NO. 18-_____

In the Supreme Court of the United States

CITY OF SAN DIEGO,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether California Government Code section 3505, the "meet-and-confer" provision of the California Meyers-Milias-Brown Act [Cal. Gov't Code section 3500 *et seq.*], can preempt an elected public official's First Amendment right to participate in a citizens' initiative process and express his or her views on a matter of significant public concern—pension reform.

PARTIES TO THE PROCEEDINGS

PETITIONER

- City of San Diego (City).

RESPONDENT

- California Public Employment Relations Board (PERB).

REAL PARTIES IN INTEREST

Official proponents of the Comprehensive Pension Reform Initiative (CPRI). (Collectively referred to as the "Citizen Proponents"):

- Catherine A. Boling
- T.J. Zane
- Stephen B. Williams

Recognized employee labor organizations. (Collectively referred to as "Unions"):

- The 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

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The Opinion of the California Supreme Court reversing the California Court of Appeal, Fourth Appellate District, Division One (Court of Appeal) opinion is reported as *Boling v. Public Employment Relations Board*, 5 Cal. 5th 898 (2018), and is reproduced at App.1-30a. The Court of Appeal's opinion in favor of the City annulling the California Public Employment Relations Board's decision was reported at *Boling v. Public Employment Relations Board*, 10 Cal. App. 5th 853 (2017), and is reproduced at App.31-100a. The California Public Employment Relations Board Decision No. 2464-M (Dec. 29, 2015) is reproduced at App.101-253a.

JURISDICTION

The California Supreme Court issued its Opinion on August 2, 2018. (App.1a.) The City filed a Petition for Rehearing which was denied on October 10, 2018. (App.254a.) This Court has jurisdiction to consider Petitioner City's writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The prohibitions set forth in the First Amendment are extended to the States through Section 1 of the Fourteenth Amendment of the U.S. Constitution which states, in pertinent part,

U.S. CONST. AMEND. XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Government Code sections 3500 through 3511 (known as the "Meyers-Milias-Brown Act") is reproduced at App.256-87a. The relevant portions of the Act to this matter are subsection (a) of Section 3504.5 ("Notice of proposed act relating to matters within scope of representation; meeting; emergencies") and Section 3505 ("Conferences; meet and confer in good faith").

SECTION 3504.5(A)

NOTICE OF PROPOSED ACT RELATING TO MATTERS WITHIN SCOPE OF REPRESENTATION; MEETING; EMERGENCIES

> Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

SECTION 3505

CONFERENCES; MEET AND CONFER IN GOOD FAITH

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. "Meet and confer in good faith" means that a public

> agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

INTRODUCTION

The City's Petition involves its Mayor's First Amendment right to participate in and promote a citizens' initiative concerning pension reform. In 2010, the City's pension fund faced over a $2 billion unfunded liability and consumed approximately 20% of the City's annual budget. (App.190-91a.) Pension reform was a controversial topic and the City's Mayor, Jerry Sanders, believed reform was necessary for the long-term financial health of the City. However, he did not believe the City Council would use its authority to put a measure on the ballot. (App.200a.) Therefore, after City Councilmember Carl DeMaio announced his own pension reform plan, Mayor Sanders started to make his views public in November 2010.

Over the next several months Mayor Sanders continued to publicly share his ideas, including meeting with local civic and business community leaders. He also devoted a portion of his annual State of the City address to the issue of pension reform and stated that "acting in the public interest, but as a private citizen," he intended to bring forth an initiative to the voters. (App.7a.) The local civic and business leaders, which included the Citizen Proponents, ultimately thought Mayor Sanders' reform concept was not strong enough. They told the Mayor they did not want competing measures to confuse the voters, and they had the financial backing and were pursuing Councilmember DeMaio's reform concept with or without the Mayor's support. A series of meetings between supporters of the competing proposals took place, which led to what became known as the Comprehensive Pension Reform Initiative (CPRI). (App.8a.)

After the Citizen Proponents filed their notice of intent to circulate petitions to place the CPRI on the ballot, Mayor Sanders began to champion their proposal. He expressed his support in press conferences and interviews. He encouraged people to sign the petitions, and once the CPRI was duly certified as a citizens' initiative and placed on the ballot, he urged people to vote for it. (App.9a.) In June 2012, the CPRI was overwhelmingly passed by approximately 66% of the City's voters. (App.217a.)

