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San Jose Police Officers' Association

9 BEFORE THE ATTORNEY GENERAL  
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'  
12 ASSOCIATION,

13 Plaintiff-Relator,

14 v.

15 CITY OF SAN JOSE, and CITY OF  
16 SAN JOSE CITY COUNCIL,

17 Defendants.

No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF SJPOA'S  
APPLICATION FOR LEAVE TO SUE IN  
QUO WARRANTO**

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1 **I. INTRODUCTION**

2 Proposed Relator San Jose Police Officers' Association ("Relator" or  
3 "SJPOA") hereby applies for leave to sue in *quo warranto* because the proposed  
4 Defendants, City of San Jose and the San Jose City Council (collectively "the City"), have  
5 proceeded with a ballot measure designed to dramatically cut employee pension benefits  
6 without first completing the collective bargaining process with the SJPOA, as required by  
7 the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 *et seq.*<sup>1</sup> This

8 measure, which was entitled "Measure B" on the ballot, was passed by the San Jose  
9 electorate on June 5, 2012. The City's actions were illegal under longstanding case  
10 precedent, and the issue is one of great importance to the citizens of this State, making an  
11 action in *quo warranto* proper.

12 **II. FACTUAL HISTORY**

13 On April 13, 2011, the City of San Jose and Mayor Chuck Reed began a push  
14 to declare a "fiscal emergency," when Mayor Reed and Vice Mayor Nguyen issued a  
15 press release announcing that "San José's retirement director has projected that [pension]  
16 costs could rise to \$650 million per year by fiscal year 2015-2016 ...." (Verified  
17 Statement of Facts ("VSOF"), ¶ 4.) The City then published a Memorandum re: Fiscal  
18 Concerns on May 13, 2011, wherein Mayor Reed reiterated these assertions. (VSOF, ¶5.)

19 On June 20, 2011, the SJPOA and the City agreed to bargain over retirement  
20 benefit reforms and the Mayor's anticipated—but as yet unseen—ballot measure with the  
21 somewhat optimistic goal of reaching an agreement by October 31, 2011.<sup>2</sup> (VSOF, ¶10.)  
22 Over the following four months, the parties met approximately 13 times.<sup>3</sup> (VSOF, ¶¶ 13-

23  
24 \_\_\_\_\_  
25 <sup>1</sup> The MMBA (Gov. Code § 3500, *et seq.*) is the statutory scheme giving rise to and  
governing labor-management relations between the SJPOA and the City.

26 <sup>2</sup> The SJPOA did not waive its right to bargain over the City's ballot reform measures in  
the event negotiations were not completed by that date. (VSOF, ¶ 10.)

27 <sup>3</sup> The SJPOA was bargaining in coalition with firefighters represented by IAFF, Local  
28 230. (VSOF, ¶ 10.)

1 14) During these negotiations, the parties bargained over various proposals put forth by  
2 both the SJPOA and the City regarding pension reforms generally, as well as about the  
3 specific language of the City's then-proposed ballot measure. (VSOF, ¶ 14.)

4 Despite the City's repeated declarations that it was facing a "fiscal emergency"  
5 and its duty under the MMBA to bargain with the SJPOA over the proposed ballot  
6 measure, the City refused to engage in such further bargaining after October 31, 2011.

7 (VSOF, ¶ 15.) The City's refusal to bargain is underscored by the fact that the SJPOA

8 continued to make efforts to meet and confer, continued to make concessionary proposals,  
9 and never represented that any of its proposals were its last, best and/or final offer.

10 (VSOF, ¶ 15.) For example, on November 11, the SJPOA sent the City a revised

11 "Retirement Reform Proposal" that contained various concessions from its prior proposal,

12 including a lower retirement tier for new employees, a voluntary program to shift

13 employees from the City's retirement plan to a CalPERS retirement plan with reduced

14 benefits, and reductions in benefits for those who do not elect to move to CalPERS.

15 (VSOF, ¶ 15a.) Merely one week later, the SJPOA sent another proposal to the City,

16 which would seek to achieve the same savings without shifting individuals to CalPERS

17 and satisfy the City's desire to enshrine the pension reforms in the City Charter. (VSOF,

18 ¶ 15b.)

