Case No. D069630

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

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, IAFF, AFL-CIO, CATHERINE A. BOLING, T.J. ZANE, STEPHEN B. WILLIAMS, and 115,991 SAN DIEGO REGISTERED VOTERS WHO EXERCISED THEIR RIGHT TO PLACE A CITIZENS' INITIATIVE ON THE BALLOT

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-755-M, and LA-CE-758-M)

APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D069630
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APPELLANT/PETITIONER: CITY OF SAN DIEGO RESPONDENT/REAL PARTY IN INTEREST: P.E.R.B.	
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*): League of California Cities

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:

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(1)	
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☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 22, 2016

Arthur A. Hartinger
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, rule 8.200(c), *amicus curiae* League of California Cities ("League") respectfully requests permission to file the attached brief in support of Petitioner City of San Diego. This application is timely made within 14 days after the filing of the reply brief on the merits.

THE INTEREST OF *AMICUS CURIAE*

The League is a non-profit association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance.

The Committee has identified this case as having such significance for California cities because of the potential chilling effect on the free speech rights of elected officials.

THE NEED FOR FURTHER BRIEFING

The underlying decision by the Public Employment Relations Board ("PERB") would create a very harmful precedent for the League's constituent cities. The decision implicates the important Constitutional right of elected officials to speak out, without undue constraint, on matters of public concern. Whether the Meyers-Milias-Brown Act ("MMBA") somehow trumps this Constitutional right presents another important issue which deserves careful

scrutiny by an appellate court. This will be the first opportunity for such scrutiny. The League is hopeful that the Court will benefit from its broader Statewide perspective.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.200(c)(3), the League confirms that no party or their counsel authored this brief in whole or in part.[1] Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief.

CONCLUSION

The League respectfully requests that the Court grant this application for leave to file an *amicus curiae* brief.

Dated: August 22, 2016

Respectfully submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: /s/ Arthur A. Hartinger
Arthur A. Hartinger
Attorneys for *Amicus Curiae*
League of California Cities

[1] The undersigned was selected as the League's brief-writer while working at his predecessor firm – Meyers Nave. The undersigned's current partner, Tim Yeung, performed a small amount of work in the underlying PERB matter. Mr. Yeung does not represent the Petitioner in the Court of Appeal, and he did not participate in drafting this brief.

AMICUS CURIAE BRIEF

I. INTRODUCTION

The underlying PERB decision would set a very dangerous precedent and it must be vacated. It would severely limit the Constitutional right of elected officials to support or oppose legislative proposals, or even comment publicly about them. And, it ignores fundamental rules of government – for example, the principle that a City Charter determines and defines the respective roles of city officials and, in this case, the Mayor of San Diego has no power under the City Charter to adopt labor contracts or to set labor policy.

The League is committed to the principle of bargaining in good faith over wages, hours and other terms and conditions of employment under the Meyers-Milias-Brown Act ("MMBA"). But that is not what this case is about. This case is about the right of public officials to express their views regarding citizens' initiatives.

The elected Mayor of San Diego is not the City of San Diego. He does not surrender his Constitutional right to support or oppose legislation simply by virtue of the MMBA. As Mayor, he is perfectly free to speak in support of pension reform, or any other initiative. He has the Constitutional right to speak out on matters of public concern.

PERB ignored this core Constitutional right, and relied on shaky and unsupported evidence (much of it hearsay and circumstantial) to find that the Mayor acted as an "agent" of the City, such that meet and confer obligations under the MMBA were triggered. The decision was wrongly decided and it must be vacated.

II. UNDISPUTED FACTS

While the record is voluminous, there are certain key facts and principles that are completely undisputed and which bear emphasis. San Diego is a Charter City, which enjoys plenary authority over compensation paid to its employees. (Cal. Const., Art. XI, § 5.) The Charter is the over-arching governing document in the City. The voters closely control the Charter and act as the "legislative branch" with respect to Charter changes.

Under the Charter, the City Council is the legislative body of the City, responsible for enacting resolutions and ordinances, and for making public policy decisions, including decisions about compensating City employees. The Mayor has executive authority. He serves as the City's chief executive officer, and chief budget and administrative officer.

With respect to negotiating labor agreements, under the Charter it is the role of the City Council, and not the Mayor, to approve memoranda of understanding ("MOUs"). Approving a MOU is a legislative act, requiring a majority vote of a quorum of Councilmembers at a properly agendized public meeting. Only the City Council can approve a MOU, and the Council can only "act" by a majority vote. The Mayor has no authority to adopt MOUs. He has no authority to set policy; he is only empowered to take action to *implement* policies duly enacted by the City Council.

