

CALIFORNIA INITIATIVE REVIEW

Pre-Election Review and Substantial Compliance after Costa v. Superior Court

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I. Executive Summary

Proposition 77 failed at the ballot box in the 2005 special election, but it lived on in *Costa v. Superior Court*. Inadvertent clerical errors led to one version of the initiative being circulated for signatures, while another version was submitted to the Attorney General to obtain a title and summary. Proponents discovered the discrepancy but did not notify state officials until after the initiative was certified for the ballot. The Attorney General filed suit to prevent the measure from reaching the ballot. Two lower courts ruled for the Attorney General before the California Supreme Court stayed the rulings and let the initiative go to the voters.

After the election, the Supreme Court ruled on the case because of the importance of the issues for future ballot initiatives. The Court ruled that pre-election review was appropriate in cases challenging the procedure used by proponents to qualify an initiative measure for the ballot. The Court appeared to recognize these types of challenges as separate and distinct from substantive challenges that fall under the general rule that post-election review is more appropriate. This ruling may lead to more pre-election procedural challenges.

Additionally, the court established a standard for the “substantial compliance” doctrine with regard to initiative provisions in the California Constitution and the Elections Code. The court looked at whether, as a realistic and practical matter, voters could be misled. The court concluded under the facts in *Costa* that voters could not have been misled, given that the titles and summaries prepared for the two different versions were virtually identical. Justice Kennard, in her dissent criticized this standard as too subjective, and attorneys and scholars have called the rule unworkable.

II. Background

Proposition 77, on the Special Election ballot in 2005, was the latest in a long line of initiatives attempting to change the way that California draws its political districts. After an allegedly “harsh partisan gerrymander” in 1981, redistricting reform has been a common theme in California over the last quarter century. Alan Heslop, *Claremont McKenna College, Rose Institute, Redistricting Reform in California*, <http://rose.claremontmckenna.edu/publications/pdf/conf_redistricting_paper.pdf> (April 2004). Constitutional amendments for redistricting reform have appeared before California voters three times. A fourth attempt failed because the California Supreme Court struck down an initiative constitutional amendment because it violated the single subject rule. Elizabeth Garrett, *University of Southern California, Initiative & Referendum Institute, Redistricting: Another California Revolution?*, <[http://www.iandrinstitute.org/REPORT %202005-1%20Redistricting.pdf](http://www.iandrinstitute.org/REPORT%202005-1%20Redistricting.pdf)> (February 2, 2005). Of the three measures that made it to a vote, all failed.

Proposition 77, ran into legal challenges even before it was voted on. Proposition 24 also faced similar pre-election challenges. See, *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142 (1999). However, unlike Proposition 24, which dealt with a single-subject challenge,

In late 2004, Ted Costa, the chief executive officer of The People’s Advocate, was busy preparing a bevy of redistricting reform measures for California. On December 3, 2004, Daniel Kolkey, an attorney who Costa had retained to aid in drafting the initiatives, sent Costa an email containing their latest version of the proposed initiative measure (hereinafter referred to as the “December 3 version”). *Costa v. Superior Court*, 37 Cal. 4th 986, 997 (2006) [“*Costa*”]. Three days later, on December 6, 2004, Kolkey made both stylistic and substantive changes to the proposed initiative (hereinafter referred to as the “December 6 version”). The next day, Emily Adams, office manager and secretary at The People’s Advocate, prepared a cover letter for Costa’s signature to be submitted to the Attorney General with the initiative measure that was to become Proposition 77. *Id.* “When the letter was sent to the Attorney General on that same day, it contained the December 6 version of the proposed initiative.” *Id.* Later that day, the Initiative Coordinator at the Attorney General’s office replied to Costa acknowledging receipt of the proposed initiative. *Id.* The response from the Attorney General’s office to Costa advised him that any amendments, substantive or otherwise, to the proposed initiative, must be submitted within 15 days (December 22, 2004) – any substantive changes after that date would have to be submitted as a new measure. *Id.* at 998.

On January 28, 2005, Costa sent a second letter to the Attorney General adding three additional names as proponents of the initiative. Attached to this letter was the December 6 version, the same version that had been sent previously. *Id.* Shortly thereafter, on February 3, 2005, after the Attorney General’s office had completed the title and summary of the initiative, copies were sent to Costa and the other proponents, and to the Secretary of State, the Chief Clerk of the Assembly, and the Secretary of the Senate, as required by state law. *Id.* Prior to receipt of the title and summary from the Attorney General’s office, Costa, in an effort to expedite the signature gathering process, directed Adams to provide The People’s Advocate’s computer expert with a copy of the proposed initiative so that it could be formatted for printing. Adams gave the December 3 version to the computer expert so that petitions could be prepared. *Id.* at 998-999. Once the proponents received the title and summary, they were added to the previously prepared petitions containing the December 3 version. *Id.* at 999.