The California Supreme Court Opinion, overruling a Court of Appeal decision that found the Mayor's actions to be protected by the United States Constitution, held that the Mayor was a designated "representative" of the City's governing body under the

California Meyers-Milias-Brown Act (MMBA), therefore his support and advocacy in pursuit of pension reform constituted a labor relations violation for failure to have first gone through a meet-and-confer process with the Unions. A meet-and-confer process which would require the Mayor to negotiate with the Unions and obtain approval of the City Council, the very legislative body a citizens' initiative is intended to bypass, before being permitted to support an initiative. The California Supreme Court Opinion and underlying Public Employment Relations Board (PERB) Decision set a very dangerous precedent severely limiting the Constitutional right of elected public officials to support legislative proposals, or even comment publicly about them, for fear of disenfranchising initiative petition signers and voters.

Despite having been raised at every opportunity throughout the litigation below, the California Supreme Court Opinion completely omits any mention or analysis of the First Amendment issues fully briefed by the parties.[1] While the Opinion found the California Court of Appeal erred with regards to its application of the MMBA, the Opinion does not address the Appellate Court's overriding conclusion that Mayor Sanders' advocacy and support for pension reform was protected by the United States Constitution. (App.93-94a n.50

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[1] As discussed in the "Statement of the Case," the City raised First Amendment arguments at every possible stage of litigation: Before the PERB Administration Law Judge, before the PERB Board, before the California Court of Appeal, and in its briefing before the California Supreme Court, as well as in its Petition for Rehearing. First Amendment issues were also significantly briefed by amicus curiae (and responded to by PERB and the Unions) in both the California Appellate and Supreme Courts.

(citing *Wood v. Georgia*, 370 U.S. 375, 394 (1962) and *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)).

An elected public official does not surrender his or her Constitutional right to support, or even propose, legislation simply by virtue of the MMBA. The First Amendment protects the speech rights of elected public officials and private citizens equally. Therefore, it is irrelevant whether Mayor Sanders was speaking as a private citizen or as the City's Mayor. Under either scenario, the First Amendment protected his right to participate in a citizens' initiative process and set forth his views on a matter of significant public concern—pension reform. In fact, this Court has explained that elected officials "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." *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966).

Any restriction on an elected public official's speech must receive strict scrutiny. The California Supreme Court Opinion's application of California Government Code section 3505 is content-based, as it applies only to speech about "wages, hours, and other terms and conditions of employment." It is also viewpoint-based, as Mayor Sanders could have advocated against a citizens' initiative on pension reform, but not in favor of such. Additionally, interpreting Government Code section 3505 in such a manner acts as an impermissible prior restraint, as it requires the City's Mayor to go through the meet-and-confer process and receive the City Council's consent prior to being able to speak in favor of pension reform or any labor-related matter covered by the MMBA.

This Court should grant the City's Petition for a Writ of Certiorari to address and determine these significant First Amendment legal issues which were ignored by the California Supreme Court's Opinion.

STATEMENT OF THE CASE

A. Background

1. Competing Pension Reform Concepts

Early in November 2010, City Councilmember Carl DeMaio released what he called his "Roadmap to Recovery," which included a proposal to replace defined benefit pensions with a 401(k) style plan for all new hires and a freeze on pensionable pay for five years. (App.3-4, 37a.) On November 19, 2010, Mayor Sanders announced he would seek to place an initiative on the ballot to eliminate defined benefit pensions for all but safety (police, fire and lifeguard) new hires and offer a 401(k) style plan. (App.38a.)

On January 12, 2011, Mayor Sanders announced in his annual State of the City address that "acting as a private citizen" he would "soon bring to the voters an initiative to enact a 401(k) style plan that is similar to the private sector's and reflects the reality of our times." (App.7a.) The Mayor and then Councilmember Kevin Faulconer met with business leaders of the Lincoln Club, San Diego County Taxpayers Association (SDCTA) and Chamber of Commerce to describe their pension reform concept. However, they were "lukewarm" to the Mayor's concept and preferred DeMaio's plan. (App.8a.) They told the Mayor his

concept was not "tough enough" and did not save enough money, and they only wanted one initiative to go forward. (App.41a.)

