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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

EDWARD J. COSTA et al., Petitioners, v. SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; BILL LOCKYER et al., Real Parties in Interest.	C050297 (Super. Ct. No. 05CS00998)

ORIGINAL PROCEEDING; application for a writ of mandate. Writ denied.

Gibson, Dunn & Crutcher, Daniel M. Kolkey, G. Charles Nierlich, and Rebecca Justice Lazarus, for Petitioners.

No appearance for Respondent.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Deputy Attorney General, Louis R. Mauro, Senior Assistant Attorney General, Christopher E. Krueger, Supervising Attorney General, Leslie R. Lopez, Douglas J. Woods, Zackery P. Morazzini, Vickie P. Whitney, Deputy Attorneys General, for Real Party in Interest Bill Lockyer.

Olson, Hagel & Fishburn, Deborah B. Caplan, Lance H. Olson and Richard C. Miadich, for Real Party in Interest Californians for Fair Representation - No on 77.

Knox, Lemmon and Anapolsky, Thomas S. Knox, Angela Schrimp De La Vergne, Glen C. Hansen, for Real Party in Interest Bruce McPherson, Secretary of State.

Linda A. Cabatic, for Real Party in Interest Geoff Brandt, Acting State Printer for the State of California.

The petitioners are proponents of a purported initiative measure to amend the provisions of the state Constitution, article XXI, governing the redistricting of California's Senate, Assembly, Congressional, and Board of Equalization districts. The proposal substitutes a three member panel of retired judges for the Legislature as the body to do the redistricting.

The measure was submitted to the Attorney General before circulation (see Elec. Code, § 9002)[1] and designated SA2004RF0037. Through the petitioners' negligence, a different version of the measure was printed on petitions and circulated for signatures. The text circulated differs in 17 places from that given the Attorney General, including the Findings and Declarations of Purpose and the time requirements for picking judges who are candidates for the reapportionment panel. (See Appendix 1 to this opinion, *post*.) Before the discrepancy was discovered, enough signatures were obtained on the circulated petitions to warrant placing an initiative measure on the ballot (see § 9035). We are asked to decide which version, if any, should go on the November 2005 special election ballot.

After petitioners discovered the discrepancy they failed to disclose it to the Secretary of State, Bruce McPherson, until after he had certified the measure as having received sufficient

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[1] A reference to a section is to the Elections Code unless otherwise noted or implied from the text.

signatures. Petitioners made no public disclosure. Public disclosure was first made by the Attorney General on July 8, 2001.

The respondent Superior Court of Sacramento County issued a judgment prohibiting the Secretary of State from placing either version on the November ballot. The judgment is based on two implicit premises. The first is that the circulated version of the text was not submitted to the Attorney General, in violation of California Constitution, article II, section 10, and section 9002. The second is that the uncirculated version of the text was never "set[] forth" on a petition "certified to have been signed" by the requisite number of electors in violation of California Constitution, article II, section 8. (§ 9035.)

The proponents filed an original petition for writ of mandamus or prohibition in this court to direct the superior court to vacate its judgment prohibiting the Secretary of State from placing the circulated version of the text on the ballot as Proposition 77. We stayed the trial court judgment, issued an alternative writ and set the matter for an expedited hearing.

The state Constitution provides that prior to the circulation of an initiative petition a "copy" of the petition shall be submitted to the Attorney General. (Cal. Const., art. II, § 10(d).) It directs the Legislature to provide the manner in which petitions shall be circulated. (Cal. Const., art. II, § 10(e).)

The Legislature has provided that prior to the circulation of an initiative petition, a draft of the measure shall be

submitted to the Attorney General with a request to prepare a title and summary, in 100 words or less, of the chief purpose and points of the measure. (§ 9002.) The proponents shall submit any amendments to the Attorney General and a title and summary of the "final version" of the measure shall be sent to the Secretary of State. (§ 9004.) The title and summary of the final version of the initiative measure shall appear on the top of the petition to be circulated. (§§ 9001, 9004, 9008.) Each section of the circulating petition shall contain a "full and correct copy of the title and text of the proposed measure." (§ 9014.)[2] No election official, including the Secretary of State, shall receive or file an initiative petition that has been circulated and is not in conformity with these provisions. (§ 9012.)

The petitioners could easily have avoided or discovered and corrected the problem of different versions before the circulation of the petitions. They and their counsel knew of the problem in May of 2005 but chose not to make any public disclosure and not to inform the Secretary of State until June 13, 2005. This was three days after he had certified the petitions as sufficient to place a reapportionment measure on the November ballot, as Proposition 77. The Secretary of State

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[2] Section 9014 is as follows:

"Any initiative or referendum petition may be presented in sections, but each section shall contain a full and correct copy of the title and text of the proposed measure. The text of the measure shall be printed in type not smaller than 8 point."

did so in the belief the measure circulated was the same as that submitted to the Attorney General.

The petitioners contend that they had "no duty" to disclose the discrepancy between the version circulated and the version submitted to the Attorney General. They submit that questioning this nondisclosure is an unjust punishment for their "good deed" of voluntarily informing the Secretary of State about the discrepancy after he certified the petitions.

The petitioners were under a duty to disclose the discrepancies as soon as they learned of them. Their failure so to do deprived the Secretary of State of the opportunity to determine if the petitions should be rejected under section 9012. Their failure to make a public disclosure has tainted, inter alia, the ballot pamphlet review process. At oral argument, they conceded the obvious: they knew that when the matter came to light there would be litigation about the propriety of placing the purported initiative on the ballot. In failing to make prompt disclosure they significantly shortened the period of time available for the judicial resolution of the controversy.

The petitioners concede the circulating petitions violated numerous provisions of the Elections Code, e.g., sections 9001 and 9014. Nonetheless, they contend the text that was circulated should be placed on the ballot, on the ground they substantially complied with the requirements that a proposed measure shall be submitted to the Attorney General before it is circulated. They argue that the sole purpose of the submission

is the preparation of a title and summary and that the summary prepared by the Attorney General covers both versions of the initiative and that, in any event, the changes would not have changed the decision of the electors who signed the circulating petition. We disagree.

These are the wrong tests of substantial compliance. Since the summary is directed to the chief points of the initiative it does not cover the means by which the three judge panel is selected. Petitioners' tests would permit any number of changes to matters not within this summary.

Substantial compliance means actual compliance with respect to every reasonable purpose served by the law. The submission of the text of the initiative measure to the Attorney General manifestly serves several purposes. It fixes the content of the text for preparation of the title and summary by the Attorney General. (Cal. Const., art. II, § 10(d), §§ 9001, 9004.) It fixes the content of the text for purposes of review by the public, e.g., to decide whether to sign a circulating petition. (§ 9014.) It fixes the content of the text for consideration by the Legislature for the purpose of public hearings on the subject. (§ 9034.) It fixes the point at which the statute of limitations for circulation of the petition begins to run. (§ 336 [150 days].)

To fix the text of a proposed initiative measure for these purposes the text circulated must be the same text submitted to the Attorney General. That requires, at a minimum, that both must bear the same meaning. The version circulated here

undeniably changes the meaning of key provisions in the copy submitted to the Attorney General. It is the elector and not the court, who should determine whether changes of meaning in the text would have changed his or her signature on the petition. To adopt petitioners' test would allow the potential for voter confusion that occurred in this case.

It is inappropriate to postpone determination of the matter until after the election. There is a clear violation of the constitutional and statutory procedures for the circulating of an initiative petition. The Legislature has directed that an initiative petition not be received or filed which is not in conformity with the statutes which govern its submission and circulation. The validity of the procedure used to circulate the measure will become moot if it is placed on the ballot as Proposition 77 and passed by the electorate at the November election. Preelection review is essential to the enforcement of preelection procedures.

Accordingly, we shall deny the petition for a writ of mandate.

FACTS AND PROCEDURAL BACKGROUND

Edward J. Costa is the Chief Executive Officer of People's Advocate, Inc., and a proponent of the purported initiative measure. During 2004 he submitted several versions of initiatives to govern redistricting to the Attorney General pursuant to California Constitution, article II, section 10 and section 9002.

Daniel M. Kolkey is an attorney. He was retained to assist in drafting the proposed redistricting initiative. On Friday, December 3, 2004, he sent by email his latest draft of the proposal to Costa and others who were working with Costa on it.

On Monday, December 6, 2004, Kolkey edited the Friday draft, making a number of changes. That evening he sent this edited version by email to Costa.

Emily Adams is the office manager, secretary, and receptionist for People's Advocate, Inc. Various versions of the initiatives Costa was working on were provided to her. She would label each version and keep it in electronic format. All final versions were marked as such. On Tuesday, December 7, 2004, she prepared a cover letter for submission of the current proposed initiative to the Attorney General for Costa's signature. When the letter was sent to the Attorney General it contained Kolkey's Monday December 6th version of the proposed initiative.

Tricia Knight is the Initiative Coordinator for the Attorney General. She received the Costa letter with the December 6th version of the proposed initiative and replied by letter on the same day. She acknowledged receipt of the submission and explained it had been sent to the Legislative Analyst and the Department of Finance for an estimate of fiscal impact and that these agencies had 25 days under section 9005 to return it. She said that after it was returned the Attorney General would supply a title and summary within 15 days. She cautioned that substantive amendments, if any, could only be

accepted on or before December 22, 2004. After that she warned, the process would have to be begun anew.

On January 28, 2005, Knight received a letter from Costa announcing the addition of three other persons as proponents. Attached once again was the Monday December 6th version of the proposed initiative.

On February 3, 2005, Knight sent copies of the Attorney General's title and summary and the Monday December 6th version of the text of the initiative to Costa and the other proponents, to the Secretary of State, and to the Chief Clerk of the Assembly.[3]

Sometime after submission to the Attorney General and before Costa received the Attorney General's title and summary,

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[3] The title and summary of the version of the text submitted to the Attorney General are as follows:

"REAPPORTIONMENT. INITIATIVE CONSTITUTIONAL AMENDMENT. Amends the state Constitution's process for redistricting California's Senate, Assembly, Congressional and Board of Equalization districts. Requires three-member panel of retired judges, selected by legislative leaders, to adopt new redistricting plan if measure passes and again after each national census. Panel must consider legislative, public proposals/comments and hold public hearings. Redistricting plan becomes effective immediately when adopted by judges' panel and filed with Secretary of State. If voters subsequently reject redistricting plan, process repeats. Specifies time for judicial review of adopted redistricting plan; if plan fails to conform to requirements, court may order new plan. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: This measure would have the following major fiscal impact: One-time state redistricting costs, probably totalling a few million dollars. Comparable savings for each redistricting effort after 2010 (once every ten years)."

he decided to have the text of the proposed initiative prepared for printing, to expedite the beginning of circulation of petitions. He instructed Adams to provide a copy of the initiative to Heath Norton, the person who would do the preparation for printing. Adams gave Norton her file labeled "Dec[ember] Submission Final" on a floppy disk. She was unaware this was not the December 6th version. When she later learned of this she determined that she had no copy of the December 6th version in electronic media. No explanation is offered concerning who removed the December 6th version from Adams' computer, or how or when it might have been removed.