For the next three months or so, the petitions were circulated throughout California. Between May 5 and May 10, 2005, the petitions were submitted to local election officials for certification. In total, more than 950,000 Californians signed the petitions. *Id.*

Sometime in mid-May 2005, after the petitions had been submitted to the local election officials but before the measure had been certified for the ballot by the Secretary of State, Costa and Kolkey learned that the text of the initiative measure on the circulated petitions was the December 3 version of the measure and not the December 6 version that had been submitted to the Attorney General. After this discovery, Kolkey reviewed the differences in the two measures and conducted legal research on the matter, but neither he, Costa, nor anyone else immediately revealed the

discrepancy either to the Secretary of State or to the Attorney General.

Id. Then, on June 10, 2005, the Secretary of State certified that the proposed initiative had received a sufficient number of signatures to qualify for the ballot. *Id.* The Secretary of State then notified the Legislature that the measure had qualified for the ballot and sent copies of the December 6 version that had originally been submitted to the Attorney General. *Id.* at 999-1000.

Three days after the initiative was certified for the ballot, on June 13, 2005, Kolkey met with Peter Siggins (then the Governor's Legal Affairs Secretary) and William Wood, the Undersecretary of State. In this meeting Kolkey presented Wood with a legal memorandum explaining why in the proponents' view the initiative should remain on the ballot despite the discrepancy in the two different versions of the measure. *Id.* at 1000. On July 1, 2005, the Secretary of State notified the Attorney General of the problem, and asked for guidance "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." *Id.* On July 6, the Attorney General notified the Secretary of State that the Attorney General could not represent the Secretary in this matter. The next day the Secretary of State replied to the Attorney General that "he had 'the constitutional duty to present to the voters of California the measures that have qualified to appear on the ballot by the signatures of the people' and that he intended to do so 'unless directed to do otherwise by a court.'" *Id.* at 1001. On July 8, 2005, the Attorney General filed a petition of mandate in the Superior Court "seeking an order prohibiting the Secretary of State from placing either version of the initiative measure on the November 8, 2005, special election ballot." *Id.*

In his petition for a writ of mandate, the Attorney General argued that because the version of the initiative circulated for signatures differed from the version submitted to the Attorney General for title and summary, neither version had properly qualified for the special election ballot. *Id.* In response, proponents of the measure claimed that they had substantially complied with the applicable constitutional and statutory requirements and that the discrepancies between the two versions were minor and did not affect the accuracy of the prepared title and summary.

Id. The Superior Court entered judgment in favor of the Attorney General. Judge Gail Ohanesian said that since the rules "are clear and well known and easily followed... There is no good reason to put the courts in the position of having to decide what is good enough for qualifying an initiative measure for the ballot when actual compliance is easily attainable." John Wildermuth, *Redistricting Plan Thrown Off State Ballot Judge Rules Backers of Measure Presented Two Different Versions*, S.F. Chronicle (July 22, 2005). Further, the Superior Court said, "the purposes of the constitutional and statutory requirements at issue would be frustrated if the court were to apply the substantial compliance doctrine to excuse the clear defects in this situation." *Costa*, 37 Cal. 4th at 1001.

Proponents of the initiative responded by requesting a temporary stay of the Superior Court's ruling from the Court of Appeal, and they sought a writ of mandate to overturn the lower ruling. The stay was granted and the Court of Appeal ordered the Attorney General to issue a title and summary for December 3 version, which had been circulated for signatures. *Id.* at 1001-1002. In the title, the Attorney General had merely replaced the word "Reapportionment" with "Redistricting," and admitted that the change was made solely for identification of the two

versions. Additionally, the summaries provided for the two versions “did not vary in any material respect.” *Id.* at 1002. The Court of Appeal issued its ruling on August 9, 2005, less than 3 months before the date of the election. The Court of Appeal, in a two-to-one decision, upheld the ruling of the trial court and ordered that Proposition 77 not appear on the special election ballot. The Court of Appeal looked at two issues: (1) whether pre-election review was appropriate, and (2) whether the proponents had substantially complied with the constitutional and statutory requirements for qualifying an initiative for the ballot. *Costa v. Superior Court*, 32 Cal. Rptr. 3d 562 (Cal. App. 3 Dist. 2005) [“*Superior Court*”].

With respect to pre-election review, the Court of Appeal noted,

In their briefs, no party contended the matter inappropriate for pre-election 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.