The actions at issue here do *not* involve any official act by either the Mayor or the Council. Rather, the actions stem from a citizens' initiative placed on the ballot by virtue of Article 2 of the California Constitution. Private citizens filed the text of the measure (known as "Proposition B") with the City Clerk. All provisions of the California Elections Code were followed, and Proposition B

qualified for the ballot. Proposition B passed by a wide margin of voters, and the results were duly certified by the Secretary of State.

There is no evidence that the Charter authorized body to set San Diego labor relations policy – the City Council – took *any* action with respect to Proposition B. There is no evidence that the City Council, who again can only take action by majority vote, acted to endorse, disapprove or do *anything* with respect to Measure B.

Against this backdrop, PERB's Administrative Law Judge accepted the labor unions' proffer of every scintilla of possible "evidence" – hearsay, circumstantial and opinion – to show that the Mayor of San Diego was acting as an "agent" of the City, and therefore, the City was bound to negotiate with its labor unions before Proposition B could have been placed on the ballot. The decision was cavalier, and does not show proper deference to fundamental Constitutional rights, much less the Charter mandated roles of the Mayor versus the City Council. And PERB's later affirmance of the ALJ's decision reveals confusion over key local government principles, even as to what constitutes a "municipal affair" and what the "Strong Mayor" form of government means.

III. THE MAYOR'S INVOLVEMENT

Given the size of the underlying record, and the focused attack on Mayor Sanders, one would think there would be a mountain of evidence of abuse, sufficient to compel a labor tribunal to justify its decision to attempt to thwart the certified results of a lawful election in a Charter city. But in the end, the evidence is shockingly thin. In sum:

- The Mayor advocated for pension reform, and said it was necessary for "the City's financial well being." He appeared at press conferences and other public events in support of pension reform and Proposition B in particular.

- The Mayor discussed the need for pension reform with his staff. The Mayor even mentioned the issue during his State of the City address. As PERB emphasized, *only the Mayor* can address the City Council during this address.

After evidentiary hearings where testimony and hundreds of pages of exhibits were received, this sums up the evidence in this case of what Mayors Sanders did that PERB found inimical to the MMBA.

PERB found that Mayor Sanders crossed the line in advocating pension reform, but it is *PERB* that crossed the line here.

IV. ARGUMENT

A. PERB'S DECISION FAILS TO RECOGNIZE THE FREE SPEECH RIGHTS OF ELECTED OFFICIALS

This case directly implicates the core principle that public officials have a constitutional right to express their political views, regardless of whether affected labor unions agree. This principle has been confirmed, time and time again, in numerous cases in both federal and state courts.

In a seminal decision, the United States Supreme Court held in *Wood v. Georgia*, 370 U.S. 375, 394 (1962), that "the role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." In *Wood*, an elected sheriff was indicted for contempt of court because he made public statements expressing his personal ideas on a voting controversy. *Id.* at 376. The government argued that the elected official's "right to freedom of expression must be more severely curtailed than that of an average citizen." *Id.* at 393. The Supreme Court firmly rejected this argument, holding that "the petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake." *Id.* at 396.

The United States Supreme Court used the strongest language to describe the importance of an elected official's First Amendment rights in *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966), when it held that "the manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy" and that "the central commitment of the first Amendment… is that 'debate on public issues should be uninhibited, robust, and wide-open.'" (internal citations omitted). In *Bond*, the clerk of the Georgia House of Representatives refused to administer the oath of office to a newly elected representative, on the basis that the elected representative made public statements criticizing the government. *Id.* at 118. The State argued that the policy of encouraging free debate about government operations only applied to private citizens. *Id.* at 136. The Supreme Court rejected this idea, holding that "legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136-37.

Similarly, the Ninth Circuit has further emphasized that "while the free speech rights of elected officials may well be entitled to broader protection than those of public employees generally, the underlying rationale remains the same. Legislators are given 'the widest latitude to express their views on issues of policy.'" *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (citing *Bond v. Floyd*, *supra*, 385 U.S. at 136).

Finally, the California Court of Appeal in *League of Women Voters v. Countywide Crim. Justice Coordination Com.*, 203 Cal. App. 3d 529, 555-56 (1988) similarly held that elected officials, as individuals, have the right to advocate qualification and passage of ballot initiatives.

