Case No. S242034

IN THE SUPREME COURT FOR
THE STATE OF CALIFORNIA

CATHERINE A. BOLING, T.J. ZANE and
STEPHEN B. WILLIAMS

Petitioners

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent

CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO LOCAL 127; and SAN DIEGO CITY FIREFIGHTERS LOCAL 145

Real Parties in Interest

After a Decision of the Court of Appeal, Fourth Appellate District, Division One, Consolidated Case Nos. D069626 and D069630

COMBINED ANSWER BRIEF ON THE MERITS BY CATHERINE A. BOLING, T.J. ZANE AND STEPHEN B. WILLIAMS TO PETITIONS FOR REVIEW BY THE PUBLIC EMPLOYMENT RELATIONS BOARD AND THE UNION REAL PARTIES IN INTEREST

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ANSWER BRIEF ON THE MERITS

I. INTRODUCTION.

By leave of the Chief Justice, this Combined Answer Brief on the Merits by Petitioners, Catherine A. Boling, T.J. Zane and Stephen B. Williams (Proponents/Petitioners) addresses the Opening Briefs on the Merits filed by AFL-CIO, Local 127, and San Diego City Firefighters Local 145 (collectively Unions or Real Party Unions) and Respondent, Public Employment Relations Board (PERB) in support of their Petitions for Review of the Decision of the Court of Appeal, Fourth Appellate District, Division One, published in Case No. D069626 (consolidated with D069630), hereinafter referred to as *Boling v. Public Employment Relations Bd.* (2017) 10 Cal.App.5th 853 (*Opinion*).

The *Opinion* correctly annulled PERB's Administrative Decision, issued on December 29, 2015 (PERB Decision) in a consolidated case involving four PERB Unfair Practice Charges and complaints filed by the Unions[1], invalidating the Citizens' Pension Reform Initiative (CPRI or Proposition B[2]) — a voter-approved, citizen-circulated initiative measure

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[1] San Diego Municipal Employees Association (SDMEA) (Case No. LA-CE-746-M) (AR 1:1:000002-000237 (UPC and exhibits); AR 3:13:000572-000573 (complaint)); Deputy City Attorneys Association of San Diego (DCAASD) (Case No. LA-CE-752-M) (AR 3:15:000579-000589 (UPC); AR 3:27:000835-000836 (complaint)); American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME Local 127) (Case No. LA-CE-755-M) (AR 3:22:000607-000613 (UPC); AR 5:48:001180-0001183 (complaint)) and San Diego City Fire Fighters IAFF, Local 145 (San Diego Local 145) (Case No. LA-CE-758-M) (AR 4:33:000934-000941 (UPC); AR 5:62:001407-001408 (complaint)).

[2] The pension initiative at issue is generally referred to as "CPRI" prior to certification for placement on the ballot and as "Proposition B" after placement on the ballot.

— based on the erroneous finding that the City failed to comply with the Meyers-Milias-Brown Act (MMBA); which is not applicable to citizen-circulated initiative measures.

The *Opinion* correctly answers the question left open in Footnote 8 of this Court's decision in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (*Seal Beach*) (1984) 36 Cal.3d 591, as to whether the MMBA meet and confer requirements applied to "charter amendments proposed by initiative." (*Seal Beach*, fn. 8.) That answer is a resounding "no". (*Opinion*, p. 29-40.) PERB's and the Unions' attempts to weave the Reserved Right of the People to propose legislation into the MMBA find no support in Government Code sections 3504.5 or 3505.

Proponents are the legal proponents who circulated the CPRI and obtained over 145,000 signatures. (Elec. Code, § 342; *Perry v. Brown* (*Perry*) (2011) 52 Cal.4th. 1116, 1127, 1141, 1144 (fn. 14).) Proponents are not a "governing body" or a "public agency" to which the MMBA applies. (See, *California Cannabis Coalition v. City of Upland* (*Upland*) (2017) 3 Cal.5th 924.) When the Proponents follow the "content" and "viewpoint" neutral steps in California election law, they have a fundamental right to ballot placement and implementation. The MMBA does not – and was never intended to – supersede these mandates.

