

No. \_\_\_\_\_

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In the Court of Appeal of the State of California  
Sixth Appellate District

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**PETER CONSTANT, STEVEN HAUG, and  
SILICON VALLEY TAXPAYERS' ASSOCIATION,  
a California non-profit corporation,**  
*Defendants-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*

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**PETITION FOR WRIT OF MANDATE OR, IN THE ALTERNATIVE,  
SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF**

**RELATED APPEAL PENDING**

(Notice of Appeal Filed May 2, 2016)

***REQUEST FOR IMMEDIATE STAY***

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From Order of the Superior Court of Santa Clara County  
The Honorable Beth McGowen, Presiding  
Superior Court Case No. 2013-1-cv-245503  
Dept. 7, Telephone No.: (408) 882-2170

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**(APPENDIX FILED UNDER SEPARATE COVER)**

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No. \_\_\_\_\_

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State of California  
Court of Appeal  
Sixth Appellate District

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**  
**California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c),**  
**or 8.498(d)**

Court of Appeal Case Caption:

Peter Constant, Steven Haug, and Silicon Valley Taxpayers'  
*Association, Petitioners,*

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

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City of San Jose, City Council of San Jose, The people of the State of  
California on the Relation of San Jose Police Officers' Association, *Real*  
*Parties In Interest.*

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Court of Appeal Case Number: C0 [Not Yet Issued]

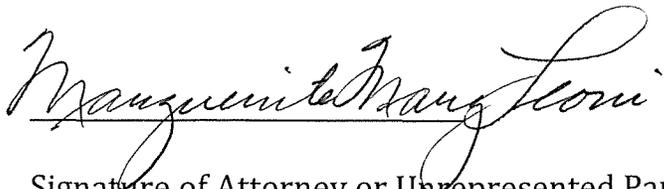
Initial Certificate

Please check here if applicable:

- There are no interested entities or persons to list in this Certificate  
as defined in the California Rules of Court Rule 8.208.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	

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).



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Date: May 6, 2016

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**RELATED APPEAL PENDING**

This Petition is related to an appeal filed in the Superior Court of the State of California in and for the County of Santa Clara on May 2, 2016, Case No. 2013-1-cv-245503. No appellate number has yet been assigned. The appeal is styled:

**THE PEOPLE OF THE STATE OF CALIFORNIA on the RELATION of  
SAN JOSE POLICE OFFICERS' ASSOCIATION,**

*Plaintiff and Respondent*

v.

**CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,**

*Defendants and Respondents,*

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

*Defendants Proposed Intervenors and Appellants*

**REQUEST FOR IMMEDIATE STAY OF JUDGMENT**

Immediate relief from this Court is necessary to stop the destruction of Petitioners' right to vote through the stipulated judicial annulment of Measure B, an amendment to the San Jose City Charter that was overwhelmingly approved by city voters four years ago. Real Parties In Interest CITY OF SAN JOSE and SAN JOSE POLICE OFFICERS ASSOCIATION ("SJPOA") have astonishingly stipulated to the entry of a judgment below to invalidate that charter amendment, depriving the City's voters of their fundamental right to vote and exposing the City's pension system to chaos by nullifying a pension reform charter amendment that has been in effect for four years. An immediate stay is requested.

In June 2012, the voters of San Jose, in a landslide 70 percent of the vote, approved an initiative charter amendment, Measure B, to reform aspects of the City of San Jose's ("City") public pension system.

Measure B and implementing ordinances have governed the City's pension system for the last four years.

Real Party SAN JOSE POLICE OFFICERS ASSOCIATION ("SJPOA"), Plaintiff/Relator below, opposes Measure B, but they lost the election. Then SJPOA unsuccessfully challenged Measure B on the merits in a separate lawsuit. In an attempted "second bite at the apple", SJPOA brought this action against Measure B under the *Quo Warranto* statutes. Real Parties CITY OF SAN JOSE and CITY COUNCIL OF SAN JOSE, Defendants below, successfully defended the first law suit, but after a change of administration in November 2014, apparently decided not to defend Measure B in the *Quo Warranto* action. Instead, they collaborated with SJPOA to enter into a stipulation for entry of a stipulated judgment that it be struck down by the court below.

On March 30, 2016, the court below, without a hearing of any sort, entered the stipulated judgment, order and writ nullifying Measure B. (Appellants' Appendix ["AA"], vol. V, pp. 1145-1149.)

Thus, Real Parties have accomplished through stipulation what they could not achieve at the ballot box: the elimination of Measure B from the City Charter. Underscoring the collusive nature of Real Parties' actions, there was not even one evidentiary hearing or legal motion about Measure B, or about the terms of the stipulated judgment in the court below.

Petitioners, who are San Jose voters and Measure B supporters and beneficiaries, attempted to intervene in the action below to protect their own constitutional rights and provide a defense for Measure B, but Real Parties opposed intervention and the court below denied the motion. (AA, vol. V, pp. 1198.)

On April 12, 2016, Petitioners filed motions to vacate the stipulated judgment and for a new trial. (AA, vol. V, pp. 1182-1194.) Two days later, they also applied *ex parte* to the trial court to temporarily stay its judgment, order and writ pending hearing and a decision on their motions. (AA, vol. V, pp. 1203.) Petitioners' showing of irreparable harm from the stipulated judgment, order and writ was un rebutted. (AA, vol. V, pp. 1266-1276.) Nevertheless, on April 27, the trial court erroneously denied Petitioners' application to stay, ruling they did not have standing to make the application. (AA, vol. VII, pp. 1685-1689.) Petitioners then perfected an appeal of the judgment and denial of their motion to intervene to this Court. (AA, vol. VII, p. 1690.)

This Court's immediate intervention to stay the stipulated judgment, order and writ of Respondent SANTA CLARA COUNTY SUPERIOR COURT is necessary to avoid irreparable harm to Petitioners and all San Jose voters to: protect their right to vote; protect their constitutional initiative and charter amendment rights from a negotiated summary nullification by political opponents; preserve the rights and benefits accorded Petitioners and San Jose voters by Measure B; preserve the *status quo* pending resolution of Petitioners' pending motions to vacate and for a new trial; protect the appellate jurisdiction of this Court to grant Petitioners effective relief from the stipulated judgment if reversed or vacated by the Court; and avoid chaos in the City's pension system should this Court uphold Measure B.

The March 30 stipulated judgment, order and writ<sup>1</sup> unburden Respondent CITY of Measure B by striking it from the Charter. In the

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<sup>1</sup> The operative language of the Stipulated Judgment and Order provides:

months prior to entry of the stipulated judgment, Real Party CITY privately negotiated with Real Party SJPOA substantially different pension provisions they like better than Measure B, called the “Settlement Framework”. (AA, vol. I, pp. 140-155.) They can now foist that scheme on San Jose’s voters.

Pursuant to an implementation path agreed to by Real Parties, upon invalidation of Measure B, the City is required immediately to adopt ordinances to implement the Settlement Framework. (AA, vol. I, pp. 174-175.) For example, under Measure B, § 1508-A(e), defined plan benefits shall accrue at a rate not to exceed 2 percent per year of service, not to exceed 65 percent of final compensation, as defined. (AA, vol. I, p. 120.) That will change. Under the Settlement Framework, the accrual

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Based on the foregoing [“Stipulated Factual Findings of the Court” and “Conclusions”], IT IS ORDERED that Resolution 76158, which placed Measure B on ballot (*sic*), is null and void due to a procedural defect in bargaining.

