Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Jennifer S. Stoughton, No. 238309
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
gmartinez@cbmlaw.com
jstoughton@cbmlaw.com
awest@cbmlaw.com

Attorneys for Defendant
San Jose Police Officers' Association ("SJPOA")

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CITY OF SAN JOSE,

Plaintiff,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION; SAN JOSE FIREFIGHTERS; I.A.F.F., LOCAL 230; MUNICIPAL EMPLOYEES' FEDERATION, AFSCME, LOCAL 101; CITY ASSOCIATION OF MANAGEMENT PERSONNEL, IFPTE, LOCAL 21, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3; and DOES 1-10,

Defendants.

No. C12-02904 LHK PSG

DEFENDANT SAN JOSE POLICE OFFICERS' ASSOCIATION'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TO DISMISS OR STAY BASED ON FEDERAL ABSTENTION PRINCIPLES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[FED. R. CIV. PROC. 12(B)(1)]

[CONCURRENTLY FILED DECLARATION OF GREGG M. ADAM; REQUEST FOR JUDICIAL NOTICE]

Date: October 4, 2012
Time: 1:30 p.m.
Place: Dept. 8
Judge: Hon. Lucy H. Koh

NOTICE OF MOTION & MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 4, 2012 at 1:30 p.m. or as soon thereafter as the matter may be heard in the courtroom of the Honorable Lucy H. Koh, located at 280 South 1st Street, Courtroom 8, 4th Floor, San Jose, CA 95113, Defendant San Jose Police Officers' Association will and hereby does move this Court for an Order dismissing this action *with prejudice* pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) on the basis that said action is not justiciable under Article III, § 2 of the U.S. Constitution. Alternatively, this case should be dismissed or stayed based on federal abstention principles under *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), *Younger v. Harris*, 401 U.S. 37 (1971), and/or *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Specifically, (1) plaintiff City of San Jose ("the City") filed its initial complaint before Measure B was passed and before any implementing ordinances were enacted and the case is, thus, not ripe; (2) the City seeks an improper advisory opinion regarding the legality of Measure B; and (3) the City lacks standing to bring this action because it fails to allege a concrete, redressable injury that can be traced to the defendants' conduct. Alternatively, this case should be dismissed with prejudice or stayed under federal abstention principles, in part, because there is an already-filed and procedurally-proper case pending in Santa Clara County Superior Court to decide the legality of Measure B under California law.

This motion is brought pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and federal abstention principles, and is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Declaration of

Gregg McLean Adam, and Request for Judicial Notice, the pleadings and papers filed herein, and upon such other matters as may be presented to the Court at the time of hearing.

Dated: July 16, 2012

CARROLL, BURDICK & McDONOUGH LLP

By / s / Gregg McLean Adam
Gregg McLean Adam
Attorneys for Defendant
San Jose Police Officers' Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Regulations

Constitutions

State Cases

State Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The day of the June 2012 primary election, the City of San Jose ("the City") secretly filed this lawsuit against some of the unions representing some of its employees, asking this Court for an advisory opinion that Measure B, a pension "reform" ballot measure it put before the San Jose voters, is constitutional. The action is improperly brought and should be dismissed for numerous reasons. ***First***, it fails to meet constitutional justiciability requirements because, when this lawsuit was filed, Measure B had not yet been passed by the voters and because the City expressly pleads that Measure B requires implementing ordinances the City has not yet drafted or adopted. ***Second***, the First Amended Complaint ("FAC"), like the initial complaint, improperly asks this Court to issue an advisory opinion declaring that Measure B is constitutional in all applications. ***Third,*** the City lacks Article III standing to maintain this action because it cannot allege any injury, let alone injury traceable to the unions' conduct. The FAC is fatally defective and should be dismissed with prejudice.

Alternatively, this Court should dismiss or stay this declaratory relief case based on federal abstention principles. No California court has yet interpreted or ruled on the legality of Measure B. Abstention is appropriate because the City merely seeks declaratory relief (1) as to federal constitutionality, so as to shop its way into this forum and (2) regarding state laws and the California Constitution, the latter of which are more properly adjudicated in state court. The San Jose Police Officers' Association ("SJPOA") filed a procedurally-proper state court action in Santa Clara County Superior Court the day after Measure B was passed by the voters which will adjudicate Measure B's legality under state law. Other city unions have filed similar suits.

Given the lack of federal subject matter jurisdiction, the City's forum shopping, its request for an advisory opinion, the complex issues of state law, the pending state court cases, as well as the U.S. Supreme Court pronouncements that state courts are just as capable as federal courts to adjudicate federal constitutional issues, this Court

should dismiss this case with prejudice and/or abstain in favor of the pending state court actions.

II. SUMMARY OF RELEVANT ALLEGATIONS AND PROCEDURAL BACKGROUND

The City's Federal Action

On Election Day, June 5, 2012, as voters were casting their ballots on Measure B, the City filed this action seeking a broad judicial declaration that Measure B is constitutional under the U.S. and California Constitutions. *See* Dkt. 1. The City sued some but not all of the unions representing city employees, including defendant SJPOA. *Id.* at 1, 33. It filed a substantially similar amended complaint on July 3, 2012. *Id.* at 33.

