

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Edward A. Kraus, Esq. (SBN 162043) Creech, Liebby & Kraus 333 W. San Carlos Street, Suite 1600 San Jose, CA 95110 TELEPHONE NO: (408) 993-9911 FAX NO: (408) 993-1335 ATTORNEY FOR (Name): Peter Constant and Benjamin Roth		FOR COURT USE ONLY						
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 191 N. First Street MAILING ADDRESS: CITY AND ZIP CODE: San Jose, CA 95110 BRANCH NAME:								
CASE NAME: Peter Constant and Benjamin Roth v. Dennis Hawkins, et al.								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="2" style="text-align: center;">CIVIL CASE COVER SHEET</td> <td style="text-align: center;">Complex Case Designation</td> </tr> <tr> <td style="width: 33%; vertical-align: top;"> <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less) </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402) </td> </tr> </table>			CIVIL CASE COVER SHEET		Complex Case Designation	<input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	<input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
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Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other P/DPD/W (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/DPD/W (23) Non-P/DPD/W (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/DPD/W tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input checked="" type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. ☐ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): **None**
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: **March 22, 2012**
Edward A. Kraus

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages; (2) punitive damages; (3) recovery of real property; (4) recovery of personal property; or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) (if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)

Other PI/PD/W (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability (not asbestos or toxic/environmental) (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other PI/PD/W (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PD/W (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other PI/PD/W

Non-PI/PD/W (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) (not civil harassment) (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice (not medical or legal)
Other Non-PI/PD/W Tort (35)
Employment
Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract (not unlawful detainer or wrongful eviction)
Contract/Warranty Breach—Seller
Plaintiff (not fraud or negligence)
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage (not provisionally complex) (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property (not eminent domain, landlord/tenant, or foreclosure)

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) (if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims (arising from provisionally complex case type listed above) (41)

Enforcement of Judgment

Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment (non-domestic relations)
Sister State Judgment
Administrative Agency Award (not unpaid taxes)
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint (not specified above) (42)
Declaratory Relief Only
Injunctive Relief Only (non-harassment)
Mechanics Lien
Other Commercial Complaint Case (non-tort/non-complex)
Other Civil Complaint (non-tort/non-complex)

Miscellaneous Civil Petition

Partnership and Corporate Governance (21)
Other Petition (not specified above) (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief From Late Claim
Other Civil Petition

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5 Attorneys for Petitioners,
6 PETER CONSTANT and BENJAMIN ROTH
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SANTA CLARA

10 PETER CONSTANT and BENJAMIN ROTH,)

11 Petitioners,)

12 vs.)

13)
14 DENNIS HAWKINS, Office of the City
15 Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,)

16 Respondents,)

17 HELEN CHAPMAN, PATTIE CORTESE,)
18 JAMES SPENCE, JOHN S. DIQUISTO and)
19 CAY DENISE MACKENZIE,)

20 Real Parties In Interest.)
21

Case No.:

**APPLICATION FOR ORDER
SHORTENING TIME TO HEAR EX
PARTE VERIFIED PETITION FOR
WRIT OF MANDATE AND STAY
(Elections Code §9295)**

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

22 Petitioner PETER CONSTANT and BENJAMIN ROTH hereby apply, pursuant to Section
23 1005(b) of the Code of Civil Procedure, for an Order Shortening Time for Hearing on their Petition
24 for Writ of Mandate and Stay.

25 Ex parte relief for said Verified Petition is being sought upon the grounds set forth in the
26 Verified Petition and for the exigent reasons requiring the Petition.
27
28

1 Petitioners hereby respectfully request that this Court grants this Ex Parte Application for an
2 Order Shortening time for Hearing on the Ex Parte Verified Petition for Writ of Mandate and Stay.

3
4 Dated: March 22, 2012

CREECH, LIEBOW & KRAUS

5
6 By: 

EDWARD A. KRAUS

Attorneys for Petitioners,

PETER CONSTANT and BENJAMIN ROTH

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PETER CONSTANT and BENJAMIN ROTH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,

Petitioners,

vs.

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,

Respondents,

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,

Real Parties In Interest.

Case No.:

**DECLARATION OF EDWARD A. KRAUS
IN SUPPORT OF EX PARTE
APPLICATION FOR ORDER
SHORTENING TIME TO HEAR EX
PARTE PETITION FOR WRIT OF
MANDATE AND STAY (Elections Code
§9295)**

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

I, Edward A. Kraus, declare:

1. I am an attorney fully licensed to practice in the State of California and am a member of the law firm Creech, Liebow & Kraus, counsel for Petitioners PETER CONSTANT and BENJAMIN ROTH (collectively referred to herein as "Petitioners") in the above captioned matter. I have personal knowledge of the matters set forth in this declaration, and if called to testify as a witness in this matter, I would be competent to testify as follows.
2. For the reasons set forth in the verified petition, the briefing schedule must be shortened.

1
2 I declare under penalty of perjury that the foregoing is true and correct under the laws of the
3 State of California. Executed this 22nd day of March, 2012 at San Jose, California.
4

5 

6 EDWARD A. KRAUS
7
8
9

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IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,)

Case No.:

Petitioners,

vs.

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR ORDER
SHORTENING TIME FOR HEARING ON
EX PARTE VERIFIED PETITION FOR
WRIT OF MANDATE AND STAY
(Elections Code §9295)**

Respondents,

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

Real Parties In Interest.

Pursuant to the Writ, Petitioners are seeking a shortened briefing scheduled based upon the exigencies set forth in the Petition.

I. ARGUMENT

**A. THE COURT HAS THE RIGHT TO CHANGE THE HEARING DATE AND
SHORTEN THE SERVICE TIME SO THAT THIS MATTER CAN BE
HEARD IN COMPLIANCE WITH THE PARTIES' AGREEMENT.**

Code of Civil Procedure Section 1005(b) sets forth the time period for filing and serving motions including an Application for Writ of Attachment. Code of Civil Procedure Section 1005(b)

1 also states that "[t]he court, or a judge thereof, may prescribe a shorter time." The Court also has its
2 own general powers to set its calendar.

3 **II. CONCLUSION**

4 Petitioner respectfully requests that this Court grant the Ex Parte Application to shorten the
5 time for hearing.

6
7 Dated: March 22, 2012

CREECH, LIEBOW & KRAUS

8
9 By: 

EDWARD A. KRAUS

Attorneys for Petitioners,

PETER CONSTANT and BENJAMIN ROTH

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Attorneys for Petitioners,
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IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,

Petitioners,

vs.

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,

Respondents,

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,

Real Parties In Interest.

Case No.:

**[PROPOSED] ORDER SHORTENING
TIME TO HEAR PETITION FOR WRIT
OF MANDATE AND STAY (Elections
Code §9295)**

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

IT IS HEREBY ORDERED that Petitioners' Ex Parte Application for an Order Shortening
Time for Hearing on Ex Parte Verified Petition for Writ of Mandate and Stay is GRANTED.

Hearing on said Petition for Writ of Mandate shall be at _____ a.m./p.m. on

_____, 2012, at the above-referenced Court.

Any opposing papers shall be filed no later than _____.

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Any reply papers shall be filed no later than _____.

The parties shall serve their papers by e-mail.

DATED: _____, 2012

JUDGE OF THE SUPERIOR COURT

1 Edward A. Kraus, Esq. (SBN 162043)
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5 Attorneys for Petitioners,
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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 PETER CONSTANT and BENJAMIN ROTH,)

Case No.:

11 Petitioners,)

**EX PARTE VERIFIED PETITION FOR
WRIT OF MANDATE AND STAY
(Elections Code §9295)**

12 vs.)

13)
14 DENNIS HAWKINS, Office of the City
15 Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,)

**Date: March 23, 2012
Time: 8:15 a.m.
Dept.: TBA**

16 Respondents,)

17 HELEN CHAPMAN, PATTIE CORTESE,
18 JAMES SPENCE, JOHN S. DIQUISTO and
19 CAY DENISE MACKENZIE,)

20 Real Parties In Interest.)
21

22 **PETITION**

23 Petitioners PETER CONSTANT and BENJAMIN ROTH (collectively referred to herein as
24 "Petitioners") seek a Writ of Mandate or Stay pursuant to Elections Code §9295 seeking
25 amendment or deletion of certain statements contained in the Argument Against Measure B
26 submitted by Real Parties In Interest on or about March 13, 2012. This Petition is brought within
27 the ten (10) days required and must be issued before said Argument is entered for printing by
28 Respondents.