IT IS FURTHER ORDERED that Measure B was not properly placed before the electorate and it and all of its provisions are therefore invalid. (AA, vol. V, p. 1149.)

The so-called Writ in *Quo Warranto* provides:

THEREFORE, YOU [RESPONDENTS CITY] ARE HEREBY COMMANDED, upon receipt of this Writ in *Quo Warranto*, to take all necessary steps to comply with the attached Stipulated Facts and Proposed Findings, Judgment and Order, and declare Resolution 76158 null and void due to a procedural defect.

YOU ARE FURTHER COMMANDED to declare that Measure B was not properly placed before the electorate and it and all of its provisions amending the City of San Jose Charter are therefore invalid and are stricken. Subsequent ordinances amending the Municipal Code to conform with Measure B shall be replaced. (AA, vol. V, p. 1146.)

rate starts at 2.4 percent and ramps up to 3.4 percent with maximum benefit of 80 percent of final average salary. (AA, vol. I, p. 129.) If Real Party CITY proceeds to implement the Settlement Framework during the pendency of this appeal, City employee pension rights may vest in its provisions, generating confusion and likely litigation if this Court later vacates the stipulated judgment; in addition to destruction of their constitutional rights, Petitioners and San Jose voters will lose the benefits of the hard-fought and won pension reforms gained through enactment of Measure B; and implementation of the Settlement Framework may be impossible to unwind, undermining the effectiveness of this Court’s decision if it overturns the stipulated judgment.

If the stipulated judgment is stayed, the City will simply continue to operate under Measure B as it has for the last four years.

**PETITION FOR WRIT OF MANDATE, SUPERSEDEAS, OR  
OTHER APPROPRIATE RELIEF**

**INTRODUCTION**

Measure B is a voter-enacted amendment to San Jose’s City Charter designed to protect the City’s employees, residents, and voters by ensuring that the “City can provide reasonable and sustainable post-employment benefits while at the same time delivering Essential City Services to the residents of San Jose.” (San Jose City Charter, Article XV-A, § 1502-A; AA, vol. I, p. 115.) In addition to imposing several pension cost containment provisions, Measure B empowered San Jose voters to approve “any change in matters related to pension and other post-employment benefits,” and required voter approval for any increases to pension or particular retiree health care benefits. (San Jose City Charter,

Article XV-A, § 1504-A; AA, vol. I, p. 116.) Prior to Measure B. San Jose voters did not have this authority. If Measure B is invalidated, not only would the will of San Jose voters be thwarted, but the direct power granted them over the pension system will be eliminated.

Petitioners PETER CONSTANT, STEVEN HAUG, and SILICON VALLEY TAXPAYERS' ASSOCIATION are, and represent direct beneficiaries of Measure B, and voters who expended countless hours, energy, and money to successfully campaign for its enactment, and who exercised their constitutional initiative and charter amendment rights, voting to amend their City Charter to include Measure B. After months of collective bargaining with Real Party SJPOA, and the other City unions pursuant to the Meyers-Milias-Brown Act (Gov. Code §§ 3500-3511, "MMBA"), in March 2012, the Real Party SAN JOSE CITY COUNCIL passed Resolution 76158 placing Measure B on the June 2012 ballot. (AA, vol. I, p. 34.) San Jose voters overwhelmingly voted in favor of including Measure B in the City Charter. (AA, vol. I, p. 34.)

Litigation to invalidate Measure began immediately after the election. In one case filed by Real Party SJPOA, the substantive validity of Measure B was largely upheld. (*San Jose Police Officers' Association v. City of San Jose* (and Consolidated Actions and Related Cross-Complaint), Santa Clara Superior Court No. 1-12-CV 225296.). Appeals are pending in this Court.

Real Party SJPOA also filed with the California Attorney General an Application for Leave to Sue in *Quo Warranto* asserting the City had failed to comply with its collective bargaining obligations under the MMBA prior to placing Measure B on the ballot. (AA, vol. I, pp. 19-21.) In April 2013, the Attorney General granted leave, stating, "Leave to sue is GRANTED to determine whether the City of San Jose fulfilled its

statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot . . . .” (96 Ops.Cal.Atty.Gen. 1 (2013); AA, vol. I, pp. 22-29.) On April 29, 2013, the complaint in the action below was filed (AA vol. I, p. 2.); the City answered the complaint on June 28, 2013 denying all material allegations and asserting its affirmative defenses. (AA, vol. I, p. 32.)

Then Real Party CITY’s political leadership changed in the November 2014 general municipal election. Despite running on a platform to defend Measure B, the new Mayor changed course. (AA, vol. I, pp. 78-79.) Real Party CITY entered into negotiations with Real Party SJPOA and the International Association of Firefighters, Local 230 (“IAFF”) to invalidate Measure B through a wholly improper stipulated judgment in the *Quo Warranto* action. Those negotiations and resolution of associated contingencies continued into 2016. (AA, vol. V, pp. 1267-1268.)

When Petitioners realized their constitutional rights were being bargained away, on March 9, 2016, Petitioners filed an application to intervene in the *Quo Warranto* action to defend Measure B pursuant to the California Supreme Court decision in *Perry v. Brown* (2011) 52 Cal.4th 1116. (AA, vol. I, p. 43.) *Perry v. Brown* mandates, when the public officials obligated to defend an initiative refuse to do so, voters, including the intended direct beneficiaries of Measure B, have standing to defend it. (*Perry, supra*, 52 Cal.4th at p. 1126 [Intervention must be granted “because it is essential to the integrity of the initiative process embodied in article II, section 8 that there be someone to assert the state's interest in an initiative's validity on behalf of the people when the public officials who normally assert that interest decline to do so.”].) Flaunting *Perry*, Real Party CITY brazenly opposed Petitioners’

intervention. Then, completely disregarding Petitioners' application to intervene, Real Parties CITY and SJPOA secured the signature of the lower court judge on their proposed stipulated judgment and writ in *Quo Warranto* on an *ex parte* basis. (AA, vol. VI, p. 1312.) Neither were served on Petitioners.

At the April 5, 2016 hearing on their application to intervene, Petitioners learned for the first time Real Parties had submitted a stipulated judgment to the Court, and the Court had already signed it. (AA, vol. V, pp. 1160-1161.) The trial court denied intervention. (AA, vol. V, p. 1199.) On April 12, 2016, Petitioners filed Notices of Intention to Move to Vacate Judgment and for Further Trial or New Trial, pursuant to Code of Civil Procedure section 657 *et seq.* and California Rules of Court Rule 3.1600. (AA, vol. V, p. 1182.)

On April 14, 2016, Petitioners applied to the trial court for a stay of its judgment and writ pending the court's decision on the motions. (AA, vol. V, p. 1203.)

On April 27, 2016, the application for stay was denied. (AA, vol. VII, p. 1685.) The trial court erroneously ruled Petitioners lacked standing to apply for the stay. (AA, vol. VII, pp. 1685-1688.)

On May 2, 2016, Petitioners filed a Notice of Appeal to this Court.