Even though Measure B was not the law of San Jose—because it had ***not*** yet been passed by the San Jose electorate at the time this action was filed—the City alleges the existence of a present and "actual controversy" regarding the constitutionality of Measure B between the City and SJPOA. *See* FAC ¶¶ 4, 6, 27, 32. Additionally, the FAC specifically alleges that Measure B has not yet been implemented and that it requires the City to draft and enact implementing ordinances and administrative procedures. *See, e.g.*, FAC ¶ 9 (Measure B's "grace period is intended to permit adjudication of the legality . . . of Measure B before it impacts City employees"); *id.* ¶ 10 ("To implement Measure B . . . the City must develop administrative procedures and draft implementing ordinances"); *id.* ¶ 29.I. ("Many of the features of Measure B call for ordinances to implement [its] provisions"); *id.* ¶ 33 ("A judicial decision is necessary to determine whether Measure B can be implemented"); *id.* ¶ 34 ("This suit seeks this Court's ruling declaring that the City may implement Measure B"); *see also* FAC at 11 (prayer seeking "a judicial declaration the City may implement Measure B").

Although the City includes a conclusory allegation that relief is necessary because "the City must move quickly to reduce personnel costs" if "Measure B is invalidated" (FAC ¶ 33), the City nowhere alleges ***any*** harm to it caused by SJPOA. The prayer does not even seek any relief against SJPOA or any other union, or against any city employee. FAC at 11.

State Actions Filed by SJPOA and Other Union Defendants

By contrast, the day *after* the voters passed Measure B, SJPOA filed an action in Santa Clara County Superior Court against the City of San Jose alleging that Measure B violates California law. Specifically, SJPOA alleges that Measure B, *inter alia*, unconstitutionally infringes on its members' vested pension rights under the California Constitution, breaches SJPOA's collective bargaining agreement with the City, and violates state statutes governing the collective bargaining process. No federal claims are asserted. SJPOA sought to enjoin implementation of certain sections of Measure B it believed would take effect immediately. RJN Ex. 1 & 2 (SJPOA First Amended State Compl.; SJPOA TRO Appl.). The City opposed the injunction and represented in its papers filed in state court that, even after Measure B was passed by the voters, it will require implementing legislation to take effect. RJN Ex. 3 at 1-3, 6-8 (Opp. TRO) & Ex. 4 ¶ 5 (Gurza Decl.). It made those same representations in a stipulation between the parties taking off-calendar SJPOA's application for a temporary restraining order. RJN Ex. 5 ("City-SJPOA Stip. In State Court.") ¶ 1. The City further stipulated that it would work with SJPOA to develop "a case management plan that will allow for the effective and expeditious management of *this* lawsuit" in state court. *Id.* ¶ 3 (emphasis added).

There are at least three other lawsuits filed by the other union defendants currently pending in state court regarding the legality of Measure B under California law. *See* Dkt. 24 (Notice of Related Cases). The City admits that "none of the state-court actions includes a federal-law claim." *See* Dkt. 32 at 3:12 (City's Opp. to Notice of Related Cases). Although these cases are ongoing, no state court has yet interpreted Measure B or ruled on its constitutionality in the first instance. *See* Adam Decl. ¶ 4.

III. FEDERAL COURTS ROUTINELY DISMISS COMPLAINTS FOR FAILURE TO MEET ARTICLE III'S JUSTICIABILITY REQUIREMENTS

A Rule 12(b)(1) motion properly is used to challenge plaintiff's standing because Article III standing is fundamental to federal subject matter jurisdiction. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Plaintiff has the burden of demonstrating jurisdiction. *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

The FAC must be dismissed because it fails to meet Article III's case or controversy requirement. *First*, this case is not ripe because the City prematurely filed this action before the vote on Measure B was complete and because the FAC specifically pleads that implementing ordinances are necessary. *Second*, the City improperly seeks an advisory opinion. *Third*, the City lacks Article III standing. Amendment will not cure these defects and thus each of these grounds is an independent basis to dismiss with prejudice.

A. Dismissal Is Warranted Because This Action Was Prematurely-Filed And The FAC Pleads An Unripe Case

Article III requires ripeness "to prevent the courts, through avoidance of *premature* adjudication, from entangling themselves in abstract disagreements." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (emphasis added). The Declaratory Judgment Act permits a federal court to "declare the rights and other legal relations" of parties only in "a case of actual controversy." 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007) (declaratory judgment actions that satisfy Article III requirements involve disputes that are "definite and concrete, touching the legal relations of parties having adverse legal interests" in a conflict that is "real and substantial") (internal quotations omitted); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945). The "actual controversy" requirement under the Declaratory Judgment Act is identical to the

"case or controversy" requirement of Article III. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005).

Ripeness is determined based on the facts that existed at the time the original complaint was filed because a "controversy must be extant at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.4 (1992) ("The existence of federal jurisdiction ordinarily depends on facts *as they exist when the complaint is filed*"—later fulfillment of the standing requirements does not give plaintiffs standing) (emphasis original, citation omitted); *Renne v. Geary*, 501 U.S. 312, 320 (1991) (no case or controversy where dispute did not exist as of the date the action commenced); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001) ("[R]ipeness is determined at the time of the filing of the complaint").

This lawsuit should be dismissed with prejudice on ripeness grounds for at least two reasons. First, the City filed its original complaint on election day ***before*** Measure B was even passed by the voters. *See* Dkt. 1. Thus, at the time of filing there was no ripe "case or controversy" regarding the legality of Measure B sufficient to satisfy Article III because that measure was ***not*** the law of San Jose. *Lujan,* 504 U.S at 571 n.4; *Sierra Club,* 161 F. Supp. 2d at 1062. For this reason, the mere presence of Measure B on the ballot before it was approved by the voters does not create a ripe controversy. Moreover, the subsequent passage of Measure B, and the City's filing of an amended complaint, do not cure this deficiency because ripeness is determined as of the filing date of the *initial* complaint. *See Lujan*, 504 U.S. at 569 n.4; *Renne*, 501 U.S. at 320.

