

Case No. H043540

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SIXTH APPELLATE DISTRICT**

**PETER CONSTANT, STEVEN HAUG, and SILICON VALLEY
TAXPAYERS' ASSOCIATION, a California non-profit corporation,**
Proposed Intervenors, Appellants and Petitioners

v.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA,**
Respondent

**THE PEOPLE OF THE STATE OF CALIFORNIA on the
RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION,**
Plaintiff, Respondent, and Real Party in Interest

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,
Defendants, Respondents, and Real Parties in Interest

**SJPOA'S PRELIMINARY OPPOSITION TO
PETITION FOR WRIT OF MANDATE OR,
IN THE ALTERNATIVE, SUPERSEDEAS,
OR OTHER APPROPRIATE RELIEF**

From Order of the Superior Court of Santa Clara County
The Honorable Beth McGowen, Presiding
Superior Court Case No. 2013-cv-245503

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SIXTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p align="center">H043540</p>
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APPELLANT/PETITIONER: Peter Constant, et al. RESPONDENT/REAL PARTY IN INTEREST: San Jose Police Officers' Association	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (<i>Check one</i>): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (*name*): San Jose Police Officers' Association

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person

Nature of interest (Explain):

- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 10, 2016

Laurie J. Hepler

(TYPE OR PRINT NAME)

/s/ Laurie J. Hepler

(SIGNATURE OF PARTY OR ATTORNEY)

TABLE OF CONTENTS

	PAGE
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	3
PRELIMINARY OPPOSITION TO A STAY OR OTHER RELIEF	8
I. THERE IS NO EMERGENCY JUSTIFYING AN IMMEDIATE STAY.....	8
II. NO STAY OF ANY KIND SHOULD ISSUE—WHETHER IMMEDIATE OR BY WRIT OF SUPERSEDEAS.....	9
A. THE STATUS QUO IS NOT WHAT PETITIONERS CLAIM; MEASURE B HAS NEVER BEEN IMPLEMENTED.	10
B. MEASURE B WAS NOT LAWFULLY PLACED ON THE BALLOT; THUS ANY “RIGHTS” CREATED BY ITS PASSAGE HAVE NEVER EXISTED.....	11
C. REAL PARTIES WOULD BE HARMED BY THE ISSUANCE OF A STAY, WHEREAS NO ACTUAL HARM WOULD BEFALL PETITIONERS IF IT IS DENIED.....	15
D. SUPERSEDEAS IS UNAVAILABLE WHERE, AS HERE, THE JUDGMENT IS SELF-EXECUTING.	17
E. PETITIONERS’ SEVEN-MONTH DELAY BEYOND REAL PARTIES’ PUBLIC ANNOUNCEMENT OF THE CHALLENGED SETTLEMENT— EMBODIED IN THE JUDGMENT—SHOULD DISQUALIFY PETITIONERS FROM ANY RELIEF NOW.....	19

TABLE OF CONTENTS

	PAGE
III. THE COURT SHOULD DOUBT THE PETITION’S VERACITY.....	22
A. SJPOA WAS THE PREVAILING PARTY ON THE MERITS CHALLENGE TO MEASURE B’S PLACEMENT ON THE BALLOT.....	22
B. THE UNDERLYING QUO WARRANTO ACTION—CHALLENGING WHETHER MEASURE B WAS VALIDLY ENACTED—IS DISTINCT FROM THE PRIOR CASE CHALLENGING WHETHER MEASURE B WAS CONSTITUTIONAL.....	23
CONCLUSION	24
CERTIFICATE OF COMPLIANCE	25

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Feinberg v. Doe</i> (1939) 14 Cal.2d 24	18
<i>Geiger v. Board of Sup'rs of Butte County</i> (1957) 48 Cal.2d 832	21
<i>Hulse v. Davis</i> (1927) 200 Cal. 316	17
<i>In re Imperial Water Co. No. 3</i> (1926) 199 C.556	18
<i>Knoff v. City etc. of San Francisco</i> (1969) 1 Cal.App.3d 184	21
<i>Mills v. County of Trinity</i> (1979) 98 Cal.App.3d 859	9
<i>Norton v. Municipal Court</i> (1935) 8 Cal.App.2d 368	17
<i>People ex rel. Boarts v. City of Westmoreland</i> (1933) 135 Cal.App. 517	11, 18
<i>People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach</i> (1984) 36 Cal.3d 591	11, 23
<i>Pulskamp v. Martinez</i> (1992) 2 Cal.App.4th 854	21
<i>Smith v. Selma Cmty. Hosp.</i> (2010) 188 Cal.App.4th 1	8
<i>Solorza v. Park Water Co.</i> (1947) 80 Cal.App.2d 809	17, 18