Thus, the City Council of Real Party in Interest, City of San Diego (City) properly exercised its mandatory duty to place the CPRI on the ballot[3].

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[3] PERB and the Unions argue that the City should have met and conferred over a competing measure. (PERB Brief, pp. 73 – 75; Unions Brief, pp. 63-64.) The Unions never proposed a competing measure, only meeting and conferring over the CPRI/Proposition B. (See, II. A below.) Moreover, PERB and the Unions cite no authority for the proposition that the City was required to propose a competing measure. The comparison to the City's actions in *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, cited in the Unions' Brief at p. 64, is misleading as the

The Charter Measure was adopted by the San Diego voters on June 5, 2012 with an approximately 65.81% affirmative vote.

Since the CPRI was first drafted, and consistently thereafter for five years, the Proponents have taken the firm position that the MMBA, which requires the City to meet and confer on employment terms propounded by the City Council, has no application to the terms of a citizen-sponsored initiative. The Constitutional right of the Proponents to initiate direct legislation is immune from interference by PERB in its exercise of authority under the MMBA.

Notwithstanding the correctness of the Proponents' position, PERB and the Unions have made the CPRI the subject of multiple lawsuits and extended administrative actions, none of which attacked the substance of the measure, but challenged the processes pursuant to which it was advanced. For better or worse, the Unions were allowed to file with PERB Unfair Practices Charges, an incredibly simple interference vehicle, which PERB processed at its leisure for forty-one months. The Proponents were systematically excluded by PERB from all these legal and administrative proceedings.

PERB struggled with the issues. As to the core issue of interference with the rights of the Proponents under California Constitution, Article XI, sections 8 and 11, PERB acknowledged its lack of expertise regarding matters of Constitutional law. (AR 11:186:003006; 11:186:003017.) Although the literal grounds for the UPC were found to be lacking, PERB issued a decision purporting to invalidate the CPRI.

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facts, issues and procedures pertaining to a supermajority two–thirds vote for approval of general tax bear no similarity to this case.

The record of administrative interference with the rights of the Proponents was complete. The Proponents brought the matter before the Fourth District Court of Appeal which issued the *Opinion* prompting the Petitions for Review before this Court.

With review granted, this Court has identified two issues of significance:

> (1) When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov. Code, §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?
>
> (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?[4].

Both Opening Briefs (respectively Real Party Unions' Brief and PERB Brief; collectively Briefs) spend most of their effort on Question One, standard of review. Proponents agree with the *Opinion*, that the *de novo* standard applies where PERB attempts to apply the MMBA to issues beyond PERB's expertise. Little briefing space in the Opening Briefs is spent on Question Two, MMBA application to CPRI, an admittedly citizen-circulated charter initiative measure. The answer to that question is "yes", because the

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[4] Supreme Court of California News Release, July 28, 2017 "Summary of Cases Accepted and Related Actions During Week of July 24, 2017", #17-232 *Boling v. Public Employment Relations Bd.*, S242034; see also, Issues Pending Before the California Supreme Court in Civil Cases, published July 28, 2017.

meet and confer duty does not extend to voter initiatives that the public agency has no discretion to negotiate or modify.

While the Opening Briefs focus on review standards, several key legal factors are missing or downplayed. First, the Briefs admit that Proponents are the legal proponents of CPRI. (Real Party Unions' Brief, p. 15; PERB Brief, p. 19.) Despite this legal admission, PERB and the Unions ignore impacts on the legal rights of Proponents. Second, PERB's administrative decision finds that the City's Mayor Jerry Sanders had no control over the actions of Proponents. (AR 11:186:003089.) While the Opening Briefs devote significant briefing space to PERB's agency theory that allegedly binds the actions of the "governing body" (City Council) to the Mayor's actions, the only finding in PERB's Decision on the actions of Proponents is that they were not under Mayor or City control. (AR 11:186:003089.) The *Opinion* notes, with a certain degree of irony, that the PERB Decision does not find a link between the Proponents and the Mayor. (*Opinion*, fn. 18.) According to PERB and the Unions, somehow agency principles between City actors bind the legal proponents of a circulated initiative. They fail to point out any legal precedent where acts of an elected official supersede the constitutional rights of initiative proponents. In fact, the question of whether or not the Proponents associated with elected officials who were frustrated with the actions of the City is legally irrelevant.

