

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-09684

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JOHANNA SCHULMAN,  
Plaintiff-Appellant,

v.

THOMAS REILLY, in his official capacity as ATTORNEY GENERAL  
and WILLIAM F. GALVIN, in his official capacity as SECRETARY  
OF THE COMMONWEALTH,  
Defendants-Appellees,

And

HON. RAYMOND FLYNN, HON. PHILIP TRAVIS, RICHARD GUERRIERO,  
JOSSIE OWENS, ROBERTO MIRANDA, RICHARD RICHARDSON,  
BRONWYN LORING, C. JOSEPH DOYLE, KRIS MINEAU, LURA MINEAU,  
THOMAS SHIELDS and MADELYN SHIELDS,  
Defendants-Intervenors.

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On A Reservation And Report From A Single Justice  
Of The Supreme Judicial Court For Suffolk County

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BRIEF OF THE PLAINTIFF-APPELLANT

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Statement of the Issue

- I. DID THE ATTORNEY GENERAL INCORRECTLY CERTIFY A PROPOSED CITIZEN-INITIATIVE CONSTITUTIONAL AMENDMENT THAT SEEKS TO "DEFINE MARRIAGE ONLY AS THE UNION OF ONE MAN AND ONE WOMAN" WHERE SUCH PROPOSED AMENDMENT RELATES TO "THE REVERSAL OF A JUDICIAL DECISION" AND THEREFORE IS EXCLUDED FROM THE INITIATIVE PROCESS BY THE MASSACHUSETTS CONSTITUTION AMENDMENT ARTICLE 48, THE INITIATIVE, II, §2?

Statement of the Case

Nature of the Case

The Plaintiff, a registered voter and resident of the Commonwealth, seeks relief relating to a citizen-initiated constitutional amendment Initiative Petition No. 05-02 ("Petition 05-02") that has been certified by the Attorney General under Amendment Article 48 of the Massachusetts Constitution ("Article 48"). The Plaintiff maintains that Petition 05-02 seeks to overturn the constitutional ruling of this Court in Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003) and thus relates to the "reversal of a judicial decision," an excluded matter under Article 48, and therefore should not have been certified by the Attorney General and should not be the subject of any

further official actions by the Secretary of the Commonwealth.

Prior Proceedings

The Plaintiff commenced this action on January 3, 2006 in the Supreme Judicial Court for Suffolk County against the Attorney General and the Secretary of the Commonwealth. (A. 4).<sup>1</sup> The complaint, sounding in certiorari and mandamus under G.L. c. 249, §4 and G.L. c. 249, §5, respectively, and declaratory relief pursuant to G.L. c. 231A, seeks a determination that the Attorney General erred in certifying Petition 05-02 and that the Secretary of the Commonwealth should take no further steps to advance Petition 05-02 to the ballot. (A. 7-19).

On January 11, 2006, twelve of the original signers of Petition 05-02 moved to intervene as defendants and filed an Answer to the Plaintiff's Complaint. (A. 4, 20-23). The single justice granted the motion to intervene on February 2, 2006. (A. 5).

The Plaintiff and the named Defendants filed a Stipulation Regarding Response to Complaint on January

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<sup>1</sup> References to the Record Appendix are designated as "(A. \_\_\_\_)."

19, 2006. (A. 24).

On January 31, 2006, the Plaintiff, the Defendants and the then-prospective Intervener-Defendants filed a Statement of Agreed Facts together with a joint motion to reserve and report. (A. 5, 25-333). The Single Justice (Spina, J.) reserved and reported the case on February 3, 2006. (A. 6, 335-336).

On February 6, 2006, the case was docketed in this Court; and oral argument was set for the May 2006 sitting. (A. 6, 336).

#### Statement of the Facts

On June 16, 2005, the Coalition for Marriage & Family, comprised of various state and national organizations (A. 101), held a press conference at the Massachusetts State House to announce the formation of a Ballot Question Committee, VoteOnMarriage.org, "to accomplish a citizens' initiative petition for a constitutional amendment." (A. 98).