Second, and more fundamentally, the passage of Measure B does not cure this ripeness defect because the City specifically pleads that Measure B requires implementing ordinances. *E.g.*, FAC ¶¶ 9, 10, 29.G, 33, 34. Yet, the City asks this Court for a declaratory judgment on the legality of Measure B, even though it admits it has not yet drafted, adopted, or given effect to ordinances that it says are required to implement Measure B. *Id.* Where a party alleges implementation of a statute is contingent on future

events, the Supreme Court has held that federal courts should dismiss the complaint for lack of ripeness. In *Texas v. United States*, 523 U.S. 296, 300-301 (1998), the high court held that the State of Texas prematurely sought a declaratory judgment that certain newly-enacted statutes did not violate the Voting Rights Act. It found the case was not ripe because Texas had yet to implement those statutes and because such implementation was contingent on certain factors, *e.g.*, Texas was not required to engage in, or to refrain from, any conduct unless it implemented the newly-enacted provisions. *Id.* The same reasoning applies here. The City of San Jose improperly invites this Court to render a premature opinion and adjudicate the general legal viability of a measure it admits it has not yet implemented even before the City drafts its implementation plan.

Dismissal with prejudice is warranted on ripeness grounds alone. Because this action was prematurely filed, and because the City has taken the position that Measure B is unimplemented legislation until further City Council action, further amendment of the complaint will not make this premature action ripe. *See Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) ("allegation(s) of other facts consistent with the challenged pleading could not possibly cure the deficiency"); *Lujan,* 504 U.S at 571 n.4; *Sierra Club,* 161 F. Supp. 2d at 1062.

B. Dismissal With Prejudice Is Also Warranted Because The City Improperly Seeks An Advisory Opinion That Measure B Is Lawful In All Applications

Dismissal is also proper because the relief the City seeks is a quintessential advisory opinion. "As is well known, the federal courts . . . do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are requisite." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947); *Hillblom v. U.S.*, 896 F.2d 426, 430 (9th Cir. 1990). The prohibition against advisory opinions stems from Article III's case or controversy requirement: "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character . . . . It must be a real and substantial controversy" capable of adjudication through an order "of a conclusive character, as distinguished from

an opinion advising what the law *would* be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937) (emphasis added). One reason for this rule is recognition that "[a] law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another." *McAdory*, 325 U.S. at 461-462 ("This Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or *contingent* questions, or to decide any constitutional question *in advance* . . . or to formulate a rule of constitutional law broader than is required by the precise facts") (citations omitted; collecting cases; emphasis added); *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation *in advance* of its immediate adverse effect . . . involves too remote and abstract an inquiry for the proper exercise of the judicial function") (italics added).[1]

Heeding these principles, countless federal courts have flatly refused to give advisory opinions regarding the legality or constitutionality of state statutes and local ordinances. *E.g., McAdory*, 325 U.S. at 457-463 (state labor statutes); *Texas v. U.S.*, 523 U.S. 296, 302 (1998) (state statutes); *Alameda Conservation Assoc. v. California*, 437 F.2d 1087, 1093 (9th Cir. 1971) (state statute); *Dixie Electric Cooperative v. Alabama*, 789 F.2d 852, 858 (11th Cir. 1986) ("A federal court may not . . . entertain a proceeding . . . that merely seeks validation of a [state] statutory scheme"); *Henschen v. City of Houston*, 959 F.2d 584, 589 (5th Cir. 1992) ("It is not this court's proper role to issue advisory opinions on the facial constitutionality of local ordinances"); *11126 Baltimore Boulevard v. Prince George's County*, 924 F.2d 557, 558 (4th Cir. 1991) (county ordinance); *see*

[1] This prohibition against advisory opinions applies to declaratory relief actions. *McAdory*, 325 U.S. at 461 ("The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding"); *Imperial Irrigation Dist. v. Nevada-California Electric Corp.*, 111 F.2d 319, 321 (9th Cir. 1940) (declaratory relief necessarily involves "a controversy of a justiciable nature, thus excluding an[] advisory decree"). In fact, declaratory relief actions require the federal courts to face the difficult task of distinguishing between actual controversies and improper attempts to obtain advisory opinions. *Bench Billboard Co. v. City of Covington*, No. 06-75-DLB, 2010 WL 420064, *11-12 (E.D. Ky. 2010) (refusing to give advisory opinion on constitutionality of city ordinance).

also Mitchell, 330 U.S. at 83-84 (refusing to give advisory opinion regarding "the legally permissible limits of regulation").

The prohibition against advisory opinions is enforced even when a state or municipality *itself* has asked a federal court for such guidance. *See, e.g.*, *Texas*, 523 U.S. at 302 (state asking for adjudication that its statutes did not violate federal voting rights act); *Associated General Contractors of America v. City of Columbus*, 172 F.3d 411, 421 (6th Cir. 1999) ("the City expected the district court to provide an advisory opinion regarding the constitutionality of the ordinance . . . [s]uch an opinion is beyond the power of a federal court"). As summarized by one district court: "[A] city is not entitled to a judicial declaration that [a] [n]ew [o]rdinance is constitutional. The Supreme Court has made clear that federal courts are not to provide prospective assurance that statutes pass constitutional muster; rather, courts consider the constitutionality of laws when presented with an actual case or controversy." *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 885 (N.D. Tex. 2008).[2]

Accordingly, the Ninth Circuit has held that district courts have "no power to render opinions merely advisory . . . or to set precedent for future litigation." *See Waialua Agr. Co. v. Maneja*, 178 F.2d 603, 613 (9th Cir. 1949) (prayer seeking declaratory relief that employee-defendants "be declared not engaged in commerce" under FLSA sought improper advisory opinion); *Alameda Conservation Assoc.*, 437 F.2d at 1093 ("a federal court will not render an advisory opinion on the constitutionality of a state statute concerning a potential or anticipated effect from the operation of the statute").