In early March 2011, the SDCTA and Lincoln Club determined that DeMaio's plan was more in line with their pension reform principles and they informed the Mayor that they were going to move forward with or without his input or support. (App.167a.) A series of meetings ultimately took place between supporters of the competing proposals, which led to what ultimately became known as the CPRI. (App.8a.)

2. The Citizen Proponents' Initiative—The Comprehensive Pension Reform Initiative

The CPRI was drafted not by attorneys paid for by the City, Mayor Sanders, or the campaign committee formed to support the Sanders' pension reform concept, but by a private law firm—Lounsbery Ferguson Altona & Peak—which was hired by the SDCTA. (App.42a.) The CPRI differed in many key respects from Mayor Sanders' concept and contained many components he expressly opposed. However, he nonetheless supported it because he believed it was "important for the City in the long run." (App.8-9a.)

On April 4, 2011, the Citizen Proponents, the official proponents of the CPRI, whom PERB found were not agents of the City or Mayor Sanders (App.237-38a.), presented their notice of intention to circulate petitions to place the CPRI on the ballot. (App.9a.) The Mayor did not run the campaign for the CPRI, it was run by the head of the Lincoln Club, Citizen Proponent T.J. Zane. (App.238a.) However, Mayor Sanders did support the signature gathering campaign and touted

his belief in the CPRI's importance in interviews, media statements, and speaking appearances. (App.9a.)

On September 30, 2011, Citizen Proponent Zane delivered the petition sections and signatures to the City Clerk and attested they contained at least 94,346 valid signatures. (App.43a.) They were forwarded to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures, and on November 8, 2011, the SDROV certified the CPRI petition had received a "SUFFICIENT" number of valid signatures requiring it to be presented to the voters as a citizens' initiative. (App.9, 43a.)

On December 5, 2011, the City Council passed a resolution of intention (R-307155) to place the CPRI on the June 5, 2012 Presidential primary election ballot, as required by law. (App.43a.) And on January 30, 2012, fulfilling its ministerial duty under then California Election Code section 9255(b)(2), the City Council enacted Ordinance O-20127 which placed the CPRI on the June 5, 2012 Presidential primary election ballot as Proposition B. (*Id.*) The CPRI was ultimately approved by approximately 66% of the City's voters. (App.217a.)

3. The Unions Demand to the City to Meet-and-Confer Over the Comprehensive Pension Reform Initiative

On July 15, 2011, the San Diego Municipal Employees Association (SDMEA) wrote to Mayor Sanders demanding that the City had an obligation under the MMBA to meet-and-confer over the CPRI. (App.44a.) SDMEA's letter informed the Mayor that they would treat the CPRI as his "opening proposal."

(App.215a.) The Unions' multiple demands that claimed the City was obligated to meet-and-confer over the CPRI because they alleged "the notion that [the CPRI] is a citizens' insisted the CPRI was the "City's initiative." (App.10-11, 45a.)

The City Attorney's Office responded that the City had no meet-and-confer obligations because there was no legal basis upon which the City Council could modify the CPRI if it qualified for the ballot; rather, the Council needed to comply with the California Elections Code and place the CPRI on the ballot if it met the signature and procedural requirements set forth therein. However, the City assured the Unions that if the CPRI did qualify for the ballot and was approved by the voters, the City would engage in the meet-and-confer process over any impacts identified by the Unions. The City declined the Unions' multiple requests to meet-and-confer over the CPRI. (App.11a.)

4. Unfair Labor Practice Charges and Initiation of the PERB Action

In January 2012, SDMEA filed an Unfair Practice Charge (UPC) with PERB over the City's refusal to bargain over the CPRI because the City claimed it was a "citizens' initiative" and not the "City's initiative." (App.11a.) The other three Real Party in Interest Unions also filed UPCs with PERB, and embraced the allegations of the SDMEA UPC. Shortly after the UPCs were filed, PERB filed administrative complaints contending the City's alleged MMBA violation was its denial of the Unions' requests to meet-and-confer over the CPRI before placing it on the ballot.

On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. PERB then filed an action in San Diego Superior Court seeking to enjoin the City from placing the CPRI on the ballot, but was rejected. *San Diego Municipal Employees Ass'n. v. Superior Court*, 206 Cal. App. 4th 1447, 1452-53 (2012). After PERB administrative hearings were scheduled, the City sought a stay in superior court. After the trial court granted the City's stay, SDMEA pursued writ relief with the California Court of Appeal. *Id.* at 1454-55. The Court of Appeal concluded the stay was improper and it was vacated. It returned the case to PERB jurisdiction solely on the basis of SDMEA UPC's claim that the CPRI was not a true citizen-sponsored initiative but was instead a "sham" device employed by the City using "strawmen" to circumvent the MMBA. *Id.* at 1460, 1463; *see also* App.11-12a.