Id. at 570 (citing to *Brosnahan v. Eu*, 31 Cal.3d 1, 4 (1982) for the general rule) [Internal quotations and citation omitted]. The Court of Appeal held that the challenge at issue in *Superior Court* was of a procedural rather than substantive nature, and therefore, the *Brosnahan* rule did not apply. *Id.* at 571. The Court of Appeal noted that Justice Mosk, in his concurring and dissenting opinion in *Brosnahan* drew a line between substantive challenges to initiatives and jurisdictional or procedural challenges. *Id.* at 570. The Court of Appeal further found that post-election review of pre-election procedural defect claims is limited and “where a pre-ballot procedural claim does not implicate the validity of the ensuing election contest it may well be moot.” *Id.* at 571. The Court of Appeal held that the challenge in *Superior Court*, was not substantive, but was procedural and therefore did not fall under the specter of *Brosnahan* that post-election review is generally more appropriate. “Pre-election judicial review is essential to the enforcement of pre-election procedures.” *Id.*

Having found pre-election review appropriate, the Court of Appeal turned to the issue of whether the proponents of the initiative had substantially complied with the constitutional and statutory requirements for qualifying a measure for the ballot. Citing *Assembly v. Deukmejian*, 30 Cal.3d at 649 (1982), the Court of Appeal said that “substantial compliance” meant actual compliance with the purposes of the statutory provision in question. *Superior Court*, 32 Cal. Rptr. 3d at 574. In *Superior Court*, the provisions in question were California Constitution article II, § 10(d) and Elections Code § 9002. Both provisions require that proponents of an initiative submit it to the Attorney General for preparation of a title and summary prior to circulation.

The Court of Appeal examined, what it considered, could be every reasonable objective of the article II, § 10(d) and Elections Code § 9002, concluding that one reasonable objective is requiring pre-circulation submission to the Attorney General to “fix the text” of the proposed

initiative so that all parties are “on the same page.” *Id.* at 578. Because there were two versions, the text could not be fixed, and the proponents had not substantially complied. The Court of Appeal further held that proponents had not substantially complied because misinformation created by having two different versions of the initiative could lead to voter confusion. *Id.* Moreover, the version of the initiative that was posted on the Secretary of State’s website for much of the summer before the election was a printed text with “handwritten interlineations and cross outs.” *Id.* at 579. This marked-up text made deciphering the true version of the proposition difficult. The court also found that changes in the way that legislative leaders would pick and strike Special Master candidates who would draw the district boundaries was a change in the meaning of the proposition. “Any change in the rules governing the conduct of any person is a change in the meaning.” *Id.* Furthermore, the court also found that the “Findings and Declarations of Purpose” section in the two different versions were substantially edited, such that determining the legislative intent behind the proposition at a later date could be very difficult. *Id.* Therefore, because the text could not be fixed and proponents through their negligence had caused the potential for great confusion among voters and elected officials alike, the court ruled that they had not substantially complied with every reasonable objective of article II, § 10(d) and Elections Code § 9002. The court affirmed the superior court ruling barring Proposition 77 from the ballot, despite the objection of Presiding Justice Scotland, who dissented.

Justice Scotland’s dissent concluded that the proponents had substantially complied with constitutional and statutory provisions because the purpose of those provisions was to obtain an informative title and summary to prevent voters from being misled. *Id.* at 587. Justice Scotland found that voters could not reasonably be confused by the fact that there were two versions of the initiative because only one of those versions was circulated for signatures. *Id.* at 589-590. He also observed that the summaries for both the December 3 version and the December 6 version prepared by the Attorney General were identical. *Id.* at 589. Only the titles were different: “Reapportionment. Initiative Constitutional Amendment” for the December 3 version and “Redistricting. Initiative Constitutional Amendment” for the December 6 version. *Id.* Justice Scotland found that there was no material difference in the two versions. He concluded by saying, “In the real world, the differences in wording were insignificant and would not have misled voters who signed the petitions.” *Id.* at 592

The day after the Court of Appeal’s ruling, August 10, 2005, proponents of Proposition 77 sought a stay from the California Supreme Court and emergency review. *Costa*, 37 Cal. 4th at 1003. On Friday, August 12, 2005, the Supreme Court issued an order in the case. Expedience was imperative for this review given that the Secretary of State indicated that the deadline of submitting the ballot pamphlet to the state printer was at 5:00 p.m. on Monday, August 15, 2005. *Id.* at 1004. The Supreme Court granted the petition for review, stayed the Superior Court ruling prohibiting placement of Proposition 77 on the ballot, ordered the Secretary of State to proceed with the steps necessary to put Proposition 77 on the ballot, and allowed an opportunity for the proponents and opponents to revise their statements or ballot arguments. *Id.* The Court explained that in the absence of a showing of voter confusion, or likely voter confusion, “we conclude that it would not be appropriate to deny the electorate the opportunity to vote on Proposition 77 at the special election to be held on November 8, 2005, on the basis of such discrepancies.” *Costa v. S.C. (Lockyer)*, 128 P.3d 149 (Cal. 2005). The Court

also stated that after the election was held, it would decide whether or not to retain jurisdiction. *Id.*