---

[2] Courts acknowledge that rendering such advisory opinions would overstep their constitutionally-limited jurisdiction and unnecessarily implicate them in administrative or legislative matters. *Mitchell*, 330 U.S. at 90 ("The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches"); *Bartholonew v. Watson*, 665 F.2d 910, 912 (9th Cir. 1981) ("State appellants appropriately invoked the Pullman principle to avoid forcing the federal courts to render an advisory opinion as to the validity of a state's administrative rules under an applicable state law. As pointed out by the district court, abstention under these circumstances promoted comity between the federal and state court systems and furthered the principles of federalism."); *Waialua,* 178 F.2d at 607 ("Otherwise, the process is not judicial but administrative or legislative").

For example, in *Hillblom*, the Ninth Circuit affirmed dismissal on justiciability grounds where plaintiffs sought an advisory opinion regarding the scope of Congressional power over the Northern Mariana Islands. Specifically, plaintiffs requested a declaration of "the inapplicability to the Northern Mariana Islands of any law which substantially affects the lives of its inhabitants." 896 F.2d at 431. The Ninth Circuit thus held that "[e]ssentially, [plaintiffs] seek a judicial declaration outlining the permissible scope of future Congressional actions. In effect, [plaintiffs] are requesting an advisory opinion, in the abstract . . . . Such a request clearly runs counter to the purposes of Article III jurisdiction." *Id.* (further noting the prohibition against advisory opinions applies when court asked to adjudicate "potential future acts").

And in *City of Farmers Branch*, the Northern District of Texas refused to allow the city to bring a counterclaim that essentially sought an advisory opinion that an amended ordinance was constitutional. Like the City of San Jose, the city there "ask[ed] the court to judicially declare that this legislation is not repugnant to the United States Constitution prior to it being challenged in court or even going into effect." 577 F. Supp. 2d at 884. The court was deeply "troubled" by the city's attempt to "seek an advance ruling on the constitutionality of the [n]ew [o]rdinance" because "[i]f the court were to allow the city's request, it would open a Pandora's box and invite every local government to seek a court's judicial blessing on an ordinance by . . . filing legal action to obtain an advisory opinion on the constitutionality of the ordinance before it went into effect." *Id.* at 884-885 (further noting such an action would "put the cart before the horse"). The district court thus refused to allow the city to bring such an action, noting that "[t]he court does not act as legal counsel to litigants." *Id*. at 885.

Under these principles, the City of San Jose's complaint is fatally defective. First, the FAC unequivocally asks for an advisory opinion, *i.e.*, a judicial decree from this Court that validates Measure B as wholly legal in all applications. *See, e.g.*, FAC ¶ 6 ("A declaratory judgment is necessary to confirm that Measure B does not violate . . . the federal and state constitutions"); *id.* ¶ 8 ("This is solely an action for declaratory relief to

confirm the legality of Measure B"); *id.* ¶ 31 (requesting declaration that Measure B does not violate the federal or state constitutions, nor state law, including the Meyers-Milias-Brown Act, promissory estoppel, breach of contract, the California Pension Protection Act, California Constitution, Article XVI, section 17); *see also* FAC at 11 (prayer seeking "judicial declaration . . . that Measure B does not violate the . . . federal or state constitutions). The City essentially asks for legal advice and a declaration—in the abstract and without being tethered to *any* specific facts—that under no circumstances would Measure B violate the federal and state constitutions or state law. When faced with an analogous request from the State of Texas, the Supreme Court demurred holding that "[w]e do not have sufficient confidence in our powers of imagination to affirm such a negative." *Texas*, 523 U.S. at 301.[3]

Second, the FAC specifically pleads that Measure B is not self-enacting and that it requires implementing ordinances, which the City has not yet written and which the City Council has not yet approved. *See, e.g.*, FAC ¶ 8; *id.* ¶ 9 (Measure B's "grace period is intended to permit adjudication of the legality . . . of Measure B before it impacts City employees); *id.* ¶ 10 ("To implement Measure B . . . the City must develop administrative procedures and draft implementing ordinances"); *id.* ¶ 29.G ("Many of the features of Measure B call for ordinances to implement [its] provisions"); *id.* ¶ 33 ("A judicial decision is necessary to determine whether Measure B can be implemented to change the benefits addressed in the Measure"); *id.* ¶ 32 ("This suit seeks this Court's ruling declaring that the City may implement Measure B"); *see also* FAC at 11 (prayer seeking "a judicial declaration the City may implement Measure B"). That is, the City admits that Measure B has not yet been enforced and that the implementing ordinances are still

[3] There are good reasons why federal courts refuse to give advisory opinions in the abstract, especially because of the unintended effects on subsequent litigation. For example, the FAC fails to distinguish between current, former/retired and future city employees, all of whom have distinct constitutionally-protected pension rights. A declaratory judgment rendered as to current employees only would fail to heed the constitutionally-different rights of retirees or future employees, and vice versa. Granting the declaratory relief the City requests would require the Court to think of these and numerous other facts unpled before rendering its opinion.

unwritten. As such it asks this Court to rule on the legality of Measure B under federal and state law by assuming hypothetical facts about legislation that has not yet been enacted. As outlined above, federal courts have rightfully refused to render advisory opinions regarding the permissible scope of existing legislation and the legality of unwritten statutes. *See also Younger v. Harris*, 401 U.S. 37, 53 (1971) ("it can seldom be appropriate for [federal] courts to exercise any such power of *prior approval* or veto over the legislative process").