19 During this same timeframe, on November 15 and 16, 2011, the parties

20 participated in mediation, throughout which the City continued to maintain that the parties

21 were at impasse and insisted it was under no obligation to bargain with the SJPOA.

22 (VSOF, ¶ 17.) The mediation was unsuccessful.

23 But on November 22, 2011, the City unveiled a significantly-changed proposed

24 ballot measure. (VSOF, ¶ 19.) It differed from an earlier version the City passed on

25 October 27, 2011 in several ways, including (for current employees) changing the annual

26 accrual rates, minimum retirement ages, and costs of living adjustments. (VSOF, ¶¶ 19-

27 20.) Indeed, in a November 22, email to all employees, City Manager Debra Figone

28

1 described the revised ballot measure as “far different than the earlier version.” (VSOF,  
2 ¶ 20.)

3 Wishing to respond and bargain over the City’s newly-refined ballot measure,  
4 on December 1, 2011, SJPOA President Jim Unland sent a letter to Deputy City Manager  
5 Alex Gurza containing a Revised SJPOA “Retirement Proposal” reflecting further  
6 monetary concessions by the SJPOA, including a rollback to the retirement plan in place  
7 in 1997. (VSOF, ¶ 21.) The City still refused to meet and confer with the SJPOA,

8 continuing to assert that the parties were at impasse. (VSOF, ¶ 22.)

9 At the same time, the independent actuaries for the City’s Police and Fire  
10 Retirement System produced revised projections showing that the City’s retirement  
11 contribution to that system in Fiscal Year 2012–13 would be \$55 million *less than*  
12 previously predicted. (VSOF, ¶ 23.) The Mayor immediately scrapped plans to declare a  
13 “fiscal emergency” at the City Council meeting on December 6, 2011. (VSOF, ¶ 24.)  
14 But at that same meeting, the City Council, without providing the SJPOA with notice or  
15 an opportunity to bargain, approved yet another revised measure (drafted on December 5)  
16 for placement on the June 2012 election ballot. (VSOF, ¶ 25.) Thereafter, the City  
17 continued to insist that the parties remained at impasse, in spite of repeated pleas by the  
18 SJPOA to resume bargaining and concessionary offers by the SJPOA worth tens of  
19 millions of dollars per year. (VSOF, ¶¶ 26-28.)

20 While continuing to refuse to bargain with the SJPOA, Mayor Reed admitted  
21 in a February 9, 2012 televised interview on NBC Channel 11 that, all along, the sole  
22 source for the \$650 million figure was an isolated oral statement by the City’s Retirement  
23 Services Director, Russell Crosby. (VSOF, ¶ 29.) But in an interview that was part of the  
24 same news story, Mr. Crosby stated that the \$650 million estimation “was a number off  
25 the top of my head” and “[t]he Mayor was told not to use that number, that the number  
26 was 400 [million dollars], that was the projection.” (VSOF, ¶ 29.) In fact, in February  
27 2012, the City retirement system’s actuaries projected that pension costs for Fiscal Year  
28

1 2015-16 will be approximately \$310 million, *less than half* of the amount the City had  
2 been publicizing. (VSOF, ¶ 32.)

3 Even though it was then clear that the City lacked any basis for its alleged  
4 “fiscal crisis,” on February 21, 2012, the City’s Director of Labor Relations provided the  
5 SJPOA with yet another version of the City’s “Pension Plan Amendments” ballot  
6 proposition and informed the SJPOA that the City Council would take a final vote on  
7 March 6, 2012 to place it on the June 2012 election ballot. (VSOF, ¶ 30.) In a

8 memorandum attached to the draft, City Manager Debra Figone admitted that it contained  
9 “many significant changes and movements from earlier drafts.” (VSOF, ¶ 31.) These  
10 included, *inter alia*, changes to the penalties that would accrue for individuals who did not  
11 “volunteer” for the new reduced tier. (VSOF, ¶¶ 30-31.) The new version also included  
12 new language moving the effective date for one key provision to June 23, 2013. (VSOF,  
13 ¶ 30.)