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Walker v. Los Angeles County</i> (1961) 55 Cal.2d 626	21
STATUTES	
California Rules of Court	
Rule 8.116(a)	9
Code of Civil Procedure	
Section 803	23
Section 923	8
Section 1021.5	22
Section 1085, subd. (a)	21
OTHER AUTHORITY	
San Jose City Council	
Resolution 76158	11, 12, 13, 14, 15

PRELIMINARY OPPOSITION TO A STAY OR OTHER RELIEF

This Court can stay a judgment pending appeal by issuance of a writ of supersedeas, or other stay order, “to preserve the status quo ... or otherwise in aid of its jurisdiction.” (Code Civ. Proc., § 923.) But such relief is improper here because this Court’s appellate jurisdiction is not threatened. The status quo is not at all what Petitioners say it is, and their claims of imminent harm are meritless. Petitioners have also inexcusably delayed their efforts here; the Petition reveals that they should have made their present assertions months ago.

A party seeking a writ of supersedeas “must convincingly show that substantial questions will be raised on appeal and must demonstrate it would suffer irreparable harm outweighing the harm that would be suffered by the other party” (*Smith v. Selma Cmty. Hosp.* (2010) 188 Cal.App.4th 1, 18.) This Preliminary Response outlines why the Petition and the supplemental information filed earlier today (“the Supplement”) fail to carry these burdens. If this Court so requires, Real Party SJPOA will make a more detailed evidentiary and legal showing.

I. THERE IS NO EMERGENCY JUSTIFYING AN IMMEDIATE STAY.

Neither the Petition nor the Supplement claims that any property will be destroyed or that any child will be removed from the state absent this Court’s immediate stay. Neither claims anything approaching the level of urgency, or even specificity, that this Court expects when presented with a

“Request for Immediate Stay.” In fact—violating Rule of Court 8.116(a)—Petitioners do not state on either cover “the nature and date of the proceeding or act sought to be stayed.”

That is because Petitioners cannot identify any specific, impending, irreversible harm justifying any intervention by this Court before it has fully considered the parties’ submissions. Instead, the Petition grandly asks the Court to “stop the destruction of Petitioners’ right to vote” (p. 11), to “protect their constitutional initiative and charter amendment rights” (p. 46), and to “avoid chaos in the City’s pension system” (*id.*). The Supplement claims at 3 that there is “URGENT NEW INFORMATION” about Real Party CITY OF SAN JOSE taking “the first step to ... nullifying [Petitioners’] right to vote.”

For the reasons explained below, none of those purported dangers is presented here at all—much less is any “urgently” presented. The Court should therefore reject Petitioners’ request for temporary stay.

II. NO STAY OF ANY KIND SHOULD ISSUE—WHETHER IMMEDIATE OR BY WRIT OF SUPERSEDEAS.

“The writ of supersedeas is a purely auxiliary writ, serving the sole function of preserving [this Court’s] appellate jurisdiction pending review of the appeal and a ruling on its merits.” (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.) The requested writ should be denied.

A. The Status Quo Is Not What Petitioners Claim; Measure B Has Never Been Implemented.

Through a series of stays, the key parts of Measure B, relating to pension contributions and related financial points, were never implemented. (Declaration of Gregg McLean Adam In Opposition to the Petition (“Adam Decl.”), ¶¶ 2-7 and Exhibits cited there.) The Court would not know this by reading the Petition or the Supplement. Mr. Constant and his co-parties claim that “Measure B and implementing ordinances have governed the City’s pension system for the last four years” (Pet., p. 12); that “[i]f the stipulated judgment is stayed, the City will simply continue to operate under Measure B as it has for the last four years” (*id.*, p. 15); and so on. But none of that is true.

After Measure B passed in the 2012 election, SJPOA immediately sued to prevent its implementation. (*See* Ex. E to Adam Decl., pp. 3-4.) The City, SJPOA and the other plaintiffs (once the cases were consolidated for trial) entered into a series of stipulations that prevented implementation of Measure B pending the outcome of the constitutional challenges. The stipulations extended from June 28, 2012 to July 1, 2014. (Adam Decl., ¶¶ 2-5.) After Santa Clara County Superior Court Judge Patricia Lucas issued her final ruling in February 2014, declaring the central plank of Measure B unconstitutional, the City implemented no further part of Measure B pending the appeals and the outcome of settlement talks. (*Id.*, ¶¶ 6-7.)