B. THE EVIDENCE THAT MAYOR SANDERS ENGAGED IN IMPERMISSIBLE CONDUCT IS FLIMSY AND INSUFFICIENT, AND CANNOT BE ATTRIBUTED TO "THE CITY" IN ANY EVENT

The League acknowledges the various limitations on the use of public funds to promote partisan campaign positions. *See, e.g., Stanson v. Mott,* 17 Cal. 3d 206 (1976) ("a public agency may not expend public funds to promote a partisan position in an election campaign."); *Vargas v. City of Salinas,* 46 Cal. 4th 1 (2009) (applying the rule in *Stanson* and holding that the City's expenditure of funds for "informational" purposes in an election was lawful). Here, PERB struggled to cobble together a case showing that the Mayor violated these principles. He supported the initiative. He discussed it with his staff members. He mentioned its importance during a State of the City address. He used his position as "Mayor" to his advantage when advocating for Proposition B.

The principle prohibiting the unlawful expenditure of public funds to support a partisan election must be balanced against the Constitutional right of free speech that elected officials continue to enjoy during office. Here, it is unquestionable that Mayor Sanders had the right to advocate in favor of Proposition B – that is his Constitutional right. Mayor Sanders was prohibited from *spending public funds* to advocate in favor of Proposition B, but there is no credible evidence that he crossed that line under existing election laws. He did *not* use public funds to purchase "such items as bumper stickers, posters, advertising 'floats," or television and radio 'spots….'" *See Stanson v. Mott, supra,* 17 Cal.3d at 221 ("[t]he use of public funds to purchase such items as bumper stickers, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity…") (internal citations omitted); *Vargas v. City of Salinas, supra,* 46 Cal. 4th at 24. His actions constituted pure free speech, and any public "resource" use, such as the use of a microphone during a City address, or

even telephone and email usage, was purely incidental and permissible under current laws. *See* Gov. Code § 8314(a)-(b) (An elected official may not use public resources for a campaign activity, however, "'[c]ampaign activity' does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.").

It is noteworthy that PERB did not even attempt to analyze whether Mayor Sanders' actions crossed the line from permissible to impermissible campaign activity under the relevant precedents flowing from *Stanson v. Matt*. Instead, PERB applied common law agency principles to conclude that the Mayor was acting as an "agent" of the City, and therefore, the City had to meet and confer with affected labor unions upon request. PERB's focus on common law agency principles highlights the error in its overall analysis. Common law agency principles are often misapplied in the context of municipal law, and that is precisely what happened here.

PERB mistakenly believes that in the context of political expression, when a public official crosses the line and advocates inappropriately by using public resources in a partisan election, this means the official was acting as an "agent" of the city and therefore the city must suffer the consequences. This is flatly incorrect. When a public official misuses public resources, the public official suffers the consequences as an individual. *See, e.g., People v. Battin*, 77 Cal. App. 3d 635 (1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424). Contrary to PERB's apparent assumption, a public official's misconduct in this arena does *not* make the official an "agent" of the entity – in fact, just the opposite. This whole foray by PERB into common law principles to

show that Mayor Sanders acted as an agent of the City by engaging in political activity is erroneous and misguided.

There are additional examples why common law "agency" principles do not apply in this context. In the context of public contracting, for example, persons dealing with a municipality are charged with knowledge of the limitation of authority of its officers and agents, and contracts made without authority are invalid. *City of Pasadena v. Estrin*, 212 Cal. 231, 235 (1931); *Katsura v. City of San Buenaventura*, 155 Cal. App. 4th 104, 109 (2007) ("Persons dealing with a public agency are presumed to know the law with respect to any agency's authority to contract."); *Burchett v. City of Newport Beach*, 33 Cal. App. 4th 1472, 1479 (1995) ("'One who deals with the public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his … peril to ascertain the extent of his … powers to bind the government for which he … is an officer.'"). These cases confirm the principle that when an agent acts in excess of his or her authority, the entity is not responsible. Yet, PERB would attribute the agent's actions to the entity, and then have the entity suffer the consequences. But the law holds just the opposite. *See also City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (public entity has no liability under agency theory for alleged civil rights violations; the violation must be attributable to a municipal policy-maker – i.e., an official with final, nonappealable authority to establish municipal policy in the area in question).[2]

PERB's application of common law agency principles was misguided in this case. These principles are inappropriately applied in this context.

[2] PERB's presumption that the Mayor was a policymaker in the area of labor relations is flat out wrong. The City Council is the policymaking authority in the arena of labor relations and myriad other areas. This mistake infects PERB's entire analysis in this case.

C. PERB'S RULING WOULD PLACE UNCONSTITUTIONAL OBSTACLES TO ELECTED OFFICIALS' FREEDOM OF EXPRESSION

The extent to which PERB put all of Mayor Sanders' actions in support of Proposition B under a microscope shows why the ruling, if allowed to stand, would unconstitutionally impair the free speech rights of elected officials.

