Ann M. Smith, Esq., SBN 120733
Smith Steiner Vanderpool, APC
401 West A Street, Suite 340
San Diego, CA 92101
Telephone: (619) 756-7007, ext. 207
Email: asmith@ssvwlaw.com

Attorneys for Plaintiff-Relator
San Diego Municipal Employees Association

Fern M. Steiner, Esq., SBN 118588
Smith Steiner Vanderpool, APC
401 West A Street, Suite 340
San Diego, CA 92101
Telephone: (619) 756-7007, ext. 201
Email: fsteiner@ssvwlaw.com

Attorneys for Plaintiff-Relator
San Diego City Firefighters Local 145,
IAFF, AFL-CIO

Ellen Greenstone, Esq., SBN 66022
Hannah Weinstein, Esq., SBN 301666
Rothner, Segall and Greenstone
510 South Marengo Avenue
Pasadena, CA. 91101-3115
Telephone: (626) 796-7555
Fax: 626-577-0124
Email: egreenstone@rsglabor.com;
hweinstein@rsglabor.com

Attorneys for Plaintiff-Relator
AFSCME LOCAL 127, AFL-CIO

James J. Cunningham, Esq., SBN 128974
Law Offices of James J. Cunningham
10405 San Diego Mission Road, Suite 201
San Diego, CA 92108
Telephone: (858) 693-8833
Email: jimcunninghamlaw@gmail.com

Attorneys for Plaintiff-Relator
Deputy City Attorneys Association of
San Diego

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO, AFSCME LOCAL 127, AFL-CIO AND DEPUTY CITY ATTORNEYS ASSOCIATION OF SAN DIEGO,

Plaintiffs,

v.

CITY OF SAN DIEGO AND ITS CITY COUNCIL,

Defendants.

CASE NO. 37-2019-00051308-CU-MC-CTL

VERIFIED COMPLAINT IN *QUO WARRANTO*; ATTACHED LEAVE TO SUE (EXHIBIT A)

[Code of Civ. Proc. § 803; Cal. Code Reg. Title 11, § 2(A)]

The People of the State of California *ex rel.* SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION ("MEA"), SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO, ("Local 145"), AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES (AFSCME) LOCAL 127, AFL-CIO, ("Local 127"), and DEPUTY CITY ATTORNEYS ASSOCIATION OF SAN DIEGO ("DCAA")(collectively "Plaintiff-Relators"), bring this verified complaint in *quo warranto* against Defendant CITY OF SAN DIEGO ("City") and its CITY COUNCIL ("City Council") pursuant to Code of Civil Procedure section 803.

Introduction

1. The remedy of *quo warranto* belongs to the State, in its sovereign capacity, to protect the interest of the people as a whole and to guard the public welfare. Leave to bring this action has been granted by the Attorney General.

2. The provisions of a City charter become effective when filed with the Secretary of State and these provisions are the law of the State with the force and effect of legislative enactments. (*California Constitution*, art. XI, § 3(a).)

3. The State's sovereign interest, and the general public's interest, are uniquely implicated where a local agency amends its charter in violation of state laws which govern the local lawmaking process, including the Meyers-Milias-Brown Act ("MMBA").

4. *Quo warranto* is Latin for "by what authority." In certain *quo warranto* actions, the "authority" question focuses on whether a charter city's placement of an initiative measure on the ballot without bargaining under the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500, *et seq.*, was an unlawful exercise of the city's franchise. (*Bakersfield Police Officers Association* (2012) 95 Ops.Cal.Atty.Gen. 31; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [*Seal Beach*].)

5. When a charter city places an initiative on the ballot which is intended to affect matters within the scope of representation without first complying with the meet-and-confer requirements of the MMBA, a procedural irregularity in the legislative process occurs and the resulting charter amendment, if approved by the voters, represents an unlawful exercise of the city's franchise rendering the charter amendment invalid. (*Seal Beach, supra*, 36 Cal.3d at 595;

Bakersfield Police Officers Association (2012) 95 Ops.Cal.Atty.Gen. 31; *Fresno Police Officers and Firefighters Associations* (1993) 76 Ops.Cal.Atty.Gen. 169, 171-173; *City of Palo Alto v. PERB* (2016) 5 Cal.App.5th 1271, 1316-1317; *IAFF, Local 1319 v. City of Palo Alto* (2017) PERB Decision No. 2388a-M.)

A Dispositive Determination Requiring Invalidation of City's Proposition B Charter Amendments Has Been Made By the California Supreme Court

6. Plaintiff-Relators bring this action on behalf of the People of the State of California to seek issuance of a writ in *quo warranto* declaring invalid and striking from the San Diego City Charter all provisions added effective July 20, 2012, by operation of the "Proposition B" charter amendment. This result is required under the *quo warranto* precedent established by the California Supreme Court in *Seal Beach* because the City of San Diego violated section 3505 of the MMBA in connection with its Proposition B charter amendments – just as the City of Seal Beach did – by putting proposed charter amendments before the voters while failing and refusing to bargain. (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 [*Boling I*].)

7. In *Boling I*, the Supreme Court reversed the Court of Appeal, rejecting its attempt to distinguish *Seal Beach* by finding that no section 3505 obligation attached to the City's Proposition B legislative process because Proposition B was a citizen-sponsored initiative and not a proposal *by* the governing body." (*Id.* at 916.)

8. By unanimous opinion, the *Boling* Supreme Court reversed the Court of Appeal to uphold PERB's Decision in favor of Relators on their unfair labor practice charges. *Boling I* held that section 3505 of the MMBA extended to the mayor's sponsorship of the Proposition B Initiative. (*Id.* at 918.) "Mayor Sanders conceived the idea of a citizens' initiative pension reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward. He relied on his position of authority and employed his staff throughout the process. He continued using the powers of office to promote the Initiative after the proponents emerged." (*Id.* at 916.) Since "the mayor was the city's chief executive, empowered by the city charter to make policy recommendations with regard to city employees and to negotiate with the city's unions, under the terms of section 3505, he was required to meet and confer with the unions

prior to arriving at a determination of policy or course of action on matters affecting the terms and conditions of employment." (*Ibid.*) "The obligation to meet and confer did not depend on the means he chose to reach his policy objectives or the role of the city council in the process." (*Id.* at 919.) "Because the mayor was directly exercising his executive authority on behalf of the city, no resort to agency principles is required to bring him within the scope of section 3505." (*Ibid.*) "The relevant question is whether the executive is using the powers and resources of his office to alter terms and conditions of employment. Here the answer is plainly "yes." (*Ibid.*)

> Sanders informed San Diegans that he would place a pension reform measure on the ballot as part of his "agenda to streamline city operations, increase accountability and reduce pensions costs . . . by the time he leaves office." In his state of the city address, he formally recommended to the city council the "policy" of substituting 401(k)-style plans for defined benefit pensions, as well as the 'course of action" of pursuing reform by way of a citizens' initiative measure. He pledged to work with others in city government to achieve this goal, and he did. He and his staff were deeply involved in developing the proposal's terms, monitoring the campaign in support of it, and assisting in the signature-gathering effort. He signed ballot arguments in favor of the measure as "Mayor Jerry Sanders." He consistently invoked his position as mayor and used city resources and employees to draft, promote, and support the Initiative. The city's assertion that his support was merely that of a private citizen does not withstand objective scrutiny." (*Id.* at 919.)

