IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Consolidated Case Nos. D069626 and D069630

CATHERINE A. BOLING, et al., and CITY OF SAN DIEGO,
Petitioners,

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 AND HON. JAN I. GOLDSMITH (RET.) IN OPPOSITION TO UNION REAL PARTIES IN INTEREST'S PROPOSED REMEDY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

CONSTITUTION

PAGE

STATUTE

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

In the State of California "[a]ll political power is inherent in the people." Cal. Const. art. II, § 1. Pursuant to this power, the people reserve to themselves "the right to alter or reform [their government] when the public good may require." *Id.* This was the power expressed by the people of San Diego in enacting the Comprehensive Pension Reform Initiative (Proposition B): To alter the retirement and pension plans for future city workers to account for an over one-billion dollar unfunded liability. It is this legitimate expression of inherent political power that the Real Parties in Interest (Unions) invite this Court to undo for their own political gain and purposes.

The Court should decline their invitation.

Not only was Proposition B lawfully enacted by the people of San Diego, but the subsequent rulings in the case against Mayor "Jerry" Sanders by Public Employment Relations Board (PERB) and the California Supreme Court, *see v. Public Employment Relations Board*, 5 Cal. 5th 898, 905 (2018), did not negate or cast doubt onto Proposition B's validity. However, the Unions still maintain that this Court should exercise its power on remand to enter an invalidation order to undo democratically enacted Proposition B because they allege it is an impermissible "unilateral change."

Union Real Parties in Interest Supp. Open. Br. at 25. But not only does this characterization conflate the differences between a citizens' initiative and the unilateral action of a rogue city council, s*ee People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach,* 36 Cal. 3d 591 (1984), but the Unions ignore the inappropriate, illegal, and unjust nature of the remedy they ask this Court to provide. Given that Proposition B was enacted directly by the people of San Diego, it is up to the people of San Diego to rescind or modify it. Rescinding Proposition B because of a mayor's support would make a mockery of the supposed first power reserved to the people, and undermine the foundation of the California Constitution.

For these reasons, *Amici* respectfully urge this Court to reject the Unions proposed remedy to rescind Proposition B.

ARGUMENT

I. The Citizens Initiative Is an Instrument of Direct Democracy Embodying The People's Unalienable Inherent Political Power

The citizens' initiative process is intended as an instrument of direct democracy, allowing voters to engage in unmediated and unobstructed lawmaking. Interpreted in a parallel way, *see, e.g., Rossi v. Brown*, 9 Cal. 4th 688, 695-96 (1995), the initiative's purpose at both the local and statewide level is to allow the people, directly and unobstructed, to exercise their "inherent political power." *See, e.g., Spencer v. City of Alhambra*, 44 Cal. App. 2d 75, 77 (1941) (recognizing right of a city's voters to address salary

levels for public employees by initiative. Justice Tobriner's summary of the citizens' initiative's historical underpinnings explains how the initiative is both a reflection of, and a means of acting on, the people's sovereignty, with no interference by 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 California Constitution's concise definition of "[t]he 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).

What the California Constitution does not contain is a provision empowering a bureaucratic gatekeeper to pass judgment, modify, or impede a legally enacted citizens' initiative. Like the absence of any provision for pre-approval clearance, the lack of post-approval review by any non-judicial agency or actor is an indispensable element of the initiative's purpose as a "legislative battering ram," which allows the people 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).

As the California Supreme Court recently explained in *California Cannabis v. City of Upland*, 3 Cal. 5th 924, 934 (2017):

> The Constitution speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. . . . [The] courts have consistently declared it their duty to jealously guard and liberally construe the right so that it be not improperly annulled. Moreover, when weighing the tradeoffs associated with the initiative power, we have acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible.

As laid out in the California Constitution, the initiative process is controlled by voters, with no veto power accorded to any outside interest groups, elected officials, or administrative agencies. Cal. Const. art. II, § 8(a). It is the exclusive property and province of the people.