Once the Attorney General's title and summary was provided, Costa directed Norton to add it to the petition and send it to the printer. The petitions were printed and circulated over the next three months. From about May 5 to May 10, 2005, signed petitions were tendered to local elections officials for certification. Sometime in May, after the petitions had been tendered, Costa and Kolkey learned that the text on the petitions was the December 3rd version and not the December 6th version that had been submitted to the Attorney General. On July 15, 2005, the Attorney General asked Kolkey for disclosure of the exact date that knowledge of the discrepancy first surfaced. Kolkey replied July 19, 2005, calling this a "false issue" and refused to say. At oral argument Kolkey said, in answer to a question by the court, that he had learned of the discrepancy sometime in May after the May 10th submission of the circulated petitions to local election officials. After the

discovery Kolkey reviewed the differences and conducted research on the matter.

On June 10, 2005, the Secretary of State certified that the purported initiative had qualified for the ballot. That day he sent a letter to the Chief Clerk of the Assembly pursuant to section 9034[4] notifying the Legislature that the initiative had qualified for the ballot. As the "cop[y] of the initiative measure" called for by section 9034 he attached the December 6th version of the initiative that had been submitted to the Attorney General.

On June 12th Kolkey asked to meet with Undersecretary of State William P. Wood about the proposition. On June 13th, Wood met with Kolkey and Peter Siggins, Legal Affairs Secretary for the Governor. They disclosed to Wood the problem of the two versions of the text. Kolkey gave Wood a 13-page memorandum dated June 10, 2005, containing a detailed legal argument

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[4] Section 9034 is as follows:

"Upon the certification of an initiative measure for the ballot, the Secretary of State shall transmit copies of the initiative measure, together with the ballot title as prepared by the Attorney General pursuant to Section 9050, to the Senate and Assembly. Each house shall assign the initiative measure to its appropriate committees. The appropriate committees shall hold joint public hearings on the subject of such measure prior to the date of the election at which the measure is to be voted upon. However, no hearing may be held within 30 days prior to the date of the election.

"Nothing in this section shall be construed as authority for the Legislature to alter the initiative measure or prevent it from appearing on the ballot."

supporting the view that, notwithstanding the discrepancy, the proposition should be placed on the ballot.

On June 23, 2005, the Attorney General received a letter from Costa urging him to reissue the SA2004RF0037 ballot title and summary of February 3, 2005, as the ballot title and summary (required under § 9050)[5] for the voter pamphlet. The letter makes no mention of the problem of the two versions of the text.

On July 1, 2005, Wood had a letter hand-delivered to the Attorney General. The letter says: "[a] situation has come to the attention of the Secretary of State's office concerning an initiative . . . given the title 'Reapportionment Initiative Constitutional Amendment[]' by your office." The situation described is that the text of the initiative on the petitions that circulated differs from the text submitted to the Attorney General for the initial preparation of a title and summary. The letter asks for "guidance from your office whether the Secretary of State has the authority to make a determination which version of the text of a measure should be placed before the voters." The memorandum prepared by Kolkey was enclosed with the letter.

On July 6, 2005, the Attorney General informed the Secretary of State that he could not represent his office in

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[5] Section 9050 is as follows:

"The Attorney General shall provide and return to the Secretary of State a ballot title for each measure submitted to the voters of the whole state."

this matter. On July 8, 2005, the Attorney General filed the petition for writ of mandate in the superior court.

On July 13th Joanna Southard, Ballot Pamphlet and Initiatives Program Manager for the Elections Division of the Secretary of State, delivered a letter to the Office of the Legislative Counsel requesting that the December 3rd version of the initiative text circulated for signature be prepared and proofread pursuant to section 9091.[6]

On July 22, 2005, judgment was entered in the superior court proceeding in favor of the Attorney General and a writ issued commanding the Secretary of State not to place any version of Proposition 77 on the ballot.

On July 25, 2005, the proponents filed the petition for writ of mandate in this court seeking to overturn the judgment of the superior court. It requested a temporary stay to allow the Secretary of State to display Proposition 77 materials for the requisite time before the August 15, 2005 deadline for delivery to the State Printer pursuant section 9092.[7] We granted the stay that day.

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[6] Section 9091 is as follows:

"The Legislative Counsel shall prepare and proofread the texts of all measures and the provisions which are repealed or revised."

[7] Section 9092 is as follows:

"Not less than 20 days before he or she submits the copy for the ballot pamphlet to the State Printer, the Secretary of State shall make the copy available for public examination. Any

On July 27, 2005, the proponents filed a supplemental petition for writ of mandate. The petition asserts that the Secretary of State had informed the Attorney General that if a stay was issued he would display Proposition 77 materials on July 26, 2005, and requested a title and summary (under § 9050). However, the Attorney General had taken the position that he would not supply a ballot label (§ 13281) or ballot title and summary (§ 9050) for the version of the text that had been circulated. The petition requested an order directing the Attorney General to supply these to prevent a claim of noncompliance with section 9092, notwithstanding a potential ruling by this court that the version of the initiative which had been circulated should be placed on the ballot.

On July 28, 2005, we issued an alternative writ on the original petition. On July 29, 2005, after considering opposition from the Attorney General and Californians for Fair Representation - No on 77, we issued an order directing the

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elector may seek a writ of mandate requiring any copy to be amended or deleted from the ballot pamphlet. A peremptory writ of mandate shall issue only upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of this code or Chapter 8 (commencing with Section 88000) of Title 9 of the Government Code, and that issuance of the writ will not substantially interfere with the printing and distribution of the ballot pamphlet as required by law. Venue for a proceeding under this section shall be exclusively in Sacramento County. The Secretary of State shall be named as the respondent and the State Printer and the person or official who authored the copy in question shall be named as real parties in interest. If the proceeding is initiated by the Secretary of State, the State Printer shall be named as the respondent."

Attorney General to provide a ballot label and a title and summary addressed to the version of the proposed measure which had been circulated.[8]

The Secretary of State's public display of the ballot pamphlet includes, inter alia, both of the disputed texts of the proposed measure. The display of the version of the text which circulated is a printed version of the text submitted to the Attorney General, marked up in handwritten strikeout and handwritten interlineated substitutions of the text that was circulated.

DISCUSSION

I
The Appropriateness of Pre-election Review

In their briefs, no party contended the matter inappropriate for preelection determination. Nonetheless, we raised that question for consideration. Having done so, we conclude the matter is not within the ambit of the doctrine that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election . . . , in the absence of some clear showing of invalidity. (E.g., [citations].)" (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 (*Brosnahan*).)

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[8] The Attorney General, pursuant to the order of this court, has submitted a summary of the initiative measure as circulated which is not materially different regarding the matters at issue than the one prepared for the version submitted to the Attorney General. However, it does not include an analysis of the fiscal impact of the measure.

Notwithstanding the phrase “constitutional and other challenges,” the cases cited for the rule noted in *Brosnahan* are all cases where a challenge was made that the substance of the text of the initiative measure stated a rule in conflict with a superior constitutional rule. Justice Mosk, in his concurring and dissenting opinion, characterizes this as a “contention that an initiative is unconstitutional because of its substance.” (31 Cal.3d at p. 6.) He opined that the rule noted in *Brosnahan* only applied to such cases. He submitted it was inapplicable to “jurisdictional” cases, where the contention was that the substance was not within the legislative power of initiative, or “procedural” cases, where the contention was violation of laws about ballot qualification “designed to prevent voter deception or confusion.” (*Ibid*.) He argued the rule should not be applied to the violation of the single subject rule (Cal. Const., art. II, § 8(d)) in issue in *Brosnahan,* because violating that rule is akin to the “procedural” cases. That is, because it too was intended to avoid placing before the voters measures that were misleading or confusing. (*Id.* at p. 7.)

In *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 666, the Supreme Court favorably cited the portion of Justice Mosk's *Brosnahan* opinion distinguishing “jurisdictional” cases. In *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 696, footnote 11, it adopted the view that the rule in *Brosnahan* is simply inapplicable to “jurisdictional” cases. (See also, e.g., *City and County of San Francisco v. Patterson* (1988) 202

Cal.App.3d 95, 100; contra *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 151.)

In *Senate v. Jones* (1999) 21 Cal.4th 1142, the Supreme Court overruled the holding in *Brosnahan* that the rule it noted should be applied to cases of a statewide initiative ballot measure challenged as in violation of the single subject rule. The court found that article II, section 8(d), expressly contemplated preelection relief in stating that "'[a]n initiative measure embracing more than one subject *may not be submitted to the electors* or have any effect.'" (*Id.* at p. 1153.) The court noted: "subsequent decisions have explained that this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative . . . ." (*Ibid*.)

The question in this case is whether the rule noted in *Brosnahan* is applicable to the other category of cases, "procedural" cases, which Justice Mosk observed are outside the line of case law cited by the *Brosnahan* majority. As appears, there are significant policy reasons to find that the kind of procedural rule contention in the case before us should continue to be outside the rule noted in *Brosnahan*.

The rule in *Brosnahan* addresses the problem that arises because preelection review challenges will usually have to be resolved in an expedited manner. (See *American Federation of Labor v. Eu, supra,* 36 Cal.3d at p. 696, fn. 10.) One reason for the substantive/procedural distinction as to this problem is the different consequences of upholding a claim of a substantive

versus a procedural defect. If the court errs under the press of time and decides the text is substantively impermissible for Constitutional reasons, the voters are deprived of any ability to enact it -- for all time. In a procedural violation case, an error has less drastic consequences. The proponents can comply with proper procedure and, if the requisite interest subsists, bring the matter before the voters, untainted, at the next election.

Another point of distinction is that post-election review of pre-ballot procedural defect claims is quite limited. There are tight restrictions both on the kinds of claims that may be tendered in post-election contests and the scope of review. (See § 16100; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192.) Where a pre-ballot procedural claim does not implicate the validity of the ensuing election contest it may well be moot. (See, e.g., *Chase v. Brooks* (1986) 187 Cal.App.3d 657, 661-662.)

A substantive constitutional attack on the measure, however, ordinarily could be reviewed even if no challenge was brought before the election. For these reasons we conclude that pre-ballot procedural violation claims are not within the ambit of the rule noted in *Brosnahan*.

The challenge here does not rest upon the alleged unconstitutionality of the substance of the proposed initiative. Accordingly, it is not within the *Brosnahan* general rule.

In any event, as noted, preelection judicial review is essential to the enforcement of preelection procedures.

II
The Initiative Law

The power of the electorate to propose a statute or amendment to the Constitution by initiative is established in the state Constitution. An initiative petition must contain the text of the statute or constitutional provision sought to be enacted. (Cal. Const., art II, § 8.)[9] A copy of the initiative petition must be submitted to the Attorney General prior to its circulation. (Cal. Const., art. II, § 10(d).)[10] The Legislature is delegated the power to "provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." (Cal. Const., art. II, § 10(e).) The Legislature has done so.

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[9] "(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed" by the requisite number of electors. (Cal. Const., art. II, § 8(a)&(b).)

[10] In pertinent part, it provides:

"(d) Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law."