As Justice Scalia noted when Texas sought an advisory opinion that its statutes did not violate federal law, "[i]f Texas is confident that" implementation of its statutory scheme does not violate the law, "it should simply go ahead" and implement it. *Texas*, 523 U.S. at 301-302. So too with the City of San Jose and Measure B.

The City's FAC is fundamentally defective and cannot be remedied by further amendment because it seeks an improper advisory opinion. As such, it should be dismissed with prejudice. *Schreiber Distributing Co.*, 806 F.2d at 1401; *see e.g., Bolton v. Actuant Corp.*, No. CV03-08184 PA(CWx), 2004 WL 1136551, *5 (C.D. Cal. March 5, 2004) (dismissing complaint seeking advisory opinion with prejudice because "any attempt to amend . . . will prove futile because Plaintiffs cannot allege a case or controversy").

C. The City Lacks Standing Because It Fails To Plead An Article III Case Or Controversy

A party invoking federal jurisdiction must satisfy three specific requirements to establish Article III standing. *Lujan*, 504 U.S. at 560-561. First, the party must establish an "injury in fact" that is actual or imminent, "not conjectural or hypothetical." *Id*. at 560. An alleged injury that confers standing "must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered an invasion of a legally protected interest which is . . . concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citations omitted). Next, there must be a causal

connection between the injury and the complained-of conduct, so that the injury is traceable to actions by the defendant. *Lujan*, 504 U.S. at 560-561 (requiring allegations of "injury *resulting from the defendant's conduct*") (emphasis added). Third, plaintiff must show that a judgment can redress that injury. *Id*.

1. The City Alleges No Injury In Fact

The City does not plead *any* injury sufficient to confer Article III standing. It alleges no municipal rights or interests that were impaired. Instead, it merely alleges "facts" regarding the purported need for Measure B and its desire to implement Measure B without delay. *See* Compl. ¶¶ 3, 20-32; FAC ¶¶ 3, 22-34.[4] The City alleges no "concrete and particularized" harm (*Raines*, 521 U.S. at 819), or even any imminent threat of past, present, or future harm stemming from any uncertainty regarding the legality of Measure B. *See* Compl. ¶¶ 20-32; FAC ¶¶ 22-34. The City ***cannot*** plead any injury in fact because Measure B does not adversely affect it in any way. "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other." *McAdory*, 325 U.S. at 463.

The purported "harm" the City alleges is not a cognizable injury in fact. The City alleges an urgent need for declaratory relief so it can proceed with implementing Measure B or "move quickly to reduce personnel costs" if Measure B is invalidated (Compl. ¶ 31; FAC ¶ 33), and further alleges its need to minimize delays in its planned timeline for administration of Measure B (Compl. ¶ 31; FAC ¶ 33). But it alleges no particular or imminent injury it is seeking to avoid. Instead, the City pleads an unspecified urgency to address broad, unalleged fiscal matters that affect the City of San Jose. Compl. ¶ 31; FAC ¶ 33. But this is not sufficiently concrete and particularized harm that gives the City standing to bring this case. An interest in maintaining the

[4] Although standing is generally determined as of the time of filing *Lujan*, 504 U.S. at 569 n. 4 ("[t]he existence of federal jurisdiction ordinarily depends on facts *as they exist when the complaint is filed*"), the FAC also fails to meet Article III requirements.

effectiveness of government, and any general threat thereto, does not create a legally and judicially cognizable injury under Article III. *See Raines*, 521 U.S. at 825.

2. Any Alleged Harm To The City Is Not Traceable To SJPOA

To show Article III standing the City must allege injury "*resulting from the defendant's conduct*" sufficient to demonstrate a causal nexus between the conduct and the harm alleged. *Lujan*, 504 U.S. at 561 (emphasis added). Even if the City had pled any cognizable injury, this alone would not confer standing because the City failed to plead any injury ***caused*** by SJPOA. The City merely alleges SJPOA's opposition to Measure B. *E.g.,* Compl. ¶¶ 6, 13; FAC ¶¶ 6, 13. It does not allege that any conduct by SJPOA or its members has caused, or might imminently cause, the City harm. *Id.* Thus, while the City alleges in a conclusory manner that there are unspecified "disputes concerning Measure B" (Compl. ¶ 17; FAC ¶ 19), it alleges ***no injury caused*** by SJPOA or its members. In fact, the City alleges no misconduct, harm, or threat of harm of any sort by SJPOA. *See* Compl. ¶¶ 20-32; FAC ¶¶ 22-34.

While the City alleges it would like to implement Measure B quickly to avoid possible cuts to City services, these matters and any harm flowing from them are not caused by any conduct of SJPOA or its members but rather stem from the City's purported fiscal state. *See, e.g.*, Compl. ¶ 3 ("The City's ability to provide Essential City Services has been and continues to be threatened by dramatic budget cuts caused in large part by the climbing and unsustainable cost of employee benefit programs"), ¶¶ 8, 11 ("economic crisis" caused harm); FAC ¶¶ 8, 11 (same). The FAC thus must be dismissed because the City alleges no harm resulting from SJPOA's conduct.

