

1 Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
2 Linda M. Ross (SBN: 133874)
lross@meyersnave.com
3 Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
4 Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
5 MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
6 Oakland, California 94607
Telephone: (510) 808-2000
7 Facsimile: (510) 444-1108

8 Attorneys for Defendants
City of San Jose and Debra Figone, in Her
9 Official Capacity

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**IN THE SUPERIOR COURT FOR THE
COUNTY OF SANTA CLARA**

SAN JOSE POLICE OFFICERS
ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE AND
FIRE RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 inclusive.,

Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

Consolidated Case No. 1-12-CV-225926
[AFSCME Case No. 1-12-CV-227864]

*Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV225926]*

*Assigned for all purposes to the Honorable
Patricia M. Lucas]*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' DEMURRER TO
PLAINTIFF AFSCME'S FIRST
AMENDED COMPLAINT**

Date: April 23, 2013
Time: 9:00 a.m.
Dept.: 8

Complaint Filed: June 6, 2012
Trial Date: June 17, 2013

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I. INTRODUCTION

On June 5, 2012, the voters of San Jose enacted Measure B, a pension reform measure that amended the retirement sections of the San Jose City Charter. Individuals and employee organizations, including plaintiff American Federation of State, County, and Municipal Employees, Local 101 (“AFSCME”), brought five lawsuits challenging Measure B, which this Court has ordered consolidated for pretrial purposes. AFSCME’s complaint included eleven (11) causes of action. On January 31, 2013, this court dismissed with leave to amend AFSCME’s second and seventh causes of action, which had asserted that Measure B was an unlawful bill of attainder and an illegal tax, respectively.

On February 11, 2013, AFSCME filed its first amended complaint, asserting additional allegations to support these two causes of action. The additional allegations, do not correct the flaws in these two causes of action. Indeed, there is no amendment that can successfully categorize Measure B as either an “unlawful bill of attainder” or an illegal “tax”. Accordingly, defendants City of San Jose (“City”) and Debra Figone, in her official capacity as City Manager (“Figone”), demurr to the second and seventh causes of action pursuant to Code of Civil Procedure sections 430.10(e), 430.30, and 430.40 on the ground that they do not state facts sufficient to constitute a cause of action against the City or Figone.

A. STATEMENT OF THE CASE AS ALLEGED¹

Measure B: On June 5, 2012, San Jose city voters enacted Measure B, entitled, “The Sustainable Retirement Benefits and Compensation Act.” (First Amended Complaint (“FAC”), ¶ 12; Defendants’ Request For Judicial Notice in Support of Demurrer (“RJN”), Exh. A.)

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¹ This demurrer is premised on the facts as alleged, and on those facts subject to judicial notice. See *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). This Court has already taken judicial notice of Measure B. (See Order Re: Motions for Judgment on the Pleadings (“Order”), at 2:20-22, filed February 1, 2013.)

1 The Act itself must be construed in its entirety, but below are provisions of Measure B that
2 are specifically at issue in this motion:

3 The "Findings" section declares, among other things, "Without the reasonable cost
4 containment provided in this Act, the economic viability of the City, and hence, the City's
5 employment benefit programs, will be placed at an imminent risk." (RJN, Exh. A, § 1501-A.)
6 The declaration continues, "The City and its residents always intended that post employment
7 benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City
8 services. At the same time, the City is and must remain committed to preserving the health, safety
9 and well-being of its residents." (*Id.*) Thus, it states, "By this Act, the voters find and declare that
10 post employment benefits must be adjusted in a manner that protects the City's viability and public
11 safety, at the same time allowing for the continuation of fair post- employment benefits for its
12 workers." (*Id.*) The Findings also indicate, "This Act is intended to strengthen the finances of the
13 City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at
14 the time of the voters' initial adoption of the City's retirement programs." (*Id.*)

15 The "Intent" section declares, "This Act is intended to ensure the City can provide
16 reasonable and sustainable post-employment benefits while at the same time delivering Essential
17 City Services to the residents of San Jose." (RJN, Exh. A, § 1502-A.) It also provides, "This Act
18 is not intended to deprive any current or former employees of benefits earned and accrued for prior
19 service as of the time of the Act's effective date; rather, the Act is intended to preserve earned
20 benefits as of the effective date of the Act." (*Id.*) And it declares, "This Act is not intended to
21 reduce the pension amounts received by any retiree or to take away any cost of living increases
22 paid to retirees as of the effective date of the Act." (*Id.*)

23 In connection with employee pension contribution rates, Measure B provides: "Unless
24 they voluntarily opt in to the Voluntary Election Program ..., Current Employees shall have their
25 compensation adjusted through additional retirement contributions in increments of 4% of
26 pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to
27 amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may
28 exist due to Tier 2 benefits in the future...." (*Id.*, § 1506-A(b).)

