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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SANTA CLARA

12 SAN JOSE POLICE OFFICERS'
13 ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE
17 AND FIRE DEPARTMENT
RETIREMENT PLAN OF CITY OF
18 SAN JOSE, and DOES 1-10,
inclusive,

19 Defendants.
20
21
22

No.

**SAN JOSE POLICE OFFICERS'
ASSOCIATION'S *EX PARTE* APPLICATION
FOR A TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT
ISSUE PROHIBITING IMPLEMENTATION OF
MEASURE B SECTIONS 9-13**

AND

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF *EX PARTE*
APPLICATION**

Date: June 6, 2012

Time: 8:15 a.m.

Place: TBD

1 **EX PARTE APPLICATION**

2 Plaintiff San Jose Police Officers' Association ("Plaintiff" or "SJPOA") moves
3 *ex parte* for a Temporary Restraining Order ("TRO") and Order to Show Cause ("OSC")
4 as to why a preliminary injunction should not issue enjoining Defendant City of San Jose
5 ("the City") and Defendant Board of Administration ("the Board") of the 1961 Police and
6 Fire Department Retirement Plan ("the Retirement Plan") from implementing or otherwise
7 giving effect to portions of a ballot measure that will dramatically cut and/or eliminate
8 employee pension benefits.

9 Measure B repeatedly violates the constitutionally-protected pension rights of
10 Police Officers¹; however, Plaintiff initially only seeks to enjoin implementation of four
11 specific provisions because of the immediate irreparable harm they will cause:

12 (1) Section 1509-A essentially eliminates the availability of disability
13 retirement for Police Officers injured in the line of duty by
detrimentally changing the qualifications for disability retirement;

14 (2) Section 1511-A eliminates entirely the Supplemental Retiree
15 Benefit Reserve ("SRBR"), which provides Police Officers an
16 additional benefits check once per year when they retire when certain
investment goals are met. If the SRBR is eliminated, that benefit will
not be available once Police Officers retire;

17 (3) Section 1512-A will effect at least a 6% salary reduction by
18 dramatically increasing Police Officers' contribution rate for retiree
healthcare costs;

19 (4) Section 1513-A dilutes the constitutionally-based fiduciary duties
20 of the Board to ensure the Retirement Plan is run solely for the interest
21 of current and future beneficiaries by compelling the Board, *inter alia*,
22 to consider "any" risk to the City and taxpayers in its actuarial analyses.

23
24 ¹ Though several offending provisions of Measure B will not take effect immediately, all
25 implementing ordinances are to be in effect by September 30, 2012. The provisions
26 described below, however, have no phase-in provisions and do not obviously require
27 implementing ordinances, so, as the supreme law of the City of San Jose, they would on
28 their face govern. Indeed, Deputy City Manager Alex Gurza conceded at a May 3, 2012
meeting of the Board that some provisions will go into effect, while others will be delayed
or may require implementing ordinances. His statements in this regard may be viewed at
<http://sanjose.granicus.com/MediaPlayer.php?view_id=2&clip_id=5736>. The relevant
discussion begins approximately at 2:49:43 in the video.

1 All of these modifications to the Retirement Plan substantially impair Police Officers’
2 vested and protected rights without being accompanied by any comparable new benefit.

3 If implemented, the challenged sections of Measure B will cause numerous
4 immediate and irreparable harms to Police Officers by violating their contractual and
5 constitutionally-protected rights, as the impairment of these rights cannot be fully undone
6 once made effective. The most egregious of these harms will flow from the elimination of
7 the retirement disability benefit and financially-crippling decreases in take home pay
8 associated with the implementation of Measure B.

9 The importance of disability retirement benefits to protect officers who are
10 injured in the line of duty and their families cannot be overstated. Police Officers’ daily
11 job duties necessarily subject them to an increased risk of injury compared to the general
12 public. A sampling of the injuries Police Officers have suffered while on duty include: a
13 gunshot wound to the abdomen, catastrophic injuries to ankles, knees, and shoulders while
14 pursuing suspects, and a broken neck and fractured thoracic spine.² Measure B would
15 eliminate the current guarantee of retirement benefits for these and all SJPOA members
16 who have or will suffer such on-the-job injuries, leaving them without means to provide
17 for themselves and their families. Indeed, for Police Officers Tina Boales, Mike Albin
18 and Devlin Creighton, this irreparable harm is imminent, as they have already suffered
19 catastrophic injuries in the line of duty, but will not be evaluated for disability retirement
20 until after Measure B is implemented—unless such implementation is enjoined.

21 The financial impact of Measure B will also cause irreparable harm. Prior pay-
22 cuts and large increases in salary deductions to pay for benefits have left many officers
23 struggling to make ends meet. The additional salary deductions effected by Measure B
24 will force these officers into financial ruin because they will be unable to pay for basic

25 ² See Decl. of D. Ichige, ¶ 9 [shot in the abdomen by a suspect]; Decl. of E. Navarro, ¶4
26 [while pursuing suspect suffered compound fracture to fibula and tibia requiring surgery
27 to put in 3 plates and more than 30 screws to stabilize]; Decl. of M. Albin, ¶ 10 [while
28 protecting fellow officer suffered severe knee injury requiring surgery]; Decl. of T.
Boales, ¶ 10 [tore rotator cuff pursuing suspect]; and Decl. of D. Creighton, ¶ 12 [broken
neck and fractured thoracic spine from motorcycle accident while on patrol].