B. Measure B Was Not Lawfully Placed On The Ballot; Thus Any “Rights” Created By Its Passage Have Never Existed.

Measure B was not placed on the 2012 ballot by voter petition (as was true in the cases Petitioners rely on), but instead by the San Jose City Council, via Resolution 76158. A public agency must fulfill its meet and confer obligations under the Meyers-Milias-Brown Act before it can place a measure that affects employee working conditions on the ballot, and if it does not, the Charter measure is set aside. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 602.)

Because **Resolution 76158 itself was invalid**, Measure B was never properly on the ballot at all, and any rights created by it never legally existed. (*People ex rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517, 520-521 [quo warranto judgment meant defendant City had never legally existed, despite purported operations].) That is the nature of the judgment in the underlying quo warranto action – no more, and no less. (*See* AA, pp. 1147-49; AA 22-29 [Attorney General’s Opinion granting SJPOA leave to sue “to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing [Measure B] on the June 2012 ballot”].)

Accordingly, no action of this Court can “preserve the rights and benefits accorded Petitioners and San Jose voters by Measure B” (Petition, p. 13), because those interests arose—in theory—only after the passage of Measure B, whereas the only live issue on Petitioners’ pending appeal of

the judgment here is whether the City adequately bargained **before** placing Measure B on the ballot. The only interests directly affected by the subject matter of this litigation belong to the City, on one hand, and the POA and its members on the other. Nothing in the Petition suggests any way Petitioners can show that the voters had Measure B properly before them (or that they even have a cognizable interest in that question).

There were very good reasons the City stipulated that it failed to complete its statutory bargaining obligations before it passed Resolution 76158. (AA, pp. 1721-27 [Stipulated Order and Facts].) It was not due to changed political winds, as the Petition speculates. That stipulation came only after two contested administrative trials and two rulings by a specialist Administrative Law Judge that the City's passage of Resolution 76158 violated state law. (AA, pp. 320-387, 388-454 [decisions by Public Employment Relations Board ALJ, declaring Resolution 76158 to be invalid].) The stipulation also followed very lengthy settlement discussions—stalked by a deepening crisis as the City's police ranks dwindled. (*See* AA, pp. 523-525 [City Manager Duenas Decl.]; pp. 519-521 [Police Chief Garcia Decl.]

The ruling by Administrative Law Judge Eric Cu in PERB Unfair Practice Case No. SF-CE-969-M, *International Association of Firefighters, Local 230 ("Local 230") v. City of San Jose*, is especially important. (AA, pp. 320-387.) Local 230 and SJPOA bargained over Measure B as a coalition. This means that all the facts and claims were the same as between the Local 230 and SJPOA claims.

After an evidentiary hearing, including live witnesses, Judge Cu concluded his 66-page decision as follows:

After reviewing the record as a whole, **I conclude that the City did not satisfy its obligations [to] meet and confer in good faith with Local 230 prior to approving either Resolution No. 76087 or Resolution No. 76158.** The City has not established that any valid defense excus[ed] its duty to bargain. Therefore, the City's conduct violates the duty to meet and confer in good faith under MMBA sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) as well as PERB Regulations 32603(a), (b), and (c).

(AA, p. 381, emphasis added.) He then ordered that the City:

TAKE THE FOLLOWING AFFIRMATIVE
ACTIONS DESIGNED TO EFFECTUATE THE
POLICIES OF THE ACT:

1. **Rescind** the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit. [Emphasis added.]

(AA, p. 384.) In a second ruling in a case involving a bargaining unit of federated employees, Judge Cu reached the same result. (AA, pp. 388-454.)