**Parties.**

1. Petitioner PETER CONSTANT ("CONSTANT") is, and at all relevant times mentioned herein was, a retired police officer of the City of San Jose and is a member of a retirement system that is governed, in part, by Measure B, by virtue of his 11 years of service on the City's police force. Measure B directly affects his retirement payments and health care benefits by providing for the long term stability of the San Jose's pension system of which he is a beneficiary. Measure B expressly states

its intent “to ensure the City can provide reasonable and sustainable post-employment benefits while at the same time delivering Essential City Services to the residents of San Jose.” (AA vol. I, p. 115.) CONSTANT is informed and believes and thereon alleges he will be harmed by nullification of Measure B. CONSTANT is clearly within the class of persons intended to be protected by Measure B. CONSTANT is also a former City Council member of Real Party CITY OF SAN JOSE, and he was a principal crafter of Measure B. He also campaigned tirelessly for Measure B, expending personal time and financial resources to do so, and voted in favor of the Charter Amendment.

2. Petitioner SILICON VALLEY TAXPAYERS ASSOCIATION (“SVTA”) is a long standing non-profit organization, whose only political committee ever to be formed was primarily formed to support Measure B at the June 5, 2012 election. SVTA, through its political committee, raised and spend tens of thousands of dollars supporting Measure B. Petitioner SVTA’s then-president signed the ballot argument in favor of Measure B and SVTA actively campaigned for its passage. Petitioner SVTA’s membership includes residents and voters in the City of San Jose who supported and voted for Measure B, and who have a direct interest in this matter as described in the next paragraph.

3. Petitioner STEVEN HAUG (“HAUG”) is a resident, taxpayer and registered voter of the City of San Jose. In addition, Petitioner HAUG is treasurer of Petitioner SVTA and campaigned for, supported and voted for Measure B. Measure B granted Petitioner HAUG, as well as all other San Jose voters, new power not previously possessed by San Jose voters. Section 1504-A reserved to the voter authority to “consider any change in matters related to pension and other post-employment benefits,” and requires voter approval of any increases to pension or retiree-

healthcare benefits, other than Tier 2 benefit plans, as set forth in Measure B. (AA, vol. I, p. 116.)

4. Petitioners are parties aggrieved by the judgment below. Collectively, Petitioners represent the retirees and citizens of the City who exercised their constitutional right to amend San Jose's Charter by expending time and money to campaign for the initiative, and voting to approve Measure B. (*Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417.) The stipulated judgment and writ signed by the trial court summarily nullifies Measure B and directly affects Petitioners by nullifying their right to vote and their constitutional right to enact Measure B as an amendment to their City Charter, rendering the time and resources expended by Petitioners for naught. The beneficiaries of Measure B represented by Petitioners 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, a less stable and sustainable retirement system, and, as City of San Jose voters, they will be deprived of the right to approve pension changes granted them in Section 1504-A of Measure B.

5. Real Party CITY OF SAN JOSE is, and at all relevant times mentioned herein was, a Charter City organized under Article XI of the California Constitution and the laws of the State of California within the boundaries and jurisdiction of the County of Santa Clara.

6. Real Party CITY COUNCIL OF SAN JOSE is the legislative body of the City of San Jose. (Defendants City of San Jose and City Council are jointly referred to herein as "City").

7. Real Party SAN JOSE POLICE OFFICERS' ASSOCIATION is a labor organization in the City of San Jose that opposed enactment of Measure B.

8. Respondent SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA filed a stipulated judgment on March 30, 2016 invalidating Measure B, denied Petitioners' motion to intervene on April 13, 2016, and denied their application for a temporary stay on April 27, 2016. In Respondent Superior Court, the action below was assigned to Judge Beth McGowen in Department 7.

**Brief History of Measure B.**

9. Beginning in 2008, the City of San Jose faced a budget crisis driven in large part by rising costs for employee retirement benefits. In response, the City adopted a fiscal reform program that called for a variety of cost reduction measures, including a possible charter amendment concerning employee retirement benefits. (Motion for Judicial Notice, Ex. D., pp. 278-279 [Statement of Decision in Consolidated Cases].) The Meyers-Milias-Brown Act obligates local agency employers to meet and confer over proposed charter amendments that would directly impact terms and conditions of employment for their employees. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.)

10. In May 2011, San Jose's then-Mayor and City Council directed staff to draft a proposed ballot measure addressing retirement benefits for new and current employees and to contact the City's unions to start bargaining over such a ballot measure. (Motion for Judicial Notice, Ex. B, p. 27 and Ex. C, p. 35 [Statement of Undisputed Facts in Opposition to SJPOA's Application for Leave to Sue in Quo Warranto ("Undisputed Facts"), ¶¶ 6-7; Declaration of Alex Gurza in Opposition to SJPOA's Application for Leave to Sue in Quo Warranto (Gurza Decl.) ¶¶9-10].) The City and SJPOA agreed in a "Pledge of Cooperation" that negotiations

would complete by October 31, 2011, and if no agreement is reached, the Parties would proceed to impasse procedures. (Motion for Judicial Notice, Ex. B, p. 27 and Ex. C, p. 36 [Undisputed Facts, ¶¶ 8-9; Gurza Decl. ¶ 14].) The Parties met for thirteen negotiation sessions and exchanged several drafts of the ballot measure. (Motion for Judicial Notice, Ex. B, p. 28 and Ex. C, p. 36 [Undisputed Facts, ¶¶ 10-13; Gurza Decl. ¶ 15].) Not able to agree on the ballot measure language, the Parties reached an impasse on October 31, 2011 and proceeded to mediation on November 15 and 16, 2011. (Motion for Judicial Notice, Ex. B, p. 28 and Ex. C, p. 37 [Undisputed Facts, ¶¶ 14-15; Gurza Decl. ¶¶ 18-19; Quo Warranto Stipulated Facts And Proposed Findings, Judgment And Order “Stipulated Findings”, No. 2]; AA, vol. VII, p. 1723.)

11. During mediation, the City offered a number of concessions, which it incorporated into its November 22, 2011 draft of the ballot measure. (Motion for Judicial Notice, Ex. B, pp. 28-29 and Ex. C, p. 37 [Undisputed Facts, ¶¶ 16-19; Gurza Decl. ¶¶ 20-21].) However, the concessions of the City did not result in an agreement with Real Party SJPOA. (Motion for Judicial Notice, Ex. B, pp. 28-29 [Undisputed Facts, ¶¶ 16-19].) The City also offered a later December 5 version of the ballot measure that was “substantially similar” to November 22 version. (Motion for Judicial Notice, Ex. B, p. 29 [Undisputed Facts, ¶ 22].) Accordingly, the City denied SJPOA’s allegation in the Complaint herein that the City “significantly changed” or made “dramatic changes” to its November 22 ballot measure. (AA, vol. I, pp. 10-11 [*Quo Warranto* Complaint, ¶¶ 33, 39-40; AA, vol. I, pp. Answer, ¶¶ 33, 39-40.] The parties continued to negotiate into the new year, and, again, the City offered concessions, but the parties were unable to reach agreement. (Motion for Judicial Notice, Ex. B, p. 30 [Undisputed Facts, ¶¶ 28-29].)

12. On March 6, 2012, after nine-months of negotiations and twenty-one (21) meetings with the Real Party SJPOA on retirement and pension reform, to meet the deadline for the June 2012 election, Real Party SAN JOSE CITY COUNCIL voted to place Measure B on the June 5, 2012 ballot. (Motion for Judicial Notice, Ex. B, p. 31 [Undisputed Facts, ¶ 34]; AA, vol. VI, p. 1309.)