1 living expenses, including care for elderly parents, and many risk losing their homes as a
2 result. A subsequent monetary remedy cannot make these individuals whole.

3 The other impacts of Measure B addressed herein, including the outright
4 elimination of the SRBR fund and changes to the fiduciary duties of the Board, are also
5 irremediable through normal legal means. Therefore, all these harms should be prevented
6 with a temporary restraining order and preliminary injunction preserving the *status quo*
7 *ante* until a full determination of the legality of Measure B is made on the merits.

8 These papers succinctly explain how these provisions of Measure B, as applied
9 to the SJPOA's members, violate decades of established law:

- 10 • Police Officers' pension rights are constitutionally-protected vested
11 rights that cannot be legislated away by a ballot measure under
California law.
- 12 • Sections 1509-A and 1511-A through 1513-A violate the contract
13 clause of the California Constitution by unilaterally changing the
14 pension rights of Police Officers, without providing Police Officers any
new comparable advantages or having any relation to keeping the
pension system viable;
- 15 • Section 1512-A additionally violates the parties' labor contract and
16 governing labor laws by unilaterally changing Police Officers'
17 obligations to pay for retiree healthcare costs, thus entitling the SJPOA
to an injunction to preserve the labor arbitrator's jurisdiction pending
grievance arbitration of the dispute.
- 18 • Section 13 violates the California Pension Protection Act, Cal. Const.
19 art. XVI, section 17 by abrogating the Board's fiduciary duties to
current or future beneficiaries.

20 The traditional factors for granting preliminary injunctive relief strongly
21 support preservation of the *status quo ante* until the Court can determine whether a
22 permanent injunction is appropriate. Several factors demonstrate that the SJPOA is likely
23 to prevail on the merits. *First*, “[p]ension rights of police officers provided by city
24 charters [and municipal codes] are considered part of their compensation, serve as
25 incentives toward public service, and vest at the time of their employment.” (*Newman v.*
26 *City of Oakland Retirement Board* (1978) 80 Cal.App.3d 450, 458.) As such, although
27 the SJPOA's members are not yet retired, they have a constitutionally-protected right to
28 the retirement system in place when they began working for the City, as well as any

1 enhancements made during their employment. *Second*, the increased salary deductions
2 violate their collective bargaining contract with the City and, with it, state law. *Third*, the
3 City cannot abrogate the fiduciary duties of the Board without violating the California
4 State Constitution.

5 And as summarized *supra*, the SJPOA and its members will suffer severe and
6 irreparable harm if the above-described portions of Measure B go into effect.

7 Furthermore, because Plaintiff merely asks for an injunction to maintain the *status quo*
8 *ante*, the City cannot show any irreparable harm by complying with the pension rights as
9 they existed before Measure B was passed by the voters. The City thus suffers no
10 cognizable harm if the challenged sections of Measure B are enjoined, by contrast to the
11 immediate and irreparable harm Police Officers will suffer.

12 As outlined in the Declaration of Jonathan Yank (“Yank. Decl.”) (¶¶ 15-17)
13 filed concurrently with this *Ex Parte* Application, the SJPOA has complied with the
14 applicable notice provisions mandated by California Rules of Court, Rule 3.1203, and this
15 is the first *ex parte* application made by Plaintiff. In addition, in compliance with
16 California Rules of Court, Rule 3.1202, SJPOA represents that it has reason to believe that
17 the City will be represented by:

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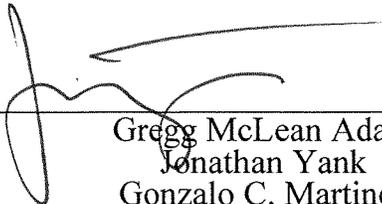
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10 Dated: June 5, 2012

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12 By _____

13 
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF FACTS

3 A. The Parties

4 Plaintiff SJPOA represents over a thousand individuals working in Police
5 Officer classifications employed by the City of San Jose (“Police Officers”).

6 Defendant the City is a charter city that employs the members of the SJPOA
7 and established the Retirement Plan. The City is governed by the San Jose City Charter
8 (“Charter”) and superseding state law. The Retirement Plan is administered by Defendant
9 the Board, whose fiduciary duties are solely to current and future beneficiaries. The
10 Board has no authority to change the structure or implementation of the Retirement Plan.

11 The Charter obligates the City to establish and maintain a retirement plan for
12 its employees and sets minimum benefits. (Yank Decl. / Request for Judicial Notice
13 (“RJN”) Ex. 4.) The specific Retirement Plan applicable to Police Officers is contained in
14 the Charter and Municipal Code. (Yank Decl. / RJN Exs. 2, 4.) Other terms and
15 conditions of SJPOA members’ employment, including their right to retiree medical
16 benefits and their current salaries, are governed by a memorandum of agreement
17 (“MOA”—a collective bargaining agreement) between the SJPOA and the City, which
18 was entered into pursuant to the Meyers-Milias-Brown Act (“MMBA”), Government
19 Code section 3500 *et seq.* (Yank Decl. / RJN Ex. 3.) The Retirement Plan is funded by
20 contributions from employees and the City, as specified in the funding provisions of the
21 Charter and Municipal Code. (See Yank Decl. / RJN Ex. 4.)