II. Proposition B Was Legally Democratically Enacted, and No Entity Has Purported To Overturn It

In order to qualify as a legal citizens' initiative, a proposed measure must first obtain the signatures of at least 15% of the city's registered voters. *Boling*, 5 Cal. 5th at 905. *See also* Cal. Elec. Code, § 9255, former subd. (a)(3)–(4). A qualified measure becomes law if a majority of the participating voters approve it at the polls. Cal. Const. art. II, § 8(b). Proposition B passed both tests with flying colors. Proposition B qualified for the ballot with approximately 116,000 valid signatures. County of San Diego Registrar of

Voters, *Re: City of San Diego Pension Charter Amendment Petition* (Nov. 8, 2011).[1] *See also Boling*, 5 Cal. 5th at 908. It was subsequently overwhelmingly enacted by 65.81% of the voters. San Diego City Clerk, *Certificate of Election Results for June 5, 2012 City Election.*[2] *See also Boling*, 5 Cal. 5th at 909. Thus, there is no question that Proposition B was duly qualified for the ballot, and legally enacted by the people of San Diego.

Additionally, at no subsequent time has any entity purported to overturn Proposition B, or even question its validity. PERB's holding that a citizens' initiative can be subject to the Meyers-Milias-Brown Act's "meet and confer" requirements, while an unprecedented distortion and violation of the initiative process and its constitutional framework, did not purport to invalidate the legality of Proposition B. On the contrary, PERB rejected the administrative law judge's previously proposed remedy to vacate the results of the election, noting that such a power was "the province of courts alone." *Boling*, 5. Cal. 5th at 910, 920. Thus the initiative, validly enacted, remains in effect regardless of PERB's decision.

Nor was Proposition B overturned by the California Supreme Court's recent decision regarding the actions of Mayor Sanders. *See Boling*, 5 Cal. 5th at 920. That decision did not address the legality of Proposition B. In

[1] https://pacificlegal.org/wp-content/uploads/2018/11/Reg.-of-Voters-1.pdf.
[2] https://www.sandiego.gov/sites/default/files/results120605.pdf.

what is a case of first impression, the Court held that "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 the terms and conditions of employment, the duty to meet and confer arises." *Boling*, 5 Cal. 5th at 919. Although this is the first time a court has ever found that an elected officeholder's advocacy in support of a citizens' initiative violated labor laws, and the court severely criticized Mayor Sanders for doing so, the court did not raise any issue as to the legality or validity of Proposition B itself. *Id.* at 919–20.

Thus there is no real doubt about the legality or continuing validity of Proposition B. The approximately 116,000 voters who signed the petition placing Proposition B on the ballot, along with the nearly 66% of voters who approved the measure, expressed their inherent political power under the California Constitution. There is simply no legal or other authority for the proposition that valid citizens' initiative may be overturned based on an elected officials alleged misuse of his official resources in promoting it under the labor code. Neither the Supreme Court nor PERB concluded that Proposition B was anything but a lawful exercise of voters' constitutional rights under the initiative process.

III. Rescinding Proposition B's Already Existing Retirement and Pension Plans Is Not the Appropriate Remedy

The Unions argue that "only an invalidation decree will restore terms and conditions of employment to what they were before the City's violation and thereby give employees access to the defined benefit pension plan from which they have been wrongfully excluded." Union Real Parties in Interest Supp. Open. Br. at 13. But these employees have not been "wrongfully excluded" from the city's defined benefit plan. Every employee provided a defined contribution plan was hired *after* Proposition B was democratically adopted by the voters. Further, the Unions' argument that Proposition B represents an impermissible "unilateral change" is based on a mischaracterization of the driving force behind Proposition B: the people of San Diego. Further, an invalidation decree unraveling Proposition B's pension and retirement plans would be inappropriate, illegal, and unjust.

A. Rescinding Proposition B Would Be Inappropriate

The Unions maintain that *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591 (1984), and this case are both "unilateral change" cases in which terms and conditions of public employment have been unlawfully changed without meeting obligations to meet and confer with labor unions. Union Real Parties in Interest Supp. Open. Br. at 25. Accordingly, the Unions argue that "this Court can and should

exercise its power on remand to enter a *Seal Beach* invalidation order to undo this unlawful charter amendment." But *Seal Beach* did not involve a citizens' initiative. The measure in *Seal Beach* was illegally placed on the ballot by a city council's unilateral action. *Seal Beach*, 36 Cal. 3d at 594–95.