1 If a court determines Section 1506-A(b) is invalid, then Measure B has the following
2 “Savings” clause: “In the event Section 6(b) is determined to be illegal, invalid or unenforceable
3 as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent
4 permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any
5 pay reductions implemented pursuant to this section shall not exceed 4% of compensation each
6 year, capped at a maximum of 16% of pay.” (*Id.*, § 1514-A.)

7 **Attainder Allegations:** In the original complaint, AFSCME had alleged in its second
8 cause of action that Measure B constituted an Unlawful Bill of Attainder because it 1) “shifts the
9 burden of financing public debt upon a small class of private persons;” 2) “exclusively targets and
10 penalizes” City employees for “harsher treatment” than other City residents “by imposing an
11 excise on them” of up to 16% of salary unless they forego their rights to receive their full pension
12 benefits; and 3) punishes City employees by “imposing on them a ‘poison pill’ provision” that
13 reduces salaries if they successfully challenge the constitutionality of Measure B. (Complaint, ¶¶
14 16(c), 125, 126, 128).

15 On February 1, 2013, the Court granted defendants’ motion for judgment on the pleadings
16 as to this second cause of action, with ten days’ leave to amend. (Order at 3:1-3.)

17 In its FAC, AFSCME’s amendments reiterate the allegations in the original complaint,
18 including characterizing the acts alleged in the original complaint as a fine, forfeiture, penalty, and
19 punishment, with a punitive motivation. (FAC, ¶¶ 16(c), 103, 110, 129, 132, 135, 139, 140, 145,
20 146.) AFSCME’s new amendments also include allegations that there are “fairer methods of
21 generating revenue ... for the purpose of paying the City’s general obligations,” that the City has
22 sought to provide retroactive salary increases to management employees who are not members of
23 AFSCME, that the City is fining AFSCME’s members for filing unfair labor practice charges, and
24 that AFSCME members who have already received a pay reduction cannot support themselves or
25 their families with an additional wage reduction. (*Id.*, ¶¶ 110, 133, 134, 135, 141.)

26 AFSCME also alleges in its FAC that the Court of Appeal characterized the draft ballot
27 language as “charged” and “biased.” (FAC, ¶ 136)

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1 AFSCME’s amendments also allege that “an e-mail from City Retirement Services
2 Director to the City Manager and others ... described a large percentage of City employees as
3 ‘totally useless’ and ‘marginally employed’ and that ‘benefit and salary reductions are less
4 important.” (FAC, ¶ 137.) Finally, AFSCME alleges that the “City and its agents have
5 “indicated that they are waging a ‘war’” on AFSCME. (*Id.*, ¶ 138.)

6 **Tax Allegations:** In the original complaint, AFSCME alleged in its seventh cause of
7 action that Measure B violates the equal protection clause of Article I, section 7 of the California
8 Constitution by imposing an “excise on City employee wages” to raise funds for “already-incurred
9 liabilities of future retirees and the benefits provided to current retirees” associated with the City’s
10 pension system and retiree healthcare plan. (Complaint, ¶¶ 93, 166-171.) AFSCME contended
11 that this “excise” violates California’s equal protection clause because it “select[s] one particular
12 class of persons for a species of taxation without rational basis.” (*Id.*, ¶¶ 172-174).

13 On February 1, 2013, the Court granted defendants’ motion for judgment on the pleadings
14 as to this seventh cause of action, with ten days’ leave to amend. (Order at 3:7-9.)

15 In the amended complaint, AFSCME’s new allegations reiterate the contentions of the
16 original complaint that Measure B is an “excise tax on City employee wages,” targeted at a group
17 who cannot afford them and who do not opt into the VEP, “for the purpose of funding the City’s
18 general obligations, namely the unfunded liabilities of its pension and retiree health system.”
19 (FAC, ¶¶ 16(i), 63, 64, 67, 95, 186, 187, 189, 196, 199, 202, 203.) They also allege, “The amount
20 of the wage excise is unrelated to the particular employee’s cost of benefits and is not
21 particularized to the employee.” (*Id.*, ¶¶ 65, 188, 190, 199, 200, 202.) AFSCME alleges that
22 Measure B imposes a tax only on the group of employees who choose not to opt into the VEP
23 plan, which AFSCME characterizes as singling out a group for refusing “to relinquish certain
24 pension rights.” (*Id.*, ¶¶ 191-195.)

