IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

No. D069630

CITY OF SAN DIEGO,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION;
DEPUTY CITY ATTORNEYS ASSOCIATION;
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127;
SAN DIEGO CITY FIREFIGHTERS LOCAL 145;
CATHERINE A. BOLING; T.J. ZANE; and STEPHEN B. WILLIAMS;
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)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, HOWARD JARVIS TAXPAYERS ASSOCIATION, AND NATIONAL TAX LIMITATION COMMITTEE, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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TO BE FILED IN THE COURT OF APPEAL

State of California, Court of Appeal, Fourth Appellate District, Div. 1

Court of Appeal Case Number: **D069630**

Superior Court Case Number: **37-2012-00093347-CU-MC-CTL**

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APPELLANT/PETITIONER: **City of San Diego**

RESPONDENT/REAL PARTIES IN INTEREST: **Pub. Emp't Relations Bd., et al.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*):

Amici Curiae Pacific Legal Foundation, et al.

2.a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest *(Explain)*:
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/s/ Harold E. Johnson Date: **August 22, 2016**

HAROLD E. JOHNSON

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INTRODUCTION AND SUMMARY OF ARGUMENT

> All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.
>
> Cal. Const. art. II, § 1.

To that foundational tenet of California's governmental system, the California Public Employment Relations Board (PERB) has now added a corollary, to the effect: "All power is inherent in the people, *except when we pull rank on them*."

PERB has pulled rank on the people by granting special interests and government officials a checkmate over the instrument by which the people exercise their sovereign legislative authority: the citizens' initiative. In the decision at issue in this litigation, PERB subverted the people's right "to alter or reform" government by arbitrarily voiding a validly introduced and enacted initiative—San Diego's Comprehensive Pension Reform Initiative (CPRI)—with the remarkable claim that it should have been vetted, and perhaps vetoed, by government officials and union officials before it was allowed to qualify for the ballot. PERB Decision No. 2464-M at 2, 39. In other words, PERB treated a *citizens'* initiative designed to adjust public pensions as if it was *government* legislation; with this rationale, PERB ruled that CPRI was subject to "meet and confer" discussions—*i.e.*, the negotiation process that

government conducts with labor leaders when it proposes changes in government workers' compensation or terms of employment.

PERB justified giving unions and government agents this unprecedented pre-clearance power over a citizens' initiative by asserting that a city official—San Diego's mayor, supposedly acting in some kind of city-sanctioned capacity—was intimately engaged in CPRI's formulation and promotion. PERB Decision No. 2464-M at 2, 6-8, 52. However, whatever the nature and extent of the mayor's involvement, from a constitutional perspective it is irrelevant. The "initiative" is the process of "the electors"—the *voters*—proposing new laws. What classifies a proposal as a citizens' initiative—a work of the public, not the public sector—is that the required number of electors sign petitions to qualify it for the ballot. CPRI met that qualification with mountains of valid signatures—followed by the support of two-thirds of the city electorate at the polls. San Diego City Clerk, *Certificate of Election Results for June 5, 2012 City Election*, https://www.sandiego.gov/sites/default/files/results120605.pdf.

PERB's ruling sets a destructive precedent. By creating a system of intermediaries empowered to derail citizens' initiatives under certain circumstances, PERB tampered with the constitutional framework and subverted the people's right to engage in direct, unmediated, unobstructed democracy. Public officials have an obligation to "jealously guard" the initiative process. PERB flouted this duty. Amici respectfully urge this Court

to grant the City's Petition for Writ of Extraordinary Relief, and thereby exercise the protective obligation that PERB ignored and uphold the sovereign rights of the people that PERB sought to trump.

ARGUMENT

The citizens' initiative process is intended as an instrument of direct democracy, allowing voters to engage in unmediated and unobstructed lawmaking. PERB unilaterally subverted this process by introducing, for certain citizens' initiatives in certain circumstances, a vetting or veto power for public-employee unions and public officials. Subjecting a citizens' initiative to pre-clearance by special interests and public officials has no basis in the California Constitution and, indeed, is utterly at variance with it.

I

AS ESTABLISHED BY THE CONSTITUTION, THE INITIATIVE PROCESS IS AN INSTRUMENT OF DIRECT PARTICIPATORY DEMOCRACY UNHAMPERED BY IMPEDIMENTS OR OBSTRUCTIONS

The local and statewide initiative processes are interpreted in a parallel way. *See, e.g.*, *Rossi v. Brown*, 9 Cal. 4th 688, 695-96 (1995). At both levels, the initiative's purpose is to allow the people—unobstructed—to exercise their "inherent political power." *See, e.g.*, *Spencer v. City of Alhambra*, 44 Cal. App. 2d 75, 77 (1941) (recognizing the right of a city's voters, through the initiative, to address salary levels for public employees).