14 On February 24, 2012, the SJPOA sent a letter to Deputy City Manager Alex  
15 Gurza requesting that the City reconvene bargaining in light of the foregoing admission  
16 and the fact that the SJPOA “had no opportunity to bargain about this new ballot  
17 language.” (VSOF, ¶ 33.) But in a February 27, 2012 response, Deputy City Manager  
18 Alex Gurza expressly conditioned any resumption of bargaining on the SJPOA (1) making  
19 a concession that the City deemed, in its subjective opinion, to be “sufficient” and (2) that  
20 such concession be capable of being “ratified prior to March 6.” (VSOF, ¶ 34.)

21 In an attempt to meet the City’s demands, the SJPOA sent a new proposal to  
22 the City on March 2, 2012 that guaranteed tens of millions of dollars in savings per year to  
23 the City. (VSOF, ¶¶ 36-37.) The City responded on March 5, 2012 by admitting that the  
24 SJPOA had made significant movement on a number of issues. (VSOF, ¶ 38.)  
25 Nonetheless, the City rejected the SJPOA’s request to resume bargaining because,  
26 according to the City, the timing of the proposal “render[ed] further bargaining  
27 impractical [before] March 6<sup>th</sup>—the final City Council meeting before the last date to  
28 place this measure on the June 2012 ballot.” (VSOF, ¶ 38.)

1           On March 6, 2012, the San Jose City Council passed a resolution ordering that  
2 the “Pension Plan Amendments” ballot proposition be placed on the June 5, 2012 ballot.  
3 (VSOF, ¶ 39.) At the meeting, the City counsel also added to the ballot proposition a  
4 provision dictating that, if adopted by the voters, the City would file a lawsuit seeking a  
5 declaratory judgment on the legality of its various pension reduction provisions. (VSOF,  
6 ¶ 39.) Measure B was printed on the June 2012 ballot, and passed by the San Jose  
7 electorate on June 5, 2012. (VSOF, ¶ 41.)

8           Consequently, despite a significant change in City's financial projections  
9 regarding retirement costs, the City vastly changing the language of its ballot measure  
10 during the relevant time frame, and repeated concessionary proposals by the SJPOA, the  
11 City refused to bargain with the SJPOA over the ballot measure from November 2011  
12 until March 6, 2012, when the City Council voted to approve the ballot measure going to  
13 the voters. In taking these unilateral actions without satisfying its bargaining obligation,  
14 the City committed a *per se* refusal to bargain under the MMBA. (See *California State*  
15 *Employees' Assn.* (1996) 51 Cal.App.4th 923, 934.)

### 16 **III. DISCUSSION**

#### 17 **A. Standards for Granting Leave to Sue in *Quo Warranto***

18           California Code of Civil Procedure section 803 states:

19           An action may be brought by the attorney-general, in the name of  
20 the people of this state ... upon a complaint of a private party,  
21 against any person who usurps, intrudes into, or unlawfully holds or  
22 exercises any public office, civil or military, or any franchise, or  
23 against any corporation, either de jure or de facto, which usurps,  
24 intrudes into, or unlawfully holds or exercises any franchise, within  
25 this state. And the attorney-general must bring the action, whenever  
26 he has reason to believe that any such office or franchise has been  
27 usurped, intruded into, or unlawfully held or exercised by any  
28 person, or when he is directed to do so by the governor.

“In determining whether to grant leave to sue in quo warranto the Attorney General  
considers (1) whether the application has raised a substantial question of fact or issue of

1 law which should be decided by a court and (2) whether it would be in the public interest  
2 to grant leave to sue.” (76 Ops. Cal. Atty. Gen. 169, 171)

3 It should be borne in mind that in passing on applications for leave to  
4 sue in quo warranto, the Attorney General ordinarily does not decide  
5 the issues presented, but determines only whether or not there is a  
substantial question of law or fact which calls for judicial decision.