25 The new allegations also include legal arguments AFSCME raised in its opposition to the
26 defendants’ earlier motion for judgment on the pleadings, including that assertion that Measure B

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1 is a tax under 13(C) of the California Constitution, that it violates California Government Code
2 section 17041.5, that it should be subject to strict scrutiny, and that it has a discriminatory effect
3 based on wealth. (FAC, ¶¶ 195-198.)

4 II. LEGAL ARGUMENT

5 As set forth below, there is no possible way for plaintiff to amend its causes of action
6 based on “bill of attainder” and “tax” theories. Plaintiff is attempting to apply causes of action
7 that have *never been applied in this context*. The court should reject plaintiff’s invitation to make
8 new law, and sustain the City’s demurrers.

9 A. AFSCME Still Cannot State a Claim for Unlawful Bill of Attainder

10 AFSCME brings its second cause of action under Article I, Section 9 of the California
11 Constitution, which provides, “A bill of attainder ... may not be passed.” “A bill of attainder is ‘a
12 law that legislatively determines guilt and inflicts punishment upon an identifiable individual
13 without provision of the protections of a judicial trial.’” *Atonio v. Wards Cove Packing Co.*, 10
14 F.3d 1485, 1495 (9th Cir. 1993), quoting *Nixon v. Adm’r of General Servs.*, 433 U.S. 425, 468
15 (1977); see *California State Employees’ Assn. v. Flournoy*, 32 Cal. App. 3d 219, 224-229 (1973)
16 (California courts rely on precedent interpreting the attainder clause’s federal counterpart).

17 Even with the amendments to its second cause of action, AFSCME still cannot state a
18 claim for unlawful bill of attainder because, as a matter of law, Measure B does not “punish”
19 AFSCME members under any of the tests articulated by the courts. Put simply, Measure B is not
20 a “trial by legislature” contemplated by the constitutional prohibition against bills of attainder.
21 *United States v. Brown*, 381 U.S. 437, 442 (1965).

22 “A statute inflicts forbidden punishment when it: (1) falls within the historical meaning of
23 legislative punishment; (2) furthers no nonpunitive legislative goals; and (3) evinces Congress’
24 intent to punish, as reflected in the legislative record.” *Atonio*, 10 F.3d at 1496. After amending
25 its complaint, AFSCME still cannot meet any of these tests because Measure B is 1) not the type
26 of legislation historically deemed an unlawful bill of attainder; 2) its purpose is “nonpunitive,”
27 given that its legislative goals were to “strengthen the finances of the City” to ensure that it could
28 continue fair post-employment benefits for its workers as well as provide essential services to the

1 City's residents; and 3) the legislative record does not evince an intent to punish anyone for any
2 alleged misconduct. (RJN, Exh. A, §§ 1501-A, 1502-A.) See *Legislature of the State of*
3 *California v. Eu*, 54 Cal. 3d 492, 525-527 (1991) (applying these tests in rejecting attainder claim
4 related to initiative limiting legislators' terms and pensions).

5 ***1. Measure B is Not a Bill of Attainder Under the Historical Test***

6 Under the first test, historically, no legislation similar to Measure B has ever been deemed
7 an unlawful bill of attainder. Measure B, for example, is "nothing like the traditional death,
8 imprisonment, banishment, or property seizure consequence of prior action... ." *Alpha Standard*
9 *Investment Co v. County of Los Angeles*, 118 Cal. App. 3d 185, 190 (1981). Here, there is no
10 finding of guilt in Measure B, or any type of legislative trial.