5. The PERB Decision

A PERB Administrative Law Judge (ALJ) conducted administrative hearings in July 2012. (App.12a.) On February 11, 2013, the ALJ issued his Proposed Decision finding the City violated the MMBA by failing to meet-and-confer with the Unions over the CPRI, and proposed the results of the election approving the CPRI be vacated. (App.183, 251a.)

On December 29, 2015, PERB issued its Decision affirming and adopting the ALJ's Proposed Decision with minor modifications. (App.101, 105a.) It abandoned the "sham"/"strawman" theory, finding the Citizen Proponents were not agents of Sanders or the City as the Unions alleged. Instead, it concluded the City violated the MMBA when it refused to meet-and-confer

over the CPRI, based on theories of statutory agency and common law agency principles. (App.133-34a.)

Specifically, PERB found that: (1) under the City's Strong Mayor form of governance and common law principles of agency, Mayor Sanders was a statutory agent of the City with actual authority to speak for and bind the City with respect to initial proposals in collective bargaining with the unions; (2) under common law principles of agency, the Mayor acted with actual and apparent authority when publicly announcing and supporting Proposition B; and (3) the City Council had knowledge of the Mayor's conduct, by its action and inaction, and, by accepting the benefits of the CPRI, thereby ratified his conduct. (*Id.*)

PERB Ordered the City to cease and desist from "[r]efusing to meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects." (App.177a.) Recognizing it lacked the authority to overturn an election, PERB modified the ALJ's proposed remedy to vacate the CPRI election results. The Decision directed the City to pay its employees "for all lost compensation, including but not limited to the value of lost pension benefits . . . offset by the value of new benefits required from the City under [the CPRI]," and called for such payments to continue for as long as the CPRI is in effect, or until the parties mutually agree otherwise. (App.13, 178a.)

The City raised the Mayor's First Amendment right of free speech to express his views on matters of significant public concern and engage in direct democracy at every stage of the PERB proceedings, including via motion to dismiss the PERB complaints, in

its opening brief, as well as in the City's statement of exceptions to the ALJ's Proposed Decision. (App.110a.)

The PERB Decision admitted it did not purport to resolve the Constitutional issues raised by the City, and acknowledged "the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative." However, it concluded "those issues are not implicated by the facts of this case," and therefore, chose not to address them." (App.134-35a.)

6. Writ for Extraordinary Relief and the California Court of Appeal Opinion

On January 26, 2016, the City filed a Petition for Writ of Extraordinary Relief seeking to annul PERB's Decision. The Citizen Proponents also filed their own Petition. The California Court of Appeal issued the writ of review on August 17, 2016. The City's and Citizen Proponents' Petitions were consolidated for purposes of opinion and on April 11, 2017, the Court of Appeal's opinion was issued, granting the writ petitions and annulling PERB's decision. (App.52, 100a.)

The Court of Appeal opinion held that the meet-and-confer obligations under the MMBA applied only to a proposed charter amendment placed on the ballot by the governing body of a charter city, but has no application when such proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. (App.34a.) Despite several people occupying elected and non-elected positions in City government providing support for the CPRI, the Court of Appeal concluded PERB erred when it applied agency principles to transform the CPRI into a governing-

body-sponsored ballot proposal. Notwithstanding the support given to the CPRI by Mayor Sanders and others, there was no evidence the CPRI was ever approved by the City Council (the City's governing body), and, therefore, it was determined PERB erred when it concluded the City was required to satisfy the concomitant "meet-and-confer" obligations imposed upon governing-body-sponsored charter amendment ballot proposals. (*Id.*)

The Court of Appeal also found that Mayor Sanders' advocacy and support for the CPRI and pension reform was protected by the United States Constitution. (App.93-94a n.50 (citing *Wood v. Georgia*, 370 U.S. 375, 394 (1962) and *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)).