9. "When a local official with responsibility over labor relations uses the powers and resources of his office to play a major role in the promotion of a ballot initiative affecting terms and conditions of employment, the duty to meet and confer arises." (*Boling I* at 919.) Whether an official played such a major role will generally be a question of fact, on which PERB's conclusion is entitled to deference. (§ 3509.5, subd. (b).) Substantial evidence supports PERB's conclusion here that Sanders's activity created an obligation to meet and confer. (*Ibid.*)

10. The *Boling I* Supreme Court answered, in part, the question left open in *Seal Beach* at page 599, footnote 8: "Needless to say, this case does not involve the question of whether the meet-and-confer requirement was intended to apply to charter amendments proposed by initiative." *Boling I* holds that the meet-and-confer requirement *does* apply where the initiative is sponsored and promoted by government itself. *Boling I* rejected the City's central contention that a *Seal-Beach* style MMBA violation can never occur unless the City's *City Council*, not its Mayor, is making a policy decision and determining a course of action to change pensions for represented City employees. As PERB concluded, and *Boling I* agreed, the command of MMBA section 3505 is not

limited to the City Council as governing body. *Boling I* explains that "allowing public officials to purposefully evade the meet-and-confer requirements of the MMBA by officially sponsoring a citizens' initiative would seriously undermine the policies served by the statute: fostering full communication between public employers and employees, as well as improving personnel management and employer-employee relations." (*Boling I* at 918-919, citing § 3500 and *Seal Beach* at p. 597.)

11. Having applied "settled law" to answer the two questions on which it granted review, *Boling I* remanded the case to the Court of Appeal for review of PERB's remedial orders and to "address the appropriate judicial remedy for the (MMBA) violation identified." (*Id.* at 920.)

12. On March 25, 2019, the Fourth District Court of Appeal upheld PERB's remedial "cease and desist" and "make-whole" orders with minor modifications. *Boling v. Public Employment Relations Board* (2019) 33 Cal.App.5th 376 (*"Boling II"*). (**Exhibit 6** to this Verified Statement.) *Boling II* upheld, without modification, PERB's order directing the City to take the following affirmative action designed to effectuate the policies of the MMBA: "Upon request by the Unions, join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B, and to restore the status quo as it existed before the adoption of Proposition B." Noting that "it is apparent from PERB's Decision that PERB does not believe the Initiative is valid," the *Boling II* court concluded that litigation directed at rescinding the provisions of Proposition B and restoring the *status quo ante* should be decided in a *quo warranto* proceeding. (*Boling II* at 384-386.)

13. General law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern. (*Boling I* at 915, citing *Seal Beach* at p. 600.)

14. After the Proposition B charter amendments took effect, the City has acted and continues to act under the color of authority provided by these defective and invalid charter amendments by denying all City employees newly hired on and after July 20, 2012, except sworn police officers, any access to City's defined benefit pension plan. In so doing, City has usurped, intruded into, and unlawfully held and exercised powers not belonging to it.

15. To harmonize the duties and rights established under the MMBA with the constitutional right to propose local initiative legislation, the City was required to engage in a good faith meet-and-confer process over the Mayor's proposed changes in City's pension policy *before* the City put the Proposition B charter amendments before the voters.

16. Issuance of a writ in *quo warranto* invalidating the Proposition B charter amendments and striking them from the San Diego City charter is necessary in furtherance of the State's sovereign interest, to protect the general public interest, to provide the appropriate judicial remedy for the violation identified in *Boling I* – as the high court directed (*Boling I* at 920) – and to comply with controlling precedent in *Seal Beach*.

Parties

17. At all relevant times, Defendant City was a municipal corporation existing, qualifying, and acting under a charter pursuant to State law and the California Constitution. As a charter city, the City of San Diego remains subject to the same state laws as general law cities on matters considered to be of "statewide concern."

18. Though its duly-elected members have changed, Defendant City Council serves and has served at all relevant times as the City's legislative body entrusted with various powers specified in Article III of City's charter.

19. The four Union Plaintiff-Relators are recognized employee organizations under the MMBA, Government Code section 3501. They are the exclusive bargaining representatives for City employees who provide vital services to the City's estimated 1.42 million residents. The scope of Plaintiff-Relators' representation includes all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, including pension benefits. (Gov. C. § 3504.)

20. City is a public agency within the meaning of the MMBA (Gov. Code § 3501), and the employer of the bargaining unit employees Plaintiff-Relators represent.

City's MMBA Obligations

21. The MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and, (2) to improve personnel management and employer-

employee relations within the various public agencies. (*Boling I* at 914.) These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations. (*Ibid.*) The Legislature has set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations. (*Ibid.*)

22. The MMBA requires the City to engage in a good faith meet and confer process regarding pensions and other subject matter within the scope of representation prior to arriving at a determination of policy or course of action. (Gov. C. §§ 3504, 3505.) The centerpiece of the MMBA is section 3505, which requires the governing body of a local public agency, or its designated representative, to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. (*Boling I* at 913.) The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements. (*Id.* at 914.) MMBA obligations extend to and include a charter city's proposals to amend its charter to affect or change matters within the scope of representation. (*Seal Beach.)*

23. At all relevant times, City and Plaintiff-Relators had agreements in effect known as "Memoranda of Understanding" ("MOUs") which specified all terms and conditions of employment including pension benefits. These MOUs were approved by the City Council, reduced to writing and signed by the parties. (Gov. Code § 3505.1.) Under these MOUs, all new hires were required, as a condition of employment, to become participants in City's defined benefit pension plans.

24. As recognized employee organizations under the MMBA, Plaintiff-Relators were at all relevant times, on behalf of themselves and the employees they represent, beneficially interested in the City's faithful performance of its obligations under the MMBA which is intended by the Legislature to foster labor peace in California by 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. (Gov. C. § 3500.)

25. The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse. (*Boling I* at 914.)

26. It is undisputed that the pension benefit changes effected by Proposition B fell within the scope of the unions' representation. (*Ibid.*)

27. "On these facts," Mayor Sanders had an obligation to meet and confer with the unions before pursuing pension reform by drafting and promoting a citizens' initiative to amend the City's charter. (*Id.* at 913-914.)

Procedural Irregularity When Presenting Proposition B Charter Amendment to Voters

28. By Ordinance O-20127 adopted on January 30, 2012, the City Council placed the "Comprehensive Pension Reform Initiative" on the June 5, 2012 ballot as "Proposition B." Proposition B's purpose was to alter employee benefits and compensation by charter amendments – notwithstanding the City's existing MOUs with Plaintiff-Relators establishing all terms and conditions – including provisions to deny all new City employees except sworn police officers access to City's defined benefit pension plan known as the San Diego City Employees' Retirement System ("SDCERS").

29. At no time prior to January 30, 2012, did the City give notice and opportunity to Plaintiff-Relators to engage in a good faith meet and confer process under MMBA section 3505 regarding the pension and compensation changes covered by the proposed Proposition B charter amendments. City excused its failure to bargain and, in response to multiple written demands to bargain, defended its refusal to bargain on the basis that the proposed charter amendments did not constitute a *City* proposal.

30. Proposition B was approved by the voters and took effect on July 20, 2012, adding Sections 140, 141.1, 141.2, 141.3, 141.4, 150, and 151 to City Charter Article IX, amending Section 143.1 thereof, and adding Sections 70.1 and 70.2 to Article VII. Section 70.2 stated on its face that it would be automatically repealed and removed from the Charter on July 1, 2018.

31. The Proposition B Charter amendments resulted in unilateral changes to terms and conditions of employment for employees represented by Plaintiff-Relators.

Unfair Practice Proceedings Before Public Employment Relations Board (PERB)

32. In 2001, the Legislature transferred jurisdiction over the MMBA from the courts to the Public Employment Relations Board (PERB). (Gov. C. § 3509, subd. (a).)

33. In response to Plaintiff-Relators' unfair labor practice charges filed with PERB and the complaints issued thereon, as well as injunctive relief proceedings initiated by PERB pursuant to its authority under Government Code section 3541.3, subdivision (j), City persisted in its refusal to bargain, opposed injunctive relief, and secured a stay of PERB's administrative proceedings – all on the basis that the proposed charter amendments affecting compensation and eliminating defined benefit pensions did not constitute a *City* proposal or a *City* policy determination under the binding precedent of *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, and, therefore, the *City* had no duty to bargain under the MMBA before putting Proposition B on the ballot.