Third, PERB's and the Unions' Briefs fail to explain how the alleged "agency" between the Mayor and the City Council eliminates the mandatory duty of the City Council to place a qualified citizen charter initiative on the ballot under content-neutral election laws. Charter cities, general law cities, counties and special districts all have mandatory ballot placement laws that grant no leeway which would allow time for labor bargaining. Upholding the administrative decision would upset the content-neutral election process for all local governments under PERB's jurisdiction.

If this Court recognizes that the statutory bargaining rights of public employees outweighed the reserved power to propose laws through the initiative process, how would it work? Neither Brief even attempts to explain the process they advocate. Do public sector bargaining groups have a special right to amend a citizen-sponsored measure before ballot placement? Can they bargain to conclusion over placement of a competing measure on the ballot, possibly changing ballot timing to their benefit? Public sector bargaining groups would hold rights denied to other groups based solely on viewpoint. No other group opposing a ballot measure has the right to ask to "meet and confer". There is little or no explanation of how the mechanics of their request would work or why this special ballot box status should be granted.

Real Party Unions and PERB seek to erase the bright line between governing body and the electorate with the reserved power to circulate citizen-sponsored initiatives for the benefit of a statutory right such as public-sector bargaining. This Court has consistently refused to apply governing body procedural rules to citizen-sponsored ballot measures. (See, *Upland.*) If PERB and the Unions prevail, an administrative body would determine which measures pass the initiative "purity" test. Proponents would stand on the sidelines while the fate of their proposal is decided. If the law was changed to allow their full participation, Proponents would be subject to cross-examination about their political ties to elected officials, possibly during an election campaign. If Proponents prevailed, they would spend the post-election period defending their electoral gains through the courts because of their associations during the process.

PERB's Decision acknowledged that PERB had no expertise regarding constitutional issues. (AR 11:186:003006; 11:186:003017.) If PERB prevails, it will change the face of election law. Based on the filing of a one-page unfair practice form, PERB could weigh in on local citizen

initiative campaigns involving "wages, hours and other terms and conditions of employment". (Gov. Code, § 3505.) Any attempt to establish uniform rules to control the operation of local government would face the threat of bargaining delays and possible invalidation. Yet, if an employee bargaining group supported a ballot measure, no member of the public could request a similar process. PERB and Real Party Unions seek a viewpoint-based advantage at the ballot box.

The *Opinion* protects initiative rights and declines to extend the MMBA beyond its legislatively intended reach, consistent with *Seal Beach,* and *Upland.* Proponents respectfully request that this Court affirm the *Opinion* of the Court of Appeal, and its content-neutral application of election procedures.

II. BACKGROUND FACTS.

A. The Proponents' Initiative.

On April 4, 2011, City Clerk Elizabeth Maland received Proponents' "Notice of Intent to Circulate-Request for Title and Summary". (AR 3:26:000681-000696 (Exhs. A and B to the City's Initial Position Statement Regarding UPC).) During signature gathering, SDMEA asked the City to "meet and confer" on the "Pension Reform Ballot Initiative". (AR 1:1:000018-000019 (Exh. 1(A) to SDMEA UPC (Demand dated July 15, 2011).) The demand asked for bargaining on the terms and conditions of a circulating citizen measure. The letter stated that SDMEA would treat CPRI "as your opening proposal on the covered subject matter." (AR 1:1:00018.) A second demand was sent on August 10, 2011. (AR 1:1:00021 (Exh. 1(B) to SDMEA UPC).) The City Attorney responded on August 16, 2011. (AR 1:1:00022-00024 (Exh. 1(C) to SDMEA UPC).) In its response, the City Attorney pointed out that the City could not meet and confer on the contents of a circulating citizen initiative. (*Id.*) A third demand by SDMEA, asking

again to bargain on a circulating ballot measure, was dated September 9, 2011. (AR 1:1:00025-00028 (Exh. 1(D) to SDMEA UPC).)