1 Petitioners specifically allege the following:

2 1. Petitioners are United States citizens, more than eighteen (18) years of age, and
3 residents and registered voters of the City of San Jose, California for more than two (2) years. Mr.
4 Constant has lived in San Jose for 33 years. Mr. Roth has lived in San Jose for thirty-six (36) years.

5 2. Petitioners are informed and believe and thereon allege that Respondent DENNIS
6 HAWKINS is the City Clerk for the City of San Jose and is the official responsible for handling
7 election information for the City of San Jose's elections including Arguments related to Measures
8 that are on the Ballot for the June 5, 2012 election. Petitioners are also informed and believe and
9 thereon allege that Respondent BARRY GARNER is the Registrar of Voters for all of Santa Clara
10 County.

11 3. Petitioners are informed and believe and thereon allege that the Real Parties In
12 Interest, Helen Chapman, Pattie Cortese, James Spence, John S. DiQuisto and Cay Denise
13 MacKenzie, have an interest that is directly affected by this proceeding in that they authored and
14 filed with the City Clerk on March 13, 2012 an Argument against Measure B to be included in the
15 voter pamphlet. A true and correct copy of the Argument against Measure B is attached to
16 Petitioners' Request for Judicial Notice as Exhibit A.

17 4. Petitioners seek a Writ of Mandate pursuant to Elections Code §9295 to compel the
18 deletion of certain unlawful statements in the Argument Against Measure B which Respondent City
19 Clerk or Respondents are preparing for voter use in the City of San Jose's Election to be held on
20 June 5, 2012. Said statements are false and/or misleading in violation of Elections Code
21 §9295(b)(2). Said statements that are false or misleading are as follows:

- 22 a. "It could eliminate disability retirements for police and firefighters injured on
23 the job and unable to perform their previous duties, it increases by thousands
24 of dollars the amount widows and seniors pay for promised health care, and
25 the City admitted that Measure B may not be constitutional because it
26 violates employees' vested rights."
- 27 b. "But city officials never even tried to offer taxpayers a way to achieve any
28 savings that would stand up in court.

1 c. "City workers recently took 10%-18% pay cuts."

2 d. "Employees proposed dozens of legal pension reforms that would have
3 increased retirement ages, reduced benefit levels and lowered COLA's.
4 Police and fire even proposed to cut pensions back to 1962 levels."

5 e. "...politicians unsuccessfully tried to declare a fiscal emergency..."

6 f. "This pattern of inaccurate financial projections, meant to scare voters..."

7 5. Statement a is false and misleading because Measure B does not eliminate disability
8 retirement. Measure B redefines disability so that if a police officer or firefighter can still perform a
9 job within that department, then they are not disabled. In addition, Measure B does not change the
10 retiree or beneficiaries health care benefits. It codifies existing practice into the City Charter.
11 Finally, the City obtained an outside counsel's legal opinion that credible legal arguments support
12 Measure B's constitutionality. The City modified Measure B and the details therein as a result of
13 issues discussed during negotiations. Measure B provides a legal right and recourse for the voters
14 to change the City's pension scheme. It is intended and believed that Measure B will stand up in
15 Court.

16 6. Statement b is false and misleading because as stated above, the City obtained a legal
17 opinion that Measure B is legal. Measure B provides that legal right and recourse for the voters to
18 determine how their taxpayer funds are used to fund city employee pensions.

19 7. Statement c is false and misleading because no City employee took an 18% pay cut.
20 The highest pay cut taken by any City employee was 12%. Pay cuts are calculated on gross pay and
21 no City Employee was required to take an 18% pay cut.

22 8. Statement d is false and misleading because none of the 11 bargaining units
23 including police and firefighters made any proposals to change current employee pensions including
24 rolling back pensions to 1962 levels. The majority of proposals by the bargaining units dealt with
25 new employee pensions and not current employees. Thus Statement d implies that bargaining units
26 made proposals for current employees which, other than offering an alternative plan for current
27 employees to voluntarily participate, is not true. Also, none of the proposals for new employees
28

1 included rolling back pension benefits to 1962 levels. That level was 50% in 1962 and there have
2 been no offers to roll back pensions for new employees to 50%.

3 9. Statement e is false and misleading because the City Council never voted or took a
4 vote to declare a fiscal emergency. No action was ever taken by the Council to even try and declare
5 a fiscal emergency.

6 10. Statement f is false and misleading because the alleged inaccurate financial
7 projections were not City projections. Rather, those numbers came from the Retirement Board
8 actuaries who created the pension projections, not the City. Thus, the City in no way created
9 inaccurate pension projections to scare voters. The historical growth of pensions itself demonstrates
10 the problem and need for Measure B.

11 11. Pursuant to Elections Code §9295, this Petition is made during the 10-calendar-day
12 examination period provided by the Elections Code to seek a Writ of Mandate or injunction to
13 require that said statements in the Argument Against Measure B submitted by the Real Parties In
14 Interest be deleted before the City Clerk or Registrar submits the official contents of the voter
15 pamphlet for printing.

16 12. All available remedies are exhausted because Elections Code §9295 requires that in
17 order to seek correction of an Argument in favor of or against a Measure, Petitioners must bring this
18 Petition for Writ of Mandate.

19 13. Petitioners further are informed believe and therefore allege that bringing this
20 Petition is still timely for the City Clerk or Registrar of Voters to correct the Argument and delete
21 the false or misleading statements before the Argument goes to the printer. Thus, said Argument
22 Against Measure B will be printed in the voter pamphlet unless the Court issues an appropriate Writ
23 or Stay before that date.

24 14. The issuance of a timely peremptory Writ of Mandate will not substantially interfere
25 with the conduct of the Election, as the Respondents City Clerk and Registrar of Voters has not sent
26 the Argument to print and Petitioners are within the ten (10) day review period.

27 15. The issuance of the Writ is indispensable to the enforcement of the Petitioners' rights
28 in that Petitioners have no plain, speedy, or adequate remedy in the ordinary course of law whereby

1 their rights can be upheld or whereby Respondents can be compelled to comply with the Elections
2 Code. If the relief sought by this Petition is not granted, great and irreparable injury will be caused
3 to Petitioners.

4 WHEREFORE, Petitioners pray judgment as follows:

5 1. A Writ of Mandate, a copy of which is attached hereto, issued from this Court
6 compelling Respondents to refrain from printing and/or delete the following statements from said
7 Argument Against Measure B submitted by the Real Parties In Interest:

8 a. "It could eliminate disability retirements for police and firefighters injured on
9 the job and unable to perform their previous duties, it increases, by thousands
10 of dollars the amount widows and seniors pay for promised health care, and
11 the City admitted that Measure B may not be constitutional because it
12 violates employees' vested rights."

13 b. "But city officials never even tried to offer taxpayers a way to achieve any
14 savings that would stand up in court.

15 c. "City workers recently took 10%-18% pay cuts."

16 d. "Employees proposed dozens of legal pension reforms that would have
17 increased retirement ages, reduced benefit levels and lowered COLA's.
18 Police and fire even proposed to cut pensions back to 1962 levels."

19 e. "...politicians unsuccessfully tried to declare a fiscal emergency..."

20 f. "This pattern of inaccurate financial projections, meant to scare voters..."

21 2. Said Writ of Mandate should be granted on the grounds that the above statements
22 violate Elections Code §9295, or to show before this Court at a time and place then or thereafter
23 specified by the Court why Respondents have not done so and why a peremptory Writ should not be
24 issued.

25 3. Petitioners to be awarded costs including reasonable attorneys' fees under Code of
26 Civil Procedure §1021.5 of this action; and

27 ///

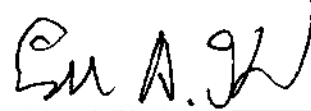
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4. The Court grant such other and further relief as the Court consider just and proper.

Dated: March 22, 2012

CREECH, LIEBOW & KRAUS

By: 
EDWARD A. KRAUS
Attorneys for Petitioners,
PETER CONSTANT and BENJAMIN ROTH

LASJFRY-02\Petition for Writ of Mandate\Ex Parte Petition for Writ of Mandate (3.21.12).doc

VERIFICATION

I am a Petitioner in the above-entitled action. I have read the attached **EX PARTE PETITION FOR WRIT OF MANDATE AND STAY (Elections Code §9295)**, and know the contents thereof. I have read the foregoing and certify that the same are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 22, 2012, at San Jose, California.



