v. Clark* (1989) 489 U.S. 726, 739; 109 S.Ct. 1455, 1463.) The plain intent of the quo warranto statutory scheme is evident on its face, as Code of Civil

Procedure section 811 is the only exception to the rule of Attorney General control. Such an interpretation is consistent with the policy of promoting, rather than thwarting, the legislation's intent. (Code Civ. Proc., § 1859; *People v. Montes* (2003) 31 Cal.4th 350, 356; *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *People v. Loeun*, *supra*, 17 Cal.4th 1.)

Should the Court still deem an ambiguity to exist, the next step is to consider and examine the history and background of the statutory language to ascertain the most reasonable interpretation. (*People v. Birkett* (1999) 21 Cal.4th 226, 231–232; *People v. Montes*, *supra*, 31 Cal.4th at p. 356.) The legislative history of the statutory scheme governing quo warranto supports the interpretation of Section 811 as the narrow exception to a general rule requiring Attorney General control over proceedings. Section 811 was added by the Legislature in 1937 because local government was viewed as able to respond more effectively" to the narrow issue contemplated by that Section. (Cal. Att'y Gen. Office, "Quo Warranto, Resolution of Disputes -- Right to Public Office", *supra*, Section II, "Nature of the Remedy of Quo Warranto", p. 4, citing Note (1963) 15 Hastings L.J. 199, 224; Note (1937) 11 So. Cal .L.R. 1, 50-51.)

By seeking a judicial invalidation decree in this action the Unions are improperly attempting to make an end run around the statutorily mandated – and jurisdictional – quo warranto procedure. This consolidated action is not, and has never been, a writ in quo warranto under Code of Civil Procedure section 803. (Code Civ. Proc., § 803, et seq..) The Attorney General is not, and has never been a real party, and at no point been given control over these proceedings. This consolidated action was brought by the City and Proponents as a Writ of Review under Government Code section 3509.5 and California Rules of Court, rule 8.498 to challenge the PERB Decision. (Gov. Code, § 3509.5; Cal. Rules of Court, rule 8.498.) Thus the remedy of invalidation is unavailable herein.

In addition, while quo warranto actions are civil actions governed by the Code of Civil Procedure the nature of the action takes "some of its form" from the "criminal process." (*People ex rel. Pennington v. Richmond* (1956) 141 Cal.App.2d 107, 117; *Int'l Ass'n of Fire Fighters v. City of Oakland, supra*, 174 Cal.App.3d at p. 696; see Code Civ. Proc., § 809 [imposing a fine of up to $5,000].) Thus, by asking this Court to invalidate Prop B in the present action, where the issue of its validity has not been fully adjudicated, the Unions seek to abridge Proponents' right to defend their Initiative under *Perry v. Brown*, and their due process right to trial on the merits. (see, U.S. Const., XIV Amend.; *Perry v. Brown, supra.*)

E. The Attorney General has Not Determined a Quo Warranto Action is Proper and in the Public Interest.

The Attorney General has discretion to grant or deny leave to sue. (74 Ops.Cal.Atty.Gen. 77 (1991) ["*San Diego Sheriff's Assoc*"].). The Attorney General will grant such leave **only** where the proposed relator establishes that there is a substantial question of law or fact which requires judicial resolution, and where the action in quo warranto would serve the **overall public interest of the people of this state.** (72 Ops.Cal.Atty.Gen. 15, 19 (1989); *Citizens Utilities Co. v. Superior Court* (1976) 56 Cal.App.3d 399, 406 ["the remedy of quo warranto belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare. It is a preventative remedy addressed to preventing a continuing exercise of an authority unlawfully asserted rather than to correcting what has already been done under that authority."]; internal citations omitted; *City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 647 ["Attorney General need not automatically grant leave to file any kind of suit presented to him if he does not in the exercise of his discretion deem it a proper subject for litigation."].) "It must be remembered, however, that ... regardless of whether a private interest is at stake, the cause of action is always carried

forward in the name of and on behalf of the public." (Cal. Att'y Gen. Office, "Quo Warranto, Resolution of Disputes – Right to Public Office", *supra*, IV. "Consideration and Determination by the Attorney General on the Application for Leave to Sue in Quo Warranto", p. 15.)

The determination of the Attorney General in denying leave to sue is reviewable by way of mandamus relief. (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d, at p. 698.) However, the California Supreme Court has historically upheld such denial. (*Lamb v. Webb* (1907) 151 Cal.451, 455-456; *City of Campbell v. Mosk, supra,* 197 Cal.App. 2d, at p. 645.)