34. On June 19, 2012, after Proposition B had been approved by the voters, the Fourth District Court of Appeal granted Plaintiff-Relator San Diego Municipal Employees Association's petition for writ of mandate, after briefing and oral argument, and ordered the stay of PERB proceedings lifted so that PERB could exercise its exclusive initial jurisdiction to hear and decide Plaintiff-Relators' unfair practice complaints seeking to invalidate Proposition B because City manipulated the citizen-initiative process to insulate the City from the meet and confer process. *San Diego Municipal Employees Association v. The Superior Court of San Diego County (City of San Diego, RPI)* (2012) 206 Cal.App.4th 1447, 1453, 1460 (*rev. denied* 8/29/12)[*SDMEA.*].) *SDMEA* noted that the City "does not dispute that, had City *directly* placed the Initiative on the ballot without satisfying the meet and confer procedures, it would have engaged in conduct prohibited by the MMBA under *Seal Beach.*" (*Id.* at 1460, emphasis in original.) PERB's initial exclusive jurisdiction was triggered "because Union's unfair practice charge alleges that City engaged in activity *arguably* prohibited by public employment labor law because the Initiative (while nominally a citizens initiative) was actually placed on the ballot by City using straw men to avoid its MMBA obligations." (*Ibid.*)

///

35. The administrative proceedings before PERB resulted in a 6,132-page, 24-volume Administrative Record, including sworn testimony taken and 247 exhibits admitted during a four-day hearing in July 2012. The City called ballot proponents' attorney Kenneth Lounsbery to testify under oath as a witness in City's defense.

36. After post-hearing briefs were filed, the Administrative Law Judge's (ALJ) 56-page Proposed Decision issued on February 11, 2013, together with a Proposed Order and Notice to Employees to be posted by order of PERB. After reviewing the procedural history, the ALJ made numerous "findings of fact" based on the testimonial and documentary evidence, including but not limited to the following:

(a) The characterization of the private citizens who assisted in the passage of the initiative as "innocent third parties" who merely carried forward an idea for legislation proposed by the Mayor as a citizens' initiative, is inaccurate. The impetus for the reforms originated within the offices of City government. (ALJ's Proposed Decision, p. 54.)

(b) The electorate would have reasonably interpreted Proposition B to be a proposal developed by City officials in their elected capacities. (*Ibid.*)

(c) By their statements prior to the filing of the initiative, even San Diego Taxpayer Association Vice-Chair Hawkins and Councilmember DeMaio recognized that the unions had a stake in the matter by acknowledging that the solutions they sought could potentially be achieved through the meet-and-confer process. (*Id.* at p. 17; p. 54, fn. 20.)

(d) The efforts of the private citizens who participated in the initiative campaign contributed to the City's unfair practice and were ratified by the City. (*Id.* at pp. 54-55.)

37. The ALJ framed the issue for decision as follows : "Did the City violate its duty to meet and confer as a result of the Mayor's development, sponsorship and promotion of his pension reform proposal coupled with the City's refusal to negotiate with unions over the matter?" The ALJ reached the following conclusions of law:

(a) In light of *Seal Beach*, and given the City's legal responsibility to meet and confer and supervisory responsibility over its bargaining representatives, section 3505 must be construed to require that the City provide its unions the opportunity to meet and confer over the

Mayor's proposal for pension reform before accepting the benefits of a unilaterally imposed new policy, when the Mayor, invoking the weight of his office, has taken concrete steps toward qualifying his policy determination as a ballot measure. (ALJ's Proposed Decision, p. 38.)

(b) The Mayor under the color of his elected office, supported by two City Councilmembers and the City Attorney, undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it, all while denying the unions an opportunity to meet and confer over his policy determination in the form of a ballot proposal. (*Id.* at p. 53.)

(c) By this conduct the Mayor took concrete actions toward implementation of the reform initiative, the consequence of which was a unilateral change in terms and condition of employment for represented employees to the City's considerable financial benefit. (*Ibid.*)

(d) *Seal Beach* requires negotiations when a public agency, acting through its governing body, makes a policy determination that it proposes for adoption by the electorate. By virtue of the Mayor's status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applies to the City because it has ratified the policy decision resulting in the unilateral change, and because the Mayor was not legally privileged to pursue implementation of that change as a private citizen. (*Ibid.*)

(e) The City violated section 3505 of the MMBA and PERB Regulations 32603(a)-(c) by failing and refusing to meet and confer over the Mayor's 2010-2011 proposal to reform the City's defined benefit pension plan prior to placing Proposition B on the ballot. (*Id.* at pp. 54-55.)

38. The ALJ held that, because the Mayor's policy determination was successfully adopted through the passage of Proposition B, this amounted to a unilateral change, making the traditional remedy in a unilateral change case appropriate. "Labor law recognizes that a policy change implemented is a fait accompli; it cannot be left in place during the remedial period because vindication of the union's right to negotiate cannot occur when it has to "bargain back" to the status quo." Accordingly, the ALJ ordered the City to cease and desist from its unilateral action, restore the status quo that existed at the time of the unlawful conduct by rescinding the provisions of

Proposition B now adopted, and make employees whole for any losses suffered as a result of the unlawful conduct. (*Id.* at pp. 54-55.)

39. Briefing ensued on City's exceptions to the ALJ's Proposed Decision and, with the Board's permission, Mr. Lounsbery's firm filed an informational brief on behalf of the three ballot proponents.

40. The Board issued its 63-page Decision on December 29, 2015, affirming the ALJ's Proposed Decision and remedy, as modified. The Board identified two minor factual inaccuracies in the Proposed Decision which the Board found to be "harmless errors and inconsequential to the outcome of the case." With these two exceptions, the Board upheld the ALJ's findings of fact as supported by the record and adopted them as the findings of the Board itself. The Board also noted that the material facts, as set forth in the Proposed Decision, were not in dispute. (Board Decision, p. 4.)

41. The Board adopted the ALJ's determinations as follows:

(a) That the evidence established that Sanders, in his capacity as the City's chief executive officer and labor relations spokesperson, made a firm decision and took concrete steps to implement his decision to alter terms and conditions of employment of employees represented by the Unions. (Board Decision, p. 8.) An employer violates its duty to bargain in good faith when it fails to afford the employees' representative reasonable advance notice and an opportunity to bargain *before reaching a firm decisions* to establish or change a policy within the scope of representation. (*Id.* at p. 52.)

(b) That Mayor Sanders was acting as the City's agent when he announced the decision to pursue a pension reform initiative that eventually resulted in Proposition B, and that the City Council, by its action and inaction, ratified both Sanders' decision and his refusal to meet and confer with the Unions. (*Id.* at p. 8.)

(c) That the impetus for the pension reform measure originated within the offices of City government. (*Ibid.*)

(d) That Mayor Sanders acted with actual authority because proposing necessary legislation and negotiating pension benefits with the Unions were within the scope of the Mayor's

authority and because the City acquiesced to his public promotion of the initiative, by placing the measure on the ballot, and by denying the Unions the opportunity to meet and confer, all while accepting the considerable financial benefits resulting from the passage and implementation of Proposition B. (Board Decision, p. 15.)

(e) That, given the extent to which the Mayor, his staff, and other City officials used the prestige of their offices to promote Proposition B, and given the City's legal responsibility to meet and confer and its supervisory responsibility over its bargaining representatives, the MMBA's meet-and-confer provisions must be construed to require the City to provide notice and opportunity to bargain over the Mayor's pension reform initiative before accepting the benefits of a unilaterally-imposed new policy. (*Id.* at p. 16.)

(f) That it is undisputed that the general public and the media were aware of the controversy over the Mayor's status as a private citizen when publicly supporting the initiative. Sanders admitted that, because he wished to avoid going through the MMBA's meet-and-confer process, he chose to present and support the issue as a private citizen rather than in his official capacities as City's Mayor. (*Id.* at p. 19.)