Section 9002[11] calls for the submission of "a draft of the proposed measure" to the Attorney General prior to its circulation with a request to prepare a title and summary of the measure. If the proponents amend the draft of the initiative petition, whether the amendments are substantive or technical or nonsubstantive, they shall be submitted to the Attorney General within 15 days of submission of the initial draft. (§ 9004.)[12]

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[11] Section 9002, is similar to subdivision (d) of the Constitutional provision:

"Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose and points of the proposed measure be prepared. The title and summary shall not exceed a total of 100 words.

"The persons presenting the request shall be known as the 'proponents.'

"The Attorney General shall preserve the written request until after the next general election."

[12] Section 9004 is as follows:

"Upon receipt of a draft of a petition, the Attorney General shall prepare a summary of the chief purposes and points of the proposed measure. The summary shall be prepared in the manner provided for the preparation of ballot titles in Article 5 (commencing with Section 9050), the provisions of which in regard to the preparation, filing, and settlement of titles and summaries are hereby made applicable to the summary. The Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the final version of a proposed initiative measure, or if a fiscal estimate or opinion is to be included, within 15 days after receipt of the fiscal estimate or opinion prepared by the Department of Finance and the Joint Legislative Budget Committee pursuant to Section 9005.

"If during the 15-day period, the proponents of the proposed initiative measure submit amendments, other than

The Attorney General is directed to prepare a title and summary of the measure submitted or a "final version" of the measure as amended and send it to the Secretary of State together with a fiscal estimate of the proposed law prepared by the Department of Finance and the Joint Legislative Budget Committee. (§§ 9004, 9005.) The title and summary must appear on the heading of the initiative measure as circulated together with the "text of the measure" submitted to the Attorney General. (§ 9001.)[13]

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technical, nonsubstantive amendments, to the final version of the measure, the Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the amendments.

"The proponents of any initiative measure, at the time of submitting the draft of the measure to the Attorney General, shall pay a fee of two hundred dollars ($200), which shall be placed in a trust fund in the office of the Treasurer and refunded to the proponents if the measure qualifies for the ballot within two years from the date the summary is furnished to the proponents. If the measure does not qualify within that period, the fee shall be immediately paid into the General Fund of the state."

[13] Section 9001 is as follows:

"The heading of a proposed initiative measure shall be in substantially the following form:

Initiative Measure to Be Submitted Directly to the Voters

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

(Here set forth the title and summary prepared by the Attorney General. This title and summary must also be printed across the top of each page of the petition whereon signatures are to appear.)

An initiative petition shall not be circulated prior to its official summary date and shall not be filed with county elections officials after 150 days from the official summary date. (§ 336.) The "official summary date" of the measure is the date a summary of the proposed initiative measure is delivered or mailed by the Attorney General to the proponents of the measure. (*Ibid.)*

Immediately upon the preparation of the summary the Attorney General must transmit copies of the text of the proposed measure to the Senate and Assembly. The appropriate committees of each house may hold hearings on the subject of the measure but may not alter its language or prevent it from appearing on the ballot. (§ 9007.)

An initiative petition may be circulated in sections but "each section shall contain a full and correct copy of the title and text of the proposed measure." (§ 9014; see fn. 2, *infra*.) Although this is addressed to the method of circulation (in sections), it necessarily implies that the "text of the proposed

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To the Honorable Secretary of State of California

We, the undersigned, registered, qualified voters of California, residents of _____ County (or City of County), hereby propose amendments to the Constitution of California (the _____ Code, relating to _____) and petition the Secretary of State to submit the same to the voters of California for their adoption or rejection at the next succeeding general election or at any special statewide election held prior to that general election or otherwise provided by law. The proposed constitutional (or statutory) amendments (full title and text of the measure) read as follows:"

measure" is the text submitted to the Attorney General that initiates the circulation process. (See also § 9001.)

These requirements fix the text of the proposed initiative for the purposes of the preparation of a title and summary (§ 9002), the circulation of the petition (§ 9014), the proofreading by the Legislative Counsel (§ 9091), the establishment of the beginning date for the period of circulation (§ 336), the preparation of a cost estimate by the Department of Finance and the Joint Legislative Budget Committee (§§ 9004, 9005), the holding of public hearings on the proposed measure by the Legislature (§ 9034), the preparation of arguments for and against the measure if qualified (§§ 9041, 9042, 9044, 9064), and the preparation of an analysis of the measure by the Legislative Analyst for the ballot pamphlet (§§ 9091, 9086, 9087).

To carry out these purposes the same text must be submitted to the Attorney General and circulated so that all of the parties to the initiative process are on the same page.

III
Substantial Compliance

We note at the outset that the Attorney General and real party in interest Californians for Fair Representation - No on 77 contend that the substantial compliance doctrine has no application to compliance with California Constitution, article II, section 10, citing *People v. City of San Buenaventura* (1931)

213 Cal. 637.[14] At oral argument they softened this view, allowing that minor changes with no bearing on meaning might be amenable to a substantial compliance treatment. In any event, we need not decide if we are bound under the no substantial compliance doctrine of *City of San Buenaventura.*[15] As appears,

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[14] At the time of *City of San Buenaventura* the Constitution provided that where a freeholders' city charter was sought the city council shall advertise the availability of copies of the proposed charter in pamphlet form in one or more papers of general circulation. The council published the proposed charter in the local newspapers and had the pamphlet printed. In lieu of advertising the city clerk requested reporters to publish a story or notice that the pamphlets were available at his or her office. The newspapers carried the information as a news item. Fifteen hundred copies of the proposed charter were applied for and distributed and the question of adoption of a new charter was discussed throughout the city. The proposal passed at the city election and was approved by the Legislature.

A resident and taxpayer brought a quo warranto action attacking the ability of the city to act under the charter. The city defended, inter alia, with a claim of substantial compliance.

The Supreme Court responded: "An undirected casual request by the city clerk to newspaper reporters looking for news, to run a 'story' or news item to that effect is not even a substantial compliance with the Constitution[al requirement to advertise]. Aside from such conclusion, the cases which hold that a rule of substantial compliance may be invoked under some circumstances arising under the application of mere statutory enactments do not apply to the fulfillment of mandatory constitutional requirements." (213 Cal. at pp. 641-642.) The court relied upon former section 22 of the California Constitution declaring provisions of the Constitution are mandatory, now article 1, section 26.

[15] Petitioners argue the case has been overruled *sub silentio*. They point to *California Teachers Assoc. v. Collins* (1934) 1 Cal.2d 202, 204: "The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If

the purported initiative measure in this case fails the test of substantial compliance.

In *Assembly v. Deukmejian, supra,* 30 Cal.3d at page 649, the Supreme Court applied the classic formulation for the term "substantial compliance" to an Elections Code violation claim; "'[it] means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' (*Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29[].)"

Notwithstanding the display of both versions in the draft ballot pamphlet and the request of the Secretary of State for advice concerning which text should appear on the ballot, no party argues that the version of the text submitted to the Attorney General and designated SA2004RF0037 should be placed on the ballot. We agree that cannot be permitted since the uncirculated version of the text was never "[s]et forth" on a

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that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law."

In *Collins* the only matter in issue was compliance with a Political Code section. The same is true of the repetition of the *Collins* remark in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, at pages 652-653. However, as in *Collins*, no constitutional provision was in issue and there is no indication that the court was aware of or addressing the *City of San Buenaventura* problem.

The only case that petitioners cite that did address a constitutional provision, indeed the very provision here in issue, is *Perry v. Jordan* (1949) 34 Cal.2d 87, 94. However, when carefully read, that case does not actually address a substantial compliance issue. It addresses an issue of deference to the exercise of the discretion of the Attorney General in drafting the title and summary.

petition “certified to have been signed” by the requisite number of electors, in violation of California Constitution, article II, section 8.

However, the petitioners contend that submitting that version of the proposed initiative measure to the Attorney General should be deemed substantial compliance with the Constitution and the Elections Code as to the version circulated in the circumstances of this case. They argue as follows. The only purpose of the submission of an initiative draft is to enable the Attorney General to prepare a title and summary pursuant to section 9004. The title and summary which was prepared is equally applicable to both versions of the proposition and none of the differences between the versions could warrant a materially different title and summary. In their view, case law teaches that minor differences between versions of an initiative should not be used to invalidate a ballot measure. (See *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1388-1391 (*City of Santee*); c.f., *People v. Scott* (2002) 98 Cal.App.4th 514; see generally, *Assembly v. Deukmejian, supra,* 30 Cal.3d 638.)

There is an immediate difficulty with this measure of substantial compliance. The Attorney General’s summary of an initiative measure need not address all of the provisions of the proposed measure. It need contain only a “summary of the chief purposes and points of the proposed measure” and is limited to 100 words. (§§ 9002, 9004.) “[I]t need not be a catalogue or index to all of the provisions of the measure.” (*Epperson v.*

Jordan (1938) 12 Cal.2d 61, 66.) If the measure of substantial compliance is the adequacy of such a general summary to encompass both the submitted and circulated versions, an unlimited number of substantive changes not contained in the copy submitted to the Attorney General could be made to the circulating copy. (§ 9002.) As Adams opines in her declaration submitted by petitioners, the title and summary for SA2004RF0037 might well have served for any of the various proposed measures drafted by Costa, despite significant differences in their provisions.

In this case the Attorney General's summary does not set forth the method of selection of the judges to serve on the reapportionment panel. Nor does it address the findings urged to sustain the policy of the initiative and that form the basis for the resolution of ambiguity of its operative provisions. In short, the summary does not address the subject matter of the changes made in the circulating copy of the petition. More importantly, the petitioners' argument ignores the many other purposes served by fixing the text, a matter we discuss below.

In particular, the Attorney General's summary does not reveal the tight timing requirements by which the panel of retired judges is selected. The process is initiated immediately upon the passage of the initiative. It provides 20 days within which to select the panel of judges. Within that time the Judicial Council must select a pool of 24 retired judges, 12 from each of the majority parties, willing to serve as a Special Master. When that is done, the two legislative

leaders of each house, one from each party, must narrow the pool to eight judges. They do this by each nominating three candidates from the opposite party and then by exercising a single peremptory challenge each. From this narrowed pool the Chief Clerk of the Assembly selects the three judge panel of reapportionment judges by lot. (See Appendix 1.)

It is in this context that the change in the period of limitations for the accomplishment of these tasks, provided by the circulating version of the initiative, from completion of the nomination of candidate judges by the legislative leaders, from six days to five days for nomination, from four days to three days to challenge a nominee, and from four days to three days for the selection by drawing of the Special Masters by the Chief Clerk of the Assembly, and from four to three days to challenge a nominee, takes on significance. The proponents belittle these changes, without analysis of the context within which they are meaningful.

We turn next to the cases petitioners cite in support of their view of substantial compliance.

City of Santee arises under section 9203, governing municipal initiative petitions, a somewhat analogous process. There the proponents are required to file a copy with the local elections official with a request that a ballot title and summary be prepared by the city attorney within 15 days. If the petitions garner the requisite number of signatures the City Council must adopt the ordinance without alteration or submit it to the voters without alteration. (§ 9215.)