13. The voters of San Jose, by an overwhelming majority, approved Measure B.

**Quo Warranto Action.**

13. Litigation immediately ensued. In a lawsuit filed by SJOA, which the City vigorously defended, the substantive validity of Measure B was mostly upheld. (Motion for Judicial Notice Exs. D and E.) Real Party SJPOA also filed with the California Attorney General an Application for Leave to Sue in *Quo Warranto* on the following question: “Did the City of San Jose fulfill its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers’ retirement contributions and reduce their retirement benefits?” (96 Ops.Cal.Atty.Gen. 1 (2013); AA, vol. I, p. 23.) Real Party CITY strenuously opposed the application. (Motion for Judicial Notice, Exs. A through C.; 96 Ops. Cal. Atty Gen. at p. 3.)

14. In April 2013, the Attorney General granted leave to Real Party SJPOA to file the action in *quo warranto*, concluding, “Leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers’ retirement contributions and reduce their retirement benefits.” (96 Ops.Cal.Atty.Gen. 1 (2013);

AA, vol. I, p. 23.) Thereafter, the complaint in this action was filed on April 29, 2013; the City answered the complaint on June 28, 2013 denying all material allegations and asserting its affirmative defenses. (AA, vol. I, p. 32.)

15. Then, in January 2015 a new administration took office in San Jose. The new Mayor, despite being elected on a platform to defend Measure B, three months later commenced negotiating with Real Party SJPOA to settle the *Quo Warranto* action. (AA, vol. I, pp. 78-79; AA, vol. I, p. 127.) In 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.) The Settlement Framework was ambiguous in many respects and contained numerous unresolved contingencies, but throughout negotiations, the City’s sometimes inconsistent public documents and proclamations stated that the City’s voters would vote on a measure negotiated by Real Parties to supersede Measure B. (AA vol. I, pp. 169-172.)

**Application to Intervene.**

16. Petitioners were entitled to rely on the presumption that the City was vigorously defending their interests and constitutional rights, as it had done in the first law suit challenging the merits of Measure B, and in opposing SJPOA’s application to the Attorney General. (*United States v. Carpenter* (9th Cir. 2002) 298 F.3d 1122, 1124-1125.) Nevertheless, concerned about the ambiguities and inconsistencies in the City’s public documents and statements, on March 7, 2016, Petitioner CONSTANT informed San Jose’s Mayor of his intent to seek intervention in this action to defend Measure B. (AA, vol. IV, 1006.)

Immediately thereafter, on March 8, 2016, Real Party CITY privately and unbeknownst to Petitioners, accepted a proposed form of stipulated judgment offered by Real Party SJPOA that completely invalidated Measure B by judicial decree. (AA, vol. VI, p. 1312.) The stipulations did not provide for a ballot measure to repeal and supersede Measure B. (AA, vol. VII, pp. 1721-1727.) Later that same day, counsel for Real Party SJPOA walked the signed stipulations over to the courthouse of Respondent SANTA CLARA COUNTY SUPERIOR COURT and dropped the document in the drop-box provided. (AA, vol. VI, p. 1312.) All of this was done in secret without any public notice.

17. Petitioners filed their application to intervene one day later, on March 9, 2016. Counsel for Petitioners had several discussions with counsel for Real Parties CITY and SJPOA over the next several days, and all parties agreed to appear *ex parte* on March 16, 2016, to set a briefing and hearing schedule on Petitioners' application to intervene. (AA, vol. VII, p. 1629.) At no point did Real Parties' attorneys disclosed they had agreed to a stipulated judgment on March 8 and hand-delivered it to the court. (AA, vol. V, p. 1223, 1230.)

18. The Real Parties filed their opposition briefs to Petitioners' Application to Intervene on March 23, 2016, asserting Petitioners' application was too late because the case was settled and the settlement had been delivered to the court, but not serving their factual stipulations or the proposed stipulated judgment and writ on Petitioners. (AA, vol. V, p. 1222.) Counsel for Petitioners were unable to find any evidence of Real Parties' unsupported assertions through the Court's on-line public information portal of case filings, or oral inquiries to the Court's clerk. (AA, vol. V, pp. 1222-1223.)

19. At the intervention hearing on April 5, 2016, the Court informed Petitioners for the first time the judgment had been signed on March 15, 2016, six days after the filing of Petitioners' motion to intervene. (AA, vol. V, pp. 1223.) The Court heard oral argument and took Petitioners' Application to Intervene under submission. (*Ibid.*) It filed its order denying intervention on April 13, 2016. (AA, vol. v., p. 1198.)

**Post-Judgment Motions.**

20. On April 12, 2016, Petitioners filed a Notices of Intention to Move to Vacate Judgment and for Further Trial or New Trial, pursuant to Code of Civil Procedure section 657 et seq. and California Rules of Court Rule 3.1600. (AA, vol. V, 1224.)

21. On April 14, 2016, Petitioners appeared *ex parte* before Judge McGowen and requested a stay of her judgment and writ pending her ruling on Petitioners' motions for new trial. (AA, vol. V, p. 1203.) The Real Parties appeared in opposition to the stay. Judge McGowen granted a temporary stay and provided an expedited briefing schedule and hearing date on the stay application. (AA, vol. V, p. 1251.) Petitioners' declarations demonstrating irreparable harm were un rebutted. Judge McGowen heard oral argument on Petitioners' application for a stay on April 27, 2016, and issued a ruling thereafter denying the stay on the basis that Petitioners lacked standing to file the application. (AA, vol. VII, p. 1685.)

**Writ of Mandate.**

22. The allegations in paragraphs 1 through 21 are incorporated herein by reference as if fully set forth.

23. Petitioners had standing to apply to the court below for a stay pursuant to Code of Civil Procedure sections 657, 918, 128, and 187.

Respondent SUPERIOR COURT committed clear error in ruling they did not.

24. Respondent SUPERIOR COURT also abused its discretion in failing to issue a stay.

25. As set forth in paragraph 4, above, Petitioners are beneficially interested in the actions of Respondent SUPERIOR COURT.

26. In the absence of this Court's writ of mandate, Petitioners will be irreparably harmed in that Measure B will be nullified by the stipulated judgment, order and writ, along with Petitioners' right to amend their Charter and right to vote. "Advocacy for an Initiative and adoption of the measure are, without question, a fundamental exercise of the First Amendment right to petition." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 73.) The right of Californians to petition their government for redress of grievances is "vital to a basic process in the state's constitutional scheme - direct initiation of change by the citizenry through initiative, referendum, and recall." (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 907-908.) In this case, the initiative power is further enhanced under Article XI, section 3 of the California Constitution, which reserves to the City's voters exclusive power to enact and amend the City's Charter. The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury. (*Elrod v. Burns* (1976) 427 U.S. 347, 373; *New York Times Co. v. United States* (1971) 403 U.S. 713; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 480; *American Booksellers Assn., Inc. v. Superior Court* (1982) 129 Cal.App.3d 197, 206.)

27. Strong public interest also demands issuance of a writ of mandate to preserve constitutional rights and avoid confusion and chaos in the administration of Real Party CITY's pension system if the

City ceases to enforce Measure B and replaces its provisions with a different pension system, and later the trial court's stipulated judgment is overturned.