Less than three months later, on November 8, 2005, in a special election, Proposition 77 appeared on the ballot before California voters. Proposition 77 failed, like all the other initiatives in the election, garnering only 40.2 percent in favor and 59.8 percent against. Secretary of State, *Votes for and Against November 8, 2005, Statewide Ballot Measures and Constitutional Amendments*, <http://ss.ca.gov/elections/sov/2005_special/sov_pref_pgxiii_votes_for_against_props.pdf> (last accessed Apr. 3, 2006). The day after the election, the Supreme Court ordered the case onto the calendar for hearing December 7, 2005. California Supreme Court, *California Appellate Courts, Case Information, Docket Entries (Register of Actions)*, <http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=385696>.

III. **Costa v. Superior Court**

The Supreme Court's ruling in *Costa* dealt with two issues: (1) whether pre-election review is appropriate for an initiative challenged because the version circulated for signatures differs from the version submitted to the Attorney General, and (2) whether despite the differences between the December 3 version and the December 6 version the proposition should have been presented to the voters on the ballot. *Costa*, 37 Cal.4th at 1005, 1008.

A. **Pre-Election Review**

The Supreme Court first addressed the appropriateness of pre-election review in cases like *Costa*. *Id.* at 1005. Generally, it is more appropriate to review challenges to ballot measures after an election so that the electoral process is not disturbed. This rule generally applied unless there was a clear showing that the measure in question is invalid. *Brosnahan*, 31 Cal.3d at 4. Since *Brosnahan*, the Court has placed some limitations on the general rule. The *Brosnahan* rule is applied when the challenge to the ballot measure is based on its alleged unconstitutionality of the substance of the measure. However, pre-election review is available when the challenge to the ballot measure is that the measure should not be submitted to the voters because the measure is beyond the scope of the initiative power (e.g., the measure is not legislative in nature or the measure amounts to a constitutional revision, as opposed to a mere amendment). *Senate of the State of Cal. v. Jones*, 21 Cal.4th 1142, 1153 (1999). Additionally, the Court said that where the challenge to a ballot measure is that the measure violates the single-subject rule, pre-election review is also appropriate because the constitutional provision establishing the single-subject rule states “an initiative measure embracing more than one subject *may not be submitted to the electors* or have any effect.” *Costa*, 37 Cal.4th at 1005-1006 (citing Cal. Const., art II, § 8, subd. (d)) (Italics in original). This provision explicitly contemplates a pre-election review, because a measure in violation of the single-subject rule, “may not be submitted to” the voters. Pre-election review is appropriate in that instance to prevent the offending measure from reaching the ballot.

The Court then noted that “The legal challenge in the present case does not relate to the substantive validity of the initiative measure but rather involves a procedural claim pertaining to

the pre-election petition-circulation process.” *Id.* at 1006. Implicitly, the Court was approving the Court of Appeal’s reasoning in *Superior Court*, as described above, that there is a difference between substantive and procedural challenges to initiative measures, and that it may very well be appropriate to have pre-election review in procedural challenge cases. The Supreme Court cited cases where pre-election review was appropriate, such as where during a referendum the text of the measure on the petition varied from the text of the measure that had been enacted; where the completeness and accuracy of the Attorney General’s title and summary are challenged; where the short title on the petition does not accurately describe the initiative measure; where the challenge is that the petitions has not received the requisite number of signatures; and where the short title for the proposed initiative was misleading. *Id.*

As these and similar cases implicitly recognize, because the question at issue in such a case is whether the initiative measure has satisfied the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot, it is logical and appropriate for a court to consider such a claim prior to the election, because if the threshold procedural prerequisites have not be satisfied the measure is not entitled to be submitted to the voters.

Id.

The Court also acknowledged the reluctance of courts to overturn the results of an election “on the basis of a procedural defect that has occurred at the petition-circulation stage of the process,” perhaps implying reality of Justice Otto Kaus’ metaphor of the crocodile in the bathtub. *Id.*; and Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133 (May, 1997). Justice Kaus used the metaphor of the crocodile in the bathtub to describe the problem of deciding difficult and controversial cases while having to face reelection – the public may not like the judge’s decision. Uelman, 72 Notre Dame L. Rev. 1133 (1997). This dilemma tends to be particularly strong when popular initiatives are at stake: “The initiative crocodile can be labeled the angriest crocodile because the promoters of initiative measures tend to take personal pride in their handiwork, and take personal offense when a court messes with it.” *Id.* at 1147.