7. The California Supreme Court Opinion

PERB and the Unions each filed Petitions for Review, which were granted on July 26, 2017. The California Supreme Court identified two main issues: (1) When a final decision of PERB under the MMBA (Cal. Gov't Code §§ 3500 *et seq.*) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?; and (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment? (App.2-3a.)

On the second question, relevant to the instant petition, the Court concluded that California Government Code section 3505 expressly imposes a meet-and-

confer duty on "[t]he governing body of a public agency" as well as "administrative officers or other representatives as may be properly designated by law or by such governing body," and that "the duty regularly attaches to actions taken by agency representatives without a governing body's participation." (App.26a.) Under the terms of Section 3505, Mayor Sanders was required to meet-and-confer "prior to arriving at a determination of policy or course of action" on matters affecting the "terms and conditions of employment." (App.26-27a.) The Court further held that under the factual scenario presented, Mayor Sanders had a duty to meet-and-confer with the Unions. (App.28-29a.)

The Court did not invalidate the CPRI, rather, it noted that the Court of Appeal did not consider the remedy issue because it concluded there was no MMBA violation. Therefore, the case was remanded back to the California Court of Appeal to "address the appropriate judicial remedy for the violation identified." (App.30a.)

The City's briefing and multiple amicus briefs, raised the Mayor's First Amendment rights. However, the California Supreme Court Opinion ignored and contained no mention of the United States Constitutional issues.

8. The City's Petition for Rehearing in the California Supreme Court

On August 17, 2018, the City filed a Petition for Rehearing. The Petition noted that despite having been raised at every opportunity throughout the litigation, the California Supreme Court Opinion completely omits any mention or analysis of the First

Amendment issues fully briefed by the parties. While the Opinion found the Court of Appeal erred with regards to its application of the MMBA, it failed to address the Appellate Court's overriding conclusion that Mayor Sanders' advocacy and support for pension reform was protected by the United States Constitution. (App.93-94a n.50.) The City's Petition for Rehearing was summarily denied on October 10, 2018. (App.254a.)

REASONS FOR GRANTING THE PETITION

If the California Supreme Court Opinion and underlying PERB Decision stand, they set dangerous precedents significantly eroding the Constitutional rights of elected public officials to support legislative proposals, or even to comment about them publicly for fear of disenfranchising initiative petition signers and voters. By requiring the City's Mayor to go through the meet-and-confer process before being able to speak in favor of pension reform, the Opinion requires him or her to negotiate with labor unions and obtain the City Council's approval prior to speaking. Voices of elected officials will be silenced, and citizens will be deprived from hearing on issues of significant public concern by the very individuals that they have elected to represent them.

I. THE MMBA CANNOT PREEMPT THE MAYOR'S FIRST AMENDMENT RIGHTS TO PARTICIPATE IN AND SHARE HIS VIEWS ON MATTERS OF PUBLIC CONCERN SUCH AS A CITIZENS' INITIATIVE ON PENSION REFORM

A. The First Amendment Fully Protects Speech on Public Issues

The First Amendment to the United States Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const., amend. I. The same prohibition is extended to the States by the Fourteenth Amendment. *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1664 (2015); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 570-71 (1942).

The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). Thus, it is designed to protect "the free discussion of governmental affairs," including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218-19 (1966).

When elected officials, such as the City's mayor, assume office they do not relinquish their First Amendment rights to address the merits of pending ballot measures or to even propose and draft them. *See League of Women Voters of California v. Countywide Criminal Justice Coordination Committee (League of Women Voters)*, 203 Cal. App. 3d 529, 555-56 (1980)

(recognizing the right of public officials to draft and propose a citizens' initiative).

This Court has held that any restriction on speech about public issues "trenches upon an area in which the importance of First Amendment protections is at its zenith." *Meyer*, 486 U.S. at 425. Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Accordingly, pursuant to such principles, Mayor Sanders' speech about the citizens' initiative was entitled to the highest degree of First Amendment protection. At the time the Mayor's speech took place the City faced an unfunded liability of over $2 billion and was spending 20% of its annual budget on its retirement obligations. Whether or not the Mayor was initially discussing his own concept of pension reform, or was supporting the Comprehensive Pension Reform Initiative (CPRI), his activities fell squarely within the category of "matters of public concern." Speech about such issues "occup[y] the highest rung of First Amendment values." *Connick*, 461 U.S. at 145.