In *City of Santee* the proponents submitted a mobile home rent control initiative and request for title and summary. During the 15 days they submitted a modified version. The second submission said only: "'There has been a necessary typographical correction to the initiative as submitted to your office for a title and summary.'" (125 Cal.App.4th at pp. 1377-1378.) The only ballot title and summary issued was apparently addressed to the text of the first submission. It was circulated with the text of the second submission. When the petitions were returned and confirmed the City Council enacted the first version as an ordinance under section 9215. The opinion attributes this to "administrative mistake and inadvertence . . . ." (*Id.* at p. 1378.)

Eventually, the error was discovered. An association of park owners opposing the first ordinance was informed of the "mistake" in the enactment through their counsel, in April of 1999. In January 2001 the council enacted the circulated version of the initiative as an ordinance. In October 2001 the park owners association sued to invalidate the second ordinance. They claimed the second ordinance was invalid because of the procedural error of failing to obtain a title and summary. (125 Cal.App.4th at p. 1379.)

The *City of Santee* opinion (125 Cal.App.4th at pp. 1388-1391) rejects the claim, reasoning that "the title and summary accurately reflect the substance of the [circulated] initiative and therefore did not frustrate the purposes of the title and summary requirement of section 9203." The analysis in the

opinion assumes the only purpose of the submission requirement is to obtain a serviceable summary and title. It does not consider that another purpose of submission is fixing the text to avoid exactly what occurred, the enactment of the "wrong" ordinance.

In any event, several strong grounds for distinction appear. First, the posture in *City of Santee* is analogous to a post-election claim of procedural defect. As discussed above, such a posture materially affects the tenability of any judicial review. Moreover, the local legislative body could validly enact the same ordinance, and did so, regardless of the impetus of the initiative process.

Though sections 9203 and 9002, and the schemes in which they are embedded, are similar, there are significant differences. There is no ballot pamphlet viewing process for local measures. There is no provision addressed to amendment of text pending summary and title. (Compare § 9004.) Nor is there an analogous statute to section 9012 which directs election officials not to receive or file a petition which violates the procedures for circulation.

We note that the proponents in *City of Santee* did submit the text of the circulated petitions to the appropriate officer during the period for preparation of the title and summary. Hence, they actually complied with the reasonable objectives of fixing the final text as a matter of public record before circulating their petitions.

In *People v. Scott* a convict made a nonanalogous *post-election* challenge to an initiative affecting his sentence. The posture was the analytic point of departure for the opinion, which notes that in such a case review addresses only "whether the purported deficiencies 'affected the ability of the voters [in the election contest] to make an informed choice.' (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 180[].)" (*Scott, supra,* 98 Cal.App.4th at p. 519.)

Defendant Scott argued the measure was infirm because the ballot version differed from the circulated version. The *Scott* opinion relates that "the variation in the text was due to either the correction of clerical and grammatical errors, or legislative revisions to statutes impacted by Proposition 21 between the time of the measure's circulation with the petition and the election, which the Secretary of State and Legislative Counsel were mandated by the Elections Code to include." (98 Cal.App.4th at p. 519.) Thus, aside from the limited scope of review in *Scott* it is distinguished because the only differences in meaning were those made pursuant to Elections Code provisions requiring the updating of revised statutes.

In *Assembly v. Deukmejian* a challenge was made to a proposed referendum measure on the ground: "that the text of the reapportionment statutes reprinted in the petitions contained errors, in violation of the requirement that 'a full and correct copy of the title and text of the proposed measure[s]' be printed in each section of the petition." (30 Cal.3d at p. 652.) The Supreme Court rejected this claim as follows. "[T]he

alleged errors in the text of the petitions concern only typographical errors in the listing of census tract numbers. The errors were so minor as to pose no danger of misleading the signers of the petitions. They, therefore, do not affect the validity of the petitions." (*Id*. at p. 653.)

The claim of violation in *Assembly v. Deukmejian* was not one of failure to submit a copy of the proposed referendum to the Attorney General. It was the failure to make an exact copy of the statute proposed for repeal. In a referendum case the language in issue has already been indelibly fixed in the public record for all to access by the original enactment. Moreover this is not a case of a few typographical errors. For these reasons, we do not find *Assembly v. Deukmejian* apposite.

As noted, "'[substantial] compliance . . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.'" (*Assembly v. Deukmejian, supra,* 30 Cal.3d at p. 649; see also *California Teachers Assn. v. Collins, supra,* 1 Cal.2d at pp. 204-205 [12-point type satisfies requirement of 18-point type because it is equally legible].)

That both the Constitution and section 9002 mention the preparation of a title and summary by the Attorney General entails the conclusion that it is a reasonable objective of requiring precirculation submission. However, it does not mean that it is the only reasonable objective.

The phrase "every reasonable objective of the statute" is not delimited by objectives expressly addressed in the statute.

Often there is no objective stated in the statute. The objectives are also reasonably to be inferred from the consequences that would ordinarily attend the act required.

The superior court opined as follows. "Whether or not Petitioner [Attorney General] may have given the same title and summary to each of the 2 versions of Prop 77, had both been presented to him, is not dispositive. The version that was submitted to the AG for title and summary was made available by web site and was also submitted to the [L]egislature and other government officials. The public and the government officials are entitled to rely on that official version. [The proponents'] argument that no one was misled by the title and summary is unpersuasive and unsupported."

Embedded in this is the view that another reasonable objective of the constitutional and statutory provisions is to require that proponents fix the text of the initiative before circulation so that everyone will be on the same page. An ordinary consequence of requiring a copy of the initiative to be submitted to the Attorney General is that it becomes a matter of public record. It is then available for anyone who may be interested in studying it during the period of circulation. This includes the detailed scrutiny and subsequent redistribution by political activists and representatives of affected interest groups.[16] It also allows the citizen to read

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[16] Petitioners argue that the public access afforded to the text when submitted to the Attorney General could not have

at length the complex detailed document that he or she will be asked to sign in the brief interval upon entering or leaving the market or mall.

As the facts in this case reveal, failing to supply the text of a proposed proposition to the Attorney General before circulation leads to a series of occasions of misinformation about the content of an initiative and an inherent tendency to sow confusion. Those who seek the content from the Attorney General will receive a different version from those who obtain

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affected the outcome here because there were only 7,884 visits to the Attorney General's website to view the measure. They submit that more than that number of voters could be subtracted from their verified signatures and the petitions would still have been eligible for certification. This misses the point of public information. If viewers are influenced by text they can and hopefully do publish their views in the public debate on the matter. (See, *Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90.)

In *Ibarra* the City of Carson clerk rejected a municipal initiative measure on the ground that some of the petitions' signatures were invalid. She did so because they were collected before full compliance with section 4003 requirements that a notice of intention to circulate a petition be published in the newspaper and posted in three public places in the city. The proponent published before circulation, but did not post until three days after circulation began. The clerk disallowed the signatures obtained before posting.

The proponent argued substantial compliance, arguing that publishing should suffice for the three day interval before posting occurred. The *Ibarra* opinion responded that the purpose of the posting requirement was to give notice to the public to assist them in deciding whether to sign or oppose the petition. Since there was no compliance with the posting provision this purpose could not have been fulfilled and the shortcoming could not be excused on the ground of substantial compliance. (*Ibarra, supra,* 214 Cal.App.3d at pp. 99-100.)

it from the petitions that are actually circulated. Also misinformed are those government officials and agencies to whom the Attorney General forwards the text either as a matter of courtesy and practice, e.g., the Secretary of State, or under compulsion of law, the Department of Finance and the Joint Legislative Budget Committee (§ 9004), and the Legislature (§ 9007).

Depending upon the timing of disclosure of the different versions of the text, the misinformation can continue, as in this case, into the period after the measure has been certified for the ballot. In this case, after the certification, the Secretary of State sent to the Legislature (under § 9034) the text of the measure that had been submitted to the Attorney General and not the text that was circulated. Presumably, two components of the ballot pamphlet (§ 9086)[17] analysis by the

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[17] Section 9086 in pertinent part provides:

"The ballot pamphlet shall contain as to each state measure to be voted upon, the following, in the order set forth in this section:

" . . . . . .

"(b) Beginning at the top of the right page shall appear the analysis prepared by the Legislative Analyst, provided that the analysis fits on a single page. If it does not fit on a single page, the analysis shall begin on the lower portion of the first left page and shall continue on subsequent pages until it is completed.

"(c) Arguments for and against the measure shall be placed on the next left and right pages, respectively, following the final

Legislative Analyst and arguments against the measure have been predicated upon the version of the text not circulated.

The existence of two versions of the text is inherently confusing. Indeed, because of the uncertainty concerning which version of text should appear on the ballot, both versions have been made available for public examination under section 9092. As related, the version which was circulated is particularly hard to decipher; it is replete with handwritten interlineations and cross outs of the printed text submitted to the Attorney General.

The amount and degree of variation between the two versions in issue in this case is beyond the pale of no difference in meaning. It also, by virtue of the nature and magnitude of the variation, sows confusion. In this regard, we again refer the reader to the appendix of this opinion which sets forth the numerous and sizeable changes.

Two changes in the period within which legislative leaders would pick and strike candidates for Special Master positions are undeniable changes in meaning. Any change in the rules governing the conduct of any person is a change in meaning.

The draft of the "Findings and Declarations of Purpose" submitted to the Attorney General was, in the words of Kolkey's original legal memorandum, "substantially edited from" the circulating version. A statement of legislative findings and

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page of the analysis of the Legislative Analyst ends. The rebuttals shall be placed immediately below the arguments."

declarations has relevance to legislative intent. (E.g., *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15.) Changes in the findings could well change the meaning that would be assigned to provisions of the initiative when applied to future disputes arising under it.

The Attorney General submits that several of the other changes in wording which are claimed to be inconsequential are efforts to dispel ambiguity. For example, he points to the addition of language to insure that the initiative power could not be used to enact redistricting plans by "means independent of the new article." He suggests that resolution of ambiguity could result in a difference in meaning between the ambiguous version and the unambiguous version. In any event, in view of our determination that there are meaning differences, we need not resolve nor treat at length these claims.

We assume for the sake of discussion that the claims of ambiguity could be dispelled by lengthy legal analysis. (See, e.g., *CSAA v. Bourne* (1984) 162 Cal.App.3d 89, 93.) Nonetheless, the different versions of the text that require such expertise to decipher inherently sow confusion. One can only pity the ordinary voter who attempts to determine whether to vote for the purported initiative based on the ballot display of the Secretary of State.

As related, petitioners contend that they cannot be held to account for the foregoing consequences, because they were under no duty to disclose the circulation of a different text from the one submitted to the Attorney General. Petitioners suggest they

went beyond the call of duty in voluntarily disclosing the problem to the Secretary of State after he certified the petitions. This can only be founded on the view that their duties are limited to those explicitly prescribed by the Elections Code.

It is true that no statute says that if you accidentally circulate a version of the text of a proposed initiative that is different from the one submitted to the Attorney General you shall disclose that upon learning of the accident. It would be startling to find such a prescient provision. It would be pernicious to circumscribe duty, for present purposes, with such a constraint.

Even in the marketplace, one who "acquire[s] information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so" is under a duty to exercise reasonable care to disclose. (See Rest.2d Torts, § 551.) In our view, the rule for the electoral forum is at least as strict. Petitioners should have promptly disclosed the discovery of this problem to avoid the continuation and exacerbation of the harm stemming from their original negligence.