Procedural challenges to ballot measures are often mooted by election results, courts not finding that the alleged procedural problems caused any harm to the election. *Costa*, 37 Cal.4th at 1007. Being that there might be harm to the challengers (the case being moot) in postponing review until after the election, the Court concluded that procedural challenges to ballot measures rightly can be made pre-election, and that in this case, the lower courts were correct to entertain the challenge to Proposition 77 prior to the election. *Id.*

B. Substantial Compliance

The Court then turned to the second issue in *Costa*: “whether the disparities between the version of the initiative measure circulated for signature and the version submitted to the Attorney General warranted withholding the initiative measure from the ballot.” *Id.* at 1008. At the outset, the Court described the relevant constitutional and statutory provisions. Of particular concern in this case was California Constitution article II, § 8, subdivision (d), which states “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,” and also Elections Code § 9002, which says that a “draft of the proposed measure shall be submitted to the Attorney General...” Additionally, Elections Code § 9004 says that 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...” Elections Code § 9012 provides that election officials are not permitted to receive or file a petition “not in conformity with this article.” Based on these constitutional and statutory provisions, the court concluded, “that there can be no question but that... the version of a measure submitted to the Attorney General by the measure’s proponents prior to circulation of the petition be the same version of the initiative measure circulated for signature.” *Costa*, 37 Cal.4th at 1011-1012. Moreover, the Court noted that it was undisputed among the parties that these provisions required that the Attorney General receive the final version that was to be used for circulation for signatures, and that the parties did not dispute that the use of two versions of the initiative measure in this case was inadvertent. *Id.* at 1012.

Despite these seemingly clear constitutional and statutory requirements, the Supreme Court turned to the question of whether the proponents had substantially complied with the provisions, rather than actually complied with the letter of the law. The reason for this further examination lay in the judicial policy that courts liberally construe provisions regarding the initiative power such that questions can be resolved in favor of maintaining the people’s right to enact laws via the initiative power. *Id.* at 1013.

Thus, when California courts have encountered relatively minor defects that the court finds could not have affected the integrity of the electoral process *as a realistic and practical matter*, past decisions have generally concluded that it would be inappropriate to preclude the electorate from voting on a measure on the basis of such a discrepancy or defect. In such cases, as long as the fundamental purposes underlying the applicable constitutional or statutory requirements have been fulfilled, the decisions have concluded that there has been “substantial compliance” with the applicable constitutional or statutory provisions and that invalidation of a petition and preclusion of a vote on the measure is not warranted.

Id. (Italics in original)

Key to determining whether the proponents have substantially complied with the applicable constitutional and statutory requirements is determining whether “the purpose of the technical requirement is frustrated by the defective form of the petition.” *Id.* at 1017. Therefore, before determining whether there was substantial compliance, a court must first determine the purposes of the applicable constitutional and statutory provisions. The objective of the provisions must be met in order to meet the substantial compliance test. *Id.* See n. 24.

For guidance in this examination, the Court looked at *MHC Financing Limited Partnership Two v. City of Santee*, 125 Cal. App. 4th 1372 (4th Dist. 2005) [“*MHC*”]. In *MHC*, proponents of an initiative submitted a version to the city attorney in Santee as required by law. Later, the proponents submitted a second version to the city attorney but did not specifically request a title and summary for the second version. Proponents then circulated a petition containing the second version of the initiative with the title and summary that was prepared for the first version. After obtaining the requisite number of signatures, the city adopted the first version of the initiative. When the constitutionality of the measure was challenged, the city attempted to rectify the situation by adopting the second version of the measure. The Court of Appeal in *MHC* looked at the purposes of Elections Code § 9203 (the section dealing with local initiative measures) and concluded that the purposes are “(1) to reduce the risk that voters were misled when signing the petition; (2) to allow verification that the signers had a neutral explanation of the proposed ordinance available to them when they signed; and (3) to prevent signatures from being submitted in support of a different measure than that for which they were procured.” *MHC*, 125 Cal. App. 4th at 1389. The Court of Appeal examined the differences between the first version and the second version and compared them to the title and summary that was prepared for the first version. The Court of Appeal concluded that while there were differences, the differences did not go to the heart of the version that was circulated and thus the title and summary that was prepared for the earlier version was not misleading. *Id.* at 1389-1390. The *MHC* Court ruled that the petition had substantially complied with the purposes of Elections Code § 9203 because voters signing the petition would not have been misled by the title and summary. *Id.* at 1391.