Proposition B, on the other hand, was placed on the ballot through a petition signed by approximately 116,000 registered voters. If there was unilateral action, it came from those 116,000 registered voters unilaterally exercising their constitutional rights. There is no assertion, nor can there be, that those registered voters violated labor laws by not negotiating with labor unions. Rather than this being a "unilateral change" case, this precedential case is a "unilateral advocacy" case in which an elected officeholder is taken to task for promoting a citizens' initiative without first meeting and conferring with labor unions. To make the jump from "unilateral advocacy" to finding a citizens' initiative unlawful would be a jump that has never before been taken and would ignore the constitutional rights of the San Diego electorate, who overwhelmingly approved Proposition B.

B. Rescinding Proposition B Would Be Illegal and Unjust

Proposition B is now embedded in the San Diego City Charter. *San Diego, Cal. City Charter* art. IX, §§ 140–151. San Diego City Charter section 143.1(a) requires voter approval for any changes to the retirement

system affecting benefits. Section 143.1(b) requires that an actuarial study be conducted showing costs of any change, which study must be made available to voters. It is well-established law that a charter city may not act in conflict with its charter. *See, e.g.*, *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 923–24 (1975). Any act that violates or is not in compliance with a charter is void. To rescind Proposition B, as Petitioners argue, the Court would need to order the San Diego City Council to repeal its defined contribution retirement plans and amend its pre-existing pension plan to add thousands of employees and former employees. These actions would require voter approvals and City Charter amendments. *See* S*an Diego, Cal. City Charter* art. IX, §§ 143.1(a); *Cooper*, 13 Cal. 3d at 923–24. In addition, the Court would need to order the city to seek and obtain IRS approvals in order to preserve tax qualification status. Further, under the doctrine of separation of powers, neither the courts nor quasi-judicial agencies such as PERB may command or prohibit legislative action. *See City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal. App. 5th 1271, 1310–11 (2016). *See also Mandel v. Myers*, 29 Cal. 3d 531, 551 n.9 (1981) (en banc) ("[B]y virtue of the separation of powers doctrine courts lack the power to order the Legislature to pass a prescribed legislative act."). "Generally, a court is without power to interfere with purely legislative action, in the sense that it

may not command or prohibit legislative acts…." *Monarch Cablevision, Inc. v. City Council of the City of Pleasant Grove*, 239 Cal. App. 2d 206, 211 (1966). It is thus beyond the power of PERB or the courts to order the unraveling of thousands of city council authorized retirement plans and order the amendment of a city council adopted pension plan. It is beyond the Court's jurisdiction to order the IRS to accept the reconstructed pension plan as tax qualified. Finally, it is beyond the Court's jurisdiction to order thousands of employees to agree to terms they did not and do not want.

Since Proposition B was adopted in 2012, the city's pension and retirement laws have also been amended by city council action to conform to Proposition B. By city council action, the city provided a generous 9.2% employer match (11% for firefighters) and provided that employee rights to that match vested immediately. *See San Diego, Cal. Supplemental Pension Savings Plan H,* § 3.01.[3] Employees hired since 2012 were hired with that promised benefit. Since that time, some have left city employment and taken with them their 401(K) plans. Additionally, all employee plans have likely experienced a productive stock market which has added to their growth. *See* Matt Egan, *America's 7-year Bull Market: Can it Last*? CNN: Business (Mar. 9, 2016)[4] If all defined contribution plans are unraveled and employees

[3] https://pacificlegal.org/wp-content/uploads/2018/11/Pension-Plan.pdf.
[4] https://money.cnn.com/2016/03/09/investing/stocks-bull-market-turns-seven/index.html.

placed in the defined benefit pension plan, there would be a number of unjust results:

- Many employees would want to keep their defined contribution plans due to immediate vesting, the generous employer match, and the benefits of a strong stock market and to avoid the risk of over a billion dollar unfunded liability. Those employees are not represented or heard in this proceeding.