PETER CONSTANT

VERIFICATION

I am a Petitioner in the above-entitled action. I have read the attached **EX PARTE PETITION FOR WRIT OF MANDATE AND STAY (Elections Code §9295)**, and know the contents thereof. I have read the foregoing and certify that the same are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 22, 2012, at San Jose, California.


BENJAMIN ROTH

Edward A. Kraus, Esq. (SBN 162043)
CREECH, LIEBOW & KRAUS
333 West San Carlos Street, Suite 1600
San Jose, CA 95110
(408) 993-9911
Fax (408) 993-1335

Attorneys for Petitioners,
PETER CONSTANT and BENJAMIN ROTH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,

Petitioners,

vs.

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,

Respondents,

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,

Real Parties In Interest.

Case No.:

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE VERIFIED PETITION FOR
WRIT OF MANDATE AND STAY
(Elections Code §9295)**

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

I. INTRODUCTION AND STATEMENT OF FACTS

Petitioners PETER CONSTANT and BENJAMIN ROTH (collectively referred to herein as "Petitioners") respectfully request that this Court grant their Petition for Writ of Mandate pursuant to Elections Code §9295 which seeks alternative and preemptory Writ of Mandate or other appropriate injunctive relief to remove certain statements contained in the Argument Against Measure B (hereinafter "Argument") that violate Elections Code §9295. Specifically, the statements set forth below contained in the Argument are false and/or misleading as defined in Elections Code §9295(b)(2). The issuance of a Writ or Stay is required before said unlawful

1 statements are sent for printing by Respondents in the voter's pamphlet distributed for use in the
2 June 5, 2012 Election.

3 Measure B is entitled Pension Reform. A true and correct copy of the Argument Against
4 Measure B is attached to Petitioners' Request for Judicial Notice as Exhibit A. A true and correct
5 copy of Ballot Measure B that will appear on the June 5, 2012 Ballot is attached to Petitioners'
6 Request for Judicial Notice as Exhibits B. The Full Text of Measure B is attached to the Request
7 for Judicial Notice as Exhibit C. A true and correct copy of City Clerk's Impartial Analysis of
8 Measure B is attached to the Request for Judicial Notice as Exhibit D. Finally, a true and correct
9 copy of San Jose City Council Resolution No. 76158 is attached to the Request for Judicial Notice
10 as Exhibit E. A true and correct copy of outside legal opinion related to the revised ballot measure
11 from the law firm of Meyers/Nave dated March 5, 2012 is attached to the Request for Judicial
12 Notice as Exhibit F. Specifically, Measure B seeks to modify the City of San Jose pension system.
13 The details of the changes are clearly set forth in the proposed Pension Plan Amendments set forth
14 in the Full Text of the Ballot Measure attached as Exhibit C of Petitioners' Request for Judicial
15 Notice.

16 **A. FALSE AND MISLEADING STATEMENTS IN THE ARGUMENT**

17 Said statements that are false or misleading are as follows:

- 18 a. "It could eliminate disability retirements for police and firefighters injured on
19 the job and unable to perform their previous duties, it increases by thousands
20 of dollars the amount widows and seniors pay for promised health care, and
21 the City admitted that Measure B may not be constitutional because it
22 violates employees' vested rights."
23 b. "But city officials never even tried to offer taxpayers a way to achieve any
24 savings that would stand up in court.
25 c. "City workers recently took 10%-18% pay cuts."
26 d. "Employees proposed dozens of legal pension reforms that would have
27 increased retirement ages, reduced benefit levels and lowered COLA's.
28 Police and fire even proposed to cut pensions back to 1962 levels."

1 e. "...politicians unsuccessfully tried to declare a fiscal emergency..."

2 f. "This pattern of inaccurate financial projections, meant to scare voters..."

3 Statement "a" is false and misleading because Measure B does not eliminate disability
4 retirement. Measure B redefines disability so that if a police officer or firefighter can still perform a
5 job within that department, then they are not disabled. Measure B does not change retiree or
6 beneficiary health care benefits. Measure B confirms existing 50% contribution requirements of
7 current employees towards retiree health care. Finally, the City obtained an outside counsel's legal
8 opinion that credible legal arguments support Measure B's constitutionality. Measure B provides a
9 legal right and recourse for the voters to change the City's pension scheme. It is intended and
10 believed that Measure B will stand up in Court.

11 Statement "b" is false and misleading because as stated above, the City obtained a legal
12 opinion that Measure B is legal. Measure B provides that legal right and recourse for the voters to
13 determine how their taxpayer funds are used to fund city employee pensions.

14 Statement "c" is false and misleading because no City employee took an 18% pay cut. The
15 highest pay cut taken by any City employee was 12%.

16 Statement "d" is false and misleading because none of the 11 bargaining units including
17 police and firefighters made any proposals to change current employee pensions including rolling
18 back pensions to 1962 levels. The majority of proposals by the bargaining units dealt with new
19 employee pensions and not current employees. Thus Statement d implies that bargaining units
20 made proposals for current employees which, other than offering an alternative plan for current
21 employees to voluntarily participate, is not true. Also, none of the proposals for new employees
22 included rolling back pension benefits to 1962 levels. That level was 50% in 1962 and there have
23 been no offers to roll back pensions for new employees to 50%.

24 Statement "e" is false and misleading because the City Council never voted or took a vote to
25 declare a fiscal emergency. No action was ever taken by the Council to even try and declare a fiscal
26 emergency.

27 Statement "f" is false and misleading because the alleged inaccurate financial projections
28 were not City projections. Rather, those numbers came from the Retirement Board actuaries who

1 created the pension projections, not the City. Thus, the City in no way created inaccurate pension
2 projections to scare voters. The historical growth of pensions itself demonstrates the problem and
3 need for Measure B. (Declaration of Alex Gurza).

4 **II. JURISDICTION**

5 The Court has discretion to hear this matter ex parte pursuant to Code of Civil Procedure
6 §1107, and to hear and determine this Petition For Writ of Mandate based upon Elections Code
7 §9295. Elections Code §9295(b)(1) states in relevant part:

8 “During the 10-calendar-day public examination period
9 provided by this section, any voter of the jurisdiction in which the
10 election is being held, or the elections official, himself or herself, may
11 seek a writ of mandate or an injunction requiring any or all of the
12 materials to be amended or deleted. The writ of mandate or
13 injunction request shall be filed no later than the end of the 10-
14 calendar-day public examination period.” (Elections Code
15 §9295(b)(1).)

13 **III. ARGUMENT**

14 **A. CALIFORNIA LAW EXPRESSLY PROHIBITS FALSE AND MISLEADING** 15 **STATEMENTS IN ARGUMENTS IN FAVOR OR OPPOSED TO BALLOT** 16 **MEASURES.**

17 Elections Code §9295(b)(2) states as follows:

18 “A peremptory writ of mandate or an injunction shall be
19 issued only upon clear and convincing proof that the material in
20 question is false, misleading, or inconsistent with the requirements of
21 this chapter, and that issuance of the writ or injunction will not
22 substantially interfere with the printing or distribution of official
23 election materials as provided by law.” (Elections Code §9295(b)(2).)

24 Elections Code §9295(a) sets forth that it is the proper section covering arguments for or
25 against ballot measures. (See Elections Code §9282.)

26 The Court in *Huntington Beach City Council v. Superior Court of Orange County*, (2002) 94
27 Cal.App.4th 1417, 1432 sets forth the standard for false and misleading. The Court held the
28 following:

“In determining whether statements are false or misleading,
courts look to whether the challenged statement is subject to
verifiability, as distinct from ‘typical hyperbole and opinionated
comments common to political debate. . . . An ‘outright falsehood’ or
a statement that is ‘objectively untrue’ may be stricken. We need

1 only add that context may show that a statement that, in one sense,
2 can be said to be literally true can still be materially misleading;" (*Id.*)

3 The standard of review is clear and convincing. In the case at bar, and as stated above,
4 Petitioners are seeking this Court to strike those statements in the Argument that are objectively
5 untrue and taken in context are materially misleading. As discussed above and in the Petition, the
6 Argument against Measure B contains statements that are verifiably untrue. For example, Measure
7 B does not deal with health benefit payments to retirees or their families. It does not remove
8 disability retirements. In addition, bargaining units never offered to roll back pension benefits to
9 1962 levels and no one in the city ever received an 18% paycut.

10 The Opponents of Measure B are attempting to use factually false and inaccurate statements
11 to scare voters. This Measure is too important to allow such falsehoods to be part of the debate or
12 part of what voters will use to determine whether to vote yes or no to Measure B. Voters must be
13 provided factually accurate arguments in order to make their decision.