Despite some factual distinctions between *MHC* from *Costa*, the Supreme Court found the analysis and conclusion in *MHC* to be directly on point. *Costa*, 37 Cal.4th at 1022. According to the Supreme Court, “The Court of Appeal... clearly held [in *MHC*] that there was substantial compliance with the applicable Election Code provisions because the ballot title and summary that actually circulated with the initiative petition accurately reflected the substance of the version of the initiative measure that was included on the petition.” *Id.* Applying that standard to *Costa*, the Supreme Court came to the conclusion that while the inadvertent discrepancies between the two versions constituted a technical defect with regard to the constitutional and statutory provisions, the differences did not mislead the public or undermine the purposes of the constitutional and statutory provisions; therefore, the proponents had substantially complied with the applicable laws. *Id.*

In *Costa*, the Court said that the principal purpose of the applicable constitutional and statutory provisions was to enable the Attorney General to issue an accurate title and summary of the initiative measure. *Id.* at 1023. The Court acknowledged that voters who signed the petition had the entire December 3 version in front of them along with the title and summary for the

December 6 version. After examining the two versions along with the title and summary, the Court concluded that the title and summary for the December 6 version accurately described the December 3 version; therefore the voters who signed the petition could not have been misled by the discrepancy, and thus the purpose of the constitutional and statutory provisions was not frustrated. *Id.* at 1023-1024. The Supreme Court then acknowledged that the Court of Appeal had identified additional purposes for the applicable statutory and constitutional provisions, but the Supreme Court dismissed these saying, “we do not agree that the existence of different versions of an initiative measure *necessarily* or *invariably* frustrates the purposes of these provisions.” *Id.* at 1025 (Italics in original).

There was no frustration of the purpose of fixing the text because there was ample time to remedy the problems created by the discrepancies. The problem was discovered long before the ballot materials were sent to the printer, and there was plenty of time to revise ballot statements or hold legislative hearings. *Id.* Additionally, the Supreme Court addressed the Court of Appeal’s contention that one purpose of the applicable provisions was to “fix the text.” In a footnote, the Supreme Court indicated that the applicable provisions do not indicate that a purpose is to fix the text. *Id.* at 1024, n. 30. However, the Court of Appeal noted, “Often there is no objective stated in the statute.” *Superior Court*, 32 Cal. Rptr. 3d at 578. Nevertheless, the Supreme Court repeated its mantra that the variance of the versions did not “*necessarily* or *invariably* frustrate” the purpose of fixing the text, and the subsequent work product. *Costa*, 37 Cal.4th at 1024, n. 30.

Finally, the Supreme Court noted that the discrepancy was inadvertent on the part of the proponents. *Id.* at 1029. Had the variance been intentional, the result might be different because that would call into question the integrity of the electoral process. *Id.* The Court dismissed the contention that the proponents should be viewed as having acted in bad faith because they failed to disclose to state officials the discrepancy until two days after the initiative was certified as having qualified for the ballot. *Id.* at 1029 n. 33. The Court said that while the proponents should have been more prompt in disclosing the discrepancy, “we do not believe the proponents’ failure in this regard properly can be equated with intentionally” manipulating the system. *Id.*

Justice Kennard filed a concurring and dissenting opinion in the case. Justice Kennard concluded that the proponents had not substantially complied with the applicable constitutional and statutory provisions. *Id.* at 1031 (Kennard, J. dissenting). When there are two competing versions that have different meanings the “integrity of the electoral process is compromised.” *Id.* Justice Kennard identified purposes for the applicable constitutional and statutory provisions that the majority had mostly ignored. She wrote, “The constitutional and statutory requirement that the Attorney General be give a copy of a proposed initiative serves the objective of providing consistent, reliable information about the initiative to the Legislature, to certain government offices, to those who may want to comment on the proposal, and to the public.” *Id.* at 1033. By having two different versions of the initiative, this purpose is frustrated. *Id.* at 1033-1034. Justice Kennard believed that the proponents delay in notifying the Secretary of State of the discrepancy of about a month compounded the problem; the problem was made worse by the fact that that lower courts had enjoined the Secretary of State from preparing the initiative for the ballot until the Supreme Court acted, just three days before the ballot materials were to be sent to the state printer. *Id.* at 1035. “[T]he confusion an the uncertainty about which version, if either,

would be placed on the ballot necessarily impaired the ability of interested parties to understand the measure and to debate its merits during a crucial pre-election period.” *Id.*

IV. Effects of *Costa*

A. Pre-Election Review

Costa v. Superior court may open the door to more pre-election challenges of ballot initiatives, so long as the claim against the initiative measure is procedural rather than substantive in nature. The California Supreme Court acknowledged the distinction between challenges having to do with the substance of an initiative and challenges having to do with constitutional or procedural challenges to the initiative qualifying for the ballot. *Costa*, 37 Cal.4th at 1006. *Costa* might not signify a major change in the rule regarding pre-election challenges, but it may be considered as recognizing a line of cases, not just individual incidents, outside of the general rule from *Brosnahan* that it is generally more appropriate to entertain challenges to ballot initiatives after the election.

