

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**EDWARD J. "(TED) COSTA, SIDNEY S.
NOVARESI, ARTHUR LAFFER, and JIMMIE
JOHNSON,**

Petitioners,

S136294

v.

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SACRAMENTO,**

Respondent,

**BILL LOCKYER, Attorney General of the State of
California; and CALIFORNIANS FOR FAIR
REPRESENTATIVE - NO ON 77; BRUCE
McPHERSON, Secretary of State for the State of
California; and GEOFF BRANDT, Acting State
Printer,**

Real Parties in Interest.

Third Appellate District, No. C050297
Sacramento County Superior Court No. 05CS00998
The Honorable Gail D. Ohanesian, Judge

**ANSWER TO EMERGENCY PETITION FOR REVIEW
ELECTION MATTER
CRITICAL DATE: AUGUST 15, 2005**

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California; and GEOFF BRANDT, Acting State
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S136294

**TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF
THE SUPREME COURT OF CALIFORNIA, AND TO THE
HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT
OF CALIFORNIA:**

Real Party in Interest Bill Lockyer, Attorney General of the State of California, submits the following answer to the Emergency Petition for Review and Request for Stay.

INTRODUCTION

Contrary to the assertions of the initiative proponents,^{1/} the issue in this

1. Petitioners Edward J. ("Ted") Costa, Sidney S. Novaresi, Arthur Laffer and Jimmie Johnson will be referred to collectively as "proponents."

case is whether a version of a proposed initiative is eligible for placement on the special election ballot when (1) proponents never submitted that version to the Attorney General with a request for preparation of a title and summary (see Cal. Const., art. II, § 10, subd. (d); see also Elec. Code, § 9002); (2) a fiscal analysis was never prepared for that particular version (see Elec. Code, § 9005); (3) that version was never attached to the certification issued by the Secretary of State (see Elec. Code, § 9033); (4) that version was never forwarded to the Senate and the Assembly (see Elec. Code, § 9034); and (5) opponents of the measure were never afforded the opportunity to submit ballot arguments against that particular version of the measure (see Elec. Code, § 9064).

The circumstances presented in this case are quite different from the circumstances addressed by this Court in *Independent Energy Producers Association et al. v. Bruce McPherson*, California Supreme Court case number S135819 (involving Proposition 80), and in *Brosnahan v. Eu* (1982) 31 Cal.3d 1 (involving the “Victims Bill of Rights”). The *Independent Energy Producers Association* case did not involve a challenge to the procedural eligibility of Proposition 80 for placement on the ballot; instead, it involved a substantive constitutional challenge to the initiative itself. And in *Brosnahan*, this Court squarely addressed the procedural eligibility of the initiative in its pre-election decision, noting that the Legislature had passed urgency legislation changing the signature percentage needed to establish certification. (*Brosnahan, supra*, 31 Cal.3d at p. 4.) Thus, this Court concluded that the initiative should be placed on the ballot, but then declined to address the other substantive challenges raised in the lawsuit, concluding that those substantive matters could be addressed after the election. (*Ibid.*)

Accordingly, *Independent Energy Producers Association* and *Brosnahan* do not stand for the unprecedented proposition that a proposed

initiative should be placed on the ballot regardless of whether proponents, through their own negligence, engaged in violations of California's election laws. And proponents' argument that the Court of Appeal's decision somehow creates a split in authority is without merit. This case is factually different.

The trial court made certain findings of fact in this case that are supported by substantial evidence. The trial court found that the differences in the two versions submitted by proponents – one to the Attorney General for preparation of a title and summary, and another for circulation and collection of signatures – are not simply typographical, formatting, or technical differences. The trial court found that the differences go to the substantive terms of the measure. The trial court further found that the Findings and Purposes section of the initiative is substantially different in the two versions, that the time requirements are different in the two versions, and that there are numerous other substantive differences between the two versions.

In addition, the trial court found that the initiative procedures are “clear and well known and easily followed.” Moreover, the trial court found that in the exercise of ordinary care, proponents should have known of the different versions. The trial court also found that proponents did not disclose the differences until June 13, 2005, after the Secretary of State had issued his certification.

Based on these findings of fact, and also based on certain admissions made by proponents' counsel during oral argument, the Court of Appeal correctly held that through proponents' own negligence, the proponents violated the requirements of the California Constitution and the Elections Code, and the proponents also exacerbated the problem by concealing the differences until after the Secretary of State certified the measure for the ballot.

Despite the unique factual findings in this case and proponents' violations of California's election laws, proponents now ask this Court for an additional 17 hour stay and an expedited decision by 5:00 p.m. on Monday. The Attorney General agrees that time is of the essence, because there are currently *two* versions of the initiative on public display. If this Court extends the stay, but does not provide further guidance immediately, it is anticipated that the Secretary of State will send one of the versions to the State Printer at 5:00 p.m. on Monday, August 15, 2005, so that the Printer can start printing election materials.

Proponents argue that they substantially complied with election requirements, but the Court of Appeal properly concluded that under these particular facts, the substantial compliance doctrine cannot save the negligently prepared petitions when "[t]he version circulated here undeniably changes the meaning of key provisions in the copy submitted to the Attorney General."^{2/} Even if the substantial compliance doctrine was appropriate in other circumstances, its application is not appropriate under the unique facts of this case. In any event, the trial court found that proponents did not substantially comply with the election requirements.

In addition, the Court of Appeal correctly rejected proponents' claim that their substantial compliance should be measured by whether the changes between the two versions would change the content of the Attorney General's title and summary, which is limited by statute to 100 words. If proponents' standard were adopted, it would allow future proponents to make numerous substantive changes after submission of a proposed initiative to the Attorney General, so long as the changes did not impact the 100 words in the Attorney

2. *Costa v. Superior Court*, Case No. C050297, slip opinion at p. 7 (hereinafter "Slip Opn."). The Court of Appeal attached an appendix to its decision showing the differences between the two versions. (*Id.* at pp. 66-71.)

General's title and summary. Such a standard is unworkable, and would be dangerous and unprecedented.

Due to proponents' negligence, the proposed initiative is not currently eligible to be placed on the ballot. But proponents can try again. They can follow the election laws and get it right next time. The voters will not be disenfranchised, and the integrity of the initiative process will be reaffirmed.

The Court of Appeal's decision follows precedent and properly safeguards the initiative process. It should be allowed to stand.

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ARGUMENT

I.

PROPOSITION 77 SUFFERS FROM TOO MANY PROCEDURAL DEFECTS TO BE PLACED ON THE SPECIAL ELECTION BALLOT

Two different versions of the proposed initiative are now on public display. The version submitted by proponents to the Attorney General for preparation of a title and summary cannot be placed on the special election ballot, because it was never circulated to the voters. And the version circulated to the voters cannot be placed on the special election ballot, because it was never submitted to the Legislative Analyst for a fiscal analysis, it was never attached to the certification issued by the Secretary of State, it was never forwarded to the Senate and the Assembly, and it was never made available for submission of arguments for and against the measure.

The Secretary of State is required to request that voters submit ballot arguments by a press release issued at least 120 days before the date of the election, a deadline that passed on July 11, 2005. (See Elec. Code, §§ 9060-9062.) The version of Proposition 77 that proponents circulated and now wish to place on the ballot has not been the subject of any arguments for or against because the arguments presented to the Secretary of State all address the uncirculated version of the initiative. The Secretary of State has not had an opportunity to seek arguments from the voters on the circulated version as required by law. These statutory election safeguards – timely voter receipt of the ballot pamphlet and opportunity for public debate on the merits of the measure – have not been observed.

Moreover, the circulated proposal has not been the subject of a fiscal analysis by the Department of Finance and the Joint Legislative Budget Committee as required in the petition circulation process. (Elec. Code, §

9004, 9005.) Additionally, the Legislative Analyst also has provided no fiscal analysis for the Voter Information Guide as required by law. (Elec., § 9087.) Although the Attorney General prepared a ballot title and summary for the circulated version after being ordered to do so by the Court of Appeal, that title and summary does not include a fiscal impact of the measure because no fiscal analysis was ever performed on the circulated measure. (Slip Opn. at p. 15, n. 8.) While the Secretary of State has asked this Court to rule on this petition by 5:00 p.m. on August 15, 2005, so that the Voter Information Guide can be transmitted to the State Printer,^{3/} it is not clear how he could submit Proposition 77 for printing without the required fiscal impact statement and without the receipt of arguments for and against the measure.

Of course, the urgency caused by the impending deadline is of proponents' own making. The Court of Appeal concluded that proponents "significantly shortened the period of time available for the judicial resolution of the controversy" by "failing to make prompt disclosure" of the mistake. (Slip Opn. at p.5.)

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3. See Letter to Supreme Court from Secretary of State, dated August 10, 2005, p. 2.

II.

BROSNAHAN AND INDEPENDENT ENERGY PRODUCERS ARE DISTINGUISHABLE, AND THEY DO NOT STAND FOR THE PROPOSITION THAT AN INITIATIVE SHOULD BE PLACED ON THE BALLOT REGARDLESS OF ELECTION LAW VIOLATIONS

Proponents' contention that their petition should be granted because the Court of Appeal improperly engaged in pre-election review of Proposition 77 is an argument that they make for the first time in this Court. (See Slip Opn. at p. 15 [stating that "no party contended the matter inappropriate for pre-election determination"].) Although proponents did not question the propriety of pre-election review in the trial court or in the Court of Appeal, proponents now claim that preelection review should not have occurred. (Pet. Rev. at pp. 34-36.)

But the Court of Appeal correctly concluded that the unique facts of this case make it appropriate for pre-election review. Pre-election review is appropriate here because the challenge here was procedural, not substantive.^{4/} As Justice Mosk observed in his concurrence and dissent in *Brosnahan v. Eu*, the rule expressed in that case:

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 v. Eu*, *supra*, 31 Cal.3d at p. 6 (Mosk, J., concurring and

4. By contrast, the Court of Appeal's decision in *Independent Energy Producers Assoc. v. McPherson*, Supreme Court Case No. S135819 (review granted July 27, 2005), clearly considered the substantive constitutionality of Proposition 80, deemed the initiative unconstitutional, and struck it from the ballot on that basis.

dissenting) (emphasis added).) Of course, in *Brosnahan* this Court squarely addressed the procedural eligibility of the initiative in its pre-election decision, noting that the Legislature had passed urgency legislation changing the signature percentage needed to establish certification. (*Id.* at p. 4.) Thus, this Court concluded that the initiative should be placed on the ballot, but then declined to address the other substantive challenges raised in the lawsuit, concluding that those substantive matters could be addressed after the election. (*Ibid.*)

This Court has also applied Justice Mosk’s distinction in holding that the rule of *Brosnahan* does not apply to “jurisdictional cases.” (*Legislative v. Deukmejian* (1983) 34 Cal.3d 658, 666.) Such cases “go[] to the power of the electorate to adopt the proposal in the first instance.” (*Id.* at p. 667.)

The Court of Appeal noted that “significant policy reasons” exist to find that the procedural challenges to initiatives also fall outside the rule of *Brosnahan*. (Slip. Opn. at p. 17.) Post-election challenges are tightly limited, and procedural challenges to an initiative, unlike substantive challenges, do not forever deprive the voters of the chance to enact the measure. (*Id.* at p. 18.) An initiative held off the ballot by a procedural challenge can be put on future ballots if proponents correct the procedural problem. (*Ibid.*)

III.

THE COURT OF APPEAL’S DECISION DOES NOT CONFLICT WITH THE HOLDING IN MHC FINANCING

Proponents contend that review is appropriate because the decision in the Court of Appeal purportedly conflicts with the Fourth Appellate District’s decision in *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, a case involving municipal initiative petitions. Proponents’ argument lacks merit.

In *MHC Financing*, a city council chose to exercise its authority under Elections Code section 9215 to adopt a proposed initiative as an ordinance rather than putting it to a vote of the electorate. (*MHC Financing, supra*, 125 Cal.App.4th at p. 1377.) The city council, however, inadvertently adopted a prior, uncirculated version rather than the second, circulated version. (*Ibid.*) The city attorney also failed to issue a title and summary for the second ordinance, which was circulated with the title and summary prepared for the first version. (*Id.* at p. 1378.) More than two years later, the city council acted to cure its error by adopting the text of the second initiative as an ordinance. (*Id.* at p. 1379.) The plaintiff alleged that both ordinances were void, and asked that the city be enjoined from enforcing either ordinance. (*Id.* at p. 1380.) The court rejected the argument, reasoning that the first ordinance was invalid “only because the city council inadvertently adopted a somewhat altered version of the initiative that was circulated by petition, instead of an unaltered version as required under [Elections Code] section 9215.” (*Id.* at p. 1382.) The city council was therefore legally authorized to cure this mistake “by simply replacing the ordinance with the correct, unaltered version of the petition initiative, which was properly put before the city council and which the city council was required to adopt under section 9215.” (*Ibid.*)

The central issue in *MHC Financing*, whether a local legislative body can correct legislation that it adopted in error, is not present here. (*Id.* at p. 1377 [“The City’s main contention is that the trial court erred by ruling that it could not cure the defects in Ordinance 381 by enacting Ordinance 412. We agree with that contention and, accordingly, reverse that portion of the judgment.”].) For this reason, the Court of Appeal in this case correctly noted that *MHC Financing* was analogous to a post-election challenge. (Slip Opn. at p. 30.) The legislative action – the city council’s adoption of the initiative – had already occurred. Certainly, a city council can always adopt an

ordinance, even without prodding by an initiative petition.

Moreover, the invocation in *MHC Financing* of the substantial compliance doctrine is not inconsistent with the Court of Appeal's decision in this case. Both courts followed this Court's holding that substantial compliance "means *actual* compliance in respect to the substance essential to every reasonable objective of the statute." (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649.) In considering the statutes governing local initiatives, the *MHC Financing* case held that the purpose of Elections Code section 9203 had not been thwarted because the title and summary given to an initiative that had already been adopted by the city council was not misleading. (*MHC Financing, supra*, 125 Cal.App.4th at p.1391.)

The Court of Appeal in this case held that in this pre-election context, proponents did not substantially comply with the requirements of Article II, section 10, subdivision (d) of the Constitution, which is not applicable to local initiatives, and they did not comply with Elections Code section 9002. The court observed that there are significant differences between the statutory schemes governing local and statewide initiatives. (Slip Opn. at p. 30.) These differences include the absence of a ballot pamphlet viewing process for local measures and the absence of a statute applicable to local initiatives that is comparable to Elections Code section 9012, which prohibits elections officials from receiving or filing petitions that violate the procedures for circulation. (*Id.* (citing Elec. Code, §§ 9004, 9012).)

Finally, and most significantly, the proponents in *MHC Financing* "did submit the text of the circulated petitions to the appropriate officer during the period for preparation of the title and summary." (Slip Opn. at p. 30.) Therefore, unlike the proponents here, the proponents in *MHC Financing* "actually complied with the reasonable objectives of fixing the final text as a matter of public record before circulating their petitions." (*Ibid.*) The

different outcomes of this case and *MHC Financing* thus reflect the different facts of the two cases and their different procedural postures (pre-election challenge to initiative versus post-election challenge to the city's council's adoption of an ordinance), as well as differences between the statutory schemes governing state and local initiatives.

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IV.

EVEN IF THE SUBSTANTIAL COMPLIANCE DOCTRINE MIGHT BE APPROPRIATELY APPLIED IN OTHER CIRCUMSTANCES, IT SHOULD NOT BE APPLIED TO FORGIVE PROPONENTS' FAILURE UNDER THE UNIQUE FACTS OF THIS CASE

The trial court found that the differences in the two versions submitted by proponents are not simply typographical, formatting, or technical differences, but instead go to the substantive terms of the measure. The trial court found that in the exercise of ordinary care, proponents should have known of the different versions, and that even if the substantial compliance doctrine were to apply in this case, proponents did not substantially comply with election law requirements.

Proponents could have cured their mistake. Through the simple act of proofreading, proponents could have determined that the version that circulated was different from the version submitted to the Attorney General.^{5/} Moreover, proponents conceded that in May 2005 they knew the circulated version was not the version of the initiative that had been submitted to the Attorney General. (Slip Opn. at pp. 4-5.) In May 2005, no special election had been called and the next statewide election would have been the June 2006 primary. Thus, proponents had time to remedy their error by circulating the version of the initiative that had in fact been submitted to the Attorney General. Instead of curing the defect, proponents waited until after the Secretary of State certified Proposition 77, and after the Governor called the special election.^{6/} (*Ibid.*) The Court of Appeal correctly concluded that

5. When the Attorney General issued his title and summary for the proposed measure, he forwarded to proponents the title and summary and the text that the Attorney General had reviewed. (Slip Opn. at p. 9; See also Pet. App. exh. 3, ¶ 11.)

proponents were negligent, and that the substantial compliance doctrine could not forgive such negligence.

Circulating the wrong version of the proposed measure tainted the entire process in this matter, and the problem was of proponents' making. The facts of this case do not warrant emergency review by this Court.

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6. Indeed, because proponents' failure is procedural, they are free to begin the process anew and, by complying with all constitutional and statutory prerequisites, ask the voters to place a redistricting initiative on the next statewide ballot.


CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the petition for review and request for stay be denied.

Dated: August 11, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 14(c))

I hereby certify that:

Pursuant to California Rules of Court, Rule 14(c), in reliance upon the word count feature of the software used, I certify that the attached **ANSWER TO EMERGENCY PETITION FOR REVIEW ELECTION MATTER CRITICAL DATE: AUGUST 15, 2005** uses 13 point Times New Roman font and contains 3240 words.

Dated: August 11, 2005

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

Case Name: **Costa v. Superior Court, et al.**

Case No.: **California Supreme Court Case No.: S136294**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 11, 2005, I served the attached **ANSWER TO EMERGENCY PETITION FOR REVIEW** by transmitting a true copy by electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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Additionally, I served the aforementioned attached document by placing a true copy thereof to be delivered by depositing with the United States Postal Service to the following person(s) at the address(es) as follows:

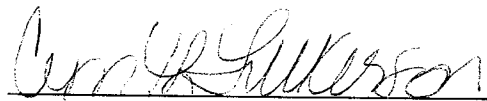
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Court Case No.: C050297

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 11, 2005, at Sacramento, California.

CYNTHIA FULKERSON

Declarant



Signature