Case No. S242034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,
Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

CITY OF SAN DIEGO; 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,
Real Parties in Interest.

After a Decision by the Court of Appeal, Fourth Appellate District, Division One (Case Nos. D069626 and D069630)

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE SAN DIEGO TAXPAYERS EDUCATIONAL FOUNDATION IN SUPPORT OF THE CITY OF SAN DIEGO

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The San Diego Taxpayers Educational Foundation is a 501(c)(3) non-profit corporation dedicated to raising awareness about economic and quality-of-life issues affecting local taxpayers. The Foundation pursues that mission by conducting fiscal and economic research and analysis of governmental revenue and expenditure policies in San Diego County. Founded in 1987, the Foundation is the research arm of the San Diego County Taxpayers Association.

This appeal involves a citizens' initiative on pension reform, which the Public Employment Relations Board effectively invalidated because the Mayor of San Diego had spoken vigorously on its behalf. That initiative responded to a significant financial crisis facing the City's public-pension system, and helped place that system on sounder financial footing by reducing its $2 billion funding gap. By undoing the initiative, the Board's decision will have significant adverse consequences for the City of San Diego, its public-pension system, and its citizens.

Over the past several years, the Foundation has done extensive research on precisely these issues. Specifically, the Foundation has researched the root causes of public-pension instability, as well as the

specific causes of this instability in the San Diego region. Much of that research formed the basis of the reforms that made up the citizens' initiative at issue. As a result, the Foundation has an acute interest in seeing that initiative upheld.

The Foundation's brief thoroughly discusses the First Amendment rights of elected officials, and applies those principles to this case. The parties have raised this First Amendment issue, but this brief addresses it in greater detail. Given the importance of the question presented, the Court would benefit from considering the additional perspective of the Foundation.

For these reasons, the Foundation respectfully requests permission to file the attached brief in support of the City of San Diego. Cal. R. Ct. 8.520(f)(1).

The Foundation confirms that no party or its counsel authored this brief in whole or in part, or made a monetary contribution to fund its preparation or submission. Cal. R. Ct. 8.520(f)(4)(A). The Foundation acknowledges that the Laura and John Arnold Foundation has made a monetary contribution to fund the brief's preparation and submission. Cal. R. Ct. 8.520(f)(4)(B).

Dated: December 1, 2017.

Respectfully submitted,

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INTRODUCTION AND SUMMARY

This appeal presents the question whether a citizens' initiative on pension reform may be invalidated because an elected official—namely, a mayor—spoke vigorously on its behalf. Because the mayor had a First Amendment right to advocate on behalf of pension reform, the answer to that question is unequivocally no.

1. Beginning in the late 1990s, the City of San Diego made a series of ill-advised decisions regarding its public-pension fund. In 1996, the City reduced its annual contribution to the fund while simultaneously increasing benefits. *San Diego Firefighters, Local 145 v. City of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M, at 2 (2010). In 1997, the City allowed employees to buy "service credits," which increased the size of their monthly retirement benefit. Although this program was supposed to be revenue neutral, the City lost $147 million due to an underestimation of its long-term costs. *Id.* at 3. In 2002, the City again reduced its annual contribution to the fund while simultaneously increasing benefits. *Id.* at 2.

These decisions significantly contributed to the City's pension fund becoming "grossly underfund[ed]." *Id.* In 2011, the shortfall was about $2 billion. R. Vol. XI, at 3050. In 2012, the City was spending

20% of its annual budget just to keep up on payments due to pensioners. *Id.* at 3049.

In early 2011, three private citizens—Catherine A. Boling, T.J. Zane, and Stephen B. Williams—decided to address this problem through a citizens' initiative. They hired a law firm to draft a proposal that (among other things) replaced the City's defined-benefit retirement plan with a defined-contribution one. *Id.* at 3066–67. They then spent the next several months taking all of the steps legally necessary to get their initiative on the ballot. First, Boling, Zane, and Williams filed with the City Clerk a "notice of intent," which explained that they planned to circulate an initiative petition in the City. *Id.* at 3067; *see also* Cal. Elec. Code §§ 9202(a), 9256. Second, they filed a request that the City Attorney prepare a ballot title and summary for the petition. R. Vol. III, at 682; *see also* Cal. Elec. Code §§ 9203, 9256. Third, they circulated the petition and gathered signatures in its support. *See* R. Vol. III, at 697–99; *see also* Cal. Elec. Code §§ 9257–64. Fourth, they filed the petition—along with approximately 145,000 signatures—with the City Clerk. R. Vol. III, at 697–99; *see also* Cal. Elec. Code § 9265.