B. The First Amendment Fully Protects Speech by Elected Officials

The Mayor's speech is entitled to heightened First Amendment protection not only because of its content, but also because of the Mayor's role as an elected official—the City's highest elected official. Rather than limiting elected officials' speech, this Court has held that elected officials must receive "the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). Protection

of their First Amendment speech is robust and elected officials do not in any way forfeit such protections upon assuming office. In fact, they have a duty to inform the public of their views. Two cases clearly demonstrate this point.

In *Wood v. Georgia*, 370 U.S. 375 (1962), an elected sheriff had been held in contempt "for expressing his personal ideas on a matter that was presently before the grand jury." *Id.* at 376. The State of Georgia claimed that because the sheriff "owe[d] a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." *Id.* at 393. This Court disagreed. The Court held the fact that the petitioner was sheriff did not "provide any basis for curtailing his right of free speech" and explained that the sheriff "was an elected official and had the right to enter the field of political controversy." *Id.* at 394. Additionally, the Court concluded that "[t]he 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." *Id.* at 395 (emphasis added). Instead of finding the sheriff's status as an elected official restricted the First Amendment rights at issue, such status actually reinforced and strengthened such rights.

PERB, in its briefing before the lower courts, argued that *Wood* was inapplicable because the speech at issue "was made in the sheriff's individual capacity." However, the Court "assum[ed] that the Court of Appeals did consider to be significant the fact that petitioner was a sheriff," and expressly held such fact did not provide "any basis for curtailing his right of

free speech." *Id.* at 394. Accordingly, it did not matter whether the sheriff spoke as an elected official or as a private citizen. The First Amendment applied in either scenario, just as it should in the present situation.

In *Bond v. Floyd*, 385 U.S. 116, 135 (1966), this Court dismissed any notion that elected public officials can have diminished First Amendment protection. In *Bond*, the Georgia House of Representatives refused to seat an elected individual who had publicly "criticiz[ed] the policy of the Federal Government in Vietnam and the operation of the Selective Service laws." *Id.* at 118. Georgia argued that "the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government." *Id.* at 136. Again, the United States Supreme Court disagreed. It explained that "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." *Id.* Thus, it concluded that "[t]he 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." *Id.* at 135-36 (emphasis added).

Wood and *Bond* make it clear the First Amendment prohibits the government from silencing elected officials on matters of public concern. However, that is exactly what would occur if the California Supreme Court Opinion stands and this Court does not grant review to address these significant First Amendment issues. Unlike in *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591 (1984), the City's Mayor cannot engage in meet-and-confer and if not persuaded otherwise still

propose his desired charter amendment. The San Diego City Council, not the City's Mayor, ultimately resolves impasse disputes.

The reason the First Amendment prevents the government from silencing elected officials on matters of public concern is obvious. If that was not the rule, "debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it [would be] radically transformed." *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990). Elected officials are "expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." *Id.* at 12. If the First Amendment did not protect such speech, citizens would lose the right to be represented in governmental debates on key issues by the very people they elected to represent them. "With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process." *Id.*

Preventing the Mayor from expressing his views on pension reform would silence the City's top elected official regarding how arguably the most significant financial issue facing the City should be handled. Since the First Amendment fully protects speech by elected officials, the capacity in which Mayor Sanders shared his views on pension reform simply does not matter. If he was speaking as a private citizen, his speech is undeniably protected by the First Amendment. If he was speaking as the City's Mayor, it is "all the more imperative that [he] be allowed freely to

express [himself] on matters of current public importance." *Wood*, 370 U.S. at 375.

C. *Garcetti* Does Not Deprive Elected Officials of Their First Amendment Rights

In the court's below, citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), PERB argued that even if viewed through the prism of the First Amendment the Mayor's activities were not protected because "[t]he First Amendment does not protect activities taken in the course of a government employee's official duties." *Id.* at 421. However, *Garcetti* is inapplicable to the present situation since it applies to government employees, not elected officials.

In *Garcetti*, a non-elected deputy district attorney wrote a memorandum to his superiors about possible government misconduct. *Id.* at 414. His superiors then took a number of adverse employment actions against him, allegedly in retaliation for his views expressed in the memo. *Id.* at 415. The district attorney argued his First Amendment rights were violated, however, this Court disagreed. The Court acknowledged "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* at 417. However, the Court held that public employees did not have First Amendment protection for speech made as part of their official duties, stating "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

The *Garcetti* Court justified the limits it placed on public employees' speech by noting that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public service." *Id.* at 418. That same rationale does not apply to elected public officials. When dealing with elected public officials the "significant degree of control" needed is held by the electorate, not the government employer, as the elected public official is responsible to the electorate who voted him or her into office.