(g) That the evidence established that, under the circumstances, members of the general public, including City employees, would reasonably conclude that the Mayor was pursuing pension reform in his capacity as an elected official and the City's chief executive officer, based on his statutorily-defined role under the City's Strong Mayor form of government and his contemporaneous and prior dealings with the Unions on pension matters, some in the form of proposed ballot initiatives. [...] City employees as part of the news-consuming general public would have also reasonably concluded that the City Council had authorized or permitted the Mayor to pursue his campaign for pension reform to avoid meeting and conferring with employee labor representatives. (*Id.* at pp. 18-19.)

(h) That there is ample evidence that the City Council knew of Sanders' efforts to alter employee pension benefits through a ballot measure, of his use of the vestments and prestige of his office, including his State of the City address before the Council, to promote this policy change, and, of his rejection of repeated requests from the Unions to meet and confer regarding this

change. It is undisputed that the City Council never repudiated the Mayor's publicly-stated commitment to pursue a pension reform ballot measure, his public actions in support of the change in City policy, or his outright refusal to meet and confer over the decisions, when repeatedly requested by the Unions to do so. (Board Decision, pp. 24-25.)

(i) That the City was on notice of the potential legal consequences of Sanders' conduct based on a Legal Memorandum to the Mayor and City Council issued by the City Attorney's Office in 2008, which cautioned that, because of the Mayor's position and duties as set forth in the City Charter, his sponsorship of an ostensibly private citizens' initiative would be legally considered as his acting with apparent governmental authority because of his position as Mayor and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions – such that the City would have the same meet and confer obligations with its unions when sponsoring a voter petition as it would have were the Mayor to propose a ballot measure to the unions directly on behalf of the City. (*Id.* at p. 25.)

(j) That after becoming aware of the Unions' requests for bargaining, the City Council, like the Mayor, relied on the advice of Goldsmith that no meet-and-confer obligation arose because Proposition B was a purely "private" citizens' initiative. The City Council failed to disavow the conduct of its bargaining representative and may therefore be held responsible for the Mayor's conduct. The City Council also accepted the benefits of Proposition B with prior knowledge of the Mayor's conduct in support of its passage. We agree with the ALJ's findings that, with knowledge of his conduct and, in large measure, notice of the potential legal consequences, the City Council acquiesced to the Mayor's actions, including his repeated rejection of the Unions' requests for bargaining, and that, by accepting the considerable financial benefits resulting from passage and implementation of Proposition B, the City Council thereby ratified the Mayor's conduct. (*Id.* at pp. 26-27.)

42. The Board also considered and rejected the Exceptions filed to the ALJ's Proposed Decision, stating, in part:

///

(a) That the City does not dispute that the subject of Proposition B, employee retirement benefits, is within the MMBA's scope of representation or that the Mayor, as the City's chief negotiator in labor relations, rejected the Unions' repeated demands to meet and confer over the pension reform proposal before the measure was placed on the ballot for voter approval. (Board Decision, pp. 27-28.)

(b) That the City argues this otherwise negotiable matter is exempt from the scope of mandatory bargaining because it was proposed and enacted through the citizens' initiative process rather than by traditional legislative means, i.e., by action of the City's governing body. "Like the ALJ, we disagree with the premise of the City's argument. The Mayor and City officials were not acting solely as *private* citizens when they used City resources and the prestige of their offices to promote the pension reform ballot initiative." (*Ibid.*)

(c) That questions and issues related to the applicability of the MMBA's meet-and-confer requirements to a pure citizens' initiative are not implicated by the facts of this case and "we therefore declined to decide them." (*Ibid.*)

(d) That a charter represents the supreme law of a charter city, but only *as to municipal affairs*. As to matters of statewide concern, it remains subject to preemptive state law. (*Id.* at p. 31, emphasis in original.)

(e) That, following *Seal Beach*, the law is clear: while the MMBA does not purport to supersede charters, ordinances, and local rules establishing civil service systems or other methods of administering employer-employee relations, neither may a charter city rely on its home rule powers to ignore or evade its procedural obligations under the MMBA to meet and confer with recognized employee organizations concerning negotiable subjects. (*Id.* at p. 32.)

(f) That the City apparently concedes this point, as stated in (City Attorney) Goldsmith's January 26, 2009 Memorandum of Law: "the duty to bargain in good faith established by the MMBA is a matter of statewide concern and of overriding legislative policy, and nothing that is or is not in a city's charter can supersede that duty." (*Ibid.*)

///

///

(g) That, in addition to the home rule powers of a charter city, the California Constitution also guarantees to the citizens of a charter city the right to legislate directly by initiative or referendum. (Cal. Const., art, II, § 11.) However, the Board concluded:

(1) The constitutional right of a local electorate to legislate by initiative, like the home rule authority of the charter city itself, extends only to *municipal affairs.*

(2) As such, this local initiative right is likewise preempted by general laws affecting matters of statewide concern – including. "as we know from *Seal Beach,*" preventing labor unrest through collective bargaining is a matter of statewide concern. (*Seal Beach* at 600.)

(3) Restrictions on the local electorate's power to legislate through the initiative or referendum process are justified when legislation establishes a uniform system of fair labor practices, including the collective bargaining process between local government agencies and employee organizations representing public employees. (*Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 780 [*Trinity County*].

(4) In sum, a charter city does not expand its powers to affect statewide matters simply by acting through its electorate rather than through traditional legislative means. (Board Decision, pp. 33-34.)

43. The Board emphasized, however, that "none of the above is to say that the MMBA necessarily preempts all voter initiatives on matters that are within the scope of bargaining." (Board Decision, p. 35.) Nor did the Board attempt to decide that issue since the Board agreed with the ALJ that this broader decision was not presented by the facts of this case because, as the ALJ reasoned, under San Diego's Strong Mayor form of government, the Mayor is a statutory agent of the City with regard to labor relations and collective bargaining matters and thus was acting on behalf of the City in announcing and promoting a ballot initiative aimed at changing employee pension benefits. The Board concluded: "We agree with the ALJ that, given the Mayor's authority as the City's bargaining representative, the City cannot evade its meet-and-confer obligations under the circumstances by claiming he acted as a private citizen." (*Ibid.*)

44. On this basis, the Board held that, because the longstanding position of California courts is that a charter city's authority extends only to municipal affairs – regardless of whether its

citizens legislate directly by initiative or by traditional legislative means, where local control implicates matters of statewide concern, it must either be harmonized with the general laws of the state (*Seal Beach*) or, where a genuine conflict exists, the constitutional right of local initiative is preempted by the general laws affecting statewide concerns. (*Trinity County*.) (Board Decision, pp. 36-37.)

45. The Board described the significant facts in the ALJ's analysis and in its own estimation as well, as follows:

(a) That the Mayor's November 2010 press conference and other conduct indicated a clear intent or firm decision to sponsor and support a voter initiative to "permanently fix" the problem of "unsustainable" pension costs by, among other things, phasing out the City's defined benefit plan with a defined contribution plan for all new hires, except police and firefighters.

(b) That the Mayor admitted it was *his* decision to pursue the pension reform objectives through a citizens' initiative, a decision which Sanders believed absolved the City of any meet-and-confer obligations.

(c) That, after several weeks of negotiations, the Mayor reached a compromise proposal with (Councilmember) DeMaio and his supporters, which, if approved by voters, would replace the City's defined benefit plan with a defined contribution plan for new hires represented by the Unions.

(d) That, despite some changes, the essence of the Mayor's initial proposition and Proposition B affected negotiable subjects in the same manner and, to the extent the two proposals differed, it was in response to pressures by other City officials and interest groups and not the result of meeting and conferring with the employees' representatives. (Board Decision, p. 53.)

46. The Board considered and rejected the City's arguments that the ALJ's Proposed Decision "erroneously confused and conflated the Mayor's ideas of pension reform with those supported by the citizen groups who sponsored Proposition B;" that Proposition B bears no relationship to the pension reform measure proposed by the Mayor in November 2010; and that the

///

///

policy change effected by the passage of Proposition B was "attributable to the efforts of non-governmental actors" and dramatically different from the pension reform measure the Mayor had announced in November 2010. (Board Decision, p. 54.) The Board explained:

(a) The essence of the Mayor's plan was to replace the City's defined benefit plan with a 401(k)-style defined contribution plan. (Board Decision, p. 54.)