6 (25 Ops. Cal. Atty. Gen. 237, 240 (emphasis added) [citing 17 Ops. Cal. Atty. Gen. 46,  
7 47; 24 Ops. Cal. Atty. Gen. 146, 151-52]; see also 19 Ops. Cal. Atty. Gen. 87; 17 Ops.  
8 Cal. Atty. Gen. 136; 19 Ops. Cal. Atty. Gen. 46.)

9 The California courts agree with this position. For example, in *International*  
10 *Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698, the Court of  
11 Appeal stated the following:

12 [I]n a case within a statute authorizing the attorney general or state’s  
13 attorney to institute the proceeding, or apply for leave of court to  
14 institute it, at the insistence of private persons, if private rights or  
15 grievances are involved, the consent of the officer is essential, but  
16 he has no arbitrary and uncontrolled discretion; the only discretion  
17 vested in him is to determine whether the documents and evidence  
presented to him are in proper legal form and prima facie sufficient,  
and, if they are, it is his duty to sign the petition and present it to the  
court.

18 In the present case, the proposed Relator has shown it has a *prima facie* case  
19 against the City for its illegal actions. The proposed complaint, the facts summarized  
20 *supra*, and the discussion below set forth that the City failed to satisfy its obligation to  
21 meet and confer with the SJPOA before putting a ballot measure which amended the  
22 City’s charter up for a vote. As stated previously by the California Attorney General,  
23 “[w]hether [a charter] amendment is valid or not presents substantial questions of fact and  
24 law with respect to the actions of the parties in complying with the provisions of the  
25 MMBA.” (76 Ops. Cal. Atty. Gen. 169, 172.) Therefore, it is clear that the proposed  
26 Relator’s application contains substantial questions of law and fact.

1           **B. Pursuant to the Meyers-Miliias-Brown Act, the City Was Required to**  
2           **Bargain With the SJPOA Prior to Deciding to Place Measure B**  
3           **Before the Voters, But It Failed to Fulfill This Obligation**

4           Under the MMBA, a city is “required to meet and confer with [an impacted  
5           union] *before* it propose[s] charter amendments which affect matters within their scope of  
6           representation.” (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*  
7           (1984) 36 Cal.3d 591, 602 [emphasis added]). “A public employee's pension constitutes  
8           an element of compensation” (*Betts v. Board of Administration* (1978) 21 Cal.3d 859,  
9           863) and, as such, is a mandatory subject of bargaining (*Claremont Police Officers Ass'n*  
10          *v. City of Claremont* (2006) 39 Cal.4th 623, 634). Here, the SJPOA is the exclusive  
11          bargaining representative under the MMBA for City-employed police officers. (VSOF,  
12          ¶ 2.)

13          Consequently, for purposes of proposing a charter amendment that would  
14          impact the pension rights of the City's police officers, the City must meet and confer in  
15          good faith with the SJPOA over the proposed amendment. (Gov. Code §§ 3504, 3505).  
16          The City cannot unilaterally reduce police officers' benefits through a charter amendment  
17          without providing the SJPOA with reasonable notice and a full opportunity to bargain,  
18          resolve any differences, and reach agreement prior to implementation. (Gov. Code §  
19          3504.5.) Moreover, the City's duty to bargain is not reduced or excused simply because it  
20          may have believed the proposed charter amendment was important in light of its alleged  
21          fiscal crisis. (See *Santa Clara County Registered Nurses Assoc.* (“*Santa Clara Nurses*”)  
22          (2010) PERB Decision No. 2120-M, p. 17 [“The mere fact that [a public employer]  
23          thought the inclusion of the measure on the ... ballot was desirable does not constitute a  
24          compelling operational necessity sufficient to set aside its bargaining obligation.”])<sup>4</sup>

25          <sup>4</sup> The Public Employment Relations Board (“PERB”) is the California administrative  
26          agency generally charged with construing and administering the MMBA. (Gov. Code §§  
27          3501 and 3509.) While PERB does not have jurisdiction over cases involving labor  
28          associations representing police officers (Gov. Code § 3511), courts give great deference  
29          to its construction of the labor statutes within its purview. (*Banning Teachers Assn. v.*  
30          *Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804–805.)