At that point, various city officials took ministerial, legally mandated actions to place the petition on the ballot. The City Clerk forwarded the petition to the San Diego County Registrar of Voters, which verified that the petition had enough valid signatures. R. Vol. III, at 697–99; *see also* Cal. Elec. Code §§ 9266, 9114–15. Then, the Registrar certified the results of its examination, and the City Clerk forwarded that certification to the City Council. R. Vol. XVI, at 4067; *see also* Cal. Elec. Code § 9115(d), (f). Finally, the City Council enacted Ordinance O-20127, which placed the initiative on the June 5, 2012 primary ballot. R. Vol. XVI, at 4071–89; *see also* Cal. Elec. Code § 9255(b)(2) (2012).

2. Throughout this process, Boling, Zane, and Williams had a vocal and influential supporter: San Diego Mayor Jerry Sanders. The Mayor did not take any of the official steps that were necessary to get the citizens' initiative on the ballot—he did not, for example, sign or file the notice of intent, request the ballot title and summary, or file the final petition. But at each step of the way, the Mayor strongly urged the public to support pension reform in general, and the initiative of Boling, Zane, and Williams in particular.

In November 2010, before Boling, Zane, and Williams began to pursue their initiative, Mayor Sanders had informed his staff that he wanted to replace the City's defined-benefit retirement plan with a defined-contribution plan. R. Vol. XI, at 3057. The Mayor also had stated that this reform should occur through a citizens' initiative rather than through the City Council. *Id.* The Mayor believed that the reform was "necessary for the financial health of the City." *Id.* He did not believe, however, that the City Council "would use its authority to put the measure on the ballot." *Id.* at 3057–58. The Mayor therefore concluded that the voters themselves should "voice their opinion by signing petitions to put that on the ballot." *Id.* at 3058.

On November 19, Mayor Sanders started making his views public. The Mayor held a press conference in City Hall to explain that he wanted to reform public pensions through a citizens' initiative. *Id.* at 3059. The Mayor's staff created a "Fact Sheet" describing his ideas, which was issued to the media and posted on the City's website. *Id.* The staff also sent an email to several thousand community leaders, explaining how the Mayor planned "to address the City's budget issues." *Id.* at 3060.

Over the next several months, Mayor Sanders continued sharing his ideas about pension reform. He met with civic and business leaders to discuss the initiative. *Id.* at 3060–61, 3066. He did interviews for KUSI News, MSNBC, and a local radio show. *Id.* at 3061–62, 3066. He held another press conference and issued additional press releases describing his position. *Id.* And he devoted a large portion of his annual State of the City speech to the issue of pension reform. *Id.* at 3061–62.

After Boling, Zane, and Williams filed their notice of intent, Mayor Sanders began championing their proposal. He held a press conference to express his support. *Id.* at 3068. He encouraged people to sign their petition. *Id.* at 3068–69. And once the citizens' initiative was put on the ballot, he urged people to vote for it. *Id.* at 3096. In June 2012, after months of public debate, the City's voters overwhelmingly approved the initiative—with nearly 67% voting in favor. *Id.* at 3072.

As these facts show, Mayor Sanders played an important role—maybe even a critical one—in the public debate over pension reform.

3. Normally, it would be a constitutional virtue that an elected official took a consistent, principled stand on an important public

issue pending before the electorate. As the U.S. Supreme Court has explained, 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) (emphasis added). By sharing his views on pension reform, Mayor Sanders was simply fulfilling that obligation.

But the Public Employment Relations Board transformed constitutional virtue into vice. Under state law, the City has a duty to "meet and confer" with unions regarding "wages, hours, and other terms and conditions of employment ... prior to arriving at a determination of policy." Cal. Gov't Code § 3505. In the decision below, the Board held that the City violated that duty when Mayor Sanders "launch[ed] a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it." R. Vol. XI, at 3096. In other words, the Board held that the City violated state law because the Mayor spoke up regarding an important citizens' initiative. Thus, in the Board's view, Mayor Sanders did not have an

"obligation to take positions on controversial political questions"; to the contrary, he had an obligation to remain silent.