(b) The Mayor's initial plan, like that of Councilmember DeMaio's so-called *roadmap for recovery* plan, included other features as well, but *both* plans would implement a defined contribution plan for new hires. (*Ibid.*)

(c) Officials of the Lincoln Club, the San Diego Taxpayers Association, the Chamber of Commerce and other business and special interest groups criticized the Mayor's proposal as insufficiently "tough." (*Ibid.*)

(d) These same individuals and groups also informed the Mayor and DeMaio that they would not fund and support two competing measures and that they were prepared to move forward on the DeMaio proposal with or without the Mayor. (*Ibid.*)

(e) Nevertheless, no signatures were gathered for several weeks and both campaigns were effectively put on hold while Sanders, DeMaio and others attempted to negotiate a compromise that would result in one measure to be placed before the voters. (*Ibid.*)

(f) After weeks of negotiations, the two sides agreed on the language of the Initiative, which Mayor Sanders continued to portray as *his* proposal. (*Ibid*, emphasis in original.)

(g) These undisputed facts undermine the City's arguments that Proposition B traces its roots only to the DeMaio plan but not to the Mayor's plan. The actual language of Proposition B was not drafted, and consequently no signatures were gathered, until *after* the Mayor and DeMaio camps had reached a compromise. (Board Decision, p. 55.)

(h) While the resulting language was not identical to either the Mayor's or the DeMaio plan, both sides were sufficiently satisfied with the compromise that they threw their support behind the initiative. (*Ibid.*)

(i) Although he described the negotiations as "tough," Sanders admitted that he "got many things [he] wanted" as a result of the compromise language. He was an enthusiastic

supporter of the Initiative as the signature-gathering campaign got underway. Indeed, Sanders financed and endorsed signature-gathering efforts and he told representatives of the City's firefighters that he had raised approximately $100,000 in support of the Initiative. (Board Decision, p. 55.)

(j) Even at the formative stages, before the language of Proposition B had been hammered out, the Lincoln Club and others considered Sanders' participation in the discussion important enough that meetings were scheduled, cancelled and re-scheduled to accommodate his schedule. (*Ibid.*) While the Chamber of Commerce and other special interest groups who initially supported the DeMaio proposal told the Mayor that they would only back one ballot initiative, and that they were prepared to move forward with the DeMaio proposal even without the Mayor, that does not explain why they placed the campaign on hold for several weeks to allow for a compromise between Sanders and DeMaio. (*Ibid.*)

(k) The mayor's participation and support were apparently important enough to the Initiative's success that even the advocates of the DeMaio proposals were willing to wait and to accept language deemed less "tough," if it meant having the Mayor's public support for the Initiative. (*Ibid.*)

47. The Board also rejected the Ballot Proponents' argument that the ALJ's Proposed Decision presents no "real" policy argument for why the MMBA should apply to a citizen-sponsored measure pre-election – noting that the ALJ did not conclude that the MMBA requires a public agency to meet and confer regarding every citizen's initiative. (Board Decision, p. 60.) Rather, the ALJ concluded and the Board agreed that, under the City's Strong Mayor form of governance, its Mayor acted as an agent of the City when announcing and pursuing the pension reform ballot initiative, and that the City cannot exploit the tension between the MMBA and the initiative process to evade its meet-and-confer obligations. (*Ibid.*)

48. The Board emphasized that the policy argument underlying the Proposed Decision is thus the same one set forth in some of the authorities cited by the Ballot Proponents themselves, particularly the Supreme Court's *Seal Beach* decision, but also the Supreme Court's *Voters for responsible Retirement v. Trinity County* decision, which the ALJ discussed at length. (*Ibid.*)

49. The Board approved and re-stated this policy as follows: The Unions were involved in negotiations for successor MOUs and in separate negotiations over retiree health benefits in which they gave up substantial concessions such that the Mayor's use – while serving as the City's chief labor relations official – of the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by the Unions on these same subjects raises questions about what incentive the Unions have to agree to anything. Or, in the words of the Supreme Court, "if the bargaining process and ultimate ratification of the fruits of his dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum. (*Id.*, at 8 Cal. 4th at 782, citing *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal. 3d 328, 336.) (Board Decision, pp. 60-61.)

50. With regard to remedy, the Board agreed that both the restorative and compensatory aspects of PERB's traditional remedy for an employer's unlawful unilateral change are well-established in PERB precedent; both enjoy judicial approval; both serve important policy objectives set forth in the MMBA and the other PERB-administered statutes. Restoring the parties and affected employees to their respective positions before the unlawful conduct occurred is critical to remedying unilateral change violations because it prevents the employer from gaining a one-sided and unfair advantage in negotiations and thereby "forcing employees to talk the employer back to terms previously agreed to." When carried out in the context of declining revenues, a public employer's unilateral actions "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." In short, restoration of the prior status quo is necessary to affirm the principle of bilateralism in negotiations, which is the "centerpiece" of the MMBA, and to vindicate the authority of the exclusive representative in the eyes of the employees. (Board Decision, pp. 40-41.)

51. The Board also concluded that the compensatory aspect of the Board's standard remedy for a unilateral change is no less important because make-whole relief ensures that employees are not effectively punished for exercising their statutorily-protected rights and also provides a financial disincentive and thus a deterrent against future unlawful conduct. In accordance

with precedent and these policy considerations, the Board started with the presumption that the appropriate remedy in this or any other unilateral change case must include full restoration of the parties to their previous positions and appropriate make-whole relief for any and all employees affected by the unlawful conduct. (Board Decision, pp. 41-42.)

52. The Board first observed that PERB's authority to annul an ordinance or other local rule whose substantive terms are inconsistent with the provisions, policies or purposes of the MMBA is not in question. However, "we have located no authority holding that PERB's remedial authority includes the power to overturn a municipal election." The Board, therefore, did not adopt that portion of the ALJ's Proposed Decision invalidating the results of the election in which the City's electorate adopted Proposition B because it is the province of the courts alone to invalidate the results of an initiative election. (*Id.* at pp. 43-45.)

53. To satisfy the restorative principle of PERB's traditional remedy and to vindicate the authority of the Unions as the exclusive representatives of the City employees, the Board directed the City, "at the Unions' options, to join in and/or to reimburse the Unions for legal fees and costs for bringing a *quo warranto* or other civil action aimed at overturning the municipal electorate's adoption of Proposition B." (*Id.* at p. 46.)

54. The Board affirmed the ALJ's findings and conclusions and adopted the Proposed Decision, including the proposed remedy, except as modified. (*Id.* at p. 61.)

On Review, A Unanimous California Supreme Court Upheld PERB's Decision

55. In January 2016, City and Ballot Proponents filed separate Petitions for Writ of Extraordinary Review to challenge PERB's Decision. In March 2017, the Fourth District Court of Appeal annulled the Decision, ordered PERB to dismiss Plaintiff-Relators' unfair labor practice complaints, and denied PERB's and Union Real parties' Petitions for Rehearing. *Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853 (*reversed.*)

56. A unanimous California Supreme Court reversed and upheld PERB's Decision in *Boling I.* Under "settled law," PERB is the expert labor relations agency to whom the Legislature has entrusted the duty to enforce the State's labor relations statutes, including the MMBA. Accordingly, PERB's legal findings are entitled to deferential review and will not be set aside unless

clearly erroneous. (*Boling I* at 904.) PERB's "reading" of the MMBA to find that the City violated the central feature of the Act – the duty to meet and confer under section 3505 – when it put Proposition B on the ballot while failing and refusing to bargain was "not clearly erroneous; to the contrary, it is clearly correct." (*Id.* at 917.)

57. City's Petition for Rehearing was denied, as was its Petition to the United States Supreme Court for writ of certiorari.