22
23 B. The City Council Placed Measure B on the Ballot to Push Its
Retirement Costs Onto Current Employees, Including Police Officers

24 In spring 2011, San Jose Mayor Chuck Reed issued a press release announcing
25 that “San José’s retirement director has projected that [pension] costs could rise to \$650
26 million per year by fiscal year 2015-2016” (Yank Decl., ¶ 3.) Over the ensuing
27 months, the SJPOA and the City engaged in collective bargaining regarding police
28 retirement benefits, during which the City repeatedly asserted the \$650 million figure.

1 (Yank Decl., ¶ 5.) Relying on these representations, the SJPOA offered concessions that
2 would dramatically reduce Police Officers' pensions. (Yank Decl., ¶ 5.) Instead, the City
3 used the \$650 million figure to maximize political support for a fiscal emergency
4 declaration and ballot measure that would undermine the vested pension rights of its
5 employees. (Yank Decl., ¶¶ 4-6.)

6 The City's finances are not as bleak as it had represented. In February 2012,
7 the City retirement system's actuaries projected that all pension costs for FY 2015-16
8 would be approximately \$310 million, less than half the level the City had represented.
9 (Yank Decl., ¶ 8.) And on March 9, 2012, the Mayor announced that the City has a
10 budget surplus of \$10 million. (Yank Decl., ¶ 9.)

11 In the midst of this positive economic news, the Mayor withdrew his proposal
12 for a declaration of fiscal emergency on December 6, 2011. (Yank Decl., ¶ 7.)
13 Nonetheless, the City Council placed its pension ballot measure before the voters as
14 "Measure B." (Yank Decl., ¶ 10.) The voters subsequently enacted Measure B, as
15 revised, on June 5, 2012.

16
17 **C. Measure B Will Immediately and Detrimentially Change Police
Officers' Pension Rights and Reduce Their Contractual Salaries**

18 Measure B makes several unlawful changes to Police Officers' retirement
19 benefits, none of which are reasonable, related to the theory or purpose of the Retirement
20 Plan, or accompanied by any new benefits to affected employees. These changes include:
21 (1) eviscerating disability retirement benefits; (2) outright elimination of the Supplemental
22 Retiree Benefit Reserve ("SRBR"), which pays an additional pension benefit once per
23 year, when certain requirements are met; (3) a financially-crippling increase in retiree
24 healthcare contributions; and (4) impairment of the constitutionally-based fiduciary duties
25 of the Board, which exist to ensure that the Retirement Plan is run solely for the interest of
26 beneficiaries. Cumulatively, these changes will have a devastating impact on individual
27 Police Officers and on the police department.

1 **II. PLAINTIFF IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND ORDER TO**
2 **SHOW CAUSE ENJOINING IMPLEMENTATION OF MEASURE B**

3 Injunctive relief is appropriate because Plaintiff SJPOA is likely to prevail in
4 challenging the legality of the challenged sections of Measure B and because allowing
5 their implementation will irreparably injure the SJPOA and its members. (Code Civ. Proc.
6 § 526(a)). This *ex parte* motion should be granted because the facts set forth in the
7 SJPOA's Complaint and in the supporting declarations establish that irreparable injury
8 will result before this matter can be heard on regular notice. (Code Civ. Proc. § 527
9 (c)(1); *see Dickey v. Rosso* (1972) 23 Cal.App.3d 493, 497-98.)

10 **A. Plaintiff Is Likely to Prevail on the Merits of its Claims that the**
11 **Challenged Sections of Measure B are Unlawful as Applied to**
12 **Current Police Officers**

12 As detailed below, our courts have safeguarded the pension rights of municipal
13 employees, especially when municipalities enact "change[s] ... designed to benefit [only]
14 the city," and even when designed "to [placate] the objections of taxpayers" (*Wallace*
15 *v. City of Fresno* (1954) 42 Cal.2d 180, 185.)¹ For that reason, SJPOA is likely to succeed
16 on the merits of its claims.

17 **1. Measure B Violates the Vested Rights Doctrine Because It**
18 **Is Not Reasonable, It Is Not Related to the Theory or**
19 **Purpose of a Pension, and It Does Not Provide Any**
20 **Comparable New Advantages for Police Officers to Offset**
21 **the Reductions it Imposes**

20 Under decades of California case law, pension rights of public employees are
21 constitutionally-protected deferred compensation. "A public employee's pension
22 constitutes an element of compensation, and a vested contractual right to pension benefits
23 accrues upon acceptance of employment. Such a pension right may not be destroyed,

24 _____
25 ¹ That Measure B applies only prospectively does not cure its illegality, because it
26 substantially impairs Police Officers' rights to proceed under the Retirement Plan. (See
27 *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695,
28 704 [holding that "prospective" reduction in benefits "is nevertheless a substantial
reduction in the pension [rights] which could have been earned under" the pre-existing
retirement plan]; *Carman v. Alvord* (1982) 31 Cal.3d 318, 325 [employees have "right to
earn future pension benefits through continued service, on terms substantially equivalent
to those" existing at the time they began working for the city].)