14 IV. CONCLUSION

15 Pursuant to the verified Petition for Writ of Mandate, the attached Declarations and the
16 foregoing discussion of points and authorities, Petitioners respectfully request that the Court timely
17 issue a Writ of Mandate and peremptory Writ of Mandate or injunction prohibiting Respondents
18 from printing the above stated improper statements in the Argument Against Measure B.

19 Dated: March 22, 2012

CREECH, LIEBOW & KRAUS

20
21 By: 

EDWARD A. KRAUS

Attorneys for Petitioners,

PETER CONSTANT and BENJAMIN ROTH

1 Edward A. Kraus, Esq. (SBN 162043)
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3 333 West San Carlos Street, Suite 1600
4 San Jose, CA 95110
(408) 993-9911
Fax (408) 993-1335

5 Attorneys for Petitioners,
6 PETER CONSTANT and BENJAMIN ROTH
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 PETER CONSTANT and BENJAMIN ROTH,)
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Petitioners,

vs.

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,

Respondents,

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,

Real Parties In Interest.

Case No.:

**DECLARATION OF ALEX GURZA IN
SUPPORT OF EX PARTE PETITION
FOR WRIT OF MANDATE AND STAY
(Elections Code §9295)**

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

I, Alex Gurza, declare:

1. I am a Deputy City Manager for the City of San Jose and serve as the Director of the Office of Employee Relations. The Office of Employee Relations is responsible for, among other things, negotiating on behalf of the City with the City's eleven bargaining units. I am thoroughly familiar with all of the facts stated in this declaration and could competently testify thereto.

2. I have been asked by counsel for San Jose Fiscal Reform Yes on Measure B to review the Argument against Measure B, and, based on my 17 years of experience working with the

1 City's retirement plans, provide additional facts regarding certain statements made in that
2 Argument.

3 3. The authors state that Measure B "could eliminate disability retirements for police
4 and firefighters injured on the job and unable to perform their previous duties." This suggests a
5 police officer or firefighter who is unable to perform his/her prior duties will not receive a disability
6 retirement. Measure B redefines eligibility for a disability retirement so that a police officer or
7 firefighter who can still perform a job within his or her department does not qualify for a disability-
8 based pension.

9 4. Section 9(b) of Measure B modifies the definition of disability to:

10 "An employee is considered "disabled for the purposes of qualifying
11 for a disability retirement, if all of the following is met:

- 12 • An employee cannot do the work that they did before; and
- 13 • It is determined that
- 14 • An employee in the Federated City Employees' Retirement
15 System cannot perform any other jobs described in the City's
16 classification plan because of his or her medical condition(s); or
- 17 • An employee in the Police and Fire Department Retirement Plan
18 cannot perform any other jobs described in the City's classification
19 plan in the employee's department because of his or her medical
20 condition(s); and
- 21 • The employee's disability has lasted or is expected to last for at
22 least one year or to result in death."

23 5. The authors further state that the Measure "increases by thousands of dollars the
24 amount widows and seniors pay for promised health care." Measure B language does not change
25 the cost of health care benefits for current retirees. During negotiations with the Unions, there have
26 been proposals to make non-charter changes to health care plans that would reduce the costs of
27 health care premiums, but that issue is not addressed in Measure B at all. Section 12(c) of Measure
28 B merely takes existing provisions of the Municipal Code requiring that employees pay 50% of the
cost of retiree health care while they are working for the City, and codifies it in the City Charter.
Nothing in the measure requires additional contributions by retirees.

6. The authors state that "City workers recently took 10%-18% pay cuts." All City
employees and officials took a 10% reduction in total compensation with some employees receiving

1 an additional 2% reduction in base pay. City workers did not take an 18% reduction in total
2 compensation nor in their base pay.

3 7. The Authors state that "Employees proposed dozens of legal pension reforms that
4 would have increased retirement ages, reduced benefit levels and lowered COLA's. Police and fire
5 even proposed to cut pensions back to 1962 levels." I have been involved in or supervised
6 negotiations on pension reform with 10 of 11 unions. None of the unions ever made a proposal to
7 roll back pensions to 1962 *formulas*, much less the *levels* of pensions that existed in 1962. For
8 example, police and fire pensions were capped at 50% of final compensation in 1962. No proposal
9 the City received even came close to a 50% cap. In addition, the use of the word "levels" is
10 misleading. Pension levels have increased dramatically due, in part, to significant pay increases
11 since 1962 and because a primary determinant of pension benefits is employees' pay. In addition,
12 no Union proposal would have affected all current employees since the proposals would have only
13 affected those who voluntarily elected a different benefit structure.

14 8. Finally, the authors' assertion that the City has engaged in a "pattern of inaccurate
15 financial projections, meant to scare voters..." is incorrect. The City administration has relied on
16 the future pension predictions by the retirement boards' outside actuary, which fluctuate from year
17 to year. Because of the significant reductions in compensation and loss of employees, some of the
18 increases in costs projected in the Police and Fire Department Retirement Plan for Fiscal Year
19 2012-2013 have not materialized.

20 I declare under penalty of perjury under the laws of the State of California that the foregoing
21 is true and correct. Executed this 22nd day of March, 2012 at San Jose, California.

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24 ALEX GURZA
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Edward A. Kraus, Esq. (SBN 162043)
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Attorneys for Petitioners,
PETER CONSTANT and BENJAMIN ROTH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,) Case No.:

Petitioners,)

vs.)

DENNIS HAWKINS, Office of the City)
Clerk, San Jose; BARRY GARNER, Registrar)
of Voters, County of Santa Clara,)

Respondents,)

HELEN CHAPMAN, PATTIE CORTESE,)
JAMES SPENCE, JOHN S. DIQUISTO and)
CAY DENISE MACKENZIE,)

Real Parties In Interest.)

**DECLARATION OF EDWARD A. KRAUS
IN SUPPORT OF EX PARTE PETITION
FOR WRIT OF MANDATE AND STAY
(Elections Code §9295)**

**Date: March 23, 2012
Time: 8:15 a.m.
Dept.: TBA**

I, Edward A. Kraus, declare:


1. I am an attorney fully licensed to practice in the State of California and am a member of the law firm Creech, Liebow & Kraus, counsel for Petitioners PETER CONSTANT and BENJAMIN ROTH (collectively referred to herein as "Petitioners") in the above captioned matter. I have personal knowledge of the matters set forth in this declaration, and if called to testify as a witness in this matter, I would be competent to testify as follows.

2. A true and correct copy of correspondence dated Wednesday, March 21, 2012 from myself to Respondents, Real Parties In Interest and expected counsel for Real Parties In Interest

1 Christopher Platten informing all parties that Petitioners are moving Ex Parte For Writ of Mandate
2 and Stay on Friday, March 23, 2012 at 8:15 a.m. is attached hereto as Exhibit A. Said
3 correspondence was personally served at the offices of Respondents on Wednesday, March 21,
4 2012.

5 3. As for the Real Parties In Interest and counsel, said correspondence was faxed,
6 emailed, personally served and/or posted at their residences depending upon contact information
7 provided to the City Clerk by the Real Parties In Interest, and whether the Real Parties In Interest
8 were home or not. I retained a process server to personally serve or post in a conspicuous place the
9 correspondence for those Real Parties In Interest where a fax number or email address was not
10 available.

11 I declare under penalty of perjury that the foregoing is true and correct under the laws of the
12 State of California. Executed this 21st day of March, 2012 at San Jose, California.

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14 EDWARD A. KRAUS
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,) Case No.:
Petitioners,)
vs.)
DENNIS HAWKINS, Office of the City)
Clerk, San Jose; BARRY GARNER, Registrar)
of Voters, County of Santa Clara,)
Respondents,)
HELEN CHAPMAN, PATTIE CORTESE,)
JAMES SPENCE, JOHN S. DIQUISTO and)
CAY DENISE MACKENZIE,)
Real Parties In Interest.)

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF EX PARTE VERIFIED
PETITION FOR WRIT OF MANDATE
AND STAY (Elections Code §9295)**

**Date: March 23, 2012
Time: 8:15 a.m.
Dept.: TBA**

Petitioners PETER CONSTANT and BENJAMIN ROTH hereby request, pursuant to
Evidence Code §§452(c) and 453, that this Court take judicial notice of the following documents:

1. A true and correct copy of the Argument Against Measure B is attached hereto as Exhibit A.
2. A true and correct copy of the proposed Ballot Measure B that will appear on the June 5, 2012 Ballot is attached hereto as Exhibit B.