For all the foregoing reasons, we conclude that the rule of substantial compliance cannot be stretched to cover this case.

The other approach to take is to entertain the view that "small" differences in meaning are not reasonably likely to have altered the final political outcome. That is, to ask if it is reasonably likely that the universe of actors who were

misinformed would have changed their behavior sufficiently to have led to the measure failing to obtain enough signatures to be certified, or to change the election outcome.

A difficulty with this view, aside from hubris, is that it can justify a finding of substantial compliance for virtually every procedural violation one can posit. For example, suppose the wrong file error here occurred at a point where the texts for circulation were being electronically submitted to two different petition printers, one in Southern and the other in Northern California. Should we place a purported initiative on the ballot, neither version of which had been signed by the requisite number of voters? But, surely, the same argument of substantial compliance here advanced would be applicable.

We would not find the argument persuasive in that case. We do not find it persuasive here. In both cases the formality of requiring one text is the only way to preserve the integrity of the process. When the Court subjectively gauges what changes in meaning are small enough to let go by it usurps the prerogatives of the electorate. To put it another way, the public notice objective of fixing the text is to give the public the opportunity to read and act and there is no actual compliance if that *opportunity* is not afforded.

As noted, to apply this test does nothing to deter the confusion that attends two versions of a proposed measure with the many differences presented in this case. It is, in our view, carrying substantial compliance "too far . . . to save carelessly or negligently prepared petitions." (See *Collins*,

supra, 1 Cal.2d at p. 205.) Assigning a broad power to the courts to make "common sense" determinations about how other actors would have exercised their prerogatives steers us toward a government of men and away from a government of laws.

This "common sense" test of substantial compliance is a far cry from *City of San Buenaventura, supra,* where actual print notice actually achieved was not substantial compliance because the means of achieving it was not as likely to succeed as advertising would have been. It is also inconsistent with the view in *Ibarra, supra,* that notwithstanding signatures were obtained to petitions containing the text of the proposed initiative, they were invalid for failure to post a notice of intention to circulate the petitions.

Since a reasonable objective of the provisions requiring submission of the text before circulation is to fix the text, it functions like a filing deadline. It provides a prescribed period before and during circulation and beyond when all may view the text of the proposal and take such action thereon as they see fit. A filing deadline for the content of the initiative measure is found in section 9004. It provides for a 15-day period in which the proponents may file any amendment, whether substantive, technical or nonsubstantive. It is a prescription for care on the part of proponents. It permits changes in the initiative language, but only within its time limits.

In this respect it is like the posting and advertising measures in *City of San Buenaventura* and *Ibarra*. "[H]ard and

fast enforcement of filing deadlines avoids uneven and inconsistent administration of preelection procedures and is the most reliable way to ensure that everyone is treated fairly and equally." (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 396.)

The proponents caused the problem in this case by their own negligence in circulating a different version of the initiative measure than that submitted to the Attorney General. They exacerbated that problem by concealing it until after the Secretary of State had certified the initiative measure for the ballot and failing to make any public disclosure.

As noted above, the manifest purposes of the Election Code requirements require that the same text of an initiative measure be circulated as that submitted to the Attorney General. It follows that they must mean the same and any change of meaning cannot substantially comply with the code.

DISPOSITION

The petition for writ of mandamus is denied. The stay of the judgment of the trial court shall remain in place until midnight August 14, 2005, at which time it shall expire. This decision is final forthwith as to this court. (See Cal. Rules of Court, rule 24(b)(3).) Petitioners shall reimburse real parties in interest for their costs in this original proceeding. (Cal. Rules of Court, rule 56(l).)

BLEASE, J.

I concur:

BUTZ, J.

When the California Supreme Court speaks, I listen.

Just two weeks ago, the Supreme Court vacated a stay issued by this court that had restrained the Secretary of State from placing Proposition 80 in the ballot pamphlet or on the ballot of the special election to be held on November 8, 2005. (*Independent Energy Producers Association v. McPherson*, filed July 22, 2005 (case No. C050115), review granted July 27, 2005, S135819.)

In doing so, the Supreme Court pointedly reminded us that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 (hereafter *Brosnahan I*).) Unanimously stating "at this point we cannot say that it is clear . . . the California Constitution precludes the enactment of Proposition 80 as an initiative measure," the Supreme Court held that "the validity of Proposition 80 need not and should not be determined prior to the November 8, 2005 election." (*Independent Energy Producers Association v. McPherson*, July, 27, 2005, order granting review.)[1]

My point in bringing this up is that if, in the Supreme Court's view, Proposition 80 is not clearly invalid for preelection review, then surely the same must be said for Proposition 77. Compared to

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[1] A unanimous opinion of a panel of this court had concluded that Proposition 80 is clearly invalid and, thus, should not be placed on the ballot.

the legal attack on Proposition 80, the preelection challenge to Proposition 77 presents much more complicated and difficult questions of law that are not easily resolved. *In fact, even the parties seeking to keep Proposition 77 off the ballot disagree on what legal principles should be applied in deciding the controversy*.

Despite the complexity of the issues raised and differing views on their resolution, my colleagues hold the general rule set forth in *Brosnahan I* does not counsel against preelection review in this case because (1) the attack on Proposition 77 is procedural, not substantive, and (2) in their view, the issue will become moot if Proposition 77 is placed on the ballot and adopted by the voters.

The first point raised by my colleagues is based on dictum in a concurring and dissenting opinion by Justice Mosk in *Brosnahan I*, where he said: "[The rule] that unless it is clear that a proposed initiative is unconstitutional, the courts should not interfere with the right of the people to vote on the measure" "applies only to the contention that an initiative is unconstitutional because of its substance. If it is determined that the electorate does not have the power to adopt the proposal in the first instance or that it fails to comply with the procedures required by law to qualify for the ballot, the measure must be excluded from the ballot." (*Brosnahan I, supra*, 31 Cal.3d at p. 6 (conc. & dis. opn. of Mosk, J.).) Justice Mosk's purported substance-procedure distinction was dictum because the issue in that case was whether voters had the power to adopt the initiative, i.e., whether it violated the single-subject rule, which states that an initiative measure embracing more than one subject "may not be submitted to the electors or have any effect."

(Cal. Const., art. II, § 8, subd. (d).)[2] When in *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, the Supreme Court relied in part on the above-quoted language of Justice Mosk, the court did not adopt the part that raised the purported substance-procedure distinction; instead, the court focused on whether the "question raised is, in a sense, jurisdictional," i.e., whether "the challenge goes to the power of the electorate to adopt the [initiative] in the first instance." (*Id.* at pp. 666-667.)

Here, we are not presented with a jurisdictional challenge, so to speak, against Proposition 77 because it is uncontested that the voters have the power by initiative measure to alter the process for legislative redistricting.

Since *Legislature v. Deukmejian, supra,* 34 Cal.3d 658, the Supreme Court has made no substance-procedure distinction, and the court has not retreated from its pronouncement in *Brosnahan I* that, except where the electorate does not have the power to adopt the initiative measure in the first instance, it is "usually more appropriate to review constitutional *and other challenges* to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Brosnahan I, supra,* 31 Cal.3d at p. 4, italics added.)

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[2] In contrast, the constitutional provision for submission of a copy of an initiative petition to the Attorney General for preparation of a title and summary of the measure as provided by law (Cal. Const., art. II, § 10) is not self-executing, and neither the Constitution nor the statutory provisions at issue provide an express consequence for inconsequential deviations.

Indeed, the very reasons for the general rule calling for postelection review of attacks on initiative measures apply equally to procedural challenges.

The rule is derived in part from the constitutional separation of the powers of government. (See *Santa Clara County v. Superior Court* (1949) 33 Cal.2d 552, 558.) When a complaining party seeks to prevent an election on an initiative measure, the court is being asked to interfere in the legislative process. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 247 [the exercise of the power of initiative is an exercise of the legislative power].) Thus, the separation of powers doctrine generally precludes advance judicial interference in the legislative process; although the courts have the authority to determine whether legislative acts, once complete, are valid. (See *Mandel v. Myers* (1981) 29 Cal.3d 531, 540; *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 70-71; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76-77.)

The rule also derives from the salutary policy that a court should not adjudicate an issue until it is clearly required to do so. (*Legislature v. Deukmejian, supra,* 34 Cal.3d at p. 666.) If a measure is submitted to the voters and rejected, there will be no necessity for judicial action. (*Ibid*.) If the measure passes, then absent extraordinary circumstances, there will be ample time to consider its validity. (*Ibid*.)

Finally, the rule derives from the fact that preelection review of an initiative measure is necessarily a hasty process. "Time is lacking for the careful study and consideration, the collegial

discussion, and the mutual criticism of opinion drafts" to which the electorate is entitled when attempts to exercise the initiative power are challenged. (*Brosnahan I, supra,* 31 Cal.3d at p. 5 (conc. opn. of Broussard, J.).)

These are important reasons why preelection review should be done only when an initiative measure's invalidity (*for whatever reason*) is clearly shown. The danger of acting otherwise is obvious. Due to the deadline necessary for printing and circulating ballot materials (August 15th in this case), courts have little time to examine, digest, and rule on preelection challenges to initiative measures. A rush to judgment, when reasonable minds might differ if given adequate time to reflect, creates the possibility of an erroneous decision that will deprive voters of their right to adopt or reject an initiative measure as a matter of public policy.

The answer to this dilemma, my colleagues tell us, is that if it turns out they are wrong in concluding Proposition 77 is invalid, the measure can be submitted to the voters at the next election. However, review by our state Supreme Court is "purely discretionary," and the parties have no right or power to insist on such review. (*People v. Davis* (1905) 147 Cal. 346, 349.) Absent such discretionary review, a final decision by this court, even one that is erroneous, is binding. Thus, the claim that an erroneous decision by this court will not prevent the measure from being submitted to the voters at the next election is pure speculation. The other problem with my colleagues' answer is that if the voters agree, as the proponents of Proportion 77 claim, that our state political system is severely broken because of the manner in which

voting districts are drawn, the voters should not be required to wait to fix it.

Also unconvincing is the second point raised by my colleagues, who believe the issue in this case will become moot if the measure is placed on the ballot and adopted by the voters. They are wrong. As I will explain later in my dissenting opinion, the real question at issue in this case is whether the placement of Proposition 77 on the ballot will have been secured by election law violations that misled voters who signed the initiative petitions. If so, then the initiative is invalid and may not be given effect. Therefore, if the voters adopt Proposition 77 while postelection review is pending, the challenge to the measure's validity will not be moot; if it ultimately is determined that the electors who signed the petition to put the measure on the ballot were misled such that the purposes of the constitutional requirement were not fulfilled, then the measure may not become law.

Hence, I turn again to the "general rule favoring postelection review" which, in the words of our Supreme Court, "contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election. Under those circumstances, the normal arguments in favor of the 'passive virtues' suggest that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required." (*Legislature v. Deukmejian, supra,* 34 Cal.3d at p. 666.)