None of these requests asked to bargain over a competing measure or any other action that the City could legally take at the time. On September 19, 2011, the City Attorney's Office responded to the latest request to "meet and confer" over the terms of CPRI. (AR 1:1:00043-00047 (Exh. 1(G) to SDMEA UPC).) The letter pointed out the inability to bargain over a circulating initiative and the lack of legal authority to amend the circulating measure. Throughout the circulation period, SDMEA was asking to bargain over the fate of CPRI even though no party who would sit at the bargaining table could require the proponents to amend or withdraw their measure during circulation. (*See:* Elec. Code, §§ 18620, 18621 (criminal penalty for improper solicitation of an initiative proponent to abandon signature gathering for any "thing of value).) It is a misdemeanor to offer a proponent of a circulating initiative any sort of bargaining.

On September 30, 2011, Proponent T.J. Zane delivered to the City Clerk a petition containing 145,027 signatures. (AR 3:26:000697-000699 (Exh. C to the City's Initial Position Statement Regarding UPC).) On October 5, 2011, while the signatures were being counted, SDMEA sent a final demand to the City to "meet and confer" about CPRI. (AR 1:1:00048-00053 (Exh. 1(H) to SDMEA UPC).) Except for claiming the Mayor was the true proponent, SDMEA offered no legal reason for attributing any discretionary authority to the City over a citizen-circulated initiative during the signature counting process.

On November 11, 2011, the City Clerk received a letter from the County Registrar of Voters certifying that Proponents had submitted the requisite number of signatures to qualify the CPRI for the ballot. (AR 3:26:000731-000733 (Exh. D to the City's Initial Position Statement Regarding UPC).) On December 5, 2011, the City Council adopted a

resolution declaring its intent to submit the CPRI to the voters (San Diego Resolution R-307155 (December 5, 2011)). (AR 3:26:000735-000738 (Exh. E the City's Initial Position Statement Regarding UPC).) On January 30, 2012, the City Council introduced and adopted an ordinance that set CPRI on the Tuesday, June 5, 2012 ballot as Proposition B. (San Diego Ordinance O-20127.) (AR 3:26:000740-000759 (Exh. F the City's Initial Position Statement Regarding UPC).)

B. Initiation of the PERB Action.

On January 20, 2012, SDMEA filed its Unfair Practice Charge (UPC) (No. LA-CE-746-M) with PERB. (AR 1:1:000002-000237.) The UPC alleged conduct of the Mayor and two of seven Council members related to pension efforts starting several years before the placement of CPRI on the ballot.[5] None of the allegations showed actual expenditures of funds allocated to support placement of CPRI on the ballot. All allegations pre-date the placement of CPRI on the ballot and relate to individual actions of personnel that indicated support for pension reform.

On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (AR 2:4:000246-000249.) The request alleged that CPRI was a "sham" initiative that did not have "true" initiative proponents. (*Id.*) PERB then filed a superior court action seeking to enjoin the City from placing CPRI on the ballot. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1451-1456 (history of the action brought by PERB and a writ brought by SDMEA to remove a stay issued preventing PERB's administrative proceedings).) Proponents

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[5] Pre-ballot placement activities alleged include press releases and emails to media outlets by the Mayor's staff about his pension reform efforts. (*i.e.* AR 1:1:00005 (Exhs. 11, 12 & 13: AR 1:1:000164-000172).) The Mayor is shown to have mentioned pension reform efforts in his January 12, 2011 State of the City Address. (AR 1:1:00005 (Ex. 9 (AR 1:1:000150-0001161.)

were not named as a party to this action even though their initiative was the target of the suit. Proponents and the Unions participated in the election campaign for the CPRI while litigation continued to challenge the CPRI on procedural grounds. Proponents raised only private funds to conduct their campaign. (AR 21:198:005432-005456.)