11 Moreover, in applying the "historical test" to pension and employment legislation,
12 California courts have declined to find the type of legislation at issue here – limits on pension and
13 compensation to be a prohibited bill of attainder. After surveying cases of attainder, the *Eu* Court
14 held that Proposition 140, which imposed "legislative term, budgetary, and pension limitations" on
15 "all current and future incumbent legislators," but which targeted Assemblyman Willie Brown and
16 Senator David Roberti, did *not* violate the prohibition on bills of attainder. *Eu*, 54 Cal. 3d at 525-
17 526. Similarly, the court in *Flournoy* also held that "the legislative failure to appropriate funds for
18 salary increases of public employees" did not "constitute 'punishment' within the meaning of the
19 anti-attainder provisions of the federal and state constitutions." *Flournoy*, 32 Cal. App. 3d at 224-
20 229. It even commented, "It is apparent that even legislation which entirely withholds salaries for
21 a public office or class of public employees does not approach, in penal character, the statute held
22 by the United States Supreme Court in *Lovett* to be one which 'operates as a legislative decree of
23 perpetual exclusion' from a chosen vocation" in violation of the attainder clause. *Id.* at 229,
24 quoting *United States v. Lovett*, 328 U.S. 303, 316 (1946).

25 Thus, under all relevant precedent, AFSCME's allegations of punishment, which amount
26 to a decrease in compensation for public employees, as well as its new allegations that the
27 decrease is unfair and a burden to its members, do not come within the historical meaning of
28 attainder. (FAC, ¶¶ 110, 133, 134, 141.) *Sagaser v. McCarthy*, 176 Cal. App. 3d 288, 306 (1986)

1 (“Forbidden legislative punishment is not involved merely because the Act imposes burdensome
2 consequences”), quoting *Nixon*, 433 U.S. at 472.

3 **2. Measure B is Not a Bill of Attainder Because It Furthers Non-Punitive**
4 **Legislative Goals.**

5 “[I]f a legitimate legislative purpose is found, the legislative purpose is not punishment.”
6 *Sagaser*, 176 Cal. App. 3d at 306. In *Eu*, the Court looked to the language of the “measure itself,”
7 and found that it “expresses broad, nonpunitive purposes, namely, ‘[t]o restore a free and
8 democratic system of fair elections, and to encourage qualified candidates to seek public office’ by
9 limiting ‘the powers of incumbency.’” *Eu*, 54 Cal. 3d at 526, quoting Cal. Const., art. IV, § 1.5.
10 The Court dismissed the petitioners’ contention that the measure’s “declarations of intent” were
11 “self-serving,” and held, “we have no reason to dispute the accuracy of their description of the
12 measure’s primary intent.” *Id.*, citing *Nixon*, 433 U.S. at 477. Similarly, here, Measure B’s
13 declared legislative intent also “expresses broad nonpunitive purposes,” in that Measure B states it
14 “is intended to ensure the City can provide reasonable and sustainable post-employment benefits
15 while at the same time delivering Essential City Services to the residents of San Jose.” (RJN, Exh.
16 A, § 1502-A; see also § 1501-A.) *Eu*, 54 Cal. 3d at 526.

17 Although AFSCME’s amendments allege that “at the outset, the City adopted and drafted
18 ballot language that was deemed by the Sixth District Court of Appeals as ‘charged,’ ‘biased’ and
19 not neutral,” they do not and cannot show that Measure B’s declared legislative intent was
20 punitive. (FAC, ¶ 136.) First, pursuant to the court of appeals’ direction, the challenged language
21 was not in the ballot that was put before the voters and did not comprise the “declared legislative
22 intent” of the voters. See *McDonough v. Superior Court*, 204 Cal. App. 4th 1169, 1174-1175,
23 1176-1177 (2012) (changing the word “reform” to “modification” in the title and “modify” in the
24 text, and deleting the introductory phrase, “To protect essential services, including neighborhood
25 police patrols, fire stations, libraries, community centers, streets and parks” from the beginning of
26 the ballot question). In addition, there was no allegation or finding that the disputed language
27 expressed punitive intent. *Id.* The language that was put before the voters, at the direction of the
28 court of appeals, read: “PENSION MODIFICATION: Shall the Charter be amended to modify

1 retirement benefits of City employees and retirees by: increasing employees' contributions,
2 establishing a voluntary reduced pension plan for current employees, establish pension cost and
3 benefit limitations for new employees, modify disability retirement procedures, temporarily
4 suspend retiree COLAs during emergencies, require voter approval for increases in future pension
5 benefits?" *Id.* at 1176-1177. This language, required by the Court, certainly expresses no punitive
6 intent, and AFSCME cannot meet this second test.