The Court of Appeal in *Superior Court*, recognized that *Costa* was ripe for pre-election review because of the distinction previously made by Justice Mosk. *Superior Court*, 32 Cal. Rptr. 3d at 570. While the Supreme Court did not explicitly endorse this view in *Costa*, the conclusion was essentially the same. The Supreme Court identified the harm in having a post-election review of a ballot measure on procedural grounds; courts are generally reluctant to overturn a vote of the people. *Costa*, 37 Cal.4th at 1006. While a substantive challenge to an initiative may be premature prior to an election, the same is not true when there is a procedural challenge. The impact of *Costa* on pre-election review is likely to open up the possibilities for procedural challenges. Cases likely will not have to track so closely to precedent in order to be successful in obtaining pre-election review. Courts may be more open to hearing novel procedural arguments pre-election. This should also help judges be less fearful of the crocodiles in their bathtub; judges will not fear a revolt of the electorate if they do not have to overturn a measure approved by the voters on procedural grounds. Where the problem is procedural, it should be, and post-*Costa* hopefully will be, addressed and resolved pre-election.

B. Substantial Compliance

It is unclear what *Costa* will mean for the doctrine of substantial compliance in ballot initiative cases. The best-case scenario for future cases is that *Costa* did not change the substantial compliance analysis at all. It is possible that courts will read *Costa* as a one-time case, or that similar cases will be addressed as they arise, without a larger over-arching rule. This may be the case because *Costa* appears to have given some mixed messages. While the Supreme Court held that Proposition 77’s proponents had substantially complied with the applicable constitutional and statutory provisions, the Court also admonished future proponents of initiatives that “our holding in this case does not mean that the proponents of an initiative measure properly may circulate, even inadvertently, a version of the measure that differs from the version submitted to the Attorney General.” *Costa*, 37 Cal.4th at 1029. Does this mean that

the Court would come to the opposite conclusion in a case that was nearly identical to *Costa*? Probably not, since the Court continued “Although, for the reasons discussed above, we have concluded that the differences in the two versions in the present case did not frustrate the purposes underlying the applicable constitutional and statutory provisions and thus did not justify withholding the proposition from the ballot, a similar conclusion may not be warranted in other circumstances.” *Id.* at 1029-1030. But then the Court went on, “Accordingly, proponents of initiative petitions would be well advised to take all steps necessary to ensure that the mishap that occurred in the present case does not recur in the future.” *Id.* at 1030. This apparent waffling cannot provide much guidance for lower courts in this area.

Prior to *Costa*, “as long as the fundamental purposes underlying the applicable constitutional or statutory requirements have been fulfilled, the [judicial] decisions have concluded there has been substantial compliance.” *Id.* at 1013. The Supreme Court in *Costa* added a few wrinkles to this rule. First, the Court said that “as a realistic and practical matter” if defects in the petitions have not affected the integrity of the election process, then the proponents of the initiative have substantially complied with the constitutional and statutory requirements. *Id.* In guarding the integrity of the electoral process as a realistic and practical matter, the Supreme Court looked at whether voters could have been misled by the existence of two different versions of the initiative. *Id.* at 1023. However, the Court did not elucidate any standard for determining if voters were misled. Instead, the Court simply concluded that voters who signed the petitions could not have been misled because those voters were able to read the petition (with the December 3 version) and the title and summary prepared for the December 6 version, which the Attorney General conceded was essentially identical to the title and summary for the December 3 version. *Id.* at 1023-1024.

Second, the Court effectively concluded that the primary purpose of California Constitution article II, § 8, subdivision (d) and Elections Code § 9002 et seq., was to allow the Attorney General to issue an accurate title and summary. While the Supreme Court acknowledged the existence of other purposes for the statutory requirements, the Court effectively discounted them. The Court said that officials who relied on the version sent to them by the Attorney General had sufficient time to “prepare accurate reports or analyses (or to hold legislative hearings) directed to the version of the initiative measure that is to be submitted to the voters.” *Id.* at 1025. However, as Justice Kennard pointed out in her dissent, because of judicial decrees in the case, Proposition 77 was not prepared for the ballot until three days before the text was sent to the printer. *Id.* at 1035 (Kennard, J. dissenting). The majority gave no indication of how much time was necessary or how different the two versions would need to be before these other purposes were frustrated. Moreover, the Court said that the decision might have gone the other way had it been apparent that the proponents of the initiative acted purposefully in having two different versions of the initiative measure. *Id.* at 1029.