Where leave to sue is granted, the Attorney General retains control over the action and may dismiss it over the objection of the relator, or refuse to permit an appeal. (*Cage, People ex rel., v. Petroleum Rectifying Co. of California* (1937) 21 Cal.App.2d 289, 291-292; *Oakland Municipal Improv. League v. City of Oakland* (1972) 23 Cal.App.3d 165.) The Attorney General's control extends over all court filings, and may require modification to those filings. (Cal. Att'y Gen. Office, "Quo Warranto, Resolution of Disputes -- Right to Public Office", supra, Section V, "Prosecution of Quo Warranto Action", supra, pp. 16-17; *People ex rel. Southwest Exploration Co. v. City of Huntington Beach* (1954) 128 Cal.App.2d 452, 456–457 (*Huntington Beach*) ["in view of the established practice as understood and followed for many years, the attorney general, in the exercise of his undoubted control over the action, could authorize and direct the attorney for the relator, who had already been authorized to sign the complaint as attorney for the plaintiff and who had taken a leading part in the trial, to file notice of or to make a motion for a new trial which the attorney general desired to have granted."]

In order for a private party to obtain leave from the Attorney General to sue as a "relator" on "the relation of" the People of the State of California,

the party must submit to the Attorney General, and serve on the proposed defendant, an "application for "leave to sue."' (Cal. Code Regs., tit. 11, §§ 1, 2; *see Huntington Beach, supra,* 128 Cal.App.2d at p. 455.) The application process includes submittal, by the proposed relator, of a verified complaint, as well as points and authorities "showing why the proposed proceeding should be brought in the name of the people, and supporting the contention of relator that a public office or franchise is usurped." (Cal. Code Regs., tit. 11, §2 (a) and (b); emphasis added.) The proposed defendant must then have an opportunity to "show cause, if any he or it have, why "leave to sue" should not be granted in accordance with the application therefor." (Cal. Code Regs., tit. 11, §2 (c); *see Huntington Beach*, *supra*, at p. 455.)

Thus, while the Unions argue that the Attorney General would have granted them leave to file a writ in quo warranto in this case, their claim is pure speculation. The Attorney General has been given no such opportunity, (see, Unions' OSB, p. 43.) and has granted no such leave. In fact the Unions have not undertaken the process necessary for the Attorney General to make that determination[5]. They have presented no evidence showing they submitted to the Attorney General an application or proposed verified complaint. Nor have Proponents, or the City, been provided with their due process right to submit a response to such an application, arguing that leave to sue should be denied. Because of the constitutional rights of initiative proponents implicated herein, the Attorney General may well have denied leave to sue in quo warranto. (72 Ops.Cal.Atty.Gen. 15, 19 (1989).)

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[5] If the Attorney General grants leave to sue, the relater must file a $500 undertaking with the Attorney General's Office before any complaint can be filed to protect the state from any expenses in the event the relator is the losing party in the quo warranto. (Cal. Att'y Gen. Office, "Quo Warranto", supra, p. 16.)

The procedural and jurisdictional requirements for the pursuit of quo warranto relief are based on sound policy foundations. They cannot be side-stepped by the Unions, nor can the quo warranto remedy be exercised independently of, or separately from, the Attorney General's participation or approval.

V. THE OTHER REMEDIES ORDERED BY PERB ARE IMPROPER.

PERB's Order contains two additional remedies which Proponents challenge on the basis that they are improper and/or beyond PERB's jurisdiction. (AR XI:186:003040-3041.)

A. Order to Meet and Confer prior to Adoption of Ballot Measure

First, PERB orders the City, upon request, to "meet and confer before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects". (*Ibid*; [Order B.1.]; see also Order A.1., [ordering the City to cease and desist from refusing to meet and confer "before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects."]) Employee pension benefits are set forth in the City Charter. Therefore, any ballot measures affecting employee pension benefits in the City of San Diego would be in the form of Charter Amendments, which the City cannot "adopt." (Elec. Code, § 9255.) Furthermore, as discussed above, if the ballot measure at issue is a citizens' initiative, the City has no discretion to meet and confer over its specific terms. (*Farley v. Healy, supra,* 67 Cal.2d., at p. 327; *see also Save Stanislaus Area Farm Economy v. Board of Supervisors, supra,* 13 Cal.App.4th at p. 148; *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano, supra,* 120 Cal.App.4th, at p. 966.) The California Supreme Court did not rule otherwise in *Boling*.