In fact, as discussed above, elected public officials have a responsibility to take positions on matters of public concern—such as pension reform. Any attempt to extend *Garcetti* from non-elected public employees such as a deputy district attorney to elected officials such as a mayor would be foreclosed by the *Wood* and *Bond* decisions. As explained, *Garcetti* held that "public employees" receive no First Amendment protection for statements made "pursuant to their official duties." *Garcetti*, 547 U.S. at 421. Yet in *Wood*, the Supreme Court held that "an elected official" has "the right to enter the field of political controversy, particularly where his political life was at stake." 370 U.S. at 394-95. And in *Bond*, the Court further held that elected officials "have an obligation to take positions on controversial political questions so that their constituents can be fully informed," and 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." 385 U.S. at 135-36.

It is also significant that the *Garcetti* Court reasoned that speech by public employees regarding their official duties is more likely to implicate matters of "private" concern to the employee or his office, rather than "public" concern to the citizenry at large. *See Garcetti*, 547 U.S. at 422-23. The same cannot remotely be said for speech of an elected official on pending legislative initiatives, particularly the speech of a mayor on a matter as important to the citizens as pension reform. Because *Garcetti* does not apply to elected officials, it does not deprive or in any way justify diminishing the City's Mayor of his or her First Amendment rights.

II. IMPOSING MMBA MEET-AND-CONFER REQUIREMENTS ON THE MAYOR'S ACTIONS IN SUPPORT OF THE CITIZENS' INITIATIVE VIOLATES THE FIRST AMENDMENT BY IMPOSING A CONTENT AND VIEWPOINT-BASED RESTRICTION, AND A PRIOR RESTRAINT ON THE MAYOR'S SPEECH

A. The Actions That the Mayor Took in Support of the Citizens' Initiative Qualify as Speech Under the First Amendment

The Unions argued below that the Mayor's actions constituted unprotected "conduct" and did not qualify as protected "speech." Beginning in late 2010 through early to mid 2012, Mayor Sanders supported pension reform in multiple ways, including:

- Holding press conferences to describe his position (App.5, 9a);
- Participating in media requests and interviews regarding pension reform (App.9a);

- Sharing his views in his State of the City speech (App.7a);
- Holding meetings to discuss the citizens' initiative with civic and business leaders (App.8a);
- Having his staff issue press releases and send emails about his position (App.7a);
- Having his staff provide comments on Boling, Zane, and Williams' proposal (App.9a); and
- Urging people to sign Boling, Zane, and Williams' petition—the CPRI (App.9a).

The Unions argued in the lower courts these actions are unprotected "conduct" rather than protected "speech." However, this Court has held that such actions qualify as speech under the First Amendment. *See, e.g.*, *Rumsfeld v. Forum for Acad.* & *Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding "sending e-mails . . . clearly involve[s] speech"); *Meyer*, 486 U.S. at 421-22 (holding that urging people to sign a petition is "core political speech."); *see also Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 297 (1981) (holding that the First Amendment protects against "limitations on contributions to committees formed to favor or oppose ballot measures."). The Mayor's actions at issue clearly qualify as speech.

The Unions also argued "[t]here is no First Amendment right to place an initiative on the ballot because the act of proposing an initiative is the first step in an act of law-making." Even if this is assumed to be true, it is irrelevant. Mayor Sanders did not take any of the official steps necessary to "place an initiative on the ballot." He did not sign the notice of intent, request the ballot summary, or file the final petition.

See Cal. Elec. Code §§ 9202(a), 9203, 9265. Rather, the Citizen Proponents, whom PERB concluded were not agents of the Mayor or City, took those steps. (App.237-38a.) It is irrelevant whether those specific actions of the Citizen Proponents qualify as speech. What is relevant is that the Mayor was engaged in protected speech when he said he wanted to pursue a citizens' initiative and when he openly supported the CPRI.