28. Petitioners have no plain, speedy and adequate remedy in the ordinary course of law. An immediate stay and a writ of mandate is the only way to provide relief and protect the Petitioners' and San Jose voters'—constitutional right to vote and to amend their city charter, and First Amendment right to petition the government. (*Sy First Family Ltd. P'ship v. Cheung* (1999) 70 Cal.App.4th 1334, 1345; see also Cal. Code Civ. Proc. § 1086 ["writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law"]).

**Writ of Supersedeas or Other Appropriate Relief**

29. The allegations in paragraphs 1 through 28 are incorporated herein by reference as if fully set forth.

30. The Court of Appeal has independent jurisdiction to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas, or to make any order appropriate to preserve the status quo. (C.C.P. § 923.)

31. The harm from not granting a stay or issuing a writ of supersedeas is such that Petitioners will lose the benefits of this appeal should they prevail, including the denial of First Amendment rights and the right to vote because Measure B will have been erased from the Charter. In addition, Petitioners will lose the benefits of Measure B if the City ceases to enforce it, and replaces its provisions with a different pension system which will be difficult if not impossible to unwind if the stipulated judgment is overturned.

30. This appeal has merit: Real Party CITY lacked authority to stipulate to destruction of Petitioners' right to vote and other

constitutional rights, and to deprive them of the benefits of Measure B as its intended beneficiaries. Real Party CITY was required to defend Measure B, but did not. (*Perry, supra*, 52 Cal.4th at p. 1116.) Since the City lacked authority to stipulate to invalidation of Measure B, the stipulated judgment is unsupported by appropriate findings. In addition, the findings are inconsistent with the evidence in the record and judicially noticeable facts.

**PRAYER**

WHEREFORE, Petitioner respectfully prays that this honorable Court of Appeal:

1. Issue an immediate stay of the Judgment below to avoid serious and irreparable harm and to aid and protect this Court's jurisdiction over the pending appeal.

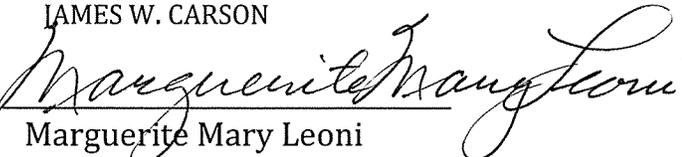
2. Grant Petitioners' petition for a writ of mandate directing respondent Superior Court (a) to rescind its order denying a stay, and (b) to enter a new order granting Petitioners' application for a stay.

3. Issue a Writ of Supersedeas or stay, and such other relief as this Court may deem just and proper, staying the Stipulated Judgment and Order, and quashing the Writ in *quo warranto*.

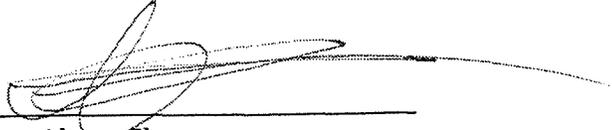
Respectfully submitted,

May 6, 2016

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**VERIFICATION**

I, Marguerite Mary Leoni, declare as follows:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 2350 Kerner Blvd., Suite 250, San Rafael, California 94901.

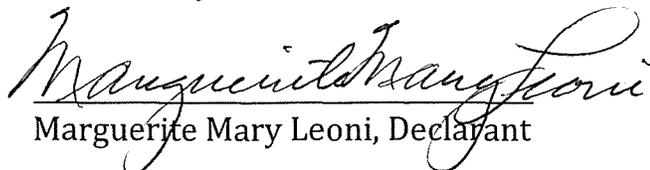
I am the attorney of record for Petitioner PETER CONSTANT in this action. Petitioner is absent from the county in which I have my office and for that reason I am making this verification on his behalf.

I have read the foregoing **PETITION FOR WRIT OF MANDATE, SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF**, and know the content thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 6, 2016, at San Rafael, California.

  
Marguerite Mary Leoni, Declarant

## MEMORANDUM IN SUPPORT OF PETITION

### I. PETITIONERS' CONSTITUTIONAL RIGHTS WILL BE DENIED IF THE STIPULATED JUDGMENT IS NOT STAYED.

The stipulated judgment wipes Measure B, an initiative charter amendment, out of the City Charter based on the improper collaboration of the measure's enemies, thus eliminating Petitioners' and San Jose voters' First Amendment and initiative rights. Measure B was enacted by nearly 70 percent of San Jose's voters. The California Constitution article XI, section 3(a), provides, in part: "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. ... A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes." (Emphasis added.) It is "self-evident that the legislature itself could not abridge nor even hamper the exercise of those powers'. (*Brown v. Boyd* (1939) 33 Cal.App.2d 416, 421, quoting *Hill v. Board of Supervisors* (1917) 176 Cal. 84, 86.)

California's Constitution also reserves to the voters the powers of initiative and referendum. (Cal. Const. art. II, § 11.) As the Supreme Court stated in *Associated Homebuilders, supra*, 18 Cal.3d at p. 591, stated:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the

courts to jealously guard this right of the people” (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), the courts have described the initiative and referendum as articulating “one of the most precious rights of our democratic process” (*Mervynne v. Acker, supra*, 189 Cal.App.2d 558, 563). “[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.” (*Mervynne v. Acker, supra*, 189 Cal.App.2d 558, 563-564; *Gayle v. Hamm, supra*, 25 Cal.App.3d 250, 258.)

Real Parties are political opponents of Measure B. But rather than ask the voters to repeal it in favor of a deal Real Parties believe is a better one, Real Parties collaborated to have the lower court invalidate Measure B by stipulation, without even one evidentiary hearing or motion on a question of law.

Real Party CITY was required to defend, or provide for the defense of Measure B, and lacked authority to stipulate it was invalidly enacted. Issuance of a writ is necessary to preserve the voters constitutional right to vote to amend their city charter, and not to have that right nullified by the refusal of recalcitrant elected officials to defend the measure. (*Perry, supra*, 52 Cal.4th at p. 1116.) If the stipulated judgment is not stayed, Petitioners will lose their constitutional rights and the benefits sought be accomplished through enactment of Measure B, because the City will proceed to implement a different pension system and incorporate City employees into that system according to its settlement with Real Party SJPOA. Petitioners will also lose the ability to gain effective relief through this appeal if the Court vacates the stipulated judgment, as the Real Parties’ Settlement Framework takes root over time, and employees and retirees vest in its provisions.

The public interest also cries out for issuance of a writ for an additional reason, to avoid confusion and future litigation concerning the City's pension system. As set forth above, Real Parties have negotiated a substantially different pension system from Measure B called the "Settlement Framework", which the Real Parties City and SJPOA can now foist on San Jose's voters. Measure B no longer stands in the way. Pursuant to the implementation plan agreed to by Real Parties, upon invalidation of Measure B, the City is required immediately to adopt ordinances to implement the Settlement Framework. (AA, vol. I, pp. 174-175.) As Real Party City proceeds to implement the Settlement Framework during the pendency of this appeal, employee rights may vest in its provisions.<sup>2</sup> Petitioners and San Jose voters will lose the benefits of pension reforms gained through Measure B, and implementation of the Settlement Framework may be impossible to unwind if this Court rules Measure B was validly placed on the ballot.