4. The Court of Appeal correctly annulled the Board's decision. *Boling v. Pub. Employment Relations Bd.*, 10 Cal. App. 5th 853, 856 (2017). The court recognized that, under state law, the City did not have a duty to meet and confer with the unions "when a proposed charter amendment is placed on the ballot by citizen proponents through the initiative process." *Id.* The court also recognized that the Board "erred when it applied agency principles to transform the [initiative] from a citizen-sponsored initiative, for which no meet-and-confer obligations exist, into a governing-body-sponsored ballot proposal." *Id.* And the court recognized that Mayor Sanders's public support for the initiative "is ... protected under both statutory law and under the Constitution." *Id.* at 891 n.50 (citations omitted).

5. Before this Court, the Board argues that the Mayor acted as an "agent of the City," rather than as a private citizen, when he supported the initiative. PERB Br. 64–66. On that basis, the Board argues that the Mayor enjoyed little if any First Amendment protection. PERB Reply Br. 35–44. For the reasons explained in the Court of Appeal's decision, the Foundation disagrees with the premise

that Mayor Sanders was speaking as an agent of the City rather than as a citizen. But there is a deeper problem with the Board's decision: it violates the First Amendment either way. As explained more fully below, the First Amendment equally protects the speech rights of elected officials and private citizens. It is therefore irrelevant whether Mayor Sanders was speaking as any other citizen or as the mayor; either way, the First Amendment protected his right to express his views on a matter of obvious public concern.

With that critical premise established, the First Amendment analysis is straightforward. For at least three different reasons, the Board's restriction of the Mayor's speech must receive strict scrutiny. First, the restriction is content-based: even the Board acknowledges that it applies only to speech about "wages, hours, and other terms and conditions of employment." Cal. Gov't Code § 3505. Second, and even worse, the restriction is viewpoint-based: Mayor Sanders could have advocated *against* a citizens' initiative on pension reform, but not *in its favor*. Third, the restriction is a prior restraint: by requiring the Mayor to go through the meet-and-confer process before being able to speak in favor of pension reform, the Board effectively

required the Mayor to obtain the City Council's approval of what he could say prior to speaking.

In sum, the Board's decision imposes a viewpoint-based prior restraint on a mayor's speech on a matter of urgent public concern to his city and his constituents. No governmental interest can justify such a restriction. On that ground alone, the Court of Appeal's decision should be affirmed.

STANDARD OF REVIEW

California agencies have no power to decide whether a state statute violates the federal Constitution. The California Constitution itself provides that an administrative agency has no power to "declare a statute unconstitutional," or "refuse to enforce a statute" on constitutional grounds, "unless an appellate court has made a determination that such statute is unconstitutional." Cal. Const. art. III, § 3.5. Here, the Board itself recognized that it lacked the power to decide the First Amendment question before it. "Even if we were to agree with the City and conclude that [§ 3505's] meet-and-confer requirement is unconstitutional," the Board explained, "we would lack authority to overturn or refuse to enforce the statute, absent controlling appellate authority directing that result." R. Vol. XI, at

3007–08. The Board continued: "If the parties believe that our decision fails to resolve any underlying constitutional issues, or that our decision intrudes on constitutional rights, they are free to seek redress in the courts[.]" *Id.* at 3017.

Because the Board did not decide, and could not have decided, whether the speech restrictions at issue violate the First Amendment, it cannot receive any deference on that point. Instead, this Court must decide the constitutional questions de novo. *See American Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570, 575 (2013).

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE MAYOR'S RIGHT TO SHARE HIS VIEWS ON PUBLIC ISSUES SUCH AS A CITIZENS' INITIATIVE ON PENSION REFORM.

A. The First Amendment Fully Protects Speech On Public Issues.

In categorical terms, the First Amendment to the United States Constitution states that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment extends that prohibition to the States. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664 (2015).

At its core, 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) (quotation marks omitted). It therefore protects "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).