1 once vested, without impairing a contractual obligation of the employing public entity.”
2 (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *Allen v. City of Long Beach*
3 (1955) 45 Cal.2d 128, 131; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 [an
4 “employing governmental body may not deny or impair the contingent liability [of
5 pensions] any more than it can refuse to make the salary payments which are immediately
6 due”]); *Carman, supra*, 31 Cal.3d at p. 325; *Frank v. Board of Administration* (1976) 56
7 Cal.App.3d 236, 242.) These rights “vest[] in such a sense that [they] cannot be destroyed
8 by charter amendment even before the time for retirement has arrived.” (*Houghton v. City*
9 *of Long Beach* (1958) 164 Cal.App.2d 298, 305.)

10 The Charter and Municipal Code sections that define the Retirement Plan
11 create such vested rights. “Where ... services are rendered under ... a pension statute, the
12 pension provisions become a part of the contemplated compensation for those services,
13 and so in a sense of a part of the contract of employment itself.” (*O’Dea v. Cook* (1917)
14 176 Cal. 659, 661-662.) Accordingly, public employees have the “right to earn future
15 pension benefits through continued service, on terms substantially equivalent to those”
16 existing at the time they began working for the City, or enhanced during their service with
17 the City. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 528; *Carman, supra*, 31 Cal.3d at p.
18 325; *Sweesy v. Los Angeles County Peace Officers’ Retirement Board* (1941) 17 Cal.2d
19 356 [since public employees do not have a right to a pension at a defined amount they are
20 entitled to subsequent benefit increases]; *Kern, supra*, 29 Cal.2d at p. 855 [even though
21 pension right vests immediately upon employment, “the amount, terms and conditions [of]
22 the benefits may be” increased].) The right to pension benefits vests at employment, even
23 if the entitlement to benefits does not mature until retirement or disability. (See *Wallace,*
24 *supra*, 42 Cal.2d at p. 183.)

25 Once vested, pension rights may only be modified if “[s]uch modifications
26 [are] reasonable,” meaning that any “alterations [to] employees’ pension rights must bear
27 some material relation to the theory of a pension system and its successful operation, *and*
28 *changes in a pension plan which result in disadvantage to employees should be*

1 accompanied by comparable new advantages.” (*Betts, supra*, 21 Cal.3d at p. 864 [italics
2 original]; *Eu, supra*, 54 Cal.3d at 529 [“there are strict limitations on the conditions which
3 may modify the pension system in effect during employment”].)

4
5 **a. Section 1509-A Redefines “Disability” and Imposes
6 Burdensome Requirements Eviscerating the Benefit**

7 The constitutional principles outlined above apply fully to disability retirement
8 rights, even before an employee is actually disabled. (*Frank, supra*, 56 Cal.App.3d at p.
9 243 [“[n]o reason exists . . . to apply a different rule to disability retirement benefits than
10 to service retirement benefits”].) Accordingly, Police Officers have a vested right to the
11 definition of disability retirement in place before Section 1509-A was enacted.

12 Whereas pre-Measure B Charter section 1504 defined disability as an officers’
13 inability to perform the duties of his or her position and the duties of an officer “*in the*
14 *same classification*” (Yank Decl. / RJN Ex. 4 [emphases added]), Measure B would
15 impose several new requirements. *First*, before an officer can be found to be disabled he
16 or she must be unable to “perform any other jobs . . . *in the employee’s department.*”
17 (Yank Decl. / RJN Ex. 1, Measure B section 1509-A(b)(ii)(2) [emphasis added].) *Second*,
18 to be eligible “[t]o receive any disability retirement benefit” such employee must also be
19 “incapable of engaging in *any* gainful employment for the City.” (*Id.* at 1509-A(a).)
20 *Third*, Section 1509-A requires that a disability retirement assessment be made even if
21 there are no positions for which an otherwise-disabled police department employee may
22 be eligible—*i.e.*, even if there are no vacancies for such jobs. (*Id.*, generally.) Finally,
23 Section 1509-A does not require the City to retain an otherwise-disabled Police Officer,
24 even when a qualifying vacancy is available. (*Id.*, generally.) These changes unlawfully
25 divest Police Officers of a constitutionally-protected vested right.

26 In *Frank*, a correctional employee was excluded from participating in the
27 disability retirement program that existed when he was first hired because the Legislature
28 amended various statutes and reclassified his position as a non-law enforcement
classification right before he retired, resulting in a significantly-diminished pension. (56

1 Cal.App.3d at pp. 238-240.) The court of appeal held that the employee had a vested
2 contractual right to continue in the same retirement system he was hired into. (*Id.* at pp.
3 241-243.) It further held that the state’s modification was unreasonable because it
4 “eviscerated” his right to disability retirement since he received no comparable new
5 advantage. (*Id.* at p. 244.) The court was especially motivated by the fact that the
6 employee’s “reasonable expectations were thwarted” because he “was denied a substantial
7 part of the compensation already earned in his employment.” (*Id.* at p. 245.)

8 Similarly, in *Newman v. City of Oakland Retirement Board* (1978) 80
9 Cal.App.3d 450, the court flatly refused to apply a change in department policy allowing
10 recall of disabled retired police officers who could perform a “reasonable range of duties”
11 because it was not the same as the policy the officer was hired under, which allowed
12 disability retirement if an officer could not perform a “full range of duties.” (80
13 Cal.App.3d at pp. 454, 462-463 [“It was this long established policy . . . that was intended
14 to and did become a part of appellant’s pension contract”].)