- 1 3. A true and correct copy of the Full Text of Measure B is attached hereto as Exhibit
2 C.
3 4. A true and correct copy of the City Clerk's Impartial Analysis of Measure B is
4 attached hereto as Exhibit D.
5 5. A true and correct copy of the San Jose City Council Resolution No. 76158 is
6 attached hereto as Exhibit E.
7 6. A true and correct copy of the outside legal opinion related to the revised ballot
8 measure from the law firm of Meyers/Nave dated March 5, 2012 is attached hereto as Exhibit F.
9

10 Dated: March 22, 2012

CREECH, LIEBOW & KRAUS

11
12 By: 

EDWARD A. KRAUS

Attorneys for Petitioners,

PETER CONSTANT and BENJAMIN ROTH

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EXHIBIT A

Argument Against Measure B

Here's what Measure B backers aren't telling you: It could eliminate disability retirements for police and firefighters injured on the job and unable to perform their previous duties, it increases by thousands of dollars the amount widows and seniors pay for promised health care, and the City admitted that Measure B may not be constitutional because it violates employees' vested rights.

Measure B is riddled with legal risk. Read what City Hall told Wall Street bond investors about its pension scheme: "Finally, existing law regarding vested rights and impairment of contracts may limit the City's ability to change retirement benefits for current employees and retirees...". But city officials never even tried to offer taxpayers a way to achieve any savings that would stand up in court.

Legal pension reform is important, but so are facts. City workers recently took 10%-18% pay cuts and don't receive Social Security. The average federated pension is approximately \$37,885.

Employees proposed dozens of legal pension reforms that would have increased retirement ages, reduced benefit levels and lowered COLA's. Police and fire even proposed to cut pensions back to 1962 levels. Putting politics above policy, politicians said "NO". Now, these same politicians want you to gamble with our City's financial future.

In December, as an excuse for putting this measure on the ballot, politicians unsuccessfully tried to declare a fiscal emergency and described catastrophic cuts to city services. Now, all of a sudden, there is a \$10 million budget surplus and millions to improve roads near a proposed sports stadium and to subsidize the Downtown Association. This pattern of inaccurate financial projections, meant to scare voters, helped convince the State's Joint Legislative Audit Committee to audit the City of San Jose's finances.

Tell the city to negotiate legal pension reform, **Vote NO on Measure B!**

www.sanjosecandobetter.com

Authors for Argument Against Measure B

1. Helen Chapman, Former Chair, San Jose Parks Commission
2. Pattie Cortese, San Jose Taxpayer
3. James Spence, President, Association of Retired San Jose Police Officers & Firefighters
4. John S. DiQuisto, Retired Captain, San Jose Fire Dept
5. Cay Denise MacKenzie, San Jose City Analyst

EXHIBIT B

LIST OF LOCAL MEASURES
PRESIDENTIAL PRIMARY ELECTION
June 5, 2012

City of San José
Majority Vote

Measure B

<u>PENSION REFORM</u> To protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended to reform retirement benefits of City employees and retirees by: increasing employees' contributions, establishing a voluntary reduced pension plan for current employees, establish pension cost and benefit limitations for new employees, reform disability retirements to prevent abuses, temporarily suspend retiree COLAs during emergencies, require voter approval for increases in future pension benefits?	YES
	NO

Full Text of Measure B

Resolution on Measure B

City Clerk's Impartial Analysis

Argument in Favor

Argument Against

Rebuttal to Argument in Favor of Measure B

Rebuttal to Argument Against Measure B

EXHIBIT C

FULL TEXT OF MEASURE B

**ARTICLE XV-A
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:
"The Sustainable Retirement Benefits and Compensation Act."

Section 1501-A: FINDINGS

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

February 8, 2012

Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

Section 1502-A: INTENT

This Act is intended 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.

February 8, 2012

The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

Section 1503-A. Act Supersedes All Conflicting Provisions

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

February 8, 2012

Section 1504-A. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

Section 1505-A. Reservation of Rights to City Council

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

Section 1506-A. Current Employees

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to

February 8, 2012

amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

**Section 1507-A: One Time Voluntary Election Program
("VEP")**

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

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IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

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Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) “Final compensation” shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

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worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

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- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

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the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

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(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

Section 1509-A: Disability Retirements

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

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(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

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**Section 1510-A: Emergency Measures to Contain Retiree
Cost of Living Adjustments**

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

Section 1511-A: Supplemental Payments to Retirees

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets:

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Section 1512-A: Retiree Healthcare

- (a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.
- (b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.
- (c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)

- (a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.
- (b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

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through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and**
- (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.**

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

- (i) the funding objectives and actuarial assumptions of the plans; and**
- (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.**

February 8, 2012

Section 1514-A: Savings

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

Section 1515-A: Severability

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

February 8, 2012

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

RES NO 76158

ADOPTED this 6th day of March, 2012, by the following vote:

AYES: CONSTANT, HERRERA, LICCARDO, NGUYEN,
 OLIVERIO, PYLE, ROCHA; REED.

NOES: CAMPOS, CHU, KALRA.

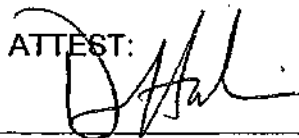
ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST:



DENNIS D. HAWKINS, CMC
City Clerk

EXHIBIT D

City Clerk's Impartial Analysis of Measure B

Impartial Analysis

Measure B would add Charter Article XV-A to establish controls over employee retirement contributions and benefits.

Background. The City administers "defined benefit" retirement plans for its employees. The City and employees each contribute to the plans. Employees who reach retirement age and complete sufficient years of service become eligible for monthly retirement benefit payments using a formula based on years of service and a percentage of salary.

Contributions. The Charter requires the City and employees to make contributions towards the "normal cost" of the City's retirement plans in a ratio of 8 (City) to 3 (employee). The City also makes contributions towards the "unfunded liabilities" that result from insufficient plan assets to pay projected retirement costs.

Beginning July 23, 2013, the Measure would require employees to make additional contributions to help pay the City plans' unfunded liabilities. Employees would contribute from 4% of pay, up to a maximum of 16% per year, but no more than half the yearly cost to pay retirement system unfunded liabilities. If a court determines this section to be unenforceable, equivalent savings would be obtained through compensation reductions.

Alternative Plan. The Measure would require the City Council to adopt a Voluntary Election Program ("VEP"), subject to IRS approval. Under the VEP, employees who "opt in" would not be required to make the additional contributions towards retirement plan unfunded liabilities. The VEP retains some existing benefits and reduces others. If the VEP has not been implemented, or employees do not elect to participate, employees would make additional contributions.

New Employees. The Measure would require the City to adopt a retirement plan for new employees that could include social security, a defined benefit plan and/or a defined contribution plan. The measure would limit City costs and retiree benefits.

Disability Retirement. The Measure would limit disability retirements to cases where the employee could not perform the work the employee did before or any other work in the City's classification plan (or in the case of safety employees, in the employee's department).

COLA. The Measure would authorize the City Council to temporarily suspend cost of living adjustments paid to retirees for up to five years if the Council adopts a resolution declaring a fiscal and service level emergency.

Supplemental Payments. The Measure would discontinue the Supplemental Retiree Benefit Reserve, which permits the allocation of excess plan investment income to fund supplemental benefits for retirees.

Retiree Healthcare. The Measure would require employee contributions to fund a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.

Oversight. The Measure reserves to the voters any future change in post employment benefits. Neither the City Council nor any arbitrator under Charter Section 1111 would have authority to provide for increases. The Measure sets retirement plan actuarial and investment standards.

A "yes" vote is a vote to approve the changes described above.

A "no" vote means that no changes would be made to the Charter's retirement provisions.

Dennis D. Hawkins
City Clerk
City of San Jose

The above statement is an impartial analysis of Measure B. If you would like to read the full text of the measure, see

<http://www.sanjoseca.gov/clerk/elections/2012Election/measures.pdf> or call 408-535-1252 and a copy will be sent at no cost to you.