1           Given its duties under the MMBA, the City could only vote the pension reform  
2 measure onto the ballot after bargaining to agreement or impasse with the SJPOA. (See  
3 *Santa Clara Nurses*, PERB Decision No. 2120-M, at p.14 [“the County breached its duty  
4 to meet and confer in good faith when it failed to bargain the Prevailing Wage Measure to  
5 agreement or impasse prior to placing it on the ballot”].) While the parties obviously did  
6 not reach an agreement, they also did not reach an impasse over the City’s pension reform  
7 proposals, as evidenced by the City’s repeated (and admitted) revisions to those proposals  
8 and the SJPOA’s repeated efforts to meet and confer and make concessionary proposals,  
9 as detailed above. Placing the proposed charter amendments on the ballot without  
10 bargaining to agreement or impasse was a violation of the MMBA. Indeed, prior to  
11 reaching impasse “[a]n employer’s unilateral change in terms and conditions of  
12 employment within the scope of representation is, absent a valid defense, a per se refusal  
13 to negotiate ....” (*California State Employees’ Assn.*, *supra*, 51 Cal.App.4th at 934  
14 [emphasis added].) Because the City did not reach an impasse with the SJPOA, it was  
15 required to continue bargaining, and its failure to do so while changing the terms and  
16 conditions of the City’s police officers’ retirement and disability benefits constitutes a  
17 violation of the MMBA.

18           In light of the foregoing, the SJPOA has presented a prima facie case that the  
19 City improperly placed Measure B before the San Jose electorate and, consequently,  
20 whether the charter amendments to be effected by Measure B are valid. And “[w]hether  
21 [a charter] amendment is valid or not presents substantial questions of fact and law with  
22 respect to the actions of the parties in complying with the provisions of the MMBA” and  
23 satisfies the prerequisites to suing in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172.)

24           **C. The City’s Failure to Bargain Constitutes an Illegal Exercise of a**  
25           **Franchise Which Is Only Remedied Through an Action in *Quo***  
26           ***Warranto***

27           As noted *supra*, the Supreme Court held that a charter city must comply with  
28 the meet and confer requirements of the MMBA before it proposes an amendment  
concerning the terms and conditions of public employment to its charter. (*Seal Beach*, 36

1 Cal.3d at 602.) And it is well established that, for purposes of suing under Code of Civil  
2 Procedure section 803 (“Section 803”), “[a] city charter is ... a franchise. ...[and i]t has  
3 long been held that the proper remedy to attack the validity of a city charter amendment is  
4 through a quo warranto action.” (76 Ops. Cal. Atty. Gen. 169, 171 [citing *Seal Beach*,  
5 *supra*, 36 Cal.3d at 595]; *Oakland Municipal Improvement League v. City of Oakland*  
6 (1972) 23 Cal.App.3d 165, 168-169.)

7 ~~[P]ublic corporations of any character whatsoever, exercising~~  
8 governmental functions, do so by reason of a delegation to them of  
9 a part of the sovereign power of the state. Where they are claiming  
10 to act and are actually functioning without having complied with the  
11 necessary prerequisites, they are usurping franchise rights as against  
paramount authority, to complain of which it lies only within the  
right of the state itself.

12 (*Int’l Ass’n of Fire Fighters, supra*, 174 Cal.App.3d at 694 [quoting *Van Wagener, supra*,  
13 58 Cal.App. at 120.] “Since an action in the nature of quo warranto will lie to test the  
14 regularity of proceedings by which municipal charter provisions have been adopted, it  
15 follows that, once those provisions have become effective, their procedural regularity may  
16 be attacked *only* in quo warranto proceedings.” (*Id.* at 694 [emphasis added] [citing  
17 *Taylor v. Cole* (1927) 201 Cal. 327, 333, 338-340]

18 Thus, the Attorney General has “upon prior occasions granted leave to sue in  
19 quo warranto in charter amendment challenges” similar to the present matter. (76 Ops.  
20 Cal. Atty. Gen. at 172 [citing *Seal Beach, supra*, 36 Cal.3d at 595]; see also *City of Fresno*  
21 *v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 89 [citing  
22 76 Ops. Cal. Atty. Gen. 169].) In fact, as recently as June 11, 2012, the Attorney General  
23 granted leave to sue in *quo warranto* to the Bakersfield Police Officers Association in a  
24 matter with close similarities to the present matter, where the association alleged that the  
25 City of Bakersfield failed to comply with its meet and confer obligation prior to placing a  
26 pension reform measure before the city’s electorate.