Speaking on behalf of the Coalition, Kris Mineau, the President of the Massachusetts Family Institute (a Coalition member), announced their goal of defining marriage "as the exclusive union of one man and one

woman" in Massachusetts where "an activist court has redefined marriage ... without the citizens ever having their say ..." (A. 97, 101).<sup>2</sup>

In support of that goal, Mr. Mineau announced two, relevant major objectives:

(1) "to oppose and defeat the Travaglini-Lees Amendment," a legislative amendment that would have defined marriage as between a man and a woman while mandating civil unions for same-sex couples and that was awaiting a second necessary vote in a pending 2005 Constitutional Convention after having been approved initially in Constitutional Convention in March 2004;

(2) to propose instead a citizen-initiated constitutional amendment to define marriage, "free from the legislative maneuverings of the last four years," and to leave "the citizens of Massachusetts to decide what marriage is, not the courts." (A. 98-99).<sup>3</sup>

Mr. Mineau also announced that the language of

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<sup>2</sup> In a January 2004 Leadership Guide, the Massachusetts Catholic Conference, another Coalition member, posed this rhetorical question, "Will we work to overturn this court ruling [Goodridge]?" and provided this answer: support a constitutional amendment which "would reverse Goodridge v. Dep't of Public Health." (A. 101, 103, 126).

<sup>3</sup> A third announced objective - to introduce "reciprocal beneficiaries" legislation - is not pertinent to the question before the Court. (A. 98).

the Coalition's proposed amendment would read as follows:

When recognizing marriages entered after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage as only the union of one man and one woman.

(A. 98).

Subsequently, on or before August 3, 2005, thirty individuals, including Mr. Mineau, identified as the Proponents' Contact Person with a business address at Massachusetts Family Institute, filed an initiative petition with the Attorney General entitled "Initiative Petition for a Constitutional Amendment to Define Marriage." (A. 37-40). The language of the proposed amendment is nearly identical to that quoted above and identified at the Coalition's June 2005 press conference. (A. 38).<sup>4</sup>

Interested persons and organizations submitted materials to the Attorney General both in opposition to and in support of the certification of Petition 05-02. (A. 26-29, 41-138).

On September 7, 2005, in accordance with Article 48 The Initiative, II, §3, the Attorney General

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<sup>4</sup> The only difference is that Petition 05-02 includes the word "into" after "entered." (Compare A. 98 with A. 38).

certified Petition 05-02, including a determination that it contained no matters excluded from the initiative process. (A. 139-154).

In certifying that the Petition contained no excluded matters, the Attorney General adopted an interpretation of the "reversal of a judicial decision" exclusion that the Attorney General's Office had never articulated previously in addressing certification. (Compare A. 139-154 with A. 31-33, 159-216).

By December 7, 2005, the proponents filed with the Secretary of the Commonwealth a sufficient number of allowed certified signatures to require the Secretary to transmit Petition 05-02 to the General Court. (A. 30). The Secretary did so transmit the Petition on January 6, 2006. (A. 30).

The Plaintiff commenced this action on January 3, 2006. (A. 4).

#### Summary of Argument

This Court's review of the Attorney General's decision to certify an initiative petition is de novo. (pp. 9-10).

This case raises an issue of first impression

under that part of the "judiciary" exclusions in Article 48 that excludes any measure relating to "the reversal of a judicial decision." The exclusion applies only to the popular initiative, leaving both the legislative initiative and a constitutional convention as open avenues to seek to overturn a decision of this Court. (pp. 10-11).

In interpreting Article 48, this Court has always looked to give effect to the plain meaning of the constitutional language, reflecting how the words would be understood by the voters who ratified the amendment, in order to effectuate the dominant purpose of the amendment. (pp. 11-16).

The words "reversal of a judicial decision" must refer to a direct attempt to explicitly overturn a decision of this Court, and Petition 05-02 clearly and admittedly seeks to overturn this Court's Goodridge decision. (pp. 16-23).