B. The California Supreme Court Opinion's Application of Gov't Code § 3505 Imposed a Restriction on the Mayor's Speech That is Content-Based, Viewpoint-Based, and a Prior Restraint

Under California law, the City's governing body "or other representatives as may be properly designated" have a duty to meet-and-confer with its labor unions regarding "wages, hours, and other terms and conditions of employment . . . prior to arriving at a determination of policy or course of action." Cal. Gov't Code § 3505. Under the City's "Strong Mayor" form of government, the City's Mayor is its chief executive officer empowered to recommend "measures and ordinances" to the City Council and has conducted collective bargaining with the City's labor unions. Thus, pursuant to the California Supreme Court's Opinion, which ignores any discussion of First Amendment rights, the City's Mayor is a designated "representative" who must meet-and-confer with the City's labor unions "prior to arriving at a determination of policy or course of action" on all labor-related matters. (App.28a.) Under such an interpretation of Government Code section 3505, the Mayor is barred from publicly sharing his

views in his official capacity on pension reform until he goes through a meet-and-confer process—or he runs the risk of invalidating a duly certified citizens' initiatives. This equates to a substantial restriction on the Mayor's right to speak.

Such a restriction is both content-based and viewpoint-based. A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015). Content-based laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. A law is viewpoint-based if it targets "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* Viewpoint-based restrictions are nearly always deemed unconstitutional, because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Here, the Opinion's interpretation of California Government Code section 3505 restricts the Mayor's speech based on content. Section 3505 requires the City to meet-and-confer in good faith "regarding wages, hours, and other terms and conditions of employment." Per the Opinion, under the facts as determined by PERB, the Mayor was required to meet-and-confer with the Unions before publicly supporting a citizens' initiative regarding pension reform. However, the Mayor

would not be required to meet-and-confer with the Unions before publicly supporting a citizens' initiative regarding a non-labor subject. In other words, the restriction applies to speech about pension reform and other labor-related matters, but not to speech about other topics. That makes the restriction content-based and thus "presumptively unconstitutional." *Reed*, 135 S.Ct. 2226.

Imposing a meet-and-confer requirement under this scenario is also viewpoint-based because it prevents the Mayor from publicly supporting pension reform. However, the Mayor could have opposed pension reform without going through the meet-and-confer process. Because the restraint applies to speech taking one view but not another, it is an impermissible viewpoint-based. The First Amendment "forbids" the enforcement of California Government Code section 3505 in such a manner. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 804.

In addition to the California Supreme Court Opinion's application of Government Code section 3505 being content and viewpoint-based, as applied it also functions as an impermissible prior restraint. A restriction is a prior restraint if it has four elements: "(1) the speaker must apply to the decision maker before engaging in the proposed communication; (2) the decision maker is empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the communication; (3) approval of the application requires the decision maker's affirmative action; and (4) approval is not a matter of routine, but involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the decision maker." *Samuelson v. LaPorte Cmty.*

Sch. Corp., 526 F.3d 1046, 1051 (7th Cir. 2008) (citing *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002)). This Court has deemed such a restriction as "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

As explained, per the Opinion's application of California Government Code section 3505, the Mayor cannot publicly support a citizens' initiative on pension reform without first going through the meet-and-confer process, a process that requires negotiations with the Unions and exhausting the City Council's impasse procedures. Cal. Gov't Code § 3505. At the conclusion of those procedures, the Mayor must present his "last, best, and final offer" to the City Council, which then votes on whether to implement such offer. Cal. Gov't Code § 3505.4. If the City Council refuses to implement that offer, the Mayor does not have the authority to do so on his own. The City Council, not the Mayor, resolves impasse disputes. *See* San Diego Council Policy 300-6.

In other words, if the Mayor wanted to publicly support a citizens' initiative on pension reform, he would need to meet-and-confer with the Unions, exhaust the City's impasse procedures, present his "last, best, and final offer" (*i.e.*, supporting the initiative) to the City Council, and request the Council's approval. The City Council would then have the discretion whether to grant or deny the Mayor's request. And if the City Council denied the Mayor's request, the Mayor would not be allowed to implement the offer (*i.e.*, support the initiative) on his own authority.

Thus, per the Opinion, the Mayor is prohibited from publicly supporting a citizens' initiative on pension reform unless and until the City Council permits him to do so.

Accordingly, the California Supreme Court Opinion's application of Government Code section 3505 operates as an impermissible prior restraint.

CONCLUSION

Petitioner City of San Diego respectfully requests this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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