27 Under the above-referenced authorities, an action in *quo warranto* is the  
28 necessary and proper procedure to challenge the validity of Measure B and its revisions to

1 the San Jose City Charter. The SJPOA alleges and has presented a *prima facie* case that  
2 the City of San Jose usurped the franchise rights granted to it by the State of California  
3 when it refused to meet and confer or otherwise bargain with the SJPOA about its  
4 proposed charter amendments prior to placing Measure B before the San Jose electorate.  
5 These prerequisites having been met, the SJPOA's Application for Leave to Sue in  
6 *Quo Warranto* should be granted. (*Int'l Ass'n of Fire Fighters, supra*, 174 Cal.App.3d at  
7 698 ["the only discretion vested in [the Attorney General] is to determine whether the  
8 documents and evidence presented to him are in proper legal form and *prima facie*  
9 sufficient, and, if they are, it is his duty to sign the petition and present it to the court"].)  
10 "[w]hether [a charter] amendment is valid or not presents substantial questions of fact and  
11 law with respect to the actions of the parties in complying with the provisions of the  
12 MMBA." (76 Ops. Cal. Atty. Gen. 169, 172.)

13  
14 **D. The SJPOA's Proposed Action in *Quo Warranto* Is of Great  
Importance to the Citizens of This State**

15 The MMBA reflects the strong public policy of the State of California of  
16 avoiding labor strife and ensuring that labor disputes are settled through the processes  
17 delineated. (See Gov. Code § 3500; *International Assn. of Fire Fighters Union v. City of*  
18 *Pleasanton* (1976) 56 Cal.App.3d 959, 968.) Thus, the crux of the dispute—i.e., whether  
19 the City satisfied its obligations under the MMBA—not only implicates the rights of  
20 hundreds of thousands of municipal employees throughout California, but the broader  
21 public policy served by California's labor relations statutes.

22 Moreover, because Measure B would reduce pension benefits for current  
23 employees and retirees, it implicates benefits that are indisputably subject to protection  
24 under the "contracts"<sup>5</sup> clause of the California State Constitution. (*Kern v. City of Long*  
25 *Beach* (1947) 29 Cal. 2d 848, 851-53 ["...public employment gives rise to certain  
26 obligations which are protected by the Contract Clause of the Constitution..."].) Thus, a

27  
28 <sup>5</sup> Cal. Const., Art. I, Sec. 9 ("a ... law impairing the obligation of contracts may not be  
passed.").

1 determination as to the propriety of the charter amendments called for in Measure B is  
2 likely to impact the rights and obligations of employees and their employers throughout  
3 the State of California.

4 In light of these broad policy implications, the California Attorney General has  
5 previously concluded in matters similar to the present controversy that it is in the public  
6 interest to permit suit in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172 [“We believe  
7 that *Seal Beach* governs here and that the same public interest and purposes are present: to  
8 resolve important questions of fact and law and to settle labor strife in the public sector.];  
9 June 11, 2012 Attorney General Decision No. 11-702 [“we conclude that the question of  
10 Measure D’s validity, and that of the [pension] ordinances it gave rise to, are matters of  
11 public interest, and that it would therefore serve the public interest for them to be  
12 properly adjudicated”].) As in those instances, leave to sue in *quo warranto* should be  
13 granted here.

14 **IV. CONCLUSION**

15 For the foregoing reasons, the San Jose charter amendments enacted on the  
16 June 5, 2012 ballot constitute an illegal exercise of a franchise by the City and a public  
17 harm. *Quo warranto* is the proper and exclusive method for remedying this harm.  
18 Therefore, the SJPOA respectfully requests that its application for leave to sue in *quo*  
19 *warranto* be granted.

20  
21 Dated: June 21, 2012

22 CARROLL, BURDICK & McDONOUGH LLP

23  
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