The plain meaning here effectuates the dominant purpose of the "judiciary" exclusions to remove our courts, our judges and their decisions from the influence of politics and compromise. (pp. 23-29)

Although the Court need not - and should not - consult the Debates of 1917-1918 to resolve this case,

the trajectory of the debates shows that all the then-current national themes of judicial reform - focusing on judicial review, judges and the people's role in establishing governing law - were addressed by the convention and expressly excluded from the popular initiative, with one major exception, i.e., the Convention approved a new, easier method of legislative amendment. (pp. 29-37)

Contrary to the Attorney General's argument, there is sound reason to believe the Convention substituted "reversal" for "recall" deliberately. (pp. 37-40)

Even assuming that the "reversal of a judicial decision" exclusion is informed by Theodore Roosevelt's 1912 "recall of judicial decisions" proposal, Petition 05-02 is exactly the type of citizen action Roosevelt envisioned and which would thus be excluded by Article 48. (pp. 40-43)

The Attorney General's interpretation of Article 48 is novel and implausible. The Attorney General cannot explain why the delegates would exclude only a Roosevelt "mechanism" but leave untouched the people's ability to do exactly the same thing by a popular initiative using the Article 48 "mechanism." (pp. 43-

46).

Dicta in this Court's Mazzone and Albano decisions, where the "reversal of a judicial decision" exclusion was not fully briefed, should not be controlling in the present case that presents an issue not previously before the Court. Unlike Mazzone, the present case raises no concerns of eviscerating the popular initiative. (pp. 46-48)

#### Argument

I. THE ATTORNEY GENERAL INCORRECTLY CERTIFIED PETITION 05-02 WHICH, IN SEEKING TO OVERTURN THE GOODRIDGE DECISION, CONSTITUTES A "MEASURE THAT RELATES TO ... THE REVERSAL OF A JUDICIAL DECISION" AND THEREFORE MAY NOT BE PROPOSED BY AN INITIATIVE PETITION UNDER THE CLEAR AND EXPRESS LANGUAGE OF THE MASSACHUSETTS CONSTITUTION AMENDMENT ARTICLE 48, THE INITIATIVE, II, §2.

A. Standard of Review.

"This Court reviews de novo the Attorney General's certification that a petition does not contain an excluded matter under art. 48." Dimino v. Sec'y of the Commonwealth, 427 Mass. 704, 707 (1998)(reversing certification by the Attorney General); see also Yankee Atomic Elec. Co. v. Sec'y of the Commonwealth, 403 Mass. 203, 207 (1988)(de novo

review); Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 248-253 (1946)(same); Horton v. Attorney General, 269 Mass. 503, 508, 511-512 (1930)(same).

B. The "Judiciary" Exclusions In Article 48.

In Amendment Article 48 of the Massachusetts Constitution, the people first make clear that "[l]egislative power shall continue to be vested in the general court." Article 48, The Initiative, I. The people then reserved to themselves the popular initiative, id., while also setting forth a long series of matters that they excluded from the citizen initiative process. Article 48, The Initiative, II, §2. Those exclusions include the following that are directed to the judicial branch of the government:

SECTION 2. *Excluded Matters.* - No measure that relates to ... the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; ... shall be proposed by an initiative petition...

Article 48, The Initiative, II, §2.

Within these "judiciary" exclusions, the present case raises a question of first impression, viz. the interpretation and application of the "reversal of a judicial decision" exclusion in the context of a

citizen-initiated constitutional amendment, or  
"popular initiative."

In regard to these exclusions, it is important at the outset also to note that they address only the popular initiative and leave two other avenues for providing a constitutional response to a decision of this Court, i.e., the legislative initiative and a constitutional convention. By definition deliberative and less subject to passion, the legislative initiative and the constitutional convention provide a reasonable, moderate approach to the process of responding to this Court's constitutional rulings, particularly in light of the competing concerns that animated the 1917-1918 Constitutional Convention.

C. The Proper Interpretation Of The  
"Reversal Of A Judicial Decision"  
Exclusion Forbids The Certification  
Of Petition No. 05-02.

1. The standard for interpretation  
of Amendment Article 48.

This Court has time and again consistently set forth the standards for interpreting the Massachusetts Constitution and, in particular, Amendment Article 48.