These rulings left the validity of Resolution 76158 hanging by a thread.¹ Had the decisions become final, the entirety of Measure B would have been invalidated. The City would have lost any financial

¹ The City appealed both PERB rulings; however, Real Parties agreed to stay both cases and numerous other lawsuits and administrative proceedings connected with Measure B as part of the Settlement Framework. (AA, pp. 170-172.) If this Petition is allowed to prevent the Settlement Framework from moving forward, all of these actions will resume. (AA, pp. 523-524, ¶¶ 10-12 [Decl. of City Manager Duenas].)

savings it had hoped to achieve. Faced with this, the City negotiated a Settlement Framework that locks in \$3 billion of lawful pension savings over 30 years. (AA, p. 525, ¶ 16.) Included in that settlement was an agreement—*given in light of all the realities outlined here*—to stipulate in the quo warranto action that Resolution 76158 was invalid. (AA, pp. 141, 155 [Settlement Framework].)

The City’s stipulation was approved by the California Attorney General, who oversaw the quo warranto action. (AA, pp. 1721-27.) Based upon it, the Attorney General and Judge McGowen also approved the stipulated judgment. (AA, pp. 1147-49; see also pp. 1145-46.)

Accordingly, it is misleading at best to suggest that the judgment at issue here and on the related appeal reflect “collusion,” and it is wrong to claim that “not even one evidentiary hearing or legal motion ... about the terms of the stipulated judgment in the court below.” (Pet., p. 12.) The very same facts and claims that SJPOA asserts in the underlying quo warranto action have already been litigated, with live testimony from witnesses, before the Public Employment Relations Board. As a result, the placement of Measure B on the ballot was ruled unlawful.

Petitioners’ insistence that Real Parties should have fought even longer than they did cannot be accepted, given all these realities omitted from the Petition. The Court should reject it as a basis for any kind of stay (or any other extraordinary relief).

**C. Real Parties Would Be Harmed By The Issuance Of
A Stay, Whereas No Actual Harm Would Befall
Petitioners If It Is Denied.**

Petitioners want to force the City to litigate and establish that it complied with all its statutory bargaining obligations (AA, pp. 44, 55 and 70-71)—even though the City has conceded, after the PERB rulings, that it did not. Such delay would harm Real Parties in at least three ways.

First, it would potentially prevent the parties from putting a new, agreed-upon ballot measure before the voters in November. The City Council must vote on which ballot language to put forward by no later than August 5, 2016. While the City and all of its unions have already agreed on preferred language, if Resolution 76158 were not rescinded—because this Court stayed the judgment here—alternative ballot language will have to be negotiated. That could take months. (AA, pp. 523, 525, ¶¶ 9, 15.) Petitioners are of course free to exercise their rights to put forward any alternative ballot measure.

Second, as City Manager Norberto Duenas explained, forcing the City to litigate whether it met its bargaining obligations would put at risk the \$3 billion in lawful pension savings agreed upon in the Settlement Framework, and would reignite multiple lawsuits against Measure B. (AA, pp. 524-525, ¶¶ 12, 16.) Third, the San Jose Police Department, which is in a well-documented staffing crisis, would be further delayed in

its recruiting and retention efforts. (AA, pp. 519-521; see also *id.*, pp. 489-491, 492-494.)

In contrast, when all their misrepresentations outlined above are stripped away, Petitioners demonstrate no need for a stay of any kind, or any other extraordinary relief. Even taking aside for purposes of this preliminary response the Real Parties' strong dispute that Petitioners have an adequate interest or standing to participate here at all, they have shown no threat of harm.

- Certainly there are no “voting rights” or “constitutional rights” at issue in the pending appeal or here, as the Petition repeatedly intones, and the Supplement barks. Even if those broad concepts could be seen as impacted by this single-measure case, the judgment itself addresses **only** the question authorized by the Attorney General as to **the validity of the City’s initial Resolution** placing Measure B on the 2012 ballot. (*See* AA, pp. 1147-49 [judgment]; AA 20-29 [AG’s Leave to Sue and Opinion.]
- No “chaos in the City’s pension system” will ensue (Pet., p. 46) if the Court denies a stay, because as explained above, Measure B has largely gone unimplemented. **Under the judgment, the City will simply continue not implementing the Measure.** In the unlikely event that Petitioners were to prevail on their pending appeal, Measure B could be

implemented at that time. At most, some arguably larger savings might be lost in the interim, compared with the lawful pension savings that the Settlement Framework would have by then achieved – but Petitioners do not demonstrate even that much.

- Similarly, while Petitioners claim that beneficiaries of Measure B “will face higher city costs and/or reduced services as city funds are shifted from city services to pay for increased pension and related employee and retiree costs” (Pet. at p. 20, ¶ 4), the opposite is true. The savings from Measure B are a fiction: they were never implemented and they are likely to be declared illegal in their entirety. Only the Settlement Framework achieves the laudatory effect of reducing costs and settling the City’s pension system.