7 **3. Measure B is Not a Bill of Attainder Under the Motivational Test**

8 Under the third and final test, the “motivational test,” the *Eu* court looked to whether the
9 legislation or ballot arguments contained any “indication of an intent to *punish* those individuals
10 for any particular past misconduct.” *Eu*, 54 Cal. 3d at 527 (emphasis in original). In doing so, the
11 Court discounted the petitioners’ focus on the “framers’ express intent to dislodge such long-term
12 incumbents as Brown and Roberti,” by explaining that “[b]road reform measures are frequently
13 prompted by particular acts or circumstances involving specific individuals, but in our view such
14 measures would not constitute improper bills of attainder unless an intent *to punish* such
15 individuals clearly appears from their face, or from the circumstances surrounding their passage.”
16 *Eu*, 54 Cal. 3d at 526-527 (emphasis in original). The Court held that although Proposition 140
17 sought to limit Brown and Roberti’s terms, it was not an unconstitutional bill of attainder because
18 there was “no evidence of an intent to single out and *punish* those individuals for any supposed
19 misconduct on their part.” *Id.* at 527 (emphasis in original).

20 Similarly, the United States Supreme Court declined to find that Congress had a punitive
21 purpose when it cut off a plaintiff’s Social Security benefits because he was deported for having
22 been a member of the Communist Party decades earlier. *Flemming v. Nestor*, 363 U.S. 603, 613-
23 621 (1960). It explained that “only the clearest proof could suffice,” warned against going
24 “behind objective manifestations” of intent, and stated that evidence of “punitive intent” must be
25 “unmistakable.” *Id.* at 617, 619. Similarly, the Court also rejected an attainder claim in *Atonio*,
26 even where a section of the Civil Rights Act of 1991 *specifically excluded* the *Atonio* plaintiffs

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1 from the litigation benefits of the Act because it found nothing in the record showing “Congress
2 intended to punish the workers for filing and maintaining this action.” *Atonio*, 10 F.3d at 1491-
3 1492, fn. 3, 1496.

4 Likewise, here, there is no factual allegation or evidence that Measure B intends to single
5 out anyone for punishment for any alleged misconduct. AFSCME’s new allegation that Measure
6 B fines AFSCME’s members for filing unfair labor practice charges and refusing to forego
7 pension rights cannot save the claim, given that nowhere in Measure B is such intent stated, and
8 given that Measure B applies to all employees and not just AFSCME members. (FAC, ¶ 135.)
9 Moreover, the stated intent is just the opposite, i.e., “This Act is intended to strengthen the
10 finances of the City to ensure the City’s sustained ability to fund a reasonable level of benefits as
11 contemplated at the time of the voters’ initial adoption of the City’s retirement programs,” and
12 “This Act is not intended to deprive any current or former employees of benefits earned and
13 accrued for prior service as of the time of the Act’s effective date; rather, the Act is intended to
14 preserve earned benefits as of the effective date of the Act.” (RJN, Exh. A, §§ 1501-A, 1502-A.)
15 In addition, AFSCME’s new allegation of an e-mail between City staff describing City employees
16 as “totally useless” and “marginally employed,” and its general allegation of the City “waging a
17 war” against AFSCME still do not show – unmistakably -- that Measure B, and the voters who
18 approved it, intended to punish the City’s employees at all, let alone for misconduct. (FAC, ¶¶
19 137, 138.) *Flemming*, 363 U.S. at 619.

20 AFSCME’s allegations cannot meet any of the three tests articulated by the courts to
21 determine if a legislative action is a bill of attainder. For these reasons, this Court should dismiss
22 AFSCME’s second cause of action, without leave to amend.

23 **B. AFSCME Still Cannot State a Claim for an Illegal Tax, Fee or Assessment**

24 In its seventh cause of action, as amended, AFSCME claims that Measure B violates the
25 equal protection clause of Article I, section 7 of the California Constitution (“A person may not be
26 ...denied equal protection of the laws”) by imposing an “excise tax on City employee wages.”
27 (FAC, ¶ 186.) The amendments to this cause of action reiterate the allegations in the original
28 complaint, and they add legal arguments AFSCME raised in its opposition to the defendants’

1 motion for judgment on the pleadings, including the assertion that Measure B is a tax under 13(C)
2 of the California Constitution, that it violates California Government Code section 17041.5, that it
3 should be subject to strict scrutiny, and that it has a discriminatory effect based on wealth. (*Id.*, ¶¶
4 195-198.) See *Chiatello v. City and County of San Francisco*, 189 Cal. App. 4th 472, 480 (2010)
5 (no deference is given to these legal arguments on demurrer, given that a demurrer does not admit
6 “contentions, deductions or conclusions of fact or law”).