15 Under *Frank* and *Newman*, Section 1509-A is fatally-defective. First, it
16 redefines “disability retirement” in a way that eviscerates the benefit. Whereas previously
17 a Police Officer unable to perform the duties of an officer “in the same classification”
18 would receive a disability retirement, Measure B now mandates that an officer is not
19 disabled unless that officer cannot perform his or her duties **and** (a) cannot perform any
20 other non-peace officer functions within the police department, **and** (b) cannot perform
21 any other City job, even if (c) there are no open positions. (Yank Decl. / RJN Ex. 1.)

22 These modifications are unreasonable and unlawful, because they effectively
23 eliminate the availability of a benefit Police Officers reasonably expected to have should
24 they become disabled in the line of duty, especially because they are not accompanied by
25 any comparable advantage nor are they necessary to maintain the Retirement Plan. since
26 the City has never claimed an inability to pay for this benefit. If Section 1509-A is
27 implemented, it will result in the termination and/or forced resignation of Police Officers
28 who would otherwise have qualified for disability retirement, resulting in a complete loss

1 of pension rights.

2 **b. Section 1511-A Wholly Eliminates the SRBR Benefit**

3 San Jose Municipal Code section 3.36.580 established Police Officers' right to
4 a supplemental benefit payment once per year upon retirement if the Retirement Plan
5 meets certain investment goals. (Yank Decl. / RJN Ex. 2.) Section 1511-A eliminates the
6 SRBR in its entirety and, with it, any right to that benefit upon retirement. It directs that
7 any benefits be returned to the Retirement Plan and mandates that any supplemental
8 benefits other than those authorized by Measure B "shall not be funded from plan assets."
9 (Yank Decl. / RJN Ex. 1.)

10 Section 1511-A cannot lawfully eliminate Police Officers' vested right to the
11 SRBR benefit. In *Kern, supra*, the City of Long Beach argued it was entitled to modify its
12 existing pension system by amending its charter, including by eliminating pensions
13 altogether for existing employees. (29 Cal.2d at p. 853.) The California Supreme Court
14 flatly rejected that argument, holding that a public employee working for the city under
15 the pre-amendment charter had acquired a vested right to pension benefits that survived
16 the city's abolishment of the retirement system. (*Id.* at pp. 853-854.) The court further
17 held that, while a government employer may modify its pension system, "it does not
18 follow that an employee may be deprived of all pension benefits by a repeal of the statute
19 without the enactment of a substitute" because "an employee's pension rights may [not]
20 be *entirely destroyed*." (*Id.* at p. 853 [italics added].) Accordingly, *Kern* held that the
21 amended charter provision could not constitutionally be applied to existing employees to
22 eliminate their pension rights. (*Id.* at p. 856; *see also Cal. League of City Employee Assn.*
23 *v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 140 ["grossly unfair to allow . . .
24 [outright] elimination of . . . benefits and reap the rewards of such long-time service
25 without payment of an important element of compensation"].)

26 Section 1511-A eliminates the SRBR in its entirety without giving Police
27 Officers *any* comparable new advantage to compensate them for this loss. Although it
28 directs that SRBR funds be returned to the retirement trust fund, it *prohibits* the use of

1 such funds to pay for any supplemental benefits. More fundamentally, the transfer to the
2 retirement trust fund is not a comparable new advantage because Police Officers already
3 participate in the retirement fund with their contributions. (See *Eu, supra*, 54 Cal.3d at
4 530 [ballot initiative requiring “transfer or redirection of pension funds to federal Social
5 Security system” was not a “comparable new advantage” because “every legislator
6 already possessed the right to join the federal Social Security system”].) Section 1511-A
7 cannot constitutionally be applied to Police Officers. (*Kern, supra*, 29 Cal.2d at p. 853.)

8 **2. Section 1513-A Violates The California Pension Protection**
9 **Act By Diluting the Fiduciary Duties of the Board to**
10 **Beneficiaries**

11 The California Pension Protection Act (the “Act”) was enacted to prevent
12 meddling with pension funds in times of perceived fiscal distress. (*State ex rel. Pension*
13 *Obligation Bond Committee v. All Persons Interested in Matter of Validity of Cal. Pension*
14 *Obligation Bonds* (2007) 152 Cal.App.4th 1386, 1392 [“Politicians have undermined the
15 dignity and security of all citizens who depend on pension benefits ... by repeatedly
16 raiding their pension funds.... [¶] ... To protect the financial security of retired
17 Californians, politicians must be prevented from meddling in or looting pension funds”].)
18 Thus, the Act gives constitutional weight to the fiduciary duties of retirement boards to
19 their beneficiaries:

20 (b) The members of the retirement board of a public pension or
21 retirement system shall discharge their duties with respect to the system
22 *solely in the interest of, and for the exclusive purposes of providing*
23 *benefits to, participants and their beneficiaries, minimizing employer*
24 *contributions thereto, and defraying reasonable expenses of administering*
25 *the system. A retirement board's duty to its participants and their*
26 *beneficiaries shall take precedence over any other duty. [¶¶]*

27 (e) The retirement board of a public pension or retirement system,
28 *consistent with the exclusive fiduciary responsibilities vested in it, shall*
have the sole and exclusive power to provide for actuarial services in
order to assure the competency of the assets of the public pension or
retirement system.”

(Cal. Const. art. XVI, § 17(b) [italics added]; see also *Board of Retirement v. Sup.Ct.*
(2002) 101 Cal.App.4th 1062, 1070 [reversing trial court determination that would “erode
the retirement board’s sole and exclusive fiduciary responsibility” to beneficiaries].)