D. Supersedeas Is Unavailable Where, As Here, The Judgment Is Self-Executing.

Where “[t]he judgment or order appealed from is self-executing, and no process is required to be issued for its enforcement ... no supersedeas is allowed.” (*Norton v. Municipal Court* (1935) 8 Cal.App.2d 368, 369, citing *Hulse v. Davis* (1927) 200 Cal. 316; see also *Solorza v. Park Water Co.* (1947) 80 Cal.App.2d 809, 812-813 [it is “well settled that, when the judgment or order from which an appeal has been taken is self-executing

and no process is required for its enforcement, the writ of supersedeas will not issue ...”], internal quotations omitted.)

“The term ‘self-executing’ ... obviously denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose.” (*Feinberg v. Doe* (1939) 14 Cal.2d 24, 29.) “It has been repeatedly held that a writ of supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been taken, where no process of, or action by, the court below is involved.” (*Solorza, supra*, 80 Cal.App.2d at p. 812, citing *In re Imperial Water Co. No. 3* (1926) 199 C. 556, 557.)

The quo warranto judgment that Petitioners ask this Court to stay is self-executing. The underlying quo warranto proceeding, like the one in *People ex rel. Boarts v. City of Westmoreland, supra*, “challenge[d] the creation of [Measure B] from its inception” and resulted in a judgment that Measure B’s charter provisions “had never legally come into existence.” (135 Cal.App. at pp. 520-521.) Accordingly, Measure B’s “legal status subsequent to that time has not been changed by the judgment.” (*Id.* [denying writ of supersedeas].) The Petition concedes this, asserting that the Judgment “wipes Measure B ... out of the City Charter” (p. 31), and that it “summarily nullifies Measure B ...” (p. 20).

Thus, regardless of measures the City has undertaken to comply with the judgment’s command (complained of in the Supplement), the status quo

remains as outlined above – and the judgment remains self-executing for purposes of rejecting Petitioner’s requested stays. Because no further action of the Respondent court is needed, none can be superseded by this Court’s writ.

E. Petitioners’ Seven-Month Delay Beyond Real Parties’ Public Announcement Of The Challenged Settlement—Embodied In The Judgment—Should Disqualify Petitioners From Any Relief Now.

Petitioners’ core contention is that “Real Party CITY was required to defend, or provide for the defense of Measure B, and lacked authority to stipulate it was invalidly enacted.” (Petition at p. 32; *see also id.*, pp. 12, 33-34.) They contend that their “appeal has merit” because “Real Party CITY lacked authority to stipulate to destruction of Petitioners’ right to vote ... and to deprive them of the benefits of Measure B Real Party CITY was required to defend Measure B, but did not.” (*Id.*, pp. 28-29; *see also id.*, pp. 42-45.) Petitioners could have and should have made those assertions a long time ago.

First, they knew last summer that the City had agreed to settle the underlying case and all related disputes over Measure B. The Petition concedes that “[i]n August 2015, the City announced it had reached a tentative agreement with the Real Party SJPOA and the International Association of Firefighters, Local 230 (“IAFF”) to replace Measure B, called the ‘Alternative Pension Reform Settlement Framework’

(‘Settlement Framework’). (AA, vol. I, pp. 126, 167.)” In fact, that announcement came a month earlier, in July 2015. (AA vol. I, pp. 126-166) The August announcement spelled out Real Parties’ detailed plan of implementation, including alternative ballot measures for 2016 – the choice to depend on whether the quo warranto action underlying this very proceeding timely reaches a final conclusion. (AA, pp. 169-172; AA 525.)

Thus, no later than August 2015, Petitioners knew the City had ceased defending Measure B—the decision they now attack. This fact is unaltered by Petitioners’ observation that “the Settlement Framework ... contained numerous unresolved contingencies” (¶15.) And Petitioners were **not** “entitled to rely on the presumption that the City was vigorously defending their interests and constitutional rights” (Petition, p. 24, ¶16), once the City announced the opposite.

Finally, Petitioners imply in ¶15 that they were lulled into inaction by the City announcements’ suggestion that “voters would vote on a measure negotiated by Real Parties to supersede Measure B. (AA vol. I, pp. 169-172.)” But this leads nowhere because they offer no reason to doubt the voters will get to do just that. (See AA 525; SJPOA will supply updated evidence of this, if this Court requires a full response.) The only question is whether this writ proceeding itself delays or derails Real Parties’ progress toward placing a new ballot measure before San Jose voters, by interfering with the finality of the quo warranto judgment.