No persuasive argument is made that serious consequences will result if we decline to review the challenge to Proposition 77 until after the election. On the other hand, when even those who oppose putting Proposition 77 on the ballot cannot agree on the legal principles to apply in resolving their attack on the initiative, the need for adequate time for reflection rather than speed to reach a decision (in time to allow parties to seek Supreme Court review prior to the August 15th deadline) is the better course. In other words, postelection rather than preelection review better serves the voters in this case. That is the lesson I learned from the Supreme Court's interlocutory ruling on the challenge to Proposition 80.

Accordingly, I conclude that the trial court erred in deciding the legal challenge prior to the election, and that this court should continue to stay the trial court's ruling and retain jurisdiction in this matter to allow us, after the election, to resolve the issues raised. Of course, if Proposition 77 is not adopted by the voters, then the petition would be dismissed as moot.

My colleagues, however, have chosen the less prudent path of preelection review. Consequently, despite what I feel has been an inadequate opportunity to fully contemplate and address the challenge to Proposition 77, I will explain why at this point it appears to me that my colleagues are wrong on the merits.

I

I begin with the fundamental principle that must be applied in resolving legal challenges to initiative measures. Because the initiative process is "'"one of the most precious rights of our democratic process,"'" it is "'"the duty of the courts to

jealously guard this right of the people"'" (*Rossi v. Brown* (1995) 9 Cal.4th 688, 695 (hereafter *Rossi*)). Thus, it "'"has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled."'" (*Ibid*.) This means that courts have long ago rejected the strict construction of laws relating to the initiative process; instead, courts will liberally construe the laws "'to the fullest tenable measure'" to preserve the "'spirit as well as letter'" of the right to initiative. (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 92.) "'"If doubts can reasonably be resolved in favor of the use of [the initiative] power, courts will preserve it."'" (*Rossi, supra,* 9 Cal.4th at p. 695.)

The policy of liberal construction to preserve, rather than annul, the power of initiative gives rise to a rule of substantial compliance. In *California Teachers Assn. v. Collins* (1934) 1 Cal.2d 202, challengers claimed that two defects in the short title of an initiative petition made the petition invalid. The Supreme Court said: "The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law." (*Id*. at p. 204.) Because the purpose of the short title--to prevent deception of the electors--was served in that case, the Supreme Court found substantial compliance sufficient. (*Id*. at p. 205; see also *Perry v. Jordan* (1949) 34 Cal.2d 87, 94-95.)

The Attorney General contends the rule of substantial compliance does not apply in this instance. He points out that submission of a copy of an initiative petition to the Attorney General for the preparation of a title and summary is required by the Constitution as well as by statute. (Cal. Const., art. II, § 10, subd. (d); Elec. Code, § 9002.) Relying on the Supreme Court's decision in *People v. City of San Buenaventura* (1931) 213 Cal. 637 (hereafter *City of San Buenaventura*), the Attorney General claims that strict compliance with a constitutional provision is required and that substantial compliance will not suffice.

It follows, the Attorney General's representative asserted at oral argument in this court, that even if the text of Proposition 77 as submitted to the Attorney General differed in only one way from the text of the measure printed on the initiative petition, in that the word "but" was changed to "however," the initiative would be invalid and could not be placed on the ballot.

Taking a more rational position, the representative of real party in interest Californians For Fair Representation--No On 77 conceded at oral argument that the substantial compliance rule does apply in determining whether the different wording makes the initiative invalid. The concession is wise and appropriate.

The rule of substantial compliance does not operate to excuse a failure of compliance. The rule presupposes that there has been actual compliance but that defects in the manner of compliance have been discovered. The rule then asks whether, despite defects in the manner of compliance, the reasonable objectives of the requirement were fulfilled. (See *Assembly v. Deukmejian* (1982) 30 Cal.3d 638,

652-653.) If the defects are inconsequential to the purpose of the requirement, then it may be concluded that the requirement has been fulfilled. (*Ibid*.)

This rule was not at issue in *City of San Buenaventura*, a case that dealt with a complete failure to comply with a constitutional requirement. The Supreme Court said, in plain words, there "[was] not even a substantial compliance with the Constitution." (*City of San Buenaventura, supra,* 213 Cal. at p. 641.) The court went on to discuss the mandatory-directory distinction that some had drawn. Under that distinction, if a provision is directory rather than mandatory, it could be ignored without consequence. This, the court said, is impermissible with respect to a mandatory constitutional requirement. Such a requirement must be fulfilled, and a substantial compliance rule does not excuse a complete failure of compliance. (*Id*. at pp. 641-642.)

Here, we are not faced with a complete failure of compliance. The proponents of Proposition 77 submitted the final version of the initiative to the Attorney General for preparation of a title and summary. Rather, we review actual compliance in a defective manner, in that due to "inadvertent" "clerical error," an earlier version of the measure was printed on the initiative petitions. The decision in *City of San Buenaventura* did not consider such a situation and is not controlling in these circumstances. The Attorney General fails in his attempt to wrest from *City of San Buenaventura* a condemnation of the rule of substantial compliance, a rule that has been applied in later Supreme Court cases. Even assuming such condemnation might be drawn from that decision, it was pure dictum because the court

unequivocally found there was not even substantial compliance in that case.

After its decision in *City of San Buenaventura*, the Supreme Court has repeatedly said that defects in referendum and initiative petitions will not invalidate the petitions if they are in substantial compliance with statutory and constitutional requirements. (*Assembly v. Deukmejian, supra,* 30 Cal.3d at p. 652; *Perry v. Jordan, supra,* 34 Cal.2d at p. 94; *California Teachers Assn. v. Collins, supra,* 1 Cal.2d at p. 204.)

This is not a novel or anomalous concept. It is one aspect of a theme that runs throughout our laws. The theme is reflected in the maxim of jurisprudence that "[t]he law respects form less than substance." (Civ. Code, § 3528.) It is the basis for the rule of substantial performance in contract law. (See *Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92-93.) It is the reason courts will not permit a forfeiture based upon inconsequential defaults. (See *Valley View Home of Beaumont, Inc. v. Department of Health Services* (1983) 146 Cal.App.3d 161, 168-169.) And it is the basis for the harmless error rule that appellate courts apply every day. With very limited exceptions, it is now established that error, including error of constitutional magnitude, will not vitiate an action or proceeding unless the rights of an interested party have been prejudiced. (See *Rose v. Clark* (1986) 478 U.S. 570, 578-579 [92 L.Ed.2d 460, 471].)

The rule of substantial compliance does nothing more than apply this theme to the initiative petition context. It does not excuse a lack of compliance with constitutional or statutory requirements. It merely recognizes that inconsequential defects in the manner of

performance should not vitiate the people's exercise of the power of initiative. Because this rule is consistent with the policy of the law in general, and since courts must construe liberally the people's exercise of the right of initiative and resolve all doubts in favor of preserving an initiative petition and, of course, because the Supreme Court has repeatedly said the rule applies to statutory and constitutional requirements, it follows that the substantial compliance rule must be applied in this case.

II

In applying the substantial compliance rule in this case, it is necessary to first identify the "interested parties" here. They are not the proponents of the initiative measure, but are the voters who signed the petitions. Certainly, it was the proponents who prepared the petition and took it through the circulation process. However, they do not own the power of initiative. The power of initiative is in the people; thus, the petition to place the measure on the ballot is the petition of the hundreds of thousands of voters who signed it. (Cal. Const., art. II, § 8, subds. (a) & (b).) It is those voters' interests upon which we must focus. This proceeding is not about imposing consequences on the proponents of Proposition 77 for their careless or negligent conduct. (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 130 ["a ballot measure is not rendered unworthy of passage by the misdeeds of its proponents"].)

The substantial compliance rule focuses on the purpose of the statutory or constitutional requirements at issue. "A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement

is frustrated by the defective form of the petition." (*Assembly v. Deukmejian, supra,* 30 Cal.3d at p. 652.)

The Supreme Court has repeatedly said the purpose of submitting a copy of the initiative measure to the Attorney General for a title and summary is informative, to prevent voters from being misled. (*Assembly v. Deukmejian, supra,* 30 Cal.3d at pp. 652-653; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243; *Perry v. Jordan, supra,* 34 Cal.2d at pp. 94-95; *California Teachers Assn. v. Collins, supra,* 1 Cal.2d at p. 204.)

In applying the substantial compliance rule in light of this purpose, courts have frequently found that inconsequential defects in the title and summary procedure are not sufficient to warrant invalidating a referendum or initiative petition. In other words, if defective compliance with the requirement to submit a copy of the initiative petition to the Attorney General for preparation of title and summary is so inconsequential that the purpose of the requirement is met, i.e., voters are not misled, then it must be said that substantial compliance is actual compliance with that which is essential to every reasonable objective of the requirement. For example, in *Assembly v. Deukmejian, supra,* 30 Cal.3d at page 653, the Supreme Court said errors in the text of the referendum petitions "were so minor as to pose no danger of misleading the signers of the petitions." In *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal.3d at page 243, the Supreme Court said: "[W]e conclude that the title and summary, though technically imprecise, substantially complied with the law, and we doubt that

any significant number of petition signers or voters were misled thereby." (See also *Perry v. Jordan, supra,* 34 Cal.2d at pp. 94-95; *California Teachers Assn. v. Collins, supra,* 1 Cal.2d at pp. 204-205; *Zaremberg v. Superior Court* (2004) 115 Cal.App.4th 111, 118.)

Recently, *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372 (review denied May 11, 2005) dealt with a mishap similar to the one now at issue. On March 18, 1998, an initiative petition was submitted to the city clerk for preparation of a ballot title and summary. Later, on April 2, 1998, a modified version of the petition was submitted to the city clerk. The April 2nd version was then circulated for signature with the title and summary that had been prepared for the March 18th version. (*Id*. at pp. 1377-1378.) The Court of Appeal found the differences in the two versions of the petition were insufficient to invalidate the measure. The court explained: "[W]hile the initiative petition *technically* did not comply with [Elections Code] section 9203 because the City Attorney did not prepare a ballot title and summary specifically for the April 2 initiative, the petition *substantially* complied with section 9203 because the ballot title and summary that circulated with it accurately reflected the substance of the accompanying April 2 initiative and did not create a risk that voters signing the petition would be misled about the substance of the initiative. The ballot summary's technical noncompliance with section 9203 did not infringe the electors' constitutional right of initiative." (*Id*. at p. 1391, orig. italics.)

Another situation, worse than the one before us, was addressed in *People v. Scott* (2002) 98 Cal.App.4th 514. Scott claimed that

Proposition 21, adopted at the March 2000 primary election, "should be invalidated because it was unlawfully presented to the electorate by containing text in the state ballot pamphlet which was different from the text of the proposed initiative measure in the petitions circulated to qualify the initiative for the ballot." (*Id*. at p. 517.) Acknowledging there were some differences in text between the versions in the petition and in the ballot pamphlet, the Court of Appeal refused to invalidate the measure. The court explained: "[C]ontrary to Scott's contention otherwise, our review of the materials he has submitted shows they are in substantial compliance with the Elections Code and he has not shown that any of the differences in the text of the initiative were material deficiencies or that such purported defects 'affected the ability of the voters to make an informed choice.' [Citation.] The 'full text' requirement he relies upon was designed to assure that petition signers are not misled regarding the nature of the initiative they are endorsing. [Citations.] Scott has provided no evidence any petition signers were misled by the differences between the qualified and ballot versions of Proposition 21." (*Id*. at p. 520.)