3. The City Cannot Allege Any Harm For Which This Court Can Fashion Relief

To meet its burden of demonstrating Article III standing, the City must show that the harm it alleges can be redressed by a judicial decree. *See Lujan*, 504 U.S. at 561. The relief the City seeks is a declaration regarding the legality of Measure B and a

declaration it "may implement Measure B as enacted by the voters." Compl. at 10; FAC at 11. There are numerous problems with this request. First, as explained in Part III.B, *supra*, what the City seeks is essentially an advisory opinion that Measure B is constitutional and not unlawful. Second, declaratory relief will not address the "injuries" the City alleges. For example, it will not expedite the City's drafting and adoption of implementing ordinances. *See* Compl. ¶¶ 8, 10, 27.G; FAC ¶¶ 8, 10, 27.I. Nor will it resolve the City's purported fiscal issues. *See* Compl. ¶ 31; FAC ¶ 33. Even if the City had pled a cognizable injury and that SJPOA caused it harm, the complaint should be dismissed with prejudice because the City cannot show redressable harm that meets Article III standing requirements. *See Lujan*, 504 U.S. at 569 n.4; *e.g.*, *Mayfield v. United States*, 599 F.3d 964, 970 (2010) (plaintiffs lacked standing to bring declaratory relief claims regarding federal surveillance statutes due to failure to show likelihood of redressability).

* * *

The City's lack of standing cannot be remedied through amendment and thus the FAC should be dismissed with prejudice.

IV. THIS COURT SHOULD DISMISS OR STAY BASED ON ABSTENTION PRINCIPLES

A. Federal Courts Have Discretion To Abstain From Cases Seeking Purely Declaratory Relief

Even if this Court determines the FAC presents a cognizable case or controversy, because the City only seeks declaratory relief "the court must [further] decide whether to exercise [its] jurisdiction." *American States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (9th Cir. 1994) ("The [Declaratory Relief] statute gives discretion to courts . . . whether to entertain declaratory judgments"). This discretion is guided by the factors announced by the Supreme Court in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942). Specifically, "(1) the district court should avoid needless determination of state law issues; (2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and (3) it should avoid duplicative litigation." *Principal Life Ins. Co. v.*

Robinson, 394 F.3d 665, 672 (9th Cir. 2005) (internal citations and quotations omitted). A district court may also consider whether the declaratory relief action results in entanglement between the federal and state court systems. *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1120, 1225 n.5 (9th Cir 1998); *see also Kearns*, 15 F.3d at 144 (a court "must balance concerns of judicial administration, comity, and fairness to the litigants").

All these factors weigh heavily in favor of dismissal. First, the City asks this Court to declare that Measure B is lawful under, *inter alia*, four different sections of the California Constitution, the Meyers-Milias-Brown Act (Cal. Gov. Code § 3500, *et seq*.) the statutory collective bargaining scheme for local public employees, and California contract law—even though no California court has yet interpreted Measure B or ruled on its legality. FAC ¶ 31. To avoid needlessly deciding those issues of state law in the first instance, this Court should abstain so those legal determinations can be made first by a California court in one of the actions pending in state court by the union defendants. *E.g., Navigators Ins. Co. v. Rodeo Stell & Metal, Inc.*, No. C01-3534 SI, 2002 WL 43254, *2 (N.D. Cal. Jan. 8, 2002) (abstention proper where state law question is "more appropriately determined by a state court").

Second, this Court should not allow the City's thinly-veiled forum shopping to deny the unions a state court forum. The City raced to file this procedurally-improper case in federal court even before Measure B was passed by the voters. And although it specifically acknowledges the unions assert no federal challenge to Measure B (Dkt. 32 at 3:12), the City asks for declaratory relief under the federal constitution only to manufacture a federal issue to get into federal court. Thus, allowing this case to proceed would have the effect of removing the unions' state court actions into federal court even though there is no federal jurisdiction. That is a wholly improper use of the declaratory judgment statute. *Exxon Shipping Co. v. Airport Depot Diner, Inc*., 120 F.3d 166, 170 (9th Cir. 1997) ("The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing . . . to choose a forum. It was not intended . . . to enable a party to obtain a change of tribunal and thus accomplish in a particular case what

could not be accomplished under the removal act . . . ."; holding district court abused its discretion by granting declaratory relief); *see also Allstate Life Ins. v. Sundboli*, No. C-95-1022 SI, 1995 WL 566040, *3 (N.D. Cal. Sept. 15, 1995) ("a party should not be allowed to choose a less appropriate federal forum by hasty initiation of a federal proceeding which is parallel to a state proceeding").

Third, not abstaining will result in duplicative litigation and force the parties to litigate the legality of Measure B in two forums. The existence of parallel state proceedings involving identical parties and issues strongly weighs in favor of this Court's dismissal, especially because it implicates comity concerns. *See Gov't Employees Ins.*, 133 F.3d at 1225 ("federal courts should generally decline to entertain reactive declaratory actions"); *Brillhart*, 316 U.S. at 495 ("it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of … state court litigation should be avoided"). A related reason is the possibility of inconsistent state and federal court judgments on issues of state law, which may result in unnecessary piecemeal litigation. *See Gov't Employees Ins.*, 133 F.3d at 1225 n.5; *Navigators Ins. Co.*, 2002 WL 43254 at *2. Abstention is thus proper on the *Brillhart* factors alone. *E.g.*, *Cal. County Superintendents v. Marzion*, No. C 08-04806 CW, 2009 WL 513742, *6-7 (N.D. Cal. Mar. 2, 2009) (abstaining because "[m]any of the *Brillhart* . . . factors weigh against the Court's exercising its jurisdiction: the federal suit does not present claims distinct from the issues raised in the state . . . proceeding; there is an inference of forum shopping; the federal suit . . . would interfere with the state . . . proceeding; and there is the possibility of duplicative litigation or inconsistent judgments").[5]

[5] In addition, the City stipulated and expressly agreed to work with SJPOA to develop "a case management plan that will allow for the effective and expeditious management" of SJPOA's lawsuit in state court. RJN Ex. 5 ¶ 3. That SJPOA asserts no federal claims in the state action does not prevent the City from filing such claims as counterclaims. As noted above, the City only raised federal claims to shop its way into federal court.