7 AFSCME still cannot state a claim under this cause of action because Measure B was
8 enacted under the City’s plenary authority over employee compensation, and is not a tax. As a
9 result, the Court should sustain the demurrer on this foundational basis alone, and need not reach
10 the issue of whether the alleged “tax” violates equal protection.

11 AFSCME does not identify any specific sections of Measure B as imposing a tax.
12 Measure B, however, addresses only employee compensation, by adjusting compensation through
13 additional retirement and retiree health care contributions or by “pay reductions.” (Measure B, §§
14 1506-A(b), 1512-A, 1514-A.)

15 Neither a decrease in employee compensation, nor an increase in employee pension
16 contributions, comes within the local tax definitions of the California Constitution (Art. XIII-C, §
17 1(a), related to real property, through Art. XIII-D), California’s Revenue and Taxation Code, the
18 City of San Jose’s Charter, or the City’s Municipal Code. Thus, AFSCME’s new allegations that
19 Measure B is a tax as “defined by Article 13(C) of the California Constitution,” and violates
20 “[G]overnment [C]ode section 17041.5” also fail to bring Measure B within the definition of a tax.
21 (FAC, ¶¶ 197, 198.)

22 First, there is no such Government Code section, and Revenue and Tax Code section
23 17041.5, which prohibits local income tax, does not purport to define a public employer’s
24 adjustment to its employees’ compensation as a tax at all, let alone an income tax. See *Weekes v.*
25 *City of Oakland*, 21 Cal. 3d 386, 397-398 (1978) (analyzing section 17041.5 and holding it did not
26 prohibit Oakland’s employee license fee). Second, classifying Measure B as a tax under the
27 general provisions of Article XIII(C) would contradict the more specific provisions of Article XI,
28 section 5(b)(4), which grant the City plenary authority to determine employee compensation and

1 would lead to absurd results. See *Upland Police Officers Ass'n v. City of Upland*, 111 Cal. App.
2 4th 1294, 1303-1304 (2003) (“statutes must be construed to avoid absurd results which do not
3 advance the legislative purpose”)

4 Specifically, the California Constitution, the San Jose City Charter, and San Jose
5 Municipal Code grant the City authority over employee compensation and employee pension
6 contributions that are in no way related to taxation.² If changes in employee compensation were
7 treated as a tax, then the City Council’s plenary authority to set employee compensation would
8 conceivably be subject to voter approval under the tax provisions of the “Right to Vote on Taxes
9 Act” of Article XIII C, section 2 of the California Constitution. This would be an absurd result,
10 contrary to the above-referenced provisions as well as years of case law that grants charter cities
11 plenary authority over employee compensation. See, e.g., *Sonoma County Org. of Public*
12 *Employees v. County of Sonoma*, 23 Cal. 3d 296, 317 (1979) (“salaries of local employees of a
13 charter city constitutes municipal affairs”); *State Bldg. & Constr. Trades Council of Cal., AFL-*
14 *CIO v. City of Vista*, 54 Cal. 4th 547, 580 (2012) (citing cases). Accordingly, there are simply no
15 cases interpreting a public entity's compensation decisions as a tax.

16 III. CONCLUSION

17 Plaintiff is attempting to assert causes of action that have *never* been applied in the context
18 of a municipal pension measure. These claims have no application here as a matter of law, and
19 there is no possible way for plaintiffs to amend.

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24 ² See, e.g., Cal. Const., art. XI, § 5(b)(4); San Jose Charter, art. IX, § 902 (“compensation of all
25 City appointive officers and employees, except as otherwise provided in this Charter, shall be
26 fixed by the Council”); San Jose Charter, art. XV (retirement); San Jose Muni. Code, §§ 3.12.010
27 (“The council may, by resolution, adopt such regulations to afford compensation to officers and
28 employees of the city, by way of salary and other benefits, as the council may deem reasonably
necessary”); § 3.28.200 *et seq.*, 3.28.700 *et seq.*, 3.36.1520 *et seq.* (pension contributions);
3.28.385 (retiree medical contributions).

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For all of the foregoing reasons, the Court should sustain the defendants' demurrers, without leave to amend, to the second and seventh causes of action in AFSCME's amended complaint.

DATED: March 18, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: Jennifer L. Nock
Jennifer L. Nock
Attorneys for Defendants
City of San Jose and Debra Figone, in Her Official
Capacity

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