EXHIBIT E

RESOLUTION NO. 76158

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE REPEALING RESOLUTION NO. 76087 AND CALLING AND GIVING NOTICE OF, ON ITS OWN MOTION, THE SUBMISSION TO THE ELECTORS OF THE CITY OF SAN JOSE, AT A SPECIAL MUNICIPAL ELECTION TO BE HELD ON JUNE 5, 2012, A BALLOT MEASURE PROPOSAL TO AMEND THE SAN JOSE CITY CHARTER TO ADD A NEW ARTICLE XV-A TO REFORM CITY PENSIONS AND BENEFITS PROVIDED TO CURRENT EMPLOYEES AND ESTABLISH REDUCED PENSIONS AND BENEFITS FOR NEW EMPLOYEES AND TO PLACE OTHER LIMITATIONS ON PENSIONS AND BENEFITS

WHEREAS, Charter Section 1600 authorizes the City Council to set the date for a Special Municipal Election; and

WHEREAS, the City Council adopted Resolution No. 76087 and approved a ballot measure for the June 5, 2012 election but directed the City Clerk not to submit the ballot measure to the Registrar of Voters to allow time for further negotiations on the ballot measure language; and

WHEREAS, the City Council now desires to submit to the electors of the City of San José at a Special Municipal Election a ballot measure proposal to amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees, to establish reduced pensions and benefits for new employees and to place other limitations on pensions and benefits; and

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. Resolution No. 76087 is hereby repealed.

SECTION 2. A Special Municipal Election is hereby called and ordered to be held in the City of San José on June 5, 2012, for the purpose of voting on a ballot measure to

amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees and to establish different pensions and benefits for new employees and to place other limitations on pensions and benefits. The proposed City Charter amendment is attached to this Resolution as Exhibit A.

SECTION 3. The ballot measure will be placed on the ballot for the June 5, 2012 election in the following form:

PENSION REFORM

To protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended to reform retirement benefits of City employees and retirees by: increasing employees' contributions, establishing a voluntary reduced pension plan for current employees, establish pension cost and benefit limitations for new employees, reform disability retirements to prevent abuses, temporarily suspend retiree COLAs during emergencies, require voter approval for increases in future pension benefits?

YES	
NO	

SECTION 4. The City Council hereby requests the Board of Supervisors of the County of Santa Clara, California to permit the Registrar of Voters of Santa Clara County to render to the City of San José such services as the City Clerk of the City of San José may request relating to the conduct of the above-described Special Municipal Election with respect to the following matters:

Coordination of election precincts, polling places, voting booths, voting systems and election officers; Printing and mailing of voter pamphlets; Preparation of tabulation of result of votes cast.

SECTION 5. The City Council hereby requests that the Registrar of Voters of the County of Santa Clara consolidate the Special Municipal Election called and ordered to be held on June 5, 2012 with any other election that may be held on that date.

SECTION 6. The City Council hereby authorizes the Board of Supervisors of Santa Clara County, California to canvass the returns of the Special Municipal Election.

SECTION 7. The City Council hereby directs the City Clerk to reimburse the County of Santa Clara in full for any of the above-mentioned services which may be performed by the Registrar of Voters, upon presentation of a bill to the City, with funds already appropriated to the City Clerk for election purposes.

SECTION 8. The City Council hereby directs the City Clerk to take all actions necessary to facilitate the Special Municipal Election in the time frame specified herein and comply with provisions of the Elections Code of the State of California, City Charter, Ordinances, Resolutions and Policies with regard to the conduct of the Special Municipal Election.

SECTION 9. Pursuant to Section 12111 of the California Elections Code and Section 6061 of the California Government Code, the City Council hereby directs the City Clerk to (a) cause a synopsis of the proposed measure to be published in the San José Mercury News, a newspaper of general circulation within the City of San José; (b)

consolidate the Notice of Measure to be Voted with the Notice of Election into a single notice; (c) transmit a copy of the Measure to the City Attorney and cause the following statement to be printed in the impartial analysis to be prepared by the City Attorney: "If you would like to read the full text of the measure, see www.sanjoseca.gov/clerk/elections/Election.asp or call 408-535-1260 and a copy will be sent at no cost to you."; and (d) do all other things required by law to submit the specified measure above to the electors of the City of San José at the Special Municipal Election, including causing the full text of the proposed measure to be made available in the Office of the City Clerk at no cost and posted on the City Clerk's website.

SECTION 10. Pursuant to Sections 9282 and 9285 of the California Elections Code, the City Council hereby approves the submittal of arguments for and against the ballot measure, if any, and authorizes the Mayor to author and submit a ballot measure argument in favor of the ballot measure and also approves the submittal of rebuttal arguments in response to arguments for and against the ballot measure and authorizes any member or members of the City Council to author and submit a rebuttal, if any.

SECTION 11. The City Council hereby directs the City Clerk to transmit a copy of the measure qualifying for placement on the ballot to the City Attorney for preparation of an impartial analysis.

EXHIBIT F



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

SUBJECT: Legal Opinion Related to the
Revised Ballot Measure

FROM: Richard Doyle
City Attorney

DATE: March 5, 2012

Attached is a public legal opinion from Meyers Nave related to the Revised Ballot Measure recommended by the City Manager under item 3.5 for Council consideration on March 6, 2012. In the past several months the Council has received oral and written legal advice related to pension reform and proposals for ballot measures. That advice was provided to the Council as privileged attorney-client communications in closed session and is subject to the confidentiality of those sessions. The contents of that advice are confidential unless and until there is a decision to waive the privileged and confidential nature of the communications.

RICHARD DOYLE
City Attorney

By 

Ed Moran
Assistant City Attorney

cc: Debra Figone

MEMORANDUM

DATE: March 5, 2012
TO: Richard Doyle, City Attorney
FROM: Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
RE: Proposed Charter Amendment -- Sustainable Retirement Benefits and Compensation Act

I. INTRODUCTION

In December 2011, the San Jose City Council voted to place on the ballot a Charter Amendment that addresses City employee retirement benefits. The City Manager is recommending that the Council consider a revised ballot measure entitled the "Sustainable Retirement Benefits and Compensation Act" (the "Act"), dated February 21, 2012. You asked us to provide a summary of the legal authority relevant to the Charter Amendment.

Whenever an agency modifies retirement-related benefits, there are legal risks, particularly with respect to vested rights challenges. But as set forth below, we believe the Act overall is defensible against a potential legal challenge. We review key sections of the Act, and note that these sections involve different degrees of legal risk.¹

We are aware that since the City published and circulated the first draft of the Act last summer, the City has made numerous amendments. As a result, subsequent versions eliminate or significantly reduce many of the legal risks identified in the first draft.

¹ We note that this opinion does not encompass legal risks that may be brought related to bargaining obligations under the Meyers-Milias-Brown Act (MMBA), California Government Code section 3500, et seq. It is our understanding, however, that the City has met and conferred with City labor unions under the MMBA as required by law.

To: Richard Doyle, City Attorney
From: Arthur A. Hartinger, Linda M. Ross and Jennifer L. Nock
Re: Proposed Charter Amendment -- Sustainable Retirement Benefits and Compensation Act
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The "Findings" for the Act state that the City's ability to provide its citizens with "Essential City Services" -- such as police and fire protection, street maintenance and libraries -- is threatened by budget cuts. The stated "Intent" of the Act is to "ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services."

The key provisions of the Act include: a requirement that employees receive adjusted compensation in the form of additional employee contributions towards their retirement systems' "unfunded liability" (Section 6); the creation of a new less expensive plan into which employees may voluntarily "opt in" (Section 7); the creation of a "Tier 2" hybrid plan for new employees (Section 8); authority to reduce COLA payments in the event of a fiscal emergency (Section 10); the elimination of the supplemental retiree benefit reserve (Section 11); and a "savings" clause that adjusts employee compensation in the event a court does not permit the increase in employee contribution rates pursuant to Section 6 (Section 14).

Below we provide legal background and then discuss each of these sections.

II. LEGAL BACKGROUND

Charter City. San Jose is a Charter City. The California Constitution, section 5, subdivision (b)(4), gives charter cities "plenary authority to provide in their charters for the compensation of their employees." *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 317 (1979). The San Jose City Charter itself affirms the City's "power to make and enforce all laws and regulations in respect to municipal affairs" (Charter, Section 200 [General Powers].)

Retirement Plans. Whether to have a pension plan, and the level of benefits provided, is a municipal affair subject to the City's home rule authority. The San Jose Charter grants the City Council the authority to create and change retirement plans for City employees. "Subject to other provisions of this article, the Council may at any time, or from time to time, amend or otherwise change any retirement plan or plans or adopt or establish a new or different plan or plans for all or any officers or employees." (Section 1500 [Duty to Provide Retirement System]; see also Section 1503.)

The Charter provides for certain "Minimum Benefits" for employees. The Charter requires that employee contributions to their retirement plans "because of current service or current service benefits" (called "normal cost" contributions) be paid in a ratio of "three (3) for such officers and employees to eight (8) for the City." (Sections 1504(b); 1505(e).) But the Charter does not address the payment towards pension plan unfunded liabilities.