By protecting speech on public issues, the First Amendment "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). When people "seek by petition to achieve political change ... their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer*, 486 U.S. at 421.

Because speech on public issues is essential to the political process, it is "more than self-expression; it is the essence of self-government." *Garrison v. State of La.*, 379 U.S. 64, 74–75 (1964). As a result, 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 (quotation marks omitted). This

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) (quotation marks omitted).

Under these principles, speech about the citizens' initiative was entitled to the highest degree of First Amendment protection. When Mayor Sanders announced his views on pension reform, the City's pension fund had an unfunded liability of about $2 billion, and the City was spending 20% of its annual budget on pensions. R. Vol. XI, at 3049–50. Those are undoubtedly issues of grave public concern. In addition, the citizens' initiative addressed them by proposing a change in "the manner in which government is operated," which is also a core public concern. *Mills*, 384 U.S. at 218–19. Speech about these issues "occupies 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—indeed, as the City's highest elected official. At least twice, the U.S. Supreme 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).

In *Wood v. Georgia*, an elected sheriff had been held in contempt "for expressing his personal ideas on a matter that was presently before the grand jury." 370 U.S. 375, 376 (1962). The State of Georgia argued 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. The Supreme Court disagreed. As for "the fact that petitioner was a sheriff," the Court "d[id] not believe this fact provide[d] any basis for curtailing his right of free speech." *Id.* at 394. The Court explained that the sheriff "was an elected official and had the right to enter the field of political controversy." *Id.* Moreover, "[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). Far from vitiating the First Amendment rights at issue, the sheriff's status as an elected official only reinforced them.[1]

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[1] The Board argues that *Wood* is irrelevant because the speech at issue there "was made in the sheriff's individual capacity." PERB

In *Bond v. Floyd*, 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." 385 U.S. at 118. In defense of that refusal, Georgia argued that "the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government." *Id.* at 136. Once again, the 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

(continued...)

Reply Br. 39. But the Supreme Court put little weight—if any—on that point. To be sure, the Supreme Court noted that "there was no finding by the trial court that the petitioner issued the statements in his capacity as a sheriff" and that the Georgia Court of Appeals "d[id] not articulate any specific reliance on this fact." *Wood*, 370 U.S. 393–94. But the Court then "assum[ed] that the Court of Appeals *did* consider to be significant the fact that petitioner was a sheriff," and expressly held that this fact *did not* provide "any basis for curtailing his right of free speech." *Id.* at 394. Thus, it did not matter whether the sheriff spoke as an elected official or as a private citizen—the First Amendment applied either way.

government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135–36.[2]

Together, *Wood* and *Bond* make clear that the First Amendment prohibits the government from silencing elected officials on matters of public concern.

There are many sound reasons for this rule. For one thing, were it otherwise, "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 radically transformed." *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990). Constituents elect representatives not only for their individual votes, but also for their ability to persuade others—to use the bully pulpit of their office in order to rally public support for important public undertakings. Elected officials are therefore "expected as a part of the democratic process to represent

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[2] The Board argues that *Bond* applies "only to 'legislators' not generally to 'elected officials.'" PERB Reply Br. 40. But the Board has not cited a single case suggesting that the First Amendment singles out legislators for such special treatment. And courts have repeatedly extended the First Amendment's protection to other elected officials. *See, e.g.*, *Wood*, 370 U.S. at 394–95 (holding that the First Amendment applies to an elected sheriff); *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007) (holding that the First Amendment applies to an elected judge); *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *18 (W.D. Tex. Aug. 30, 2017) (holding that the First Amendment applies to an elected sheriff).

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 by the person they have elected to represent them," *Bond*, 385 U.S. at 136–37. "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." *Keller*, 496 U.S. at 12.

Perversely, an elected-officials exception to the First Amendment would also silence people who often have the greatest insight into the public issue under consideration. As the U.S. Supreme Court has explained, government employees "are often in the best position to know what ails the agencies for which they work," and thus "public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). The same goes for elected officials: their job is to study and address public problems, and in doing so they may acquire unique or at least important insights. For example, the mayor of a city, as its chief executive officer, may have particularly important insights into the city's budgeting issues and long-term financial sustainability. Thus,