On June 5, 2012, the voters of the City of San Diego approved CPRI with a 65.81% affirmative vote. (AR 16:193:004096.) No substantive challenges to CPRI were filed in the aftermath of the public vote. In a writ proceeding brought by SDMEA litigated without Proponent participation, the Court of Appeal issued a writ allowing PERB to hold hearings on CPRI. In issuing the Writ, the Court of Appeal stated, in part, as follows:

> (SD)MEA contended the meet and confer procedures applied to the CPRI because the CPRI was a "sham device" used by City officials to circumvent the meet and confer obligations imposed on City by the MMBA. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th at 1452, 1463.)

The essence of SDMEA's "sham" claim was that the Proponents were merely the City's agents, making Proposition B the City's measure. The "sham" theory alleged that the Proponents were acting at the exclusive direction and control of the Mayor and not as citizens throughout the initiative process. Proponents were purportedly the secret agents of the City with no independent authority.

PERB held an administrative hearing before Administrative Law Judge Ginoza (ALJ) on July 17, 18, 20, and 23, 2012. (AR 11:186:003047.) Testimony at the hearing showed that the Mayor and two Council Members considered their own plans but ultimately supported the San Diego County Taxpayers Association (SDCTA) plan. (AR 11:186:003057-003063 (Sanders/Falconer plan); 11:186:003064 (Councilmember DeMaio plan); 11:186:003065-003070 (SDCTA/Proponents private pension reform plan

(CPRI).) And uncontradicted testimony by Counsel for the Proponents, showed that Lounsbery Ferguson Altona & Peak prepared the initiative for the Proponents, and SDCTA, who paid for the work; not the City. (AR 15:192:003994, line 13-15:192:003995, line 11.) SDMEA submitted the Proponents' Notice of Intent to Circulate CPRI and the full language of CPRI to be part of the administrative record. (AR 1:1:00054-00065 (Exh. 2 to SDMEA UPC).) Proponents' work product contained elements of previous pension reform ideas, but was a stand-alone document that Proponents submitted to the San Diego City Clerk to receive a title and summary for circulation. (*Id.*)

C. The ALJ's Proposed Decision.

Following the hearing, the ALJ issued a Proposed Decision on February 11, 2013. (AR 10:157:002613-002675.) The Proposed Decision found that the City's actions had nullified the "private" nature of the initiative. (AR 10:157:002667.)

On March 6, 2013, the City filed a Statement of Exceptions objecting to the Proposed Decision. (AR 10:159:002685-002724.) Proponents also applied to PERB to submit exceptions to the Proposed Decision, but their request was denied. (AR 10:161:002731-002732; AR 10:162:002736-002760.) Instead, on September 20, 2013, PERB granted Proponents the right to submit an "informational" brief in support of the City's exceptions, limiting the scope of Proponents' appearance despite acknowledging that Proponents were "**interested individuals**" in the proceeding. (AR 10:178:002891-10:178:002892; AR 10:179-002895-002897; emphasis added.) Proponents filed a Brief objecting to the impropriety of PERB's jurisdiction over a citizen-sponsored initiative and objecting to the very procedures and Regulations PERB cited in the Motions to Dismiss filed by PERB before the Court of Appeal. (AR 11:180:002899-002927.)

Proponents argued that PERB had excluded Proponents from defending the CPRI. (AR 11:180:002899-002927.)

D. PERB's Decision.

The PERB Decision was not issued until December 29, 2015, thirty-three plus months after the Proposed Decision. (AR 11:186:002979-003103.) It abandoned the "sham" argument. Rather, the final decision weaved the Mayor's support of the CPRI into a new and different "agency" theory. PERB based its conclusion on the following summary of the administrative hearing finding:

> Because the ALJ found that **the impetus for the pension reform measure originated within the offices of City government**, he rejected the City's attempts to portray Proposition B (CPRI) as a ***purely "private" citizens' initiative*** exempt from the MMBA's meet-and-confer requirements." (AR 11:186:002986, emphasis added.)