In 2010, the voters amended the Charter to authorize the Council to enact ordinances that exclude new employees from any existing retirement plan or retirement benefit. (Charter section 1501(b).)

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From: Arthur A. Hartinger, Linda M. Ross and Jennifer L. Nock
Re: Proposed Charter Amendment -- Sustainable Retirement Benefits and Compensation Act
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Charter Revisions. Under the home rule provisions of the state constitution, the "governing body . . . of a county or city may propose a charter or revision." (Cal Const., Art. XI, Section 3(b).) Under this authority, the City Council is proposing an amendment to establish new Charter requirements in connection with employee compensation and retirement. The City Council has the authority to place an amendment on the ballot after the City conducts "meet and confer" with employee organizations. *Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 601 (1984).

Vested Rights. A retirement benefit is considered "vested" if the employees or retirees are deemed to have a legal right, protected under the Constitution, to receive that benefit. The enforceable legal right between the employer and employee generally stems from an official enactment – Charter, statute or ordinance – that sets the terms of the benefit the employer agrees to provide. *See International Association of Firefighters v. City of San Diego*, 34 Cal. 3d 292 (1983).

Before a Court will enforce a claimed contractual right there must be "clear" and "unmistakable" evidence that the public entity intended itself to be bound to provide the benefit. The California Supreme Court recently held that: "legislation in California may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly... evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body].'" *Retired Employees Assn of Orange County, Inc. v. County of Orange*, 52 Cal. 4th 1171, 1187 (2011). [Emphasis added] Federal law similarly requires "clear and unmistakable" evidence that a governmental entity "intends to bind itself contractually." *San Diego POA v. San Diego City Employees Retirement System*, 568 F.3d 725, 737 (9th Cir. 2009).

III. LEGAL DISCUSSION

We discuss below the key provisions of the Act.

A. Current employees -- Reduction In Compensation In Form Of Increased Employee Contribution Rates (Section 6).

1. **Charter Amendment.** Beginning June 23, 2013, the Act requires that the compensation of current employees be adjusted to help defray the unfunded liabilities in their pension plans. To do so, the Act requires employee compensation to be reduced in increments of 4% of pensionable pay per year, up to a maximum of 16% of pensionable pay per year. But in any year, employees are not required to contribute more than 50% of the yearly cost to amortize pension plan unfunded liabilities. (Section 6(b).)

Under the Act, the adjustments in compensation will be treated as additional retirement contributions credited to employees' retirement accounts. (Section 6(e).) The Act does not alter the existing 3/8 ratio that governs employee and City contributions towards the

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"normal cost" of pension plans. Rather, the Act addresses only the contributions required to amortize the "unfunded liability" of the plans.

2. **Legal Discussion.** There are arguments that this requirement does not implicate employees' vested rights. The City Charter never bound the City to pay the entire amount needed to defray the "unfunded liabilities" of the retirement systems, and the City's Municipal Code and past practices reflect this understanding. Thus, the voters may amend the Charter to legally require employees to share in that burden.

a. **Charter.** As explained above, the San Jose Charter reserves the City's right to create and amend the City's retirement plans. (Charter Sections 1500, 1503.) The Charter establishes employee and city ratios (3 to 8) that pertain to the contribution rates for "current service" otherwise known as "normal cost." But the Charter does not address the "unfunded liabilities" of the retirement systems. The Charter left that topic to the City Council to address in the Municipal Code and, as indicated above, reserved the right for the Council to make changes.

Based on the information we have seen to date, the City has asserted its authority -- in the Municipal Code and Memoranda of Agreement with City unions -- to require employees to pay towards the pension systems' unfunded liability.

b. **Municipal Code.** San Jose's Municipal Code and past practices specifically permit modification of employee contribution rates. These provisions and practices are evidence that San Jose did not intend to bind itself to pay the entire amount of pension system unfunded liabilities, but reserved the right to require employee participation in the form of additional employee contributions.

Federated employees. Section 3.28.200 of the 1975 Federated City Employees Plan permits the retirement board to fix and change rates of contribution for employees and the City "as it may determine reasonably necessary to provide the benefits provided for by this retirement plan." Other Code sections require employees to pay a "normal rate" of contribution (also called "normal cost") for current service (Part 6, Section 3.28.700, 3.28.710), and require the City to pay both a "regular current service rate" (again, also called "normal cost") and a "current service deficiency rate" of contribution. (Part 7, Section 3.28.850, 3.28.860.) Consistent with this latter Code section, the City has paid a contribution rate towards pension system unfunded liabilities.

But the Code not only requires employees to make contributions towards "normal cost," it also gives the City the authority to require employees to make additional retirement contributions. In 2010, the Code was amended to read: "Notwithstanding any other provisions of this Part 6 or of Chapter 3.44, members of this system shall make such additional retirement contributions as may be required by resolution adopted by the city council or by agreement with a recognized bargaining unit." (Section 3.28.755.)

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Moreover, the Code expressly gives the City an offset from its contribution obligations, as determined by the retirement system actuary, for "the additional employee retirement contributions made by employees under section 3.28.755 against the retirement contributions that the city would otherwise be required to make under this Part 7." (Section 3.28.955.)

Safety employees. The Municipal Code similarly permits the modification of the employee contribution rates required from safety employees through resolution, agreement or arbitration, as appropriate, and permits an offset against the City's own obligations. (Section 3.36.1520, Section 3.36.1525, see also 3.36.1560.)

Based on the above provisions, the Code provides authority for additional employee contributions, and specifically permits the application of those contributions against the City's obligations – such as contributions towards deficiencies in the retirement system.

As stated above, in 2010 the City Council enacted the Code sections authorizing additional employee contributions. In connection with their enactment, the City and some bargaining groups agreed that employees would make payments of additional employee retirement contributions towards the retirement systems' unfunded liabilities. But the Code does not require "agreement" to impose additional contribution rates; it also permits the City to do so by resolution, or through binding arbitration. These provisions codified the City's understanding that it had the authority to require additional employee contributions to defray the retirement systems' unfunded liabilities.

Based on the Charter, Municipal Code and the City's practices, San Jose has arguments that it never bound itself to limit employee contributions, but reserved the right to increase employee contributions, including to pay for unfunded liabilities. In that case, San Jose's employees had no reasonable expectation that their contribution rates could not be raised in order to share in the expense of unfunded liabilities. See *International Association of Firefighters v. City of San Diego*, 34 Cal.3d 292, 300-302 (1983) (no vested right to contribution rates when pension plan expressly provided for modification of contribution rates based on periodic actuarial investigations).

c. Changes in compensation. In addition to relying on the Charter and Municipal Code, the City reasonably may argue that the changes to employee contribution rates in fact are changes to employee compensation, over which it has plenary authority under the state constitution.

As explained above, San Jose has the constitutional authority to set employee compensation in its Charter. If the City had simply reduced compensation to afford additional payments into the retirement system, no vested right would be implicated. "It is well established that public employees have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority."

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San Diego POA v. San Diego City Employees Retirement System, 568 F.3d 725, 738 (9th Cir. 2009), quoting *Tirapelle v. Davis*, 20 Cal. App. 4th 1317 (1993); see also *Butterworth v. Boyd*, 12 Cal. 2d 140, 150 (same).

Instead of reducing compensation, the proposed amendment permits employees to contribute additional amounts to the retirement system. This characterization is to the benefit of employees, because it prevents a reduction in the "final compensation" used to compute retirement allowances. Since there is no vested right to a particular level of compensation, there should be no vested right that prevents the City, in lieu of a decrease in compensation, from requiring additional employee contributions into the retirement system.

In summary, the City has reasonable arguments, based on the City's Charter and Municipal Code, and its practices, that the City never bound itself to completely subsidize the deficiencies of the retirement funds, and thus can require employees to share in that cost through higher employee contribution rates. Further, the City has an argument that its constitutional authority over employee compensation enables it to adjust compensation in the form of additional employee contributions towards unfunded liabilities.

We recognize, however, that aspects of these arguments are untested. City employees may contend that the City created the expectation, through its historical practices, that it would pay for all unfunded liabilities, despite the contrary provisions of the City Code and union agreements. And prior judicial decisions have held that the employee contribution rates at issue in those cases were vested rights. See e.g., *Allen v. City of Long Beach*, 45 Cal. 2d 128, 130-131 (1955); *Wisley v. City of San Diego*, 188 Cal. App. 2d 482, 485-487 (1961). These decisions did not address the particular arguments that will be made by the City, and we believe the courts will revisit this issue in light of the modern practice of bargaining and treating as interchangeable, wages, employee contribution rates and other benefits. But as in any case involving vested rights, there can be no certainty as to any judicial outcome in the event of a legal challenge.