Justice Tobriner's summary of its historical underpinnings explains that the initiative is both a reflection of, and a means of acting on, the people's sovereignty—with no interference by outside interests or elected or bureaucratic officials:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.

Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591 (1976) (citations omitted).

The elegant directness of the process is spelled out in the Constitution's concise definition of "The initiative" as "[t]he . . . power of the electors to propose statutes and amendments . . . and to adopt or reject them." Cal. Const. art. II, § 8(a). The Constitution creates no bureaucratic gatekeeper to pass judgment on a proposed citizens' initiative, modify it, or impede it from being circulated for signature-gathering or (if enough valid signatures have been collected) presented to the electorate for adoption or rejection. This absence of any provision for pre-approval is part and parcel of the initiative's purpose as a "legislative battering ram," allowing voters to "tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 228 (1978).

For instance, ruling on Proposition 140, the initiative that limited terms for members of the Legislature, the Supreme Court opined that subjecting a citizens' initiative to preclearance by public officials would impair its function as an independent avenue for effecting change:

> To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (*Id.*, art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, *and they have the right to alter or reform it* when the public good may require." . . .

Legislature of the State of California v. Eu, 54 Cal. 3d 492, 511 (1991).

Even after an initiative's enactment, the Constitution ensures the people's unimpeded control over the process by allowing it to be amended or repealed only by the voters themselves unless the initiative itself specifically permits the Legislature to do so. Cal. Const. art. II, § 10(c). California is the only state with this limitation. Joseph R. Grodin et al., *The California State Constitution: A Reference Guide* 69 (1993). The provision testifies to "the near sacrosanct role that direct legislation plays in the California governmental system as a safety valve for direct participatory democracy." Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 Loy. L.A. L. Rev. 1165, 1197 (1998) (citations omitted).

II

PERB INTRODUCED IMPEDIMENTS AND OBSTRUCTIONS INTO THE INITIATIVE PROCESS BY CREATING A VETO POWER THAT THWARTS VOTERS' RIGHT TO ENGAGE IN DIRECT DEMOCRACY

PERB's ruling in essence invalidates the voter-enacted CPRI and its public-pension reforms, on the grounds that CPRI should have been submitted for "meet and confer" negotiations between government and labor leaders, as the Meyers-Milias-Brown Act (MMBA, Cal. Gov't Code § 3500, *et seq.*) requires for certain proposed changes in public-employee compensation and terms of service. PERB Decision No. 2464-M at 2,39.

PERB's holding that a citizens' initiative can be subject to MMBA's "meet and confer" requirements is an unprecedented distortion and violation of the initiative process and its constitutional framework. As laid out in the Constitution, the initiative is a process controlled by voters, with no veto power accorded to any outside interest groups or elected or administrative government officials. Cal. Const. art. II, § 8(a). PERB's ruling in effect amounts to a unilateral *amendment* of that constitutional scheme, by introducing a vetting process that would intrude between the citizenry and the placement of a citizens' initiative on the ballot.

As a rationale, PERB offers the assertion that San Diego's mayor "championed" the initiative and did so clothed with official city status and sanction. PERB Decision No. 2464-M at 2, 6-8, 52. However, from the

standpoint of the Constitution scheme, this is not relevant. The Constitution sets no conditions on who may be an initiative's "champion." Rather, the Constitution defines the "initiative" as the right of "the electors"—the *voters*—to propose and vote on new laws. Cal. Const. art. II, § 8(a). The Constitution does not condition that right of the electors on who drafts, sponsors, endorses, or even funds the measure. Notably, for example, Proposition 140 was spearheaded—championed—by a public official, Los Angeles County Supervisor Pete Schabarum, who was an official proponent along with Lewis K. Uhler, president and founder of amicus organization on this brief, National Tax Limitation Committee. *See* John M. Allswang, *The Initiative and Referendum in California: 1898-1998* 169 (2000), and *Bates v. Jones*, 904 F. Supp. 1080, 1085 (N.D. Cal. 1995). Yet the Supreme Court nevertheless recognized it as an exercise of the people's "reserve[d] . . . power[] of initiative." *Eu*, 54 Cal. 3d at 501. What classifies a measure in the first instance as a citizens' initiative is that the required number of electors sign petitions to place it on the ballot; it becomes a successful citizens' initiative if, having qualified for the ballot, a majority of the electors approve it at the polls. Cal. Const. art. II, § 8(b). CPRI met these tests. It qualified for the ballot with approximately 115,000 valid signatures. San Diego City Clerk, *Certificate of [valid signatures] Sufficiency*, Nov. 8, 2011, http://dockets.sandiego.gov/sirepub/cache/2/glxacfyv5hwwt3zwmu3jszuo/384549081620161128449 94.PDF. It was enacted at the

polls with a 65.81% majority. San Diego City Clerk, *Certificate of Election Results for June 5, 2012 City Election*, https://www.sandiego.gov/sites/default/files/results120605.pdf. PERB's invention of an excuse to treat this citizens' initiative, this enactment by the public, as if it were an enactment by the public sector, has no basis in precedent or in the text of the Constitution. It deprives the hundreds of thousands of San Diegans who supported the measure of the initiative rights that the Constitution guarantees them.