Despite these and other authorities, which they unpersuasively attempt to distinguish, my colleagues postulate a new and heretofore unrecognized purpose for the title and summary procedure, "fixing the text." In doing so, my colleagues effectively eviscerate the substantial compliance rule because, obviously, textual differences mean the text was not fixed. But this is wholly inconsistent with virtually every California case that has considered the question. Certainly such a quantum leap in California law requires the type

of careful deliberation that only postelection review can afford. I find no support for this novel purpose in the language of the Constitution and the statutes; indeed, my colleagues' position is inconsistent with existing decisional authorities.

Therefore, in applying the substantial compliance rule, I will adhere to the established purpose of the title and summary procedure, i.e., ensuring that the voters who sign the initiative petition are not misled.

Try as they did, the parties seeking to keep Proposition 77 off the ballot were unable to make a reasonable argument that the title and summary prepared by the Attorney General for the version of the measure submitted to him had the effect of misleading voters when the initiative petition was circulated with a somewhat different text of the measure. The title and summary aptly describe both versions of the measure. This conclusion is illustrated by the fact that when directed to prepare a title and summary of the circulated version, the Attorney General prepared a summary that is identical to the one he prepared for the version that was not circulated. The title was different in that "Reapportionment. Initiative Constitutional Amendment" was changed to "Redistricting. Initiative Constitutional Amendment." However, the Attorney General's representative at oral argument in this court readily admitted this change was done for clerical purposes--to distinguish the title prepared for the version submitted to the Attorney General from the title later prepared for the version in the petition circulated to voters--thus, in effect conceding that the change was not material. Simply stated, there is no reasonable possibility the voters who signed the initiative

petitions were misled by the fact that the title and summary placed on the petitions was the title and summary for the version submitted to the Attorney General.

My colleagues apparently recognize it is impossible to say with a straight face that the title and summary prepared for the version of Proposition 77 submitted to the Attorney General was misleading to the voters who signed the petitions containing another version. Thus, they make no such claim.

Instead, my colleagues spend considerable effort focusing on the fact that two versions of Proposition 77 now exist on the Secretary of State's website. Their focus is myopic. The fact that two versions were posted on the website *after* the initiative petitions were signed by voters and then submitted to the Secretary of State, and *after* Proposition 77 was certified for the ballot, could not have misled the voters who signed the petitions.

Rather, the issue is whether voters who signed the initiative petitions were misled because the petitions did not contain the version of Proposition 77 that was submitted to the Attorney General. In my view, there is no reasonable possibility that the voters were so misled.

Most of the differences in the versions of the measure are too trivial to warrant extensive discussion. For example, changes in wording such as "selected" for "nominated" were not misleading, a conclusion that is supported by the fact that my colleagues make no meaningful effort to claim otherwise. Instead, they primarily seize upon (1) changes in the number of days in which legislative leaders may, in my colleagues' words, "pick and strike candidates

for Special Master positions," and (2) changes in the initiative's "Findings and Declarations of Purpose."

Proposition 77 would create a pool of retired judges from which the Judicial Council, the Speaker of the Assembly, the Minority Leader of the Assembly, the President pro Tempore of the Senate, and the Minority Leader of the Senate each nominate three retired judges. Each then has the right to exercise one peremptory challenge to the nominee of another. That creates a pool from which three special masters are drawn by lot. In the circulated version of the measure, the nominations were required to be made no later than five days before the deadline for appointment of the special masters; and exercises of peremptory challenges by legislative leaders were required to be made no later than three days before the deadline. In the version submitted to the Attorney General, these were changed to six days and four days, respectively.

Common sense and human experience inform me that before they signed the initiative petition, few (if any) voters sought out and examined in detail the text of the initiative as submitted to the Attorney General. As for the model citizens to whom my colleagues point, who amazingly may have actually examined the text submitted to the Attorney General before they signed the petition containing another version of the text, it strains credulity to believe that any of them would now lament, for example, "Gee, if only I had known that there would be an extra day for a legislator to challenge the nomination of a special master, I never would have signed the petition!"

Applying a real world perspective, it cannot realistically be said that a significant number of voters were misled by the one day differences into signing the initiative petitions. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal.3d at p. 243.) In this context, the differences were not meaningful.

The same must be said of the differences in the initiative's findings and declaration of purpose. Section 1 of the circulated version states:

> The People of the State of California find and declare that:
> (a) Our Legislature should be responsive to the demands of the citizens of the State of California, and not the self-interest of individual legislators or the partisan interests of political parties.
> (b) Self-interest and partisan gerrymandering have resulted in uncompetitive districts, ideological polarization in our institutions of representative democracy, and a disconnect between the interests of the People of California and their elected representatives.
> (c) The redistricting plans adopted by the California Legislature in 2001 serve incumbents, not the People, are repugnant to the People, and are in direct opposition to the People's interest in fair and competitive elections. They should not be used again.
> (d) We demand that our representative system of government be fair to all, open to public scrutiny, free of conflicts of interest, and dedicated to the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."

In the version of the measure submitted to the Attorney General, section 1 states:

> The People of the State of California find and declare that:
> (a) Our Legislature should be responsive to the demands of the voters, but existing law places the power to draw the very districts, in which legislators are elected, in the hands of incumbent state legislators, who then choose their voters, which is a conflict of interest.

(b) The Legislature's self-interest in drawing its members' districts has resulted in partisan gerrymandering, uncompetitive districts, ideological polarization, and a growing division between the interests of the People of California and their elected representatives.

(c) The redistricting plans adopted by the California Legislature in 2001 produced an unprecedented number of uncompetitive districts, serve incumbents and not the People, and are repugnant to the People. The gerrymandered districts in 2001 resulted in not a single change in the partisan composition of the California Legislature or the California congressional delegation in the 2004 selections. These districts should be replaced as soon as possible and never used again.

(d) The experience of the 1970's and 1990's demonstrates that impartial special masters, who are retired judges independent of partisan politics and the Legislature, can draw fair and competitive districts by virtue of their judicial training and judicial temperament.

(e) We demand that our representative system of government assure that the voters choose their representatives, rather than their representatives choose their voters, that it be open to public scrutiny and free of conflicts of interest, and that the system embody the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."

These two versions say, essentially, the same thing. The chief difference is that references to the 2004 election and the experience of the 1970's and 1990's were included in the version submitted to the Attorney General, but were not in the version circulated for voters' signatures. However, this omission and the other stylistic differences between the two versions do not alter in any meaningful way the import of the findings and declaration of purpose. And again, it defies common sense to say that a significant number of voters were misled in that they would not have signed the initiative petitions if they were aware of the differences. I am convinced that if confronted with the differences and told of this controversy,

the average voters (not the partisan voter or political insider) would say, “What’s the big deal?” Thus, again in this context, the differences were not meaningful.

My colleagues find fault in my reliance on common sense in concluding that petitioners’ actual but flawed compliance with the submission for title and summary requirement constituted substantial compliance with the constitutional and statutory scheme because the flaws in compliance were not meaningful in that they were not likely to mislead voters.

Well, it would be a sad day indeed if judges were not allowed to apply common sense in deciding the applicability of rules of law. Yet, it is “hubris” my colleagues say to ask whether it is reasonably likely that if informed of the different versions of the proposed initiative at issue here, the “universe of actors” (by that they mean the voters who signed the initiative petitions) “would have changed their behavior sufficiently to have led to the measure failing to obtain enough signatures to be certified . . . .” Well, I guess that from my colleagues’ point of view, the California Supreme Court has acted with hubris for a long, long time in having repeatedly applied the substantial compliance rule in the common sense way of assessing whether there was any real danger that flaws in complying with the initiative process misled votes into signing initiative petitions. (See, e.g., *Assembly v. Deukmejian, supra,* 30 Cal.3d at p. 653 [errors “were so minor as to pose no danger of misleading the signers of the petitions”]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal.3d at p. 243 [“we doubt that any significant number of petition signers or voters were misled”

by the errors]; *Perry v. Jordan, supra,* 34 Cal.2d at pp. 94-95; *California Teachers Assn. v. Collins, supra,* 1 Cal.2d at pp. 204-205.)

I turn now to my colleagues' concern about what they perceive to be the uncertainty and confusion created by the fact that, as a result of this litigation, there are now two versions of the text of the initiative available for public inspection on the Secretary of State's website. My colleagues "pity the ordinary voter who attempts to determine whether to vote for the purported initiative based on the ballot display of the Secretary of State." This, they say, is a reason to keep Proposition 77 off the ballot. Not so.

Although I seriously doubt that this would be any problem for all but a few voters, it is a problem with an easy solution. At oral argument in this court, there was no dispute among the parties that if Proposition 77 is placed on the ballot, then the version that was on the initiative petitions signed by the requisite number of voters is the version that must go in the official ballot pamphlet given to voters prior to the election, and that must become law if the voters adopt the measure and if the measure is not thereafter invalidated as a result of this lawsuit. So say my colleagues. Thus, it serves no purpose to continue to post the text submitted to the Attorney General that will not go in the ballot.

Removal from the website of the text that was submitted to the Attorney General, keeping only the text that was circulated to voters on the initiative petitions, coupled with the fact that voters will receive in the ballot pamphlet the text that was on the circulated petitions, would eliminate any potential for further confusion and

would effectively cure confusion, if any, that may already have taken place. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal.3d at p. 243 [minor defects in the summary circulated with the petition were cured because "a corrected summary was contained in the voters pamphlet which was mailed to all voters"].)

I summarize. In the real world, the differences in wording were insignificant and would not have misled voters who signed the petitions. Since courts have a duty to protect the people's right to initiative, we must liberally construe the laws to preserve its spirit as well as letter. If doubts reasonably can be resolved in favor of the initiative, courts will preserve it. (*Rossi, supra,* 9 Cal.4th at p. 695.) Here, the initiative proponents substantially complied with constitutional and statutory requirements in a way that fulfilled the informational purpose of the requirements and did not mislead the voters. Just as there was no basis to invalidate other initiatives for errors that are similar to, even more serious than, the insignificant error in this case (e.g., *MHC Financing Limited Partnership Two v. City of Santee, supra,* 125 Cal.App.4th 1372; *People v. Scott, supra,* 98 Cal.App.4th 514), there is no basis for this court to invalid Proposition 77.