Judicial economy and basic fairness also support abstention. If this case proceeds, it will consume the judicial resources of two judicial forums and force SJPOA and the other unions to litigate this case in state and federal forums. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to *considerations of practicality and wise judicial administration*") (emphasis added) (internal quotations omitted). Moreover, a ruling under federal law may be entirely unnecessary. Resolution of the state law claims by California courts may obviate the need for declaratory relief on federal constitutional grounds. *See, infra,* Part IV.B.

B. *Younger* and *Pullman* Principles Also Support Abstention

Under *Younger* abstention, a "federal court must abstain to avoid interference in a state-court civil action when three tests are met. First, the proceedings must implicate important state interests; second, there must be ongoing state proceedings; and third, the federal plaintiff must be able to litigate its federal claims in the state proceedings." *M&A Gabaee v. Community Redevelopment Agency of the City of Los Angeles*, 419 F.3d 1036, 1039 (9th Cir. 2005); *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention "reflects a strong policy against federal court interference in ongoing state proceedings. The interests of comity, federalism, economy, and the presumption that state courts are competent to decide issues of federal constitutional law underlie *Younger* abstention." *Communications Telesystems Int'l v. CPUC*, 196 F.3d 1011, 1015 (9th Cir. 1999) (affirming dismissal on abstention grounds). "*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts." *Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1989). *Younger* abstention applies to declaratory relief actions. *Id.* Avoiding unnecessary determination of federal constitutional questions, especially when the federal plaintiff can bring its claims in state court, also favors abstention. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987).

This case squarely falls within these principles, which militate in favor of abstention. First, California has a strong interest in protecting public employee pensions during times of perceived fiscal distress that is enshrined in its constitution. *See* Cal. Const. art. XVI, § 17 (California Pension Protection Act); *State ex rel. Pension Obligation Bond Committee v. All Persons Interested in Matter of Validity of Cal. Pension Obligation Bonds* (2007) 152 Cal. App. 4th 1386, 1392 (California Pension Protection Act enacted because "[p]oliticians have undermined the dignity and security of all citizens who depend on pension benefits ... by repeatedly raiding their pension funds.... [¶] ... To protect the financial security of retired Californians, politicians must be prevented from meddling in or looting pension funds"). Additionally, as San Jose Firefighters argue in their brief, California state courts have a long history of adjudicating the rights of public employees. *See* Dkt. 8 at 4:21-5:6. California's interest is especially strong because no state court has yet decided the legality of Measure B. *Trainor v. Hernandez*, 431 U.S. 434, 445 (1977) (identifying lack of state-court interpretation of statutory framework as central concern underlying *Younger*).

Second, there are ongoing state actions filed by SJPOA and the other union defendants that will decide the legality of Measure B under state law. That SJPOA's state court action was filed one day after the City filed this procedurally-improper federal case does not change this. "[F]ederal courts must defer even to state court proceedings that are filed *after* the federal action." *M&A Gabaee*, 419 F.3d at 1040 (emphasis original); *Hicks v. Miranda,* 422 U.S. 332, 349 (1975) ("where state . . . proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance . . . have taken place in federal court, the principles of *Younger v. Harris* should apply in full force"). For example, in *M&A Gabaee*, the Ninth Circuit flatly rejected plaintiff's argument that a federal action filed one day before the state action does not constitute an "ongoing" proceeding. It held that plaintiff's argument was "specious" because it is "well settled law in this circuit" that "*Younger* abstention applies even when the state action is not filed until after the federal action, as long as it is filed before

proceedings of substance on the merits occur in federal court." 419 F.3d at 1041 (collecting cases). There have been no proceedings of substance on the merits in this action.

Third, the City has an opportunity to bring its federal constitutional claims in the state court actions. State courts are fully competent to adjudicate federal constitutional claims. *Moore v. Sims*, 442 U.S. 415, 430-32 (1979). The principles of *Younger* merely require an "opportunity" for the City to present its federal constitutional claims in the state proceeding, even if the City has failed to do so. *See Juidice v. Vail*, 430 U.S. 327, 337 (1977); *Sims*, 442 U.S. at 430-32 (the only relevant question for *Younger* analysis is whether the state proceedings afford an opportunity to raise the constitutional challenge). In fact, "the Supreme Court has suggested that a plaintiff's failure to raise its federal claims in the state proceedings favors *Younger* abstention." *Communications Telesystems*, 196 F.3d at 1019. Additionally, abstention is proper because determining the legality of Measure B under the California Constitution may eliminate the need for any federal to make that determination under the federal Constitution. *Pennzoil*, 481 U.S. at 12 (avoidance of unnecessary constitutional determinations favors *Younger* abstention).

Alternatively, *Pullman* abstention is proper because no California state court has yet decided the legality of Measure B. *Pullman* abstention is proper when, a case "[1.] touche[s] a sensitive area of social policy, [2.] [a] state decision could obviate the need for federal constitutional adjudication, and [3.] any federal construction of the state law might, at any time, be upended by a decision of the state courts." *Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir. 2006) (affirming abstention from deciding constitutionality of California state statutes); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498-502 (1941). *Pullman* abstention thus prevents premature and unnecessary determination of federal constitutional issues. *Id.* Specifically, federal courts should abstain where state law is challenged under both federal and state constitutions because, in such cases, federal courts should allow the state courts to settle the issues under the state constitution first. *See Santa Fe Land Improvement Co. v. City of Chula*

Vista, 596 F.2d 838, 840 (9th Cir. 1979) ("it appears to us that there are state policies and questions which may obviate the need to reach federal questions and which are best left to state courts to resolve" in the first instance).