PERB's Factual Findings Are Conclusive

58. The Supreme Court held that PERB's findings with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. (*Boling I* at 912, citing Gov. C. § 3509.5, subd. (b).) "We do not re-weigh the evidence when reviewing PERB's findings. If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to use equally reasonable, or even more so. We will uphold the Board's decision if it is supported by substantial evidence on the whole record." (*Ibid.*) "When conflicting inferences may be drawn from undisputed facts, the reviewing court mut accept the inference drawn by the trier of fact so long as it is reasonable." (*Id.* at 913.)

59. *Boling I* highlighted the following "conclusive" findings of facts from the record before PERB:

(a) City of San Diego's charter establishes a "strong mayor" form of government, under which Mayor Jerry Sanders acted as the city's Chief Executive Officer during the relevant time. His responsibilities included recommending measures and ordinances to the City Council, conducting collective bargaining with city employee unions, and complying with the MMBA's meet-and-confer requirements. (*Boling I* at 904.)

(b) Proposals to amend a city's charter can be submitted to voters in two ways: (1) by city's governing body on its own motion; or by an initiative petition signed by 15% of the city's registered voters. (*Id.* at 904-905.)

(c) In 2006 and 2008, Sanders had pursued two ballot measures affecting employee pensions. These measures were intended to be presented to voters as the City's proposals and, in the course of developing them, Sanders met and conferred with union representatives, as

required by *Seal Beach*. The 2006 proposal was approved by the voters. In 2008, the proposal never went to the voters because Sanders and the unions reach an agreement. (*Id.* at 905.)

(d) In 2010, however, Sanders chose to pursue further pension reform through a citizens' initiative instead of a measure proposed by the city. He reached this decision after consulting with staff and concluding that the City Council was unlikely to put his proposal on the ballot. He was also concerned that compromises might result from the meet-and-confer process. (*Boling I* at 905.)

(e) In an interview with a local magazine, Sanders explained: "when you go out and signature gather . . . it costs a tremendous amount of money, it takes a tremendous amount of time and effort . . . But you do that so that you get the ballot initiative on that you actually want. ... [A]nd that's what we did. Otherwise, we'd have gone through the meet and confer and you don't know what's going to go on at that point." (*Ibid.*)

(f) Mayor Sanders took the following actions to implement his decision:

(1) He held a press conference at city hall to announce his plans which was attended by City Attorney Jan Goldsmith, City Councilmember Kevin Faulconer, and City's Chief Operating Officer Jay Goldstone. (*Ibid.*)

(2) His office issued a statement informing the public that "San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [c]ity employees." (*Ibid.*)

(3) A photograph in the media showed Mayor Sanders making the announcement in front of the City seal. (*Ibid.*)

(4) The Mayor's Office issued a news release bearing both the Mayor's title and the City seal to explain the Mayor's decision. The release stated in part:

(i) "As part of (his) aggressive agenda to streamline city operations, increase accountability and reduce pension costs, Mayor Jerry Sanders today outlined his strategy for eliminating the city's $73 million structural deficit by the time he leaves office in 2012."

///

(ii) "The mayor also announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector."

(iii) "The bold move is part of a major re-thinking of city government Sanders said must occur if San Diego is to provide citizens adequate services, end its structural deficit and be financially sound for future generations."

(iv) "Sanders and Councilmember Kevin Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot."

(5) City Councilmember Faulconer disseminated the Mayor's press release by e-mail, stating that he and Mayor Sanders "would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters." (*Boling I* at 905-906.)

(6) Mayor Sanders sent a similar e-mail declaring that he would work with Councilmember Faulconer to "craft language and gather signatures" for a ballot initiative to reform public pensions." (*Id.* at 906.)

(7) Mayor Sanders developed and publicized his pension reform proposal while, in January 2011, allies of the Mayor formed a campaign committee to raise money for the proposed initiative. (*Ibid.*)

(8) The Mayor's chief of staff monitored this committee's activities, keeping track of its fundraising and expenditures. (*Ibid.*)

(9) In January 2011, Mayor Sanders delivered his official "State of the City" address, vowing to "complete our financial reforms and eliminate our structural budget deficit." He said he was "proposing a bold step" of "creating a 401(k)-style plan for future employees . . . [to] contain pension costs and restore sanity to a situation confronting every big city." He declared that he, along with Councilmember Faulconer and the City Attorney, "will soon bring to voters an initiative to enact a 401(k)-style plan. We are acting in the public interest, but as private citizens. And we welcome to our effort anyone who shares our goals." (*Ibid.*)

///

(10) The Mayor's Office issued another press release on the same day publicizing the Mayor's vow "to push forward his ballot initiative" for pension reform. (*Ibid.*)

(11) The Mayor and his staff continued their publicity efforts in the following weeks. (*Ibid.*)

(12) The Mayor's campaign committee hired an attorney and also retained the same consulting firm that served as the City's actuary for its existing defined benefit pension plan. This consulting firm used its access to the pension system database to provide a fiscal analysis of the impacts of the Mayor's proposed defined contribution plan for new employees. (*Boling I* at 906.)

(13) From January through March 2011, negotiations ensued over the particulars of the Mayor's pension reform plan versus those announced by City Councilmember DeMaio the previous November – though both plans eliminated all defined benefit pensions for certain City new hires. (*Ibid.*)

(14) Two local organizations, the Lincoln Club and the San Diego County Taxpayers Association, favored the DeMaio particulars but sought to avoid the cost of two competing measures which would only confuse voters. (*Ibid.*)

(15) A series of meetings between supporters of the competing proposals followed. Mayor Sanders, his chief of staff and the City's Chief Operating Officer all participated in the negotiations and, ultimately, the two sides reached an accord that melded elements of both plans – i.e., police officers would be excluded from the 401(k)-style reform but not firefighters; the freeze on pensionable pay would be subject to the meet-and-confer process and could be overridden by a two-thirds majority of the city council – but there would be no payroll cap. (*Id.* at 907.)

(16) Mayor Sanders called the negotiations "difficult;" he did not like every part of the new proposed plan but supported it because it was "important for the City in the long run." (*Ibid.*)

(17) The San Diego County Taxpayers Association hired a law firm to draft the initiative measure using the DeMaio proposal as a starting point. COO Goldstone, the Mayor's chief of staff, and City Attorney Goldsmith reviewed drafts and provided comments. (*Ibid.*)

(18) The negotiated measure was entitled "Comprehensive Pension Reform Initiative" or "CPRI." (*Ibid.*)

(19) In April 2011, a Notice of Intent to Circulate the CPRI was filed. The Ballot Proponents were T. J. Zane and Stephen Williams – leaders of Lincoln Club; and April Boling – treasurer of San Diegans for Pension Reform. (*Ibid.*)

(20) The next day, Mayor Sanders, Councilmember DeMaio, City Attorney Goldsmith, Councilmember Faulconer, and Proponents Boling and Zane – held a press conference to announce the filing. (*Boling I* at 907.)

(21) Mayor Sanders supported the signature-gathering campaign. He touted its importance in interviews, in media statements, and at speaking appearances. The initiative appeared in "bullet points" prepared for the mayor's engagements with various groups. He approved a "Message from Mayor Jerry Sanders" for circulation to the San Diego Regional Chamber of Commerce, soliciting their assistance in gathering signatures. (*Ibid.*)

(22) Members of the Mayor's staff provided services in support of the Initiative, such as responding to media requests. (*Ibid.*)

(23) The campaign committee formed to promote Sanders' original reform proposal contributed $89,000 and other non-monetary support to the Initiative effort. (*Id.* at 908)

(g) The City refused Unions' multiple demands to bargain:

(1) San Diego Municipal Employees Association (Union) wrote to Mayor Sanders in July 2011 asserting that the City had an obligation under the MMBA to meet and confer over the Initiative. (*Ibid.*)

(2) When there was no response, Union sent a second letter demanding that the City satisfy its meet-and-confer obligations. (*Ibid.*)

(3) City Attorney Goldsmith responded that state election law required the City Council to place the initiative on the ballot without modification and, when doing so, there will be "no determination of policy or course of action by the City Council within the meaning of the MMBA." (*Ibid.*)

///

(4) Union responded that the City was required to meet and confer because Mayor Sanders was acting in his capacity as mayor to promote the Initiative, and thus "has clearly made a determination of policy *for this City* related to mandatory subjects of bargaining. [...]." (*Ibid.*) Union claimed Sanders was using the pretense of a "citizens' initiative" as a deliberate tactic to "dodge the City's obligations under the MMBA." (*Ibid.*)

(5) The City declined to meet and confer and all subsequent demands by Union and the other employee groups were rejected for similar reasons. (*Boling I* at 908.)