Although Shakespeare did not have this scenario in mind when he coined the title, "Much Ado About Nothing," this sentiment fits the tragicomedy that has played out in this court. The somewhat comedic aspects of this production are the initiative drafters' inability to suppress a last-minute urge to tinker, which resulted in changes to the words of the measure that the drafters confess

were only “immaterial, stylistic and technical”; the drafters’ well-intended effort to be efficient, that went astray when the penultimate version of the measure was inadvertently lifted from the computer and printed on the initiative petitions; and my colleagues’ decision to view the word-tinkering from the vantage point of the utterly unrealistic world of the model citizen who logs on to the Secretary of State’s website in order to “read at length the complex detailed [initiative] document that he or she will be asked to sign in the brief interval entering or leaving the market or mall.” The tragic aspect of this production is that in addition to concocting the mythical citizen, my colleagues construct and apply a heretofore unrecognized purpose of the procedural requirements of the initiative process to thwart the will of the hundreds of thousands of voters who signed initiative petitions to qualify Proposition 77 for the ballot. This must be done, my colleagues say, because of their unrealistic view that the drafters’ final tinkering with the language of the initiative may have misled the voters. Unfortunately, my colleagues make much ado about nothing. Thus, this is a production for which the Supreme Court needs to write a new ending.

SCOTLAND, P.J.

Appendix I

The following is the text of the two versions of the initiative measure. The text submitted to the Attorney General is shown in italics. The text circulated is shown in strikeout type.

REDISTRICTING REFORM: THE VOTER EMPOWERMENT ACT
INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO VOTERS
SECTION 1. Findings and Declarations of Purpose
The People of the State of California find and declare that:
~~(a) Our Legislature should be responsive to the demands of the citizens of the State of California, and not the self-interest of individual legislators or the partisan interests of political parties.~~
(a) Our Legislature should be responsive to the demands of the voters, but existing law places the power to draw the very districts, in which legislators are elected, in the hands of incumbent state legislators, who then choose their voters, which is a conflict of interest.
~~(b) Self-interest and partisan gerrymandering have resulted in uncompetitive districts, ideological polarization in our institutions of representative democracy, and a disconnect between the interests of the People of California and their elected representatives.~~
(b)The Legislature's self-interest in drawing its members' districts has resulted in partisan gerrymandering, uncompetitive districts, ideological polarization, and a growing division between the interests of the People of California and their elected representatives.
~~(c) The redistricting plans adopted by the California Legislature in 2001 serve incumbents, not the People, are repugnant to the People, and are in direct opposition to the People's interest in fair and competitive elections. They should not be used again.~~
(c) The redistricting plans adopted by the California Legislature in 2001 produced an unprecedented number of uncompetitive districts, serve incumbents and not the People, and are repugnant to the People. The gerrymandered districts of 2001 resulted in not a single change in the partisan composition of the California Legislature or the California congressional delegation in the 2004 selections. These districts should be replaced as soon as possible and never used again.
~~(d) We demand that our representative system of government be fair to all, open to public scrutiny, free of conflicts of interest, and dedicated to the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."~~

(d) The experience of the 1970's and 1990's demonstrates that impartial special masters, who are retired judges independent of partisan politics and the Legislature, can draw fair and competitive districts by virtue of their judicial training and judicial temperament.
(e) We demand that our representative system of government assure that the voters choose their representatives, rather than their representatives choose their voters, that it be open to public scrutiny and free of conflicts of interest, and that the system embody the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."

SECTION 2. Fair Redistricting
Article XXI of the California Constitution is amended to read (added language shown in underline text, deleted language shown in strike-out text):
Section 1 (a) Except as provided in subdivision (b), in the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, a panel of Special Masters composed of retired judges shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in accordance with the standards and provisions of this Article.
(b) Within 20 days following the effective date of this section, the Legislature shall appoint pursuant to the provisions of subdivision (c)(2) a panel of Special Masters to adopt a plan of redistricting adjusting the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts for use in the next set of statewide primary and general elections and until the next adjustment of boundary lines is required pursuant to ~~subdivisions (a) or (i)~~ *this article*. The panel shall establish a schedule and deadlines to ensure timely adoption of the plan. Except for subdivision (c)(1), all provisions of this article shall apply to the adoption of the plan required by this subdivision.
(c)(1) Except as provided in subdivision (b), on or before January 15 of the year following the year in which the national census is taken, the Legislature shall appoint pursuant to the provisions of subdivision (c)(2) a panel of Special Masters composed of retired judges to adopt a plan of redistricting adjusting the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts pursuant to this Article.
(2)(A) In sufficient time to allow the appointment of the Special Masters, the Judicial Council shall ~~nominate~~ *select* by

lot twenty-four retired judges willing to serve as Special Masters. Only retired California state or federal judges, who have never held elected partisan public office or political party office, have not changed their party affiliation, as declared on their voter registration affidavit, since their initial appointment or election to judicial office, and have not received income during the past 12 months from the Legislature, a committee thereof, the United States Congress, a committee thereof, a political party, or a partisan candidate or committee controlled by such candidate, are qualified to serve as ~~a Special Master~~ *Special Masters*. Not more than twelve of the twenty-four retired judges may be of a single party affiliation, and the two largest political parties in California shall be equally represented among the ~~nominated~~ *selected* retired judges.

(B) A retired judge ~~selected~~ *appointed* to serve as a Special Master shall also pledge, in writing, that he or she will not run for election in the Senatorial, Assembly, Congressional, or Board of Equalization districts adjusted by him or her pursuant to this Article nor accept, for at least 5 years from the date of appointment as a Special Master, California state public employment or public office, other than judicial employment or judicial office or a teaching position.

(C) From the pool of retired judges ~~nominated~~ *selected* by the Judicial Council, the Speaker of the Assembly, the Minority Leader of the Assembly, the President pro Tempore of the Senate, and the Minority Leader of the Senate shall each nominate, no later than ~~five~~ *six* days before the deadline for appointment of the panel of Special Masters, three retired judges, who are not registered members of the same political party as that of the legislator making the nomination. No retired judge may be nominated by more than one legislator.

(D) If, for any reason, any of the aforementioned legislative leadership fails to nominate the requisite number of retired judges within the time period specified herein, the Chief Clerk of the Assembly shall immediately draw, by lot, that legislator's remaining nominees in accordance with the requirements of subdivision (c)(2)(C).

(E) No later than ~~three~~ *four* days before the deadline for appointment of the panel of Special Masters, each legislator authorized to nominate a retired judge shall also be entitled to exercise a single peremptory challenge striking the name of any nominee of any other legislator.

(F) From the list of remaining nominees selected by said legislative leadership, the Chief Clerk of the Assembly shall then draw by lot three persons to serve as Special Masters. ~~If the drawing fails to produce at least one Special Master from each of the two largest political parties, the drawing shall be~~

~~conducted again until this requirement is met. If the drawing is unable to produce at least one Special Master from each of the two largest political parties, the drawing for the Special Master from the political party not represented from the list of remaining nominees shall be made from the original pool of twenty-four retired judges nominated~~ *If said list of remaining nominees does not include a retired judge from each of the two largest political parties, the drawing for the Special Master from the absent political party or parties shall be made from the original pool of twenty-four retired judges selected* by the Judicial Council, except that no retired judge whose name was struck pursuant to subdivision (c)(2)(E) may be appointed. In the event of a vacancy in the panel of Special Masters, the Chief Clerk shall immediately thereafter draw by lot, from the list of remaining nominees selected by said legislative leadership, or the original pool of twenty-four retired judges, if necessary, except for those whose names were struck, a replacement who satisfies the composition requirements for the panel under this subdivision.

(d) Each Special Master shall be compensated at the same rate for each day engaged in official duties and reimbursed for actual and necessary expenses, including travel expenses, in the same manner as a member of the California Citizens Compensation Commission pursuant to Section 8, subdivision (j) of Article III. The Special Masters' term of office shall expire upon approval or rejection of a plan pursuant to subdivision (h).

(e) Each Special Master shall be subject to the same restrictions on gifts as imposed on a retired judge of the superior court serving in the assigned judges program, and shall file a statement of economic interest, or any successor document, to the same extent and in the same manner as such retired judge.

(f)(1) Public notice shall be given of all meetings of the Special Masters, and the Special Masters shall be deemed a state body subject to the provisions of the Bagley-Keene Open Meeting Act (Government Code §§ 11120-11132), or any successor act, as amended from time to time; provided that all meetings and sessions of the Special Masters shall be recorded. The Special Masters shall establish procedures that restrict ex parte communications from members of the public and the Legislature concerning the merits of any redistricting plan.

(2) The panel of Special Masters shall establish and publish a schedule to receive and consider proposed redistricting plans and public comment from any member of the Legislature or public. The panel of Special Masters shall hold at least three public hearings throughout the state to consider redistricting plans. At least one such hearing shall be held after the Special

Masters have submitted their proposed redistricting plan pursuant to subdivision (f)(3) but before adoption of the final plan.

(3) Before the adoption of a final redistricting plan, the Special Masters shall submit their plan to the Legislature for an opportunity to comment within the time set by the Special Masters. The Special Masters shall address in writing each change to their plan that is recommended by the Legislature and incorporated into the plan.

(g) The final redistricting plan shall be approved by a single resolution adopted unanimously by the Special Masters and shall become effective upon its filing with the Secretary of State for use at the next statewide primary and general election, and if adopted by initiative pursuant to subdivision (h), *shall remain effective* for succeeding elections until the next adjustment of boundaries is required pursuant to this article.

(h) The Secretary of State shall submit the final redistricting plan as if it were proposed as an initiative statute under Section 8 of Article II at the same next general election ~~provided for~~ *as specified* under subdivision (g) for approval or rejection by the voters for use in succeeding elections until the next adjustment of boundaries is required. The ballot title shall read: "Shall the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts adopted by Special Masters as required by Article XXI of the California Constitution, and used for this election, be used until the next constitutionally required adjustment of the boundaries?"

(i) If the redistricting plan is approved by the voters pursuant to subdivision (h) hereof, it shall be used in succeeding elections until the next adjustment of boundaries is required. If the plan is rejected by the voters pursuant to subdivision (h) hereof, a new panel of Special Masters shall be appointed within 90 days in the manner provided in subdivision (c)(2) for the purpose of proposing a new plan for the next statewide primary and general election pursuant to this article. Any officials elected under a final redistricting plan shall serve out their term of office notwithstanding the voters' disapproval of the plan for use in succeeding primary and general elections.

(j) The Legislature shall make such appropriations from the Legislature's operating budget, as limited by section 7.5 of Article IV, as necessary to provide the panel of Special Masters with equipment, office space, and necessary personnel, including counsel and independent experts in the field of redistricting and computer technology, to assist them in their work. The Legislative Analyst shall determine the maximum amount of the appropriation, based on one-half the amount expended by the

Legislature in creating plans in 2001, adjusted by the California Consumer Price Index. For purposes of the plan of redistricting under subdivision (b) only, there is hereby appropriated to the panel of Special Masters from the General Fund of the State during the fiscal year in which the panel performs its responsibilities a sum equal to one-half the amount expended by the Legislature in creating plans in 2001. The expenditure of funds under this appropriation shall be subject to the normal administrative review given to other state appropriations. For purposes of all plans of redistricting under subdivision (a), until appropriations are made, the Legislative Analyst's Office, or any successor thereto, shall furnish from existing resources, staff and services to the panel as needed for the performance of its duties.

(k) Except for judicial decrees, the provisions of this article are the exclusive means of adjusting the boundary lines of the districts specified herein*, and the powers under Sections 8 and 9 of Article II shall be used only in the manner specified in subdivisions (g) and (h) herein*.

[The remainder of the text of the proposed initiative does not vary between versions and is omitted.]