1 Section 1513-A of Measure B compromises these constitutionally-based duties
2 by requiring the Retirement Board to administer retirement plans so they “minimize *any*
3 *risk to the City and its residents*” and to equally “ensure fair and equitable treatment for
4 current and future plan members *and taxpayers* with respect to the costs of the plans.”
5 (Measure B, Section 1513-A(a)-(b) [italics added].) Requiring the Retirement Board to
6 divide its fiduciary duties between beneficiaries and the City/taxpayers violates Article
7 XVI, section 17, because the Board is constitutionally-required to discharge its duties “for
8 the exclusive purposes of providing benefits to, participants and their beneficiaries” and
9 its paramount duty is to beneficiaries. (Cal. Const. art. XVI, § 17(b).) Additionally,
10 consistent with its fiduciary duties to beneficiaries, the Board has “the sole and exclusive
11 power to provide for actuarial services” (*id.*, subd. (e)), meaning that Section 13(c) cannot,
12 as it directs, dictate “the actuarial assumptions for the plan[.]” or their “objectives.”

13
14 **3. Measure B Also Violates the MOA and MMBA By**
15 **Unilaterally Increasing Police Officers’ Salary Deductions**
16 **for Retiree Healthcare, Requiring an Injunction to**
17 **Preserve the Grievance Arbitrator’s Jurisdiction**

18 Employee and employer contribution rates for retiree healthcare are established
19 through the collective bargaining process. The MOA sets Police Officers’ contribution
20 rates for retiree healthcare as follows: (a) SJPOA members currently pay 7.01% of their
21 gross salary (8.26% starting in July) to contribute to retiree healthcare costs; (b) any
22 additional increase in Police Officers’ contribution rates are capped at 1.25% per year; and
23 (c) Police Officers’ maximum contribution rate is capped at 10% of their salary. (Yank
24 Decl. / RJN Ex. 3.) The MOA is binding and enforceable under the MMBA, and it cannot
25 be eliminated or superseded by conflicting Charter provisions or ballot initiatives. (*Los*
26 *Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 65-66
27 [MMBA and MOAs supersede city charter]; *Voters for Responsible Retirement v. Board*
28 *of Supervisors* (1994) 8 Cal.4th 765, 782 [same re voter initiatives]; see also *Glendale*
City Employees’ Assn., Inc. v. City of Glendale (“Glendale”) (1975) 15 Cal.3d 328, 335-
336 [same re ordinance]; Gov. Code sections 3500, 3505.1.)

1 Under Measure B, Police Officers would be required to pay a minimum of
2 50% of all costs for the retiree healthcare plan. This combined cost of retiree healthcare
3 benefits is currently set by the Retirement Board's actuary at 32% of an employee's
4 salary. (Declaration of Franco Vado, ¶ 5.) Thus, Section 1512-A would dramatically
5 increase the amount and percent of salary deductions for retiree healthcare, in violation of
6 the MMBA (which prohibits unilateral changes in employee benefits without bargaining)
7 and the express provisions of the MOA. Whereas the MOA limits salary deduction
8 increases to 1.25% per year with a cap of 10% of salary, Section 1512-A will increase
9 Police Officers' salary deductions for retiree healthcare from 7.01% (8.26% in July 1) to
10 approximately 16%. As detailed in the accompanying declarations (summarized below),
11 that salary reduction is already on top of the 10% base salary decrease Police Officers
12 agreed to in 2011, as well as other reductions in net pay, and will have devastating
13 consequences for Police Officers, their families, as well as for the police department.

14 **B. The Balance of Harm Tips Sharply in Favor of Maintaining the**
15 ***Status Quo Ante* Pending a Preliminary Injunction Hearing /**
16 **Litigation on the Merits**

17 In the final prong of the analysis, the Court balances the equities to determine
18 whether a greater injury will result to the City (if injunctive relief is granted) or to the
19 SJPOA and its members (if injunctive relief is denied). The Court must exercise its
20 discretion in favor of the party that is more likely to be injured. (*Mitsui Mfrs. Bank of*
21 *Texas Commerce Bank-Fort Worth* (1984) 159 Cal.App.3d 1051, 1059.)

22 **1. Police Officers Will Be Irreparably Harmed By Measure**
23 **B's Unlawful Changes to their Pension Rights**

24 **a. Eliminating Disability Retirement Will Irreparably**
25 **Harm Police Officers, Particularly Those Awaiting**
26 **Disability Evaluations**

27 In *White v. Davis* (2003) 30 Cal.4th 528, 559, our Supreme Court recognized
28 that imminent irreparable harm is established when threatened action would deprive
"persons receiving state pensions or disability benefits ... of funds necessary to feed,
house, and clothe themselves and their families." Where sweeping changes to disability

1 retirement plans are threatened, as here, it is unclear what procedures or remedies may be
2 available to reinstitute an eliminated retirement plan or to remedy a denial of benefits.

3 Section 1509-A of Measure B will essentially eliminate the disability
4 retirement benefit for Police Officers who have worked for the City for decades, including
5 those who have recently been injured in the line of duty. Disability retirement benefits are
6 an absolutely crucial employment benefit for Police Officers, because police work is
7 extremely physically demanding and dangerous. Police Officers are expected to respond
8 to any and all situations, and often have little opportunity to plan ahead or prepare for the
9 various dangerous situations in which they find themselves. Thus, the very nature of
10 police work opens SJPOA members to the risk of catastrophic injury every day on the job.