Elected officials do not work nine to five jobs, such that they can be assured that when they are "off the clock" they are acting in a private capacity. They are elected officials with accountability to their constituents according to a schedule that they are constitutionally empowered to set and regulate. They cannot "punch out" on a time clock so they can attend to a campaign function during the lunch hour, or on an afternoon break. They work full time for their constituents, who have the Constitutional power to vote them out of office if they are dissatisfied with their performance.

The spectre of PERB combing over every email and word uttered by an elected official to determine whether the communications are "official" or "personal" would create an unworkable framework, and it is not at all clear how elected officials could reasonably comply. Taken to the extreme, an elected official who wants to offer a personal opinion would have to have a formalized way of taking a "time out," perhaps by holding up a sign during meetings that says "I am now speaking as a private citizen and not as an elected official." This is not the law, and it is not necessary.

Here, under PERB's proposed standard of neutrality, it would be virtually impossible for the Mayor to support or oppose any ballot proposition that affects labor unions because he cannot hide the fact that he is the Mayor. When the Mayor speaks at a luncheon or other political event, people attending will know he is the Mayor, and he will be introduced as "the Mayor." Thus for PERB, when the

Mayor speaks it is virtually automatic that he will be speaking as the Mayor, versus as a private citizen. If the result is that the underlying ballot proposition will be placed at risk, the Mayor and other elected city officials will be forced simply to default to the "safe" outcome – to say nothing, and to pretend they are neutral. This outcome is wrong. Robust political debate is central to our democracy, and PERB's ruling should not be permitted to suppress ideas and opinions.

D. THE COURT MUST CAREFULLY SCRUTINIZE PERB'S ANALYSIS OF KEY MUNICIPAL LAW PRINCIPLES, AS WELL AS THE BASIC FUNCTIONS OF LOCAL GOVERNMENT

It bears emphasis that PERB is an agency charged with administering local collective bargaining statutes, including the MMBA. The agency has no expertise in the many Constitutional law principles applicable to California cities (and particularly to charter cities like San Diego), and no jurisdiction to resolve them.

The PERB and underlying ALJ decisions are replete with troubling and incorrect assumptions about Charter authority, and how a local government functions. The ALJ, for example, dismisses the testimony of two elected Councilmembers that their campaign activities were carried out on personal time. The ALJ found that "the evidence establishes they were motivated to act in the interests of the Mayor, who was their supervisor." (ALJ Dec., 44.) To hold that the Mayor of San Diego is the "supervisor" of individual elected members of the City Council (as well as the elected City Attorney) is facially absurd. This erroneous holding led the ALJ to conclude that the City Council "ratified" the Mayor's conduct because as his "agent," the Council was obligated to repudiate his conduct, or suffer the consequences of "ratification."

These statements and holdings are troubling because they reveal PERB's underlying misunderstanding of local government. As mentioned above, a city

council acts only by majority vote. A minority of any council is powerless to take any action. The Mayor does not "supervise" the City Council. Nor does the Mayor "supervise" the City Attorney. These assumptions demonstrate that PERB disregarded the Charter – which constitutes the Supreme law of the City; which stands on equal footing with the California Constitution; and which defines the roles of all City elected officials.

PERB also repeatedly emphasizes that San Diego has a "Strong Mayor" form of government, thus using this label to ascribe policymaking authority to Mayor Sanders. Again, this shows a misunderstanding of how governments operate. A "Strong Mayor" form of government is one contrasted to a "Council-Manager" form of government. It simply reposes executive powers in the office of the mayor, versus a city manager. Many local governments in California operate under the "Council-Manager" form of government, where there is a five member city council, the position of "mayor" is rotated among sitting councilmembers, and the mayor sits as a voting member on the council. In San Diego, the voters adopted a structure where the Mayor does *not* sit on the City Council, and he (versus a city manager) possesses final authority on executive decisions.

PERB uses the term "Strong Mayor" to suggest that the Mayor was so "strong," he must be setting policy. This is wrong. Again, the Mayor of San Diego does *not* set labor relations policy, and the Mayor does *not* have the authority to enter into labor contracts. The Mayor *implements* policy set by the City Council.

V. CONCLUSION

The MMBA, a state statute, does *not* preempt the California Constitution. PERB's holding would unfairly and improperly impinge on the free speech rights

of elected and other public officials. The holding cannot withstand judicial scrutiny by any measure. It should be vacated.

Dated: August 22, 2016

Respectfully submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: /s/ Arthur A. Hartinger
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League of California Cities

CERTIFICATION OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The foregoing brief contains 3,336 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word word processing program used to generate the brief.

Dated: August 22, 2016 RENNE SLOAN HOLTZMAN SAKAI LLP

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