Allowing the stipulated judgment to stand also sets a terrible precedent. This case will become the model for other cities in California that do not like the constraints imposed by voter-approved initiatives to get rid of them by stipulating to their invalidity with the initiatives'

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<sup>2</sup> "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 (Supreme Court issued writ to require Board to set retirement benefits based on statutes in effect during employment); see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 (replacement of fluctuating benefit system based on salary of current occupant of position with a fixed system based on employee's highest salary, and contribution increase, impair vested right).

political opponents.<sup>3</sup> Any city sued, for example, over land use constraints imposed by initiative that are also troublesome to the city, can merely stipulate to the invalidity of the measure, have judgment entered striking the initiative, and be done with it. This horrible precedent wholly eviscerates the constitutional initiative right, and makes a mockery of the right to vote.

II. **RESPONDENT SUPERIOR COURT COMMITTED CLEAR ERROR IN DENYING PETITIONERS' APPLICATION FOR STAY.**

A. **The Superior Court Had Jurisdiction To Consider Petitioners Request For A Stay.**

Disregarding Petitioners' unrebutted evidence of irreparable harm to constitutional rights flowing from the stipulated judgment, the court below denied Petitioners' application for a temporary stay pending its decision on the motions to vacate and for a new trial (C.C.P. § 918<sup>4</sup>), ruling Petitioners lacked standing to make an application

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<sup>3</sup> This is not fantasy. Recalcitrant elected officials have tried numerous strategies to attempt to eliminate initiatives they do not like, without a vote. California's courts have stymied these efforts, upholding the court's duty to "jealously guard" the people's constitutional initiative right. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591; *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514, fn.3; *Building Indus. Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822; *Perry v. Brown* (2011) 52 Cal.4th 1116; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69.)

<sup>4</sup> Under Code of Civil Procedure section 918(a), the trial judge may stay the enforcement of any judgment or order, whether or not an appeal will be taken and whether or not a notice of appeal has been filed, except as set forth in subdivision (b). (*City of Hollister v. Monterey Ins. Co.* (2009) 165 Cal. App. 4th 455, 482: ["A prohibitory injunction is not stayed by an appeal. ... However, it does not follow that the trial court lacked any power to stay the effect of its own judgment. [Appellant] conspicuously omits any acknowledgment of the trial court's statutory

because they had been denied intervention. While acknowledging the ability of Petitioners to become parties by making their motions to vacate and for new trial, the trial court ruled, “[T]he standing of a person or entity who brings a motion to vacate judgment is limited to the right to appeal from the underlying judgment.” (AA, vol. VII, p. 1687 [emphasis added]; citing *In re Partridge's Estate* (1968) 261 Cal.App.2d 58, 61 (“*Partridge*”).)

This ruling is erroneous. *Partridge* holds no such thing. *Partridge* did not concern at all the trial court’s authority to grant a stay pending appeal. There is no case holding a trial court’s authority to grant a stay “of any judgment” vanishes when the request is made by one entitled to appeal by virtue of filing a motion to vacate or for a new trial. (See *Elliott v. Superior Court of San Diego County* (1904) 144 Cal. 501, 509 [nonparty to litigation who gained standing to appeal by filing motion to set aside judgment has “the opportunity of obtaining a stay in a proper case . . . ”].)

In *Partridge*, a bank claiming to be a creditor of an estate appealed from an order allowing the payment of attorney’s fees from the funds of

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power to “stay enforcement of any judgment or order.” Section 918 provides, in full:

- (a) Subject to subdivision (b), the trial court may stay the enforcement of any judgment or order.
- (b) If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking , a trial court shall not have power, without the consent of the adverse party, to stay the enforcement thereof pursuant to this section for a period which extends for more than 10 days beyond the last date on which a notice of appeal could be filed.
- (c) This section applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed.

said estate. The executor moved to dismiss the appeal on the grounds appellant was not a party to the proceedings in which the order appealed from was made, and did nothing to become a party after the order was made. The Court of Appeal affirmed, holding, "The proper procedure for an alleged creditor of an estate who feels aggrieved by an order of the probate court, and did not participate in the proceedings in which the order was made, is to move to set aside or vacate such order and then, if the motion is denied, appeal from the order of denial." (*Id.* at p. 61.) In explaining its holding, the Court of Appeal noted there were two classes of persons who had the right to appeal a judgment, persons named as parties to the action and persons who became parties of record by moving to vacate the judgment:

The rule is stated as follows: "Even though a person's rights or interests are injuriously affected by a judgment or an appealable order, he cannot appeal therefrom unless he is a party to the proceedings. To this end he may make himself a party to the record by moving to set aside the judgment or order, and may then obtain a review thereof on appeal from an order denying his motion. Such a procedure can scarcely be said to make him a party to the action, but it does make him a party to the record, and, as such, entitled to appeal." (3 Cal.Jur.2d, Appeal and Error, § 107, p. 560.)

(*Estate of Partridge*, supra, 261 Cal. App. 2d at p. 61, emphasis added.<sup>5</sup>)

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<sup>5</sup> Trial court also relied on a couple of other cases, but none support its ruling. (See, *People v. Martinez* (2009) 47 Cal. 4th 399, 419 [letters sent by a third part an insufficient basis for imposing a duty upon the court to conduct a *Marsden* hearing]; *Marshank v. Superior Court of Los Angeles County* (1960) 180 Cal. App. 2d 602, 605 [superior court without jurisdiction to make an award of attorney's fees under former section 137.5 of the Civil Code to one not attorney of record for party in proceedings for dissolution of marriage]; *Beshara v. Goldberg* (1963) 221 Cal. App. 2d 392 [Court of Appeal upheld the trial court's order

The court below seized on the language emphasized in the quote, giving it a weight it does not bear. The language goes no further than to describe the classes of parties with standing to appeal from an adverse judgment as “aggrieved parties”. (See also, *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736; *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417-418.)

**B. The Superior Court’s Ruling Undermines Petitioners’ Right To Move To Vacate And For A New Trial, And Constitutes An Abuse Of Discretion.**

The lower court’s ruling also undermines the purpose of providing a method to become a party to litigation by a motion to vacate or for a new trial: to protect the legal interests of the non-party aggrieved by a judgment. The motion is intended to give the trial court the first opportunity to consider the grievance of the non-party. (*Elliott v. Superior Court of San Diego County* (1904)144 Cal. 501.) The trial court enjoys plenary power in ruling on a motion for a new trial. (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 504.) That authority establishes “the power of the judge to do justice” in ordering a new trial, and to prevent the miscarriage of justice as the court exercises its supervisory role in managing a case. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 159; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747; see also *Hoel v. Los Angeles* (1955) 136 Cal.App.2d 295, 307.)

Petitioners made an unrebutted showing of irreparable harm from the stipulated judgment in the lower court in connection with their application for a stay. They demonstrated irreparable harm to their

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denying appellant's motion to quash the writ of attachment because procedurally improper.]

right to vote, their initiative right and right to make amendments to their city Charter. They further demonstrated deprivation of the benefits sought to be gained by enactment of Measure B, including the right to approve future changes to the City's pension system. Real Parties made no showing at all of harm from a stay of the judgment.<sup>6</sup> (AA, vol. V, pp. 1266-1276.) The facts cried out for a stay.