Pullman abstention is also proper here. First, the pension rights of public employees is undoubtedly an issue of social policy such that California courts are entitled to rule on the legality of Measure B in the first instance. *See* Cal. Const. art. XVI, § 17; *State ex rel. Pension Obligation Bond Committee*, 152 Cal. App. 4th at 1392. "The sensitive social policy prong . . . recognizes that abstention protects state sovereignty over matters of local concern, out of considerations of federalism, and out of scrupulous regard for the rightful independence of state governments." *Almodovar v. Reiner*, 832 F.2d 1138, 1140-41 (9th Cir. 1987).

Second, as noted above, California courts' determination regarding the legality of Measure B under state law will remove the need for any federal court to decide unnecessarily whether that measure is valid under the federal constitution. *Smelt*, 447 F.3d at 681 ("If the California courts ultimately determine that the [statutes] in question violate the California Constitution, we will have no need to consider the federal constitutional claims regarding those [statutes]"). That could happen if, for example, California courts rule that Measure B cannot lawfully be applied to SJPOA. *Almodovar,* 832 F.2d at 1140 ("[a]ll of plaintiff's constitutional claims would be moot if the state supreme court decides that the statutes do not apply [to plaintiff] . . . . [Plaintiff] will have obtained all the relief she seeks without a federal decision on her constitutional claims"). "Pullman abstention was designed especially for this sort of narrowing construction." *Id*.

Third, if this Court renders a decision on the constitutionality of Measure B, such decision could be "upended by a decision of the state [supreme] court[]" that interprets the measure differently under state law. *Smelt*, 447 F.3d at 678 n.13, 679. As the Ninth Circuit noted: "Nor have we any reason to assume the California Supreme Court will construe the California Constitution in the same was as the federal courts construe the United States Constitution. That makes this a particularly good case for *Pullman*

abstention." *Id*. at 681-82. This analysis equally applies here and militates in favor of immediate dismissal.

* * *

Should the Court find that a stay based on abstention is preferable to dismissal, such a stay would still have the salutatory effect of allowing California courts the opportunity to determine Measure B's legality under the state law in the first instance. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 721 (1996) ("[F]ederal courts not only have the power to stay the action based on abstention principles, but can also . . . decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court"); *see, e.g.*, *Burlington Ins. Co. v. Panacorp, Inc.*, 758 F. Supp. 2d 1121, 1135 (D. Haw. 2010) and *Smelt*, 447 F.3d at 678.

V. CONCLUSION

For all these reasons, this Court should dismiss this action with prejudice for lack of subject matter jurisdiction. Alternatively, this Court should dismiss and/or stay based on federal abstention principles in favor of the ongoing state court actions.

Dated: July 16, 2012

CARROLL, BURDICK & McDONOUGH LLP

By / s / Gregg McLean Adam
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Jennifer S. Stoughton
Amber L. West
Attorneys for Defendant
San Jose Police Officers' Association

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Jennifer S. Stoughton, No. 238309
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
gmartinez@cbmlaw.com
jstoughton@cbmlaw.com
awest@cbmlaw.com

Attorneys for Defendant
San Jose Police Officers' Association ("SJPOA")

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CITY OF SAN JOSE,

Plaintiff,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION; SAN JOSE FIREFIGHTERS; I.A.F.F., LOCAL 230; MUNICIPAL EMPLOYEES' FEDERATION, AFSCME, LOCAL 101; CITY ASSOCIATION OF MANAGEMENT PERSONNEL, IFPTE, LOCAL 21, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3; and DOES 1-10,

Defendants.

No. C12-02904 LHK PSG

[PROPOSED] ORDER GRANTING DEFENDANT SAN JOSE POLICE OFFICERS' ASSOCIATION'S MOTION TO DISMISS AND/OR STAY

Defendant San Jose Police Officers' Association ("SJPOA") filed a motion for an Order dismissing the First Amended Complaint ("FAC") filed by plaintiff the City of San Jose *with prejudice* pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) on the basis that said action is not justiciable under Article III, § 2 of the U.S. Constitution. Alternatively, SJPOA moved to have this case dismissed or stayed based on federal abstention principles under *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), *Younger v. Harris*, 401 U.S. 37 (1971), and/or *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Having heard the parties' arguments and considered all the papers supporting the motion, the opposition, the reply thereto, the record in this case, the Court hereby grants SJPOA's motion.

The FAC filed by the plaintiff City of San Jose ("the City") fails to present a justiciable controversy under Article III, § 2 of the U.S. Constitution for the reasons explained in SJPOA's filings. First, the action is not ripe because the City filed this action before Measure B was passed by the voters and before any implementing ordinances were enacted. Second, the City seeks an improper advisory opinion regarding the legality of Measure B. Third, the City lacks standing to bring this action because it fails to allege a concrete, redressable injury that can be traced to the defendants' conduct or that can be addressed through a judicial decree.

AND/OR

For the reasons stated on the record at the hearing on the motion and the reasons set forth in the motion, this case is dismissed with prejudice / stayed based on federal abstention principles because there is an already-filed and procedurally-proper case pending in Santa Clara County Superior Court deciding the legality of Measure B under California law.

The Court, HEREBY ORDERS that:

Defendant San Jose Police Officers' Association's Motion to Dismiss for lack of justiciability is GRANTED, with prejudice and without leave to amend;

AND/OR

Defendant San Jose Police Officers' Association's Motion to Dismiss or Stay based on federal abstention principles is GRANTED. The FAC is hereby DISMISSED with prejudice and without leave to amend OR this action is STAYED pending resolution of the pending case(s) in Santa Clara County Superior Court to decide the legality of Measure B.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Lucy H. Koh
U.S. District Court Judge