B. Current Employees - VEP (Section 7).

Under the Act, employees who do not want their pay adjusted in the form of higher contribution rates may opt into a one time "Voluntary Election Program." In exchange for no reduction in pay, the VEP provides a different pension plan. The VEP reduces the accrual rate for future service (2% per year), raises the eligibility age for retirement over time (55 to 62 for miscellaneous, 50 to 57 for safety), limits cost of living adjustments to 1.5% of CPI, and requires "final compensation" to be determined by an average of three years pay instead of one, among other changes. (Section 7(b).)

The VEP is legally permissible on its face, as a voluntary alternative to payment of additional employee retirement contributions. Courts have enforced agreements by individual employees to give up existing benefits and select a new pension plan. See

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Pasadena Police Officers Assn v. City of Pasadena, 147 Cal. App 3d 695, 706-707 (retirees gave up fixed pension in exchange for city's promise to pay a pension that would rise or fall based on the cost of living index).

As demonstrated above, the City has arguments that it may require employees to pay additional retirement contributions. But if a Court invalidated this requirement, the Court might not hold employees who elected VEP to their VEP election

C. New Employees – Hybrid Plan (Section 8).

The Act requires the City to adopt a "Tier 2" retirement program for employees hired after the program is enacted. Under the Act, the program may be designed as a "hybrid plan" consisting of a combination of social security, a defined benefit plan and/or a defined contribution plan. (Section 8(a).)

This proposal plainly does not affect vested rights. A public entity may change the benefits offered to new employees, who have only the right to benefits conferred during employment. *Legislature v. Eu*, 54 Cal. 3d 492, 534 (1991); *Claypool v. Wilson*, 4 Cal App. 4th 646, 670 (1992).

In 2010, in accordance with this principle, the voters amended the City Charter to permit the City Council by ordinance to exclude new employees from any existing plan. (Charter section 1501(b).) The Act provides further guidance by setting the parameters for the modified plans to be offered to new employees.

D. Emergency Measures to Contain Cost of Living Adjustments (Section 10).

Under the Act, if the City Council "adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees," the City may temporarily suspend cost of living adjustments in whole or in part for up to five years. (Section 10(a).)

Even if a court determined that a change in the COLAs would impair vested rights, "a substantial impairment may be constitutional if it is 'reasonable and necessary to serve an important public purpose.'" *Valdes v. Cory*, 139 Cal. App. 3d 773, 790-791 (1983); see also *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 304 (1979).

In making this assessment, courts analyze whether the enactment: (1) serves to protect the basic interests of society; (2) has an emergency justification; (3) is appropriate for the emergency, and (4) is designed as a temporary measure, during which contract rights

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are only deferred. *Olson v. Cory*, 27 Cal. 3d 532, 539 (1980), citing *Sonoma County*, 23 Cal. 3d at 305-306 (1979).

Based on the above authority, it is legally permissible for the Act to grant this emergency authority to the City Council to reduce COLAs. Whether the Council's actions implicate vested rights or satisfy the above requirements cannot be determined until the time of the emergency enactment.

E. Supplemental Payments to Retirees (Section 11).

The Act discontinues the Supplemental Retiree Benefit Reserve and returns its assets to the appropriate retirement trust fund. Any supplemental payments to retirees may not be funded from plan assets.

The Supplemental Retiree Benefit Reserve ("SRBR") permits the allocation of excess investment income earned by retirement fund assets to an account to fund supplemental benefits for retirees. The City has changed the formula for distribution of benefits to retirees over the years. For example, in 2005, the City Council enacted Municipal Code Section 3.28.340(E), which stated that the Council, after consideration of the Board's recommendation "shall determine the distribution, *if any*, of the supplemental retiree benefit reserve to said persons." [Emphasis added.] Moreover, we are informed that the City has not always paid this benefit.

The language of the Municipal Code, quoted above, and the City's practices are evidence that retirees do not have a vested right to payments from the SRBR.

F. Savings Provision (Section 14).

Section 6(b) requires current employees, not enrolled in Tier 2, to have their compensation adjusted in the form of additional contributions to their retirement funds. Under Section 14, in the event Section 6(b) is determined to be "illegal, invalid or unenforceable as to Current Employees then to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions."

As explained above in the section on Legal Background, San Jose has the constitutional authority to set employee compensation in its Charter. And public employees "have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority." *San Diego POA v. San Diego City Employees Retirement System*, 568 F.3d at 738. Although reduced compensation will affect an employee's "final compensation" for retirement purposes, "indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected." *Id.*

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Therefore, there is authority to support the alternative of reducing pay in order to pay the unfunded liabilities of the pension system. The City has sound arguments in favor of voter authority to determine compensation, after meet and confer with employee organizations. But this is a developing area of the law and as we stated above, in any case involving vested rights, there can be no certainty as to any judicial outcome in the event of a challenge.

V. CONCLUSION

The City has made numerous amendments since it published and circulated the first draft of the Act last summer. As a result, subsequent versions eliminate or significantly reduce many of the legal risks identified in the first draft.

We believe the Act in its present state is defensible against a potential legal challenge. But some sections involve a different degree of risk than others. We have reviewed each of these sections and identified the arguments in favor of their legality and the risk that a court may find that they violate employees' vested rights. The Act contains a severability provision. If a Court were to invalidate portions of the Act, this provision enables the City to still implement others.

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Attorneys for Petitioners,
PETER CONSTANT and BENJAMIN ROTH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PETER CONSTANT and BENJAMIN ROTH,)

Petitioners,)

vs.)

DENNIS HAWKINS, Office of the City
Clerk, San Jose; BARRY GARNER, Registrar
of Voters, County of Santa Clara,)

Respondents,)

HELEN CHAPMAN, PATTIE CORTESE,
JAMES SPENCE, JOHN S. DIQUISTO and
CAY DENISE MACKENZIE,)

Real Parties In Interest.)

Case No.:

(PROPOSED) WRIT OF MANDATE

Date: March 23, 2012

Time: 8:15 a.m.

Dept.: TBA

**TO: RESPONDENTS, DENNIS HAWKINS, OFFICE OF THE CITY CLERK,
SAN JOSE AND SANTA CLARA COUNTY REGISTRAR OF VOTERS,
BARRY GARNER:**

Petitioners PETER CONSTANT and BENJAMIN ROTH petition for issuance of Writ of
Mandate was heard on March 23, 2012 in Department ____, the Honorable _____
presiding. Edward A. Kraus, Esq., appeared for Petitioners, Respondent Dennis Hawkins,

1 Christopher E. Platten, Esq., appeared for the Real Parties In Interest. The Court having reviewed
2 and considered all papers on file and argument of counsel, and the matter having been submitted,

3 IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

4 The Request For Judicial Notice by Petitioners is GRANTED.

5 IT IS FURTHER ORDERED THAT Respondent Registrar refrain from printing and delete
6 the following portions of the Argument Against Measure B submitted by the Real Parties In Interest
7 for distribution to voters for use in the June 5, 2012 Primary Election:

- 8 • "It could eliminate disability retirements for police and firefighters injured on
9 the job and unable to perform their previous duties, it increases by thousands
10 of dollars the amount widows and seniors pay for promised health care, and
11 the City admitted that Measure B may not be constitutional because it
12 violates employees' vested rights."
- 13 • "But city officials never even tried to offer taxpayers a way to achieve any
14 savings that would stand up in court.
- 15 • "City workers recently took 10%-18% pay cuts."
- 16 • "Employees proposed dozens of legal pension reforms that would have
17 increased retirement ages, reduced benefit levels and lowered COLA's.
18 Police and fire even proposed to cut pensions back to 1962 levels."
- 19 • "...politicians unsuccessfully tried to declare a fiscal emergency..."
- 20 • "This pattern of inaccurate financial projections, meant to scare voters..."

21 IT IS ORDERED THAT the remaining portions of the Real Parties in Interest's Argument
22 Against Measure B shall be printed without further addition or correction.

23 The Court also ORDERS that no further notice be given to the public.

24 THIS WRIT SHALL BE EFFECTIVE IMMEDIATELY.

25 IT IS SO ORDERED.

26
27 DATED: _____, 2012

28 _____
JUDGE OF THE SUPERIOR COURT