(h) 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. (*Ibid.*)

(i) CPRI appeared on the June 2012 ballot as Proposition B, with the "Arguments in Favor" signed by "Mayor Jerry Sanders" and Councilmembers Faulconer and DeMaio, and the voters approved it. (*Id.* at 909.)

(j) Mayor Sanders spoke at an election night celebration, praising the measure as the latest in a series of fiscal reforms, including his pension reform efforts in 2006 and 2008. (*Ibid.*)

60. PERB's Decision includes other relevant findings of fact which are supported by substantial evidence and thus conclusive under *Boling I* at 912-913 and Government Code section 3509.5, subdivision (b).

Courts Must Defer to PERB's Administrative Competence When Assuring A Remedy For Violation of the MMBA Effectuates State Policy

61. When transferring jurisdiction over most MMBA matters from the superior courts to PERB (excluding peace officers), the Legislature directed PERB to interpret and apply the MMBA's unfair labor practice provisions "in a manner consistent with and in accordance with judicial interpretations" of the Act. (MMBA, §§ 3509, subd. (b), 3510, subd. (a).) It also granted PERB broad powers to remedy unfair practices or other violations of the MMBA and to take any other action the Board deems necessary to effectuate its purposes. (MMBA, § 3509, subd. (a); EERA, §§ 3541.3, subds. (i), (n), 3541.5, subd. (c)

62. The determination of an appropriate remedy is crucial to PERB's role in promoting and administering a uniform, statewide system of collective bargaining and labor relations. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090.) In *El Rancho Unified School District v. National Education Association* (1983) 33 Cal.3d 946, the California Supreme Court held: "In delimiting the areas of conduct which are within PERB's exclusive jurisdiction, the courts must necessarily be concerned with avoiding conflict not only in the substantive rules of law to be applied, but also in remedies and administration, if state policy is to be unhampered." (*Id.* at p. 960.) A court "cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB." (*San Diego Teachers Assn. v. Super. Ct.* (1979) 24 Cal.3d 1, 13.) "'Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" (*Mt. San Antonio Community College Dist. v. PERB*, *supra,* 210 Cal.App.3d at 189.) A unanimous Supreme Court in *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1168-69, described the deference owed to PERB's sister labor board:

> Where the Board relies on its "specialized knowledge" and "expertise," its decision "is vested with a presumption of validity." (Citation omitted.) That presumption has even more force when courts review the Board's exercise of its remedial powers, which "are necessarily broad." (Citation omitted.) [...] "'[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions.'" (Citation omitted.)

63. PERB modified the ALJ's Proposed Decision to the extent that it ordered the rescission of the Proposition B charter amendments. Having acknowledged that restoration of the status quo ante was fully consistent with PERB's court-approved precedents to remedy an employer's unlawful unilateral change in terms and conditions of employment, as occurred with the passage of the Proposition B charter amendments, PERB recognized that it is the province of the courts alone to invalidate the results of an initiative election. PERB thus applied its administrative competence to fashion remedial orders in this case to the full extent of its powers.

///

///

64. Invalidation of the Proposition B charter amendments by a judicial writ in *quo warranto* is, therefore, the result needed for the objectives of the MMBA to be fully implemented when taken together with PERB's court-approved administrative remedies in this case.

Prayer

WHEREFORE, Plaintiffs pray for the following relief:

1. For judgment determining that the Proposition B charter amendments added to the San Diego City Charter effective July 20, 2012, are invalid, null and void and of no legal effect;

2. For a judicial writ in *quo warranto* under California Code of Civil Procedure section 803 commanding Defendant City of San Diego and its City Council to take all necessary steps to comply with this Court's judgment by striking the unlawful and invalid provisions of Proposition B from its charter and conforming all subsequent enactments accordingly;

3. For attorneys' fees pursuant to California Code of Civil procedure § 1021.5,, and for costs incurred; and,

4. For such other or further relief as the Court deems just and proper.

DATED: 9-17-19

SMITH STEINER VANDERPOOL, APC

BY: Ann M. Smith
ANN M. SMITH
Attorneys for Plaintiff-Relator SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION

DATED: 9/17/19

SMITH STEINER VANDERPOOL, APC

BY: Fern Steiner
FERN M. STEINER
Attorneys for Plaintiff-Relator SAN DIEGO CITY FIREFIGHTERS LOCAL 145, IAFF, AFL-CIO

///

///

///

DATED: 9/17/19

ROTHNER, SEGALL AND GREENSTONE

BY: _____
ELLEN GREENSTONE
Attorneys for Plaintiff-Relator AFSCME
LOCAL 127, AFL-CIO

DATED: 9/17/19

LAW OFFICES OF JAMES J. CUNNINGHAM

BY: _____
JAMES J. CUNNINGHAM
Attorneys for Plaintiff-Relator DEPUTY CITY
ATTORNEYS ASSOCIATION OF SAN DIEGO

Approved for filing pursuant to Code of Civil Procedure sections 803 et seq.

DATED: 9/24/2019

XAVIER BECERRA
Attorney General of California
MARC J. Nolan
Lead Deputy Attorney General

By: _____
MARC J. NOLAN
Lead Deputy Attorney General
Attorneys for the Attorney General
of the State of California

XAVIER BECERRA
Attorney Generalof California
SUSAN DUNCAN LEE
Senior Assistant Attorney General
MARC J. NOLAN
Lead Deputy Attorney General
State Bar No. 160085
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 269-6392
Fax: (213) 897-2801
E-mail: Marc.Nolan@doj.ca.gov
Attorneys for the Attorney General of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA UPON THE RELATION OF SAN DIEGO MUNICIPAL EMPLOYEES ASSOC., ET AL., Plaintiffs, **V.** **CITY OF SAN DIEGO AND ITS CITY COUNCIL,** Defendants.	**Case No:** 19-404 **LEAVE TO SUE**

For the reasons set forth in Attorney General's Indexed Letter Opinion No. 19-404 (a copy of which is attached hereto), Leave to Sue is hereby granted to Relators-Plaintiffs SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, ET AL. (Plaintiffs) to file the original Verified Complaint in Quo Warranto and this Leave to Sue. Plaintiff may use the name of THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, ET AL. as plaintiffs in this proceeding. No amended complaint or substantive

Exhibit A

pleading shall be filed unless it has been approved by the Attorney General. At any time, the Attorney General may either dismiss or assume the management of this action. Upon any adverse judgment, approval of the Attorney General must be obtained before Plaintiffs may file a notice of appeal. Copies of all documents filed in this action by any party must be served on the Attorney General.

This Leave to Sue is granted upon the condition that neither the PEOPLE OF THE STATE OF CALIFORNIA, nor the Attorney General, shall be liable for any damages, costs, charges, or counsel fees in the proceeding. (Code Civ. Proc., § 810.) In this regard, this Leave to Sue has been issued only upon Plaintiffs' acknowledgement and agreement that, without limitation, any judgment for damages, costs, charges, or fees that may be recovered against Plaintiffs, and/or any associated costs and expenses incurred in this action, will be borne and paid by Plaintiffs.