B. Make Whole Remedy.

PERB also orders the City to "[m]ake current and former bargaining unit employees whole for the value of any and all lost compensation...offset by the value of new benefits required from the City under Proposition B, plus interest at the rate of seven (7) percent per annum until Proposition B is no longer in effect or until the City and the Unions agree otherwise." (AR XI:186:003041 [Order B.3.]).) This "Make Whole" remedy invalidates Prop B by reversing its implementation and denying the electorate of its fiscal benefits, therefore all the arguments against invalidation apply to this remedy.

VI. CONCLUSION

The facts and the law, at issue in this case, compel the following conclusions:

- The Constitutional right of the Proponents to draft and circulate for signature, and the right of the San Diego electorate to vote on, the CPRI, a citizens' initiative measure, is superior to, and cannot be impeded by, a statutorily created obligation to meet and confer in a labor context.

- If a public official – the Mayor – supports a citizens' initiative measure, and his support is imputed to the City, thereby creating an obligation to meet and confer, that obligation does not include the right to negotiate, or change the terms of a qualifying citizens' initiative.

- If a City is presented with a fully qualified citizens' initiative measure, it is legally obligated to refer that measure to the electorate, irrespective of any separate duty that may arise to meet and confer with Union representatives. The failure of the City to meet and confer, when obligated to do so, has no impact on the

validity of the CPRI, a citizens' initiative measure being referred to the voters.

- No statutorily created agency, including PERB, has the charge, or the jurisdiction, to decide the Constitutionality of a citizens' initiative measure.
- The Constitutionality of a citizen's initiative measure can only be tested and determined by the judiciary pursuant to quo warranto proceedings.
- The remedies ordered by PERB violate the rights of the Proponents as the sponsors of the citizens' initiative.

The charge of this Court is to determine what the City of San Diego must do to remedy its failure to meet and confer; any such remedy cannot include the invalidation of the CPRI, nor can it undercut the reserved power of a citizens' initiative.

DATED: November 1, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Supplemental Brief of Proponents', Boling, Zane and Williams Responding to the Joint Opening Supplemental Brief by Union Real Parties is proportionally spaced, has a typeface of 13 points or more, and contains 12,422 words, excluding the cover, Tables of Contents and Authorities, the signature block and this Certificate, which is less than permitted by the Rules of Court. Counsel relied on the word count feature of the word processing program used to prepare this Brief.

DATED: November 1 , 2018

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

Consolidated Case Nos. D069626 and D069630

CATHERINE A. BOLING; T. J. ZANE AND STEPHEN B. WILLIAMS
Petitioners,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Respondent.

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

Petition for Writ of Extraordinary Relief
From Public Employment Relations Board Decision No. 2464-M.
(Case Nos. LA-CE-746-M; LA-CE-752-M; LA-CE-755-M; and LA-CE-758-M)

PROOF OF SERVICE

I, Ann Buerster, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and am not a party to the above-referenced action. My business address is 960 Canterbury Place, Ste. 300, Escondido, California 92025. On November 1, 2018, I caused the following documents:

SUPPLEMENTAL BRIEF OF PROPONENTS', BOLING, ZANE AND WILLIAMS RESPONDING TO THE JOINT OPENING SUPPLEMENTAL BRIEF BY UNION REAL PARTIES

to be served to the following parties listed below, in the manner indicated:

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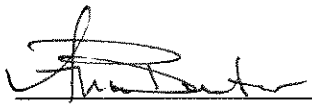
[X] **(BY E-MAIL)** Pursuant to California Rules of Court, Rule 8.71 and Court of Appeals, Fourth District Rule 5(g). I sent the documents via email addressed to the e-mail address listed above and in accordance with the Code of Civil Procedure and the California Rules of Court. I am readily familiar with the firm's practice of preparing and serving documents by e-mail, which practice is that when documents are to be served by e-mail, they are scanned in a .pdf format and sent to the addresses on that same day and in the ordinary course of business.

[ ] **(BY MAIL)** I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail for collection and mailing at Lounsbery Ferguson Altona & Peak LLP, Escondido, California, following ordinary business practices. I am familiar with the practice of Lounsbery Ferguson Altona & Peak LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

[X] **(BY ELECTRONIC SERVICE)** On the date stated above, I served the documents via TrueFiling described above on designated recipients through electronic transmission of said documents; a certified receipt is issued to filing party acknowledging receipt by TrueFiling's system. Once TrueFiling has served all designated recipients, proof of electronic service is returned to the filing party.

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

Executed on **November 1, 2018** at Escondido, California.



Ann Buerster