This standard has been criticized as “unworkable,” according to some attorneys. Jim Sanders, *Ruling Settles Ballot Dispute, Discrepancies in Wording shouldn't have Stopped Vote on Prop. 77, Top Court Says*, Sacramento Bee A3 (Feb. 17, 2006). Attorney Lance Olson said that the standard was unworkable because there was no guidance for lower courts: “The message is, you might as well go to the Supreme Court each time you think there's a problem with an initiative.” *Id.* While the Court noted that there were substantive differences, not minor

or merely technical differences, between the two versions, the Court did not indicate how different two versions of an initiative must be to be held from the ballot. Lower courts may be groping in the dark to answer that question. Based on *Costa*, the answer might be that any differences, even substantive differences in versions of a proposed initiative, may be permissible so long as the title and summary prepared for those two versions is not vastly different.

Additionally, Justice Kennard criticized the rule in her dissent by pointing out that the majority's assertion that a rule keeping an initiative off the ballot because of substantive disparities between two versions could allow a court to keep an initiative off the ballot based on the subject matter of the initiative itself saying,

The majority's argument is unsound, because the rule of substantial compliance does not, and should not, depend on the court's view of the desirability of the initiative. Indeed, the majority's comment highlights a major disadvantage of its approach--the risk that, with a vague and subjective substantial compliance standard, inappropriate considerations will actually influence a court's substantial compliance determination, or that the public will perceive the court to be so influenced.

Costa, 37 Cal.4th at 1037, n. 3 (Kennard, J. dissenting) (internal citation omitted).

Determining whether voters are misled appears to be a subjective determination. The Court noted that there was no evidence in the record that signers of the initiative petition had been misled. *Costa*, 37 Cal.4th at 1026. Yet the Court gave no indication of what showing would be necessary to prove voters were misled. Rather, the Court simply concluded, based on its own analysis, that no voter could have been misled. However, the analysis merely examined the discrepancies between the titles and summaries for the two versions, not the actual differences between the two versions of the measure.

Further, the Supreme Court's analysis seems to abrogate the presumption that voters read the initiatives: "we ordinarily should assume that the voters who approved a constitutional amendment ... have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered." *Brosnahan v. Brown*, 32 Cal.3d 236, 252 (1982) (Internal quotations and citations omitted). *Costa* seems to imply that voters do not read the initiatives, but merely the titles and summaries prepared by the Attorney General. Lower courts will be forced to create their own standards for determining whether voters were misled when those accusations are before them.

Finally, according to Election Law scholar Rick Hasen, "The majority's approach will lead to too much litigation where judges will be called upon to answer difficult questions in a very short time frame." Rick Hasen, *The Prop. 77 Ruling: Some Good News for Those Seeking Clarity and Bad News for Those Worried About Judges Having Too Much Discretion*, Election Law Blog, <<http://electionlawblog.org/archives/004954.html>> (Feb. 17, 2006). Lower courts will likely also be called on to decide more accusations of bad faith on the part of initiative proponents because of the Supreme Court's emphasis that a crucial factor in the decision was the

inadvertence of the proponents' actions. Proving bad faith may be difficult, especially in a short period of time between certification of an initiative and election because significant discovery may be necessary in such cases. Because the Supreme Court has provided little in the way of guidance for lower courts, election litigation is likely to increase as creative attorneys test the bounds of the *Costa* opinion. As pre-election review is likely to grow after *Costa*, judges will be faced with this myriad of unresolved questions in the months, weeks and days leading up to elections.

V. Conclusion

After a bumpy and litigious path to the ballot, Proposition 77 was voted on, and failed at the ballot box in the 2005 special election. After the election, the Supreme Court decided to press on with the case. The Court ruled that pre-election review in cases challenging the procedure used by proponents to qualify an initiative measure for the ballot was appropriate. The Court appeared to recognize these types of challenges as separate and distinct from substantive challenges that fall under the general rule that post-election review is more appropriate. This likely will lead to more pre-election procedural challenges.

The Supreme Court established a standard for substantial compliance with respect to initiative provisions in the California Constitution and the Elections Code. The Court looked at whether as a realistic and practical matter voters could be misled, and concluded that voters in *Costa* could not have been misled, given that the titles and summaries prepared for the two different versions were virtually identical. Justice Kennard, in her dissent criticized this standard as too subjective, and attorneys and scholars have called the rule unworkable because of the mixed messages sent in the *Costa* ruling.