PERB's ruling also deprives the initiative's three named "proponents"—*i.e.*, the original sponsors—of their constitutionally designated rights. As the Supreme Court has explained: "in the preelection setting," the "official proponents" who launch an initiative possess "their own personal rights and interests" in the measure, because the Constitution entrusts them with the procedural responsibilities for shepherding the measure forward toward signature-gathering with the aim of qualifying it for the ballot. *Perry v. Brown*, 52 Cal. 4th 1116, 1141 (2011) (citations omitted). PERB has stripped CPRI's proponents of these rights, by ruling that government and union negotiators had authority to "meet and confer" on the terms of the measure—a process that might have led these outsiders to modify the official proponents' proprietary handiwork, or even consign it to the dustbin.

PERB's ruling rearranges the organic structure of the initiative process. The audacity of this tampering is underscored when set next to the caution and deference shown by the courts when the mechanics of direct democracy are at

issue. For instance, the courts' default position is to avoid, if possible, pre-election review of procedural or even constitutional violations by initiatives, "so as not to disrupt the electoral process by preventing the exercise of the people's franchise." *Brosnahan v. Eu*, 31 Cal. 3d 1, 4 (1982). Furthermore, courts are reluctant to burden the system of legislation by voters with procedural rules that apply to legislation by government. In *Building Industry Ass'n of S. Cal. v. City of Camarillo*, for instance, the Court declined to apply to zoning-related initiatives a procedural mandate governing zoning changes by local governments. 41 Cal. 3d 810 824 (1986). At issue was a requirement that legislation for certain kinds of zoning changes should come with "findings" about the overall impact on housing. The Court held that importing this requirement to voter-initiated zoning changes would "place an insurmountable obstacle in the path of the initiative process." *Id.* The "findings" requirement at issue in *Camarillo* would have been a merely procedural addition to the initiative process; yet the Court held it to be impermissibly detrimental to the initiative's purpose of facilitating direct democracy. How much more is this true of the change that PERB has imposed—a change that, far more than procedural, alters the very structure of the initiative process by introducing a vetting process with the power to derail direct democracy before it gets started.

The proposition that a citizens' initiative must run a pre-election gauntlet of labor leaders and government negotiators violates the spirit and

letter of the whole process, and PERB's ruling implementing that radical notion should be rejected.

CONCLUSION

> Declaring it "the duty of the courts to jealously guard this right of the people" . . ., the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" . . . . "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

Associated Home Builders, 18 Cal. 3d at 591 (citations omitted).

If the courts must energetically protect the integrity of the initiative process, that duty logically extends to all other government entities. Yet, far from jealously safeguarding the initiative, PERB has opted to aggressively—and unconstitutionally—expand the reach of the MMBA, into an arena where it does not apply, where its "meet and confer" mandate can only frustrate the initiative's constitutionally ordained purpose as an engine of direct democracy.

For this Court in this case, discharging the duty to "jealously guard" the initiative requires striking down PERB's ruling that ignores that duty.

Therefore, Amici respectfully request this Court to grant the City of San Diego's Petition for Writ of Extraordinary Relief.

DATED: August 22, 2016.

Respectfully submitted,

MERIEM L. HUBBARD
HAROLD E. JOHNSON

By /s/ Harold E. Johnson
HAROLD E. JOHNSON

Attorneys for Amici Curiae
Pacific Legal Foundation,
Howard Jarvis Taxpayers Association,
and National Tax Limitation Committee

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, HOWARD JARVIS TAXPAYERS ASSOCIATION, AND NATIONAL TAX LIMITATION COMMITTEE, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF is proportionately spaced, has a typeface of 13 points or more, and contains 2,375 words.

DATED: August 22, 2016.

/s/ Harold E. Johnson
HAROLD E. JOHNSON

DECLARATION OF SERVICE

I, Harold E. Johnson, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On August 22, 2016, a true copy of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, HOWARD JARVIS TAXPAYERS ASSOCIATION, AND NATIONAL TAX LIMITATION COMMITTEE, IN SUPPORT OF CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 22nd day of August, 2016, at Sacramento, California.

/s/ Harold E. Johnson
HAROLD E. JOHNSON

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