11 As detailed in the numerous declarations of SJPOA members filed and served
12 herewith, the chance of injury is so great that most Police Officers would not have joined
13 law enforcement without the knowledge that their families would be protected with full
14 retirement benefits in the event that they become disabled as a result of actions taken in
15 the line of duty while performing their job protecting the citizens of San Jose. (See Decls
16 of Albin, Boales, Bortolotti, Creighton, Conover, Cooley, Ichige, Imobersteg, Millard,
17 Navaro, and Ryan.)

18 The declarations filed herewith demonstrate just how common serious injuries
19 are for SJPOA members. A sampling of the injuries suffered while on duty by SJPOA
20 members include: a gunshot wound to the abdomen, catastrophic injuries to ankles, knees,
21 and shoulders sustained while pursuing suspects, and a broken neck and fractured thoracic
22 spine from an on-duty motorcycle accident.² Under the pre-Measure B system, a Police
23 Officer injured in the line of duty is considered disabled and entitled to a pension if he/she
24 is unable to perform duties within a peace officer classification. (Yank Decl. / RJN Ex. 4,

25 _____
26 ² See Decl. of D. Ichige, ¶9 [shot in the abdomen by a suspect]; Decl. of E. Navaro, ¶ 4
27 [suffered compound fracture to fibula and tibia requiring surgery to put in 3 plates and
28 more than 30 screws to stabilize while pursuing suspect]; Decl. of M. Albin, ¶10 [severe
knee injury requiring surgery while protecting fellow officer]; Decl. of T. Boales, ¶10
[tore rotator cuff pursuing suspect]; and Decl. of D. Creighton, ¶ 12 [broken neck and
fractured thoracic spine from motorcycle accident while on patrol].

1 Charter Section 1504.) This retirement disability benefit ensures that a Police Officer and
2 his/her family are not forced into financial ruin due their service to the citizens of San
3 Jose.³

4 If Measure B passes, the City will determine eligibility for retirement disability
5 based on whether a Police Officer can perform the essential job functions of any position
6 within the Police Department, including jobs that consist primarily of administrative tasks.
7 If a Police Officer is found to be physically able to perform the essential job functions of
8 any position within the Police Department, the Police Officer's disability application will
9 be denied regardless of whether that position(s) is occupied. The net effect of this is that
10 Police Officers who have been injured in the line of duty will be terminated and left with
11 no means to provide for themselves or their families.

12 The concurrently filed declarations illustrate the irreparable harm that will flow
13 from the implementation of Measure B. For instance, Officer Mike Albin, Officer Devlin
14 Creighton and Officer Tina Boales, have all suffered serious and debilitating injuries in
15 the line of duty, cannot return to full duty due to the severity of their injuries and, as a
16 result, all have submitted their application for retirement disability. However, the passage
17 of Measure B will preclude them from receiving retirement disability and render them
18 wholly unable to provide for themselves and their families if they cannot meet its new
19 burdensome requirements. (Albin Decl. ¶ 14; Creighton Decl. ¶ 16; Boales Decl. ¶ 14.)
20 At the same time, the severity of their injuries precludes them from law enforcement
21 employment elsewhere. There is simply no remedy that could make these individuals
22 whole should Measure B later be found invalid. Thus, it must be enjoined immediately.

23 ³ For example, Edward Navarro, who suffered a compound fracture to his fibula and tibia
24 while pursuing a suspect, underwent several surgeries to stabilize his foot including a
25 surgery to put in 3 titanium plates and over 30 screws, and subsequent surgeries to address
26 an ongoing staff infection. (Navarro Decl. ¶ 4.) In his most recent surgery, Navarro was
27 advised that there was a chance his foot would have to be amputated although ultimately
28 the surgeon was able to fuse his foot and ankle together such that his foot is frozen in
place. (Navarro Decl. ¶ 5.) Navarro's injury left him unable to perform the basic
functions of police work and his application for retirement disability was approved in
January 2012. (Navarro Decl. ¶ 6.) Navarro's disability benefits of 50% of his salary as a
Police Officer have kept him, and his family, from financial ruin. (Navarro Decl. ¶ 10.)

1 **b. Eliminating the SRBR Will Cause Irreparable Harm**
2 **Because Pension Benefits Cannot Be Paid From a**
3 **Fund that No Longer Exists**

4 If Section 1511-A of Measure B is implemented, elimination of pension
5 benefits paid from the SRBR will be a *fait accompli*. Section 1511-A immediately
6 eliminates the SRBR, folding its assets into the Retirement Plan, effectively commingling
7 them and eliminating the independent fund. Once this is accomplished, none of the
8 contingencies for supplemental benefit payment are possible (e.g., SRBR fund
9 performance), and there will be no fund from which such payments may be made when
10 current Police Officers retire. The only way to prevent this result is an injunction
11 preserving the *status quo ante*.