PERB concluded that the City violated the MMBA and PERB Regulations and ordered the City to cease and desist from refusing to meet and confer with the Unions before adopting "ballot measures affecting employee pension benefits," and to meet and confer, upon request, with the unions before adopting "ballot measures affecting employee pension benefits." (AR 11:186:003039-003040.) PERB also ordered the City to join in and/or reimburse the unions' reasonable attorneys' fees and costs for litigation to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before Proposition B was adopted. (AR 11:186:003040.)

The interference by PERB with the citizens' initiative could not have been more graphic. When the "sham" argument failed, PERB gave itself authority to determine the quality of a citizen initiative. PERB claimed that elected officials thought of the idea for pension reform initiative, binding the

Proponents, and preventing the Proponents from using the elected officials' "idea". Even though the Court of Appeal found jurisdiction vested in PERB to determine if the measure was a city measure, drafted and circulated using city resources and authority, PERB expanded its reach to include citizen measures that are not "pure" enough.

E. The Appeal.

Proponents filed their Petition for Writ of Extraordinary Relief with the Fourth District Court of Appeal on January 25, 2016, challenging PERB's Decision (Case No. D069626), and the City filed its Petition the next day (Case No. D069630). PERB almost immediately filed Motions to Dismiss Proponents' Writ and a Motion to Dismiss the Proponents, named as Real Parties in Interest, from the City's Writ. Proponents and the City opposed.

On March 9, 2016, the Court of Appeal issued an Order on the Motions to Dismiss filed in both cases, stating that the Motions to Dismiss will be considered concurrently with the Writ Petitions. Proponents filed an opening brief in their Writ on May 9, 2016. PERB and the unions requested an extension of time to file their opposition briefs and the Court's permission to file an oversized brief, which the Court granted. After opposition and reply briefs were filed, the Court issued the Writ of Review on August 17, 2016. The oral argument was held on March 17, 2017.

The Court subsequently consolidated Proponents' Writ Petition with that of the City and issued its *Opinion* on April 11, 2017. Both PERB and the Unions filed rehearing petitions with the Court, seeking the Court's reconsideration of its *Opinion*, which the Court denied. On May 10, 2017 Proponents filed their Motion for Attorneys' fees, which was returned by the Court on May 12, 2017. Thereafter, the respective parties filed their Petitions for Review.

III. THE MEET AND CONFER REQUIREMENTS OF THE MMBA CANNOT TRUMP THE RESERVED INITIATIVE POWER.

A. This Court's Opinion in *California Cannabis Coalition v. City of Upland* Affirms the Broad Power of the Voter's Initiative, Especially at the Local Level.

In its recent decision in *California Cannabis Coalition v. City of Upland,* this Court determined that the procedural requirements of California Constitution, Article XIII C, section 2 **do not apply** to the imposition of taxes via citizens' initiative. (*Upland*, 3 Cal.5th 924; emphasis added.)

In *Upland*, this Court compared the merits of two constitutional provisions, each enacted by the electorate. In a delicate exercise, it found one to be immune from the impacts of the other. The interference with the reserved power of the initiative process presented to this Court in *Upland* was potential but largely hypothetical due to mootness. Yet, the principle was so important, the Court seized the opportunity to make its point. In this case, the impact is tangible – the facts present a glaring example of interference with the Constitutional rights of the Proponents.

The task before the Court in this case is less difficult than in *Upland*, the solution more clear-cut. Here, we compare the imperatives of Article XI against a statutory scheme – the formation by the Legislature of a complex and bewildering administrative structure. The impact of MMBA is being matched against the dignity of the Constitution.

Yet, this analysis invites more than a test of unequal dignities. The impact of the MMBA on the CPRI is the true measure of the case. In every sense of the word, the MMBA, on its face, and as applied herein by PERB, has seriously impeded the integrity of the citizen's initiative process by denying the Proponents of Proposition B the right to exercise the guarantees