A stay issued under section 918 preserves the *status quo* and protects the rights of parties, such as those demonstrated by Petitioners, from irreparable harm because they remain in the same condition as they were prior to the entry of the judgment. Thus, a non-party moving to vacate or for a new trial is not deprived of the efficacy of these statutory remedies such that the motion becomes a substantively hollow action, merely prerequisite to an appeal. (*City of Hollister v. Monterey Ins. Co.* (2009) 165 Cal.App.4th at 481; see also *Dewey v. Supreme Court* (1889) 81 Cal. 64, 68.) Trial court stays are typically granted when “[a] party wishes to pursue post-judgment motions (e.g. for new trial . . .).” (The Rutter Group, *Calif. Prac. Guide, Civil Appeals and Writs*, § 7:62; see *Drum v. Bleau, Fox & Associates* (2003) 107 Cal. App. 4th 1009, 1014.)

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<sup>6</sup> The only harm Respondents alleged was the need to draft language for the sham ballot measure. (AA, vol. V, p. 1271-1272.) First, staying the judgment nullifying Measure B while the lower court considers Petitioners' motions to vacate and for a new trial does not interfere with drafting ballot language. If the trial court, upon reconsideration pursuant to Petitioners' motions upholds Measure B, or extends the stay during this appeal, Respondent CITY can still proceed with its proposed measure, but would need to add a provision that it promised, permitting the voters to decide whether they want to supersede Measure B in favor of Respondents' new proposal.

**C. The Superior Court’s Ruling That Petitioners Lacked Standing to Apply For A Stay Is Contrary To The Rules Of Practice In This Court.**

Prerequisite to their ability to seek a stay in this Court, Petitioners were required first to seek a stay in the Superior Court. (9 Witkin *Cal. Proc. Appeal* § 293 (5th ed. 2008). Cal. Rule of Court 8.112(a)(4)(B)(iv) [“The petitioner must file the following documents with the petition[for supersedeas] . . . (iv) Any application for a stay filed in the trial court, any opposition to that application, and a reporter’s transcript of the oral proceedings concerning the stay, . . . .”]; *Nuckolls v. Bank of California, Nat’l Asso.* (1936) 7 Cal. 2d 574, 577.) There is no exception to requirement for parties with the right to appeal by virtue of filing a motion to vacate or for a new trial.

The lower court’s ruling also undermines the Legislature’s purpose in granting superior courts virtually unqualified authority to stay its own judgments. (*City of Hollister v. Monterey Ins. Co.* (2009) 165 Cal.App.4th 455, 481.) The lower court is in a better position than this Court to evaluate the equities involved in the exercise of discretion to grant a stay. (See *Ott v. Gotfried* (1940) 39 Cal. App. 2d 397, 400; *Veyna v. Orange County Nursery, Inc.* (2009) 170 Cal. App. 4th 146, 157.). In this case, Petitioners made an unrebutted showing of irreparable harm to the lower court. They were entitled to the protection of a stay while their motions to vacate and for a new trial were considered. It was an abuse of discretion to deny the stay.

**D. The Superior Court Had Inherent Authority To Grant A Stay.**

In addition to the direct statutory authority of the lower court to issue a stay as discussed above, the Court also has the inherent power to

stay enforcement of its Stipulated Judgment and Order and Writ in Quo Warranto to promote justice, public confidence, and judicial efficiency. (See *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489; see also *Walker v. Sup. Ct.* (1991) 53 Cal.3d 257, 266.) Exercise of that power was required in this case to protect constitutional rights based on the strong and un rebutted demonstration Petitioners made of irreparable harm. Code of Civil Procedure sections 128 and 187 support a trial court's exercise of its inherent power to stay enforcement of its judgment and writ to ensure the orderly administration of justice. (See *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1376-1377; *Bailey v. Fosca Oil Co.* (1963) 216 Cal.App.2d 813, 817.) Section 128 generally provides courts with broad authority to manage the cases and proceedings that come before it, while section 187 imbues a court with all the means necessary to carry its jurisdiction into effect. Courts enjoy inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them that should have been exercised in this case to protect constitutional rights. (*Cottle, supra*, 3 Cal.App.4th at p. 1377; *Vickich v. Superior Court of Los Angeles County* (1930) 105 Cal.App. 587; see also *Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 Cal.App.3d 1108, 1116.)

**III. ISSUANCE OF A WRIT OF SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF IS NECESSARY TO PROTECT THIS COURT'S JURISDICTION.**

**A. Petitioners' Constitutional Rights Will Be Trampled If The Stipulated Judgment Is Not Stayed.**

The Court of Appeal has independent jurisdiction to stay proceedings during the pendency of an appeal or to issue a writ of

supersedeas,<sup>7</sup> or to make any order appropriate to preserve the *status quo*. (C.C.P. § 923.) This is an appropriate case for the Court to exercise that authority. The rule is “that in aid of their appellate jurisdiction the courts will grant supersedeas in appeals where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him, provided, of course, that a proper showing is made.” (*People v. Emeryville* (1968) 69 Cal.2d 533, 537 [“On principle, it would be a terrible situation if in a proper case an appellate court were powerless to prevent a judgment from taking effect during appeal, if the result would be a denial of the appellant’s rights if his appeal were successful.”])

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<sup>7</sup> The stipulated judgment declares and summarily invalidates Measure B: Respondent CITY cannot enforce an invalidated law. (See *Bramberg v. Jones* (1999) 20 Cal. 4th 1045, 1048 [Proposition 225 declared unconstitutional and Respondent Secretary of State ordered not to enforce its provisions, although its provisions remain in the Elections Code, Div. 10, Pt. 2, Ch. 2, Art. 1.2.] “A prohibitory injunction is not stayed by an appeal.” (See *City of Hollister v. Monterey Ins. Co.* (2009) 165 Cal. App. 4th 455, 482.) Such a judgment is stayed only by order of the lower court, or this Court through issuance of its writ of other stay order. (*People v. Town of Emeryville* (1968) 69 Cal.2d 533, 536.) The lower court also issue so called writ in *quo warranto* ordering the City to repeal the resolution placing Measure B on the ballot and Measure B implementing ordinances. However, the “writ of *quo warranto* no longer exists” in California. (1 *Cal. Civil Writ Practice* (Cont.Ed.Bar 4th ed. 2015) § 4.27, p. 4-13; 8 Witkin, *Cal. Proc. Extraordinary Writs* §27 (5th ed. 2008).) The *quo warranto* statutes do not provide for the issuance of a writ. (C.C.P. § 803 et seq.) Nevertheless, should this Court construe the stipulated judgment, order and writ to be mandatory in nature, Petitioners respectfully request that the Court clarify the judgment is stayed by the filing of Petitioners’ notice of appeal. (See, *Johnson v. Superior Court of Los Angeles County* (1957) 148 Cal.App.2d 966, 970 [judgment declaring referendum invalid on procedural grounds, leaving the prior ordinance in place, mandatory in nature and stayed by filing of appeal.])