12 **c. Increased Salary Deductions for Retiree Healthcare**
13 **Will Cause Irreparable Harm Because Any Remedial**
14 **Authority Under the MMBA and MOA Will Be**
15 **Meaningless**

16 **i. A TRO is Necessary to Preserve Remedial**
17 **Jurisdiction Under the MMBA and MOA**

18 In the labor relations context, “the traditional idea of irreparable harm or harm
19 for which there is no adequate legal remedy is met when the employer’s practices may
20 frustrate the purposes” of the collective bargaining statutes. (*Agricultural Labor Relations*
21 *Bd. v. Tex-Cal Land Management, Inc.* (1985) 165 Cal.App.3d 429, 440.) Unilateral
22 action by an employer frustrates the purpose of collective bargaining statutes because “that
23 failure to bargain will likely result in myriad of irreparable harms[,]” including
24 eliminating the possibility the parties will reach agreement, resulting in diminution of
25 support for the union and the collective bargaining process. (*Small v. Avanti Health*
26 *Systems, LLC* (“*Small*”) (9th Cir. 2011) 661 F.3d 1180, 1191 and 1192 [summarizing
27 authorities].) “[P]ermitting an alleged unfair labor practice to reach fruition and thereby
28 rendering meaningless [any] remedial authority *is* irreparable harm.” (*Id.* at 1191
 [emphasis in original].) Thus, where an employer has acted unilaterally, “preservation
 and restoration of the *status quo* are appropriate.” (*Modesto City School District* (1982)
 136 Cal.App.3d 881, 903.)

1 Similarly, it is well-established that preliminary injunctive relief is necessary to
2 preserve the *status quo ante* and the jurisdiction of an arbitrator. Thus, in *Lever Brothers*
3 *Co. v. Int'l Chemical Workers Union* (4th Cir. 1976) 554 F.2d 115, the Court held:

4 An injunction to preserve the *status quo* pending arbitration may be issued
5 ...in an appropriate ... case where it is necessary to prevent conduct by the
6 party enjoined from rendering the arbitral process a hollow formality in
those instances where, as here, the arbitral award when rendered could not
return the parties substantially to the *status quo ante*.

7 (*Id.* at p. 120.) California courts have followed suit by enjoining public agencies from
8 violating California's collective bargaining statutes (*Int'l Assoc. of Firefighters Union v.*
9 *City of Pleasanton* (1976) 56 Cal. App. 3d 959, 964-977) and enjoining unilateral actions
10 in violation of existing MOAs. (*San Juan Teachers Assoc. v. San Juan Unified School*
11 *Dist.* (1974) 44 Cal. App. 3d 232, 260 [superseded, in part, on other grounds].)

12
13 **ii. Police Officers Will Suffer Irreparable Financial Hardships if a TRO is Not Granted**

14 As detailed in the concurrently filed declarations, Measure B will inflict
15 irreparable financial ruin on SJPOA members, who are particularly vulnerable because
16 recent decreases to total take-home pay have left them among the lowest, if not the lowest,
17 paid law enforcement personnel in the region. (Vado Decl., ¶¶ 3-4). These declarations
18 illustrate just a few representative examples of the irreparable harms that SJPOA members
19 will suffer should Measure B, and the corresponding decrease to take-home pay, be
20 implemented. Members will be unable to pay for even basic living expenses, and many
21 risk losing their homes. (See Decls. of T. Boales ¶¶ 7-8, D. Creighton ¶ 7-8, M. Albin ¶ 6,
22 R. Millard ¶¶ 7-8; E. Conover ¶¶ 7-8; D. Ichige ¶¶ 6-7; D. Bortolotti ¶¶ 7-8; R.
23 Imobersteg ¶¶ 6-7; L. Ryan ¶ 7.) It will even impact the ability of a member to care for
24 his ailing mother. (Decl. of I. Cooley ¶¶ 7-8.) All of these harms are imminent and caused
25 by Defendants' illegal application of Measure B to SJPOA members. Delayed monetary
26 relief cannot undo these harms. (*White, supra*, 30 Cal.4th at 559 [irreparable harm is
27 established when threatened action would deprive employees "of funds necessary to feed,
28 house, and clothe themselves and their families"].) SJPOA members need relief now.

1 **2. Defendants Suffer No Cognizable Harm If The Challenged**
2 **Sections of Measure B Are Not Immediately Implemented**

3 Defendants will suffer no harm from a TRO. First, the City has a budget
4 surplus and its pension cost projections are less than half of what it misrepresented.
5 Moreover, it has necessarily already budgeted for the pre-Measure B pension benefit
6 costs. Perhaps most importantly, it cannot possibly show any *increased* cost or other
7 harm flowing from a TRO in effect only until a hearing on Plaintiff's request for a
8 preliminary injunction is heard. Plaintiff is willing to stipulate to an expedited briefing
9 and hearing schedule, to be completed in June 2012.

10 **C. The SJPOA Has Complied with California Rules of Court and Local**
11 **Rule Governing *Ex Parte* Applications**

12 California Rule of Court 3.1200 *et seq.* and Santa Clara Superior Court Local
13 Rule 6.F govern *ex parte* applications. Plaintiff has provided the requisite notice to all
14 parties and complied with all other requirements. (Yank Decl. ¶ 16.) No prior application
15 for the relief requested has been made. (*Id.* ¶ 18.) Thus, *ex parte* relief is proper.

16 **III. CONCLUSION**

17 For all these reasons, the SJPOA respectfully requests this Court issue a
18 temporary restraining order and an order to show cause why a preliminary injunction
19 should not issue enjoining Defendants from implementing or otherwise giving effect to
20 the challenge of Measure B Sections as to Plaintiff's members.

21 Dated: June 5, 2012

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23
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