Respectfully submitted,

Dated: September 16, 2019

SMITH STEINER VANDERPOOL, APC

BY: ANN M. SMITH
Attorneys for Plaintiff San Diego Municipal Employees Association

Dated: September 13, 2019

SMITH STEINER VANDERPOOL, APC

BY: FERN M. STEINER
Attorneys for Plaintiff San Diego City Firefighters Local 145, IAFF, AFL-CIO

Dated: September 17, 2019

ROTHNER, SEGALL AND GREENSTONE

BY: ELLEN GREENSTONE
Attorneys for Plaintiff AFSCME LOCAL 127, AFL-CIO

Dated: September 17, 2019

LAW OFFICES OF JAMES J. CUNNINGHAM

BY: JAMES J. CUNNINGHAM
Attorneys for Plaintiff Deputy City Attorneys Association of San Diego

Dated: September 24, 2019

XAVIER BECERRA
Attorney General of California

BY: MARC J. NOLAN
Lead Deputy Attorney General
Attorneys for the Attorney General of California

Leave to Sue 19-404.doc

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET
LOS ANGELS, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6392
Facsimile: (213) 897-2801
E-Mail: Marc.Nolan@doj.ca.gov

August 15, 2019

Via email and U.S. Mail[1]

ALL COUNSEL:

RE: Quo Warranto application in
San Diego Municipal Employees Assoc., et al, v. City of San Diego and its City Council
Indexed Letter Opinion No. 19-404 (LA2019102302)

Dear Counsel:

We have read and considered the application for Leave to Sue in Quo Warrranto submitted by the San Diego Municipal Employees Association, San Diego City Firefighters Local 145, IAFF, AFL-CIO, AFSCME Local 127, AFL-CIO, and Deputy City Attorneys Association of San Diego (collectively, the "Proposed Relators"), as well as the materials and arguments submitted in response, and the Opinions of the California Supreme Court in *Boling v. Public Employment Relations Board, et al.* (2018) 5 Cal.5th 898 (*Boling I*), and the Fourth District Court of Appeal in *Boling v. Public Employment Relations Board, et al.* (2019) 33 Cal.App.5th 376 (*Boling II*).

For the reasons that follow, we GRANT Proposed Relators' application for Leave to Sue in Quo Warranto.

BACKGROUND

The present application comes to us after the parties have engaged in protracted litigation over the placement of Proposition B on the June 2012 municipal election ballot. Proposition B was a voter initiative measure aimed at reducing pension costs for the City of San Diego (the City) by, most significantly, eliminating defined benefit pension plans for most newly-hired City employees.

Although Proposition B was approved by the voters, Proposed Relators have contended that the measure is invalid because the City refused to bargain the pension issue with its municipal employee unions before placing the measure on the ballot, in violation of the Meyers-Milias-Brown Act (MMBA).[2]

---

[1] Service list for counsel appears *post*.

[2] Gov. Code, § 3500 et seq.

Proposed Relators ultimately prevailed on this issue in the California Supreme Court, which found that the MMBA required the City to bargain in good faith with its municipal employee unions on the pension matters addressed in Proposition B, but that the City had failed to do so.[3] After reaching its substantive conclusion on the MMBA violation, the Supreme Court remanded the matter to the Court of Appeal and asked it to "address the appropriate judicial remedy."[4]

On remand, the Court of Appeal held that Proposed Relators must seek Proposition B's invalidation through a Quo Warranto action,[5] which is the established means for seeking to invalidate a local voter initiative measure due to a failure-to-bargain MMBA violation.[6]

Under Code of Civil Procedure section 803, Proposed Relators now seek our permission (or "leave") to initiate such an action. Although Proposed Defendants City of San Diego and the San Diego City Council join in Proposed Relators' request, the Proponents of Proposition B—who drafted and obtained signatures in support of the measure and worked with some City officials to have it placed on the ballot—have submitted their opposition to it.[7]

ANALYSIS

Our analysis is straightforward: A party seeking to pursue a Quo Warranto action in superior court must first obtain the Attorney General's consent to do so.[8] In determining whether to authorize such an action, we do not attempt to resolve the merits of the controversy; rather, we merely consider (1) whether Quo Warranto is the appropriate remedy under the circumstances; (2) whether the proposed relator has raised a substantial issue of law or fact that warrants judicial resolution, and (3) whether authorizing the Quo Warranto action will serve the public interest.[9] In this case, the clear answer to all three questions is "yes."

---

[3] *Boling I, supra*, 5 Cal.5th at pp. 913-920.

[4] *Id.* at p. 920.

[5] *Boling II, supra*, 33 Cal.App.5th at pp. 384-385.

[6] *Id*; see *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 595 & fn. 3 (1984).

[7] We read Proponents' submission, although nominally framed as an opposition to the granting of Leave to Sue, as more of a substantive argument why Proposition B should be upheld. Because we merely conclude here that a Quo Warranto proceeding is appropriate *to determine the validity of Proposition B*, we believe that Proponents' substantive arguments are better directed to the court that will be resolving that ultimate issue in the Quo Warranto action.

[8] *International Association of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 693-698.

[9] *Rando v. Harris* (2014) 228 Cal.App.4th 868, 879; 72 Ops.Cal.Atty.Gen. 15, 20 (1989).

First, Quo Warranto is the appropriate remedy here. As recognized by the Fourth District Court of Appeal in the underlying litigation, numerous appellate court and Attorney General opinions have found Quo Warranto to be the correct legal process for this type of challenge.[10]

Second, Proposed Relators have raised a substantial issue of law regarding the City's failure to bargain under the MMBA, as demonstrated by the California Supreme Court's acceptance of that issue for review and the Court's subsequent ruling in Proposed Relators' favor.

Third, given the MMBA violation pertaining to Proposition B that the Supreme Court has recognized, it is in the public interest to have the matter of Proposition B's validity or invalidity conclusively resolved through the prescribed legal process of Quo Warranto.

CONCLUSION

For these reasons, Proposed Relators' application for Leave to Sue is GRANTED.[11]

Sincerely,

Marc Nolan

MARC J. NOLAN
Deputy Attorney General
Quo Warranto Coordinator
Opinion Unit

For XAVIER BECERRA
Attorney General

MJN:arp
LA2019102302
Issued Opinion Index Letter 19-404.docx

---

[10] *Seal Beach, supra*, 36 Cal.3d at p. 595 & fn. 3; see *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 89; *International Assn. of Fire Fighters v. City of Oakland, supra,* 174 Cal.App.3d at pp. 693-698; 96 Ops.Cal.Atty.Gen. 1, 2-3 (2013); 95 Ops.Cal.Atty.Gen. 50, 51 (2012); 95 Ops.Cal.Atty.Gen. 31, 32 (2012); 74 Ops.Cal.Atty.Gen. 77 (1991).

[11] The Attorney General maintains control over Quo Warranto actions that this Office authorizes. (See Cal. Code Regs., tit. 11, §§ 8-9.) Specific instructions for filing the Quo Warranto complaint will follow under separate cover.

SERVICE LIST

Ann M. Smith
Fern M. Steiner
Smith Steiner Vanderpool, APC
401 West A Street, Suite 340
San Diego, Califomia 92101
asmith@ssvlaw.com
fsteiner@ssvlaw.com

Ellen Greenstone
Hannah Weinstein
Rothner, Segall and Greenstone
510 South Marengo Avenue
Pasadena California 91101-3115
egreenstone@rsglabor.com
hweinstein@rsglabor.com

James J. Cunningham
Law Offices of James J. Cunningham
10405 San Diego Mission Road, Suite 201
San Diego, California 92108
jimcunningham@gmail.com

Mara W. Elliott, City Attorney
James S. McNeil, Assistant City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101-4100
elliottm@sandiego.gov
mcneilj@sandiego.gov

Kenneth H. Lounsbery
Alena Shamos
Yana L. Ridge
Lounsbery Ferguson Altona & Fick LLP
960 Canterbury Place, Suite 300
Escondido California 92025-3870
khl@lfap.com
aso@lfap.com
ylr@lfap.com