That showing has been made in this case. The purpose of the writ is to preserve appellate jurisdiction pending review of the appeal and a ruling on the merits. (*Id.*, at 538.) If Measure B is wiped from the city Charter and Real Parties' alternative provisions implemented per the stipulated judgment, this court's ability to provide effective relief will be severely curtailed with the passage of time as employees vest in the new system and the benefits of Measure B are lost to the voters. Along with Measure B, Petitioners right to vote and constitutional rights will also be lost. (See, *Browne v. Russell* (1994) 27 Cal. App. 4th 1116 [supersedeas issued to stay superior court writ pending appellate determination of validity of referendum procedures]; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal. App. 4th 60; *KGB, Inc. v. Giannoulas* (1980) 104 Cal. App. 3d 844.)

#### **B. This Appeal Raises Substantial Questions.**

As set forth in Petitioners' Motions to Vacate and for Further or New Trial listing the bases for new trial (AA, vol. V, pp. 1182-1194; which are unrebutted by Real Parties, AA, vol. VII, pp. 1694-1701), Real Party City lacked authority to stipulate to the invalidation of Measure B, a provision of the City's Charter duly enacted by the voters taking back from the City Council authority over the City's pension system. Any other conclusion would destroy the constitutional right to vote and initiative and charter amendment rights of San Jose voters. "Voter initiatives have been compared to a "legislative battering ram" because they "may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.'" (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035.) "In light of the initiative power's significance in our democracy, courts have a duty "to jealously guard this right of the

people” and must preserve the use of an initiative if doubts can be reasonably resolved in its favor.” (*Id.*, citing *Associated Home Builders etc., Inc. v. City of Livermore, supra*, 18 Cal.3d 582, 591; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248.) Allowing the City to deflect the legislative force of an initiative charter amendment by stipulating to its invalidity with the initiative’s political opponents completely disarms the voters.

Courts have uniformly rejected all attempts by a legislative body to rid itself of inconvenient initiative legislation other than by a vote of the people: legislative bodies cannot secure the invalidation of an initiative through a “friendly action for declaratory relief” (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69 [“We agree with [Intervenor]: ‘Permitting the validity of a voter-enacted initiative to be determined in a lawsuit in which both parties and their attorneys not only believe, but have affirmatively stated in prior judicial proceedings, that the measure is unconstitutional makes a mockery of ‘one of the most precious rights of our democratic process’ (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal. Rptr. 41, 557 P.2d 473]) and breeds disrespect for the integrity of the judicial process.” ]]); through legislation that undercuts the purpose of the initiative (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025 [“We begin with the observation that ‘[t]he purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to “protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.[Citations.]”, citing *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1474, 1483)]]); by re-enacting a referred law on a temporary basis (*Lindelli v. Town of San Anselmo*

(2003) 111 Cal. App. 4th 1099); or by changing other laws to subvert the impact of a referendum (*County of Kern v. T.C.E.F., Inc.* (April 5, 2016, No. F070813) 2016 Cal. App. LEXIS 268.)

In addition, City shirked its duty to defend Measure B. Local governments have a duty to defend initiatives adopted by voters. (*Perry, supra*, 52 Cal.4th at pp. 1127, 1168 (Kennard, J. concurring) [“To give those same state officials sole authority to decide whether or not a duly enacted initiative will be defended in court would be inconsistent with the purpose and rationale of the initiative power, because it would allow public officials, through inaction, effectively to annul initiatives that they dislike.”]; *Lockyer v. CCSF* (2004) 33 Cal.4th 1055, 1082; *Building Indus. Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822; *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514, fn.3; see also *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 456; *Bramberg v. Jones, supra*, 20 Cal.4th 1045.) This is rooted in the principle that the constitutionally reserved initiative power is greater than that of the legislative body, and give the people the final legislative word, a limitation upon the power of the Legislature. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 716.)

If the City did not want to defend, the City was obligated to provide for its defense by other parties, including Petitioners who attempted to intervene but were opposed by Real Party CITY. (See *Perry, supra*, 52 Cal.4th at pp. 1158-59 [“[T]he Attorney General [who declined to defend an initiative] does not have authority to prevent others from mounting a defense on behalf of the state’s interest in the validity of the measure.”].) For example, in *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., supra*, 113 Cal.App.4th 456, the City solicited an initiative supporter to defend an initiative that both the City and the

defendant believed was *ultra vires*. (*Id.* at p. 471.)

Finally, as set forth in the memorandums in support of the motions for new trial (AA, vol. VI, p. 1350; AA, vol. VII, p. 1641) because Real Party CITY lacked authority to stipulate to the invalidity of Measure B, the March 30, 2016 judgment is not supported by findings, and the improper findings are without evidentiary support and must be reversed or vacated. In addition, the judgment is contrary to the evidence in the record and judicially noticeable facts that Real Party City satisfied its obligations under the MMBA. The judgment states: “The City’s failure to [meet and confer after impasse on October 31, 2011] is deemed to be a procedural defect significant enough to declare null and void Resolution 76158, which placed Measure B on ballot (sic).” Yet the Real Parties’ stipulated facts, reflect bargaining through February 2012 (AA, vol. VII, p. 1724); the City’s own sworn and un-contradicted statements reflect the same with additional bargaining in December 2011 and January 2012 (AA, vol. I, pp. 36-37); the recently filed declaration of the City’s counsel reflect negotiations through March 2012. (AA, vol. VI, p. 1309.) None of this evidence was reviewed by the court below before invalidating Measure B pursuant to the unauthorized and incomplete factual stipulation of Real Parties. This evidence supports the conclusion that the City complied with MMBA in submitting Measure B to the voters, in contradiction to the stipulated judgment, order and writ entered in this action. The Stipulated Judgment and Order, should be vacated or reversed, and the Writ in *Quo Warranto* quashed.

**CONCLUSION.**

This Court's immediate intervention to stay the stipulated judgment, order and writ of Respondent SANTA CLARA COUNTY SUPERIOR COURT is necessary to avoid irreparable harm to Petitioners and all San Jose voters to: protect their right to vote; protect their constitutional initiative and charter amendment rights from a negotiated summary nullification by political opponents; preserve the rights and benefits accorded Petitioners and San Jose voters by Measure B; preserve the *status quo* pending resolution of Petitioners' pending motions to vacate and for a new trial; protect the appellate jurisdiction of this Court to grant Petitioners effective relief from the stipulated judgment if reversed or vacated by the Court; and avoid chaos in the City's pension system should this Court uphold Measure B. A Writ of Mandate should issue to the Respondent SUPERIOR COURT correcting its legal error and mandating the issuance of a temporary stay, as requested by Petitioners. In the alternative, a stay directly by this Court through issuance of a Writ of Supersedeas or other relief is warranted.

Respectfully submitted,

May 6, 2016

NIELSEN, MERKSAMER, PARRINELLO,

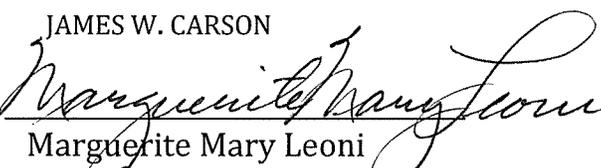
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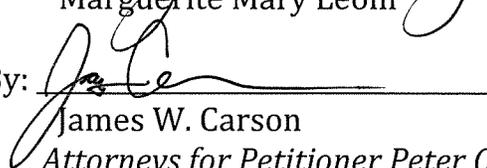
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A handwritten signature in black ink, appearing to be 'Alena Shamos', written over a horizontal line. The signature is stylized and extends to the right.

Alena Shamos

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