Procedural avenues were available to Petitioners in the summer of 2015 to assert their challenge to the City’s settlement of the underlying quo warranto action (setting aside that challenge’s lack of *merit*). While SJPOA denies that Petitioners have ever had any right to intervene in that action (for the reason set forth at AA 455-466 and supporting material), Petitioners could have petitioned the Respondent court for a writ of mandate or prohibition, and had that action related to Real Parties’ quo warranto case. (See, e.g., *Knoff v. City etc. of San Francisco* (1969) 1 Cal.App.3d 184, 197, citing Code Civ. Proc. § 1085, subd. (a) [mandamus is available to taxpayers to compel performance of public officials in carrying out their public duties]; *Geiger v. Board of Sup’rs of Butte County* (1957) 48 Cal.2d 832, 835; *Walker v. Los Angeles County* (1961) 55 Cal.2d 626, 639 [“Mandamus is a proper remedy to compel a city council or a city civil service board to perform its mandatory duties prescribed by the charter”]; *Pulskamp v. Martinez* (1992) 2 Cal.App.4th 854, 859-860 [“when an action in quo warranto is not available, a private citizen may proceed to seek relief by other means”—e.g., writ of mandate].)

In sum: A petition for writ of supersedeas should be filed as soon as an appellant becomes aware of the need for relief. Petitioners did not do that. Failing timely action, the Petition should offer strong reasons. The Petitioner does not. This Court should deny any stay or supersedeas on these additional grounds.

III. THE COURT SHOULD DOUBT THE PETITION'S VERACITY.

On matters ranging from the relatively trivial (authorship of Measure B) to the fundamental (Measure B's constitutionality), SJPOA's formal response will show—if the Court so requires—that this Petition is riddled with false or misleading assertions. In this preliminary response we highlight only the few most important, as noted above and here.

A. SJPOA Was The Prevailing Party On The Merits Challenge To Measure B's Placement On The Ballot.

The Petition claims at page 11 that “SJPOA unsuccessfully challenged Measure B on the merits.” That is false. In her 38-page decision, Judge Lucas ruled that key aspects of Measure B were unconstitutional and violated employees' vested pension rights. (Adam Decl., ¶ 6 and Ex. E.) She asked SJPOA (and other plaintiffs) to prepare the judgment, and she later awarded SJPOA and other plaintiffs their reasonable attorneys' fees as the prevailing parties under Code of Civil Procedure section 1021.5—because they had achieved important wins regardless of the fact they did not prevail on all of their claims. (Adam Decl., ¶¶ 8-9 and Exs. F-G.)

Omitting these facts while telling this Court that SJPOA essentially lost its merits challenge to Measure B is manipulation of a sort that should further disqualify Petitioners from the relief they seek.

B. The Underlying Quo Warranto Action—Challenging Whether Measure B Was Validly Enacted—Is Distinct From The Prior Case Challenging Whether Measure B Was Constitutional.

The Petition further misleads when it frames this case as “a ‘second bite at the apple’ ... under the Quo Warranto statutes.” (p. 12.) The underlying action is a *procedural* challenge asserting that the City placed Measure B on the ballot in violation of SJPOA’s collective bargaining rights. It is, by statutory design (see Code of Civ. Proc. § 803 et seq.), distinct from the *substantive* “merits” challenge addressed by Judge Lucas. Challenges by peace officers to the failure of a charter city to meet and confer in good faith before submitting a ballot measure that affects wages, hours or other terms and conditions of employment must proceed by way of a quo warranto application to the California attorney general. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 602 (“*Seal Beach*”) [charter measure set aside for failing to meet and confer].)

CONCLUSION

For these reasons and more that Real Party SJPOA can and will document if required to do so by more formal Opposition or return, no stay or other extraordinary relief is warranted. The Court should deny the Petition.

Dated: May 10, 2016

Respectfully submitted,

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By /s/ Laurie J. Hepler
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Attorneys for Real Party In Interest
**SAN JOSE POLICE OFFICERS'
ASSOCIATION**

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR, IN THE ALTERNATIVE, SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF** contains **3,815 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: May 10, 2016

/s/ Laurie J. Hepler

Laurie J. Hepler