- In order to unravel the defined contribution plans and place employees in the pre-existing defined benefit pension plan, the Court would need to order that employees return to the city the employer match and the stock market gains and order the city and employees to pay up to 6 years of contributions (in amounts substantially equal to the city's contributions) to the defined benefit pension plan. Some employees would not want to do that and they are not before the Court to be ordered.

- Due to the retroactive addition of thousands of employees to the pre-existing pension plan, the pension plan's actuary would have to re-evaluate the plan's fiscal stability and it is speculative as to the impact on employee contributions.

- Former employees who left the city's employment and took their defined contribution plans with them relied upon the fact that they were immediately vested. Unraveling the defined contribution plans would require that they return the employer matched funds and the stock market gains and, in exchange, receive a pension plan in which they are not vested.

- The complexity and differing interests would result in numerous lawsuits filed against the city and the labor unions seeking redress for violating contractual rights and possibly losing IRS tax qualification for the defined benefit pension plan.

Finally, unraveling Proposition B would subvert the rights of approximately 116,000 registered voters who signed the petition placing

Proposition B on the ballot, and the nearly 66% of San Diego voters that approved it.

IV. There Is an Appropriate Remedy Available

Rather than pursue remedies that have no relation to Mayor Sanders violation, the Court should strive for a more balanced approach. For example, in *City and County of San Francisco v. Cooper* 13 Cal. 3d 898 (1975), petitioners challenged a union strike settlement on the basis that it arose from an illegal public employee strike and, therefore, violated public policy. The court rejected that argument. *Cooper*, 13 Cal. 3d at 917. Pointing out that the circumstances surrounding the settlement negotiations were complex, the court opted instead to defer to the legislative body for the proper remedy. *Id.* "That legislative role", the court stated, "signifies the essence of the doctrine of the separation of powers." *Id.* at 918. The same should be done here.

In this case, the people of San Diego were the legislative body, exercising their inherent political power through the initiative system, to which this Court should defer. Mayor Sanders's violation as articulated by the California Supreme Court was refusal to meet and confer regarding his support of Proposition B. But voters overwhelmingly approved Proposition B. Whether they would have done so without Mayor Sanders' urging is speculative and irrelevant. Voters exercised their constitutional rights

regardless of their motivation, and there is no legal justification for undoing that constitutional exercise.

If Mayor Sanders' violation was a failure to meet and confer before advocating for Proposition B, the appropriate remedy is for the city to adopt clear policies on elected officeholders and staff participation in citizens' initiatives that affect terms and conditions of employment to avoid future confusion. In addition, the city and any applicable labor unions should meet and confer to address the remaining billion plus dollar pension plan's unfunded liability, as well as any proposed changes to Proposition B. Given that Proposition B was the direct will of the voters of San Diego exercising their reserved rights under the California Constitution, they and they alone should be the final arbiters.

CONCLUSION

For the above reasons, A*mici* respectfully urge this Court to reject the Unions' proposed remedy to rescind Proposition B.

DATED: November 15, 2018.

Respectfully submitted,

TIMOTHY R. SNOWBALL

By /s/ Timothy R. Snowball
TIMOTHY R. SNOWBALL

Attorney for *Amici Curiae* Pacific Legal Foundation and Hon. Jan I. Goldsmith (Ret.)

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the forgoing BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION AND HON. JAN I. GOLDSMITH (RET.) IN OPPOSITION TO REAL PARTIES IN INTEREST'S PROPOSED REMEDY is proportionately spaced, has a typeface of 13 points or more, and contains 3,034 words.

DATED: November 15, 2018.

s/ Timothy R. Snowball
TIMOTHY R. SNOWBALL

DECLARATION OF SERVICE

I, Timothy R. Snowball, 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 November 15, 2018, a true copy of BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION AND HON. JAN I. GOLDSMITH (RET.) IN OPPOSITION TO REAL PARTIES IN INTEREST'S PROPOSED REMEDY 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.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15th day of November, 2018, in Sacramento, California.

By /s/ Timothy R. Snowball
TIMOTHY R. SNOWBALL