First, and fundamentally, the provisions of

Article 48 "are mandatory and not simply directory. They are highly important. There must be compliance with them." Town of Mt. Washington v. Cook, 288 Mass. 67, 70 (1934) (quoting Opinion of the Justices, 271 Mass. 582, 589 (1930)).

Second, and equally fundamental, although the people "reserved to themselves" the popular initiative in article 48,

[s]ome matters are naturally unsuitable for popular lawmaking in that way, for various reasons. The people for their own protection have provided that the initiative shall not be employed with respect to certain matters.

Bowe, supra at 247.<sup>5</sup>

Turning more specifically to the interpretation of particular language in article 48, again this Court has set out clear principles.

First, and foremost, the focus is on the voters who have ratified the amendments because the goal is that "the will of the people may prevail." Opinion of the Justices, 324 Mass. 746, 748 (1949). As this Court stated in 1921, the vote is

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<sup>5</sup> As a corollary to this principle, the exclusions "would be futile, and the people could be harassed by measures of a kind that they have solemnly declared they would not consider" if the courts did not enforce them. Bowe, supra at 247.

to "be interpreted in a sense most obvious to the common understanding at the time," because [it was] proposed for public consideration and ought to be understood by all entitled to vote. [citations omitted]

...

What would the voters as men of common sense and average intelligence naturally think they were doing, when called upon to cast their ballots on the question submitted to them?

Loring v. Young, 239 Mass. 349, 372-373 (1921); see also, e.g., Yont v. Sec'y of the Commonwealth, 275 Mass. 365, 366 (1931)(amendment "was written to be understood by the voters to whom it was submitted for approval" and "is to be interpreted in the sense most obvious to the common intelligence"); Opinion of the Justices, supra, 324 Mass. at 749 (same); Lincoln v. Sec'y of the Commonwealth, 326 Mass. 313, 317 (1950)(same).

Second, and flowing directly from the foregoing focus on the voter, is the requirement that the plain meaning of the language of article 48 controls its interpretation. Loring, supra at 368; Mazzone v. Attorney Gen., 432 Mass. 515, 526 (2000).

As a result, amendment words are "to be given their natural and obvious sense according to common and approved usage at the time of [the amendment's] adoption." Id. (quoting Gen. Outdoor Advert. Co. v.

Dep't of Pub. Works, 289 Mass. 149, 158 (1935)). They are not to be given a narrow or constricted meaning because the words "are chosen to express generic ideas, and not nice shades of distinction." Opinion of the Justices, 308 Mass. 619, 626 (1941) (quoting Attorney Gen. v. Methuen, 236 Mass. 564, 573 (1921)); Town of Mt. Washington, supra at 70-71 (citing U.S. Supreme Court for the proposition that words in a constitution are "used in their normal and ordinary as distinguished from technical meaning"); Yont, supra at 366-367 (amendment phrases "are to be read and construed according to the familiar and approved usage of the language").<sup>6</sup>

Plain meaning includes application of the "established and recognized rules of grammatical construction." Yont, supra at 368.

Third, and more broadly, this Court has held that

[t]he aim of all interpretation is to give effect to the dominating idea of the instrument. Statements in the Constitution and its Amendments must be given effect in

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<sup>6</sup> Indeed, plain meaning cannot be overridden even where there is a danger that hewing to the pertinent words of article 48 might give the legislature the opportunity to manipulate the process. Yont, supra at 369 (clear prohibition of referenda on laws that make an appropriation applies regardless of argument that the legislature could immunize a law from a referendum by tacking on an appropriation).

consonance with the end they are designed to accomplish.

Town of Mt. Washington, supra at 70; Lincoln, supra at 317 ("If possible, the amendment must be construed so as to accomplish a reasonable result and to achieve its dominating purpose"). This Court has consistently tied this dominating purpose together with voter adoption and the obvious meaning of the words used. See, e.g., Opinion of the Justices, 365 Mass. 655, 657 (1974); Opinion of the Justices, 362 Mass. 895, 903 (1972).

These are the essential standards. As Buckley v. Sec'y of the Commonwealth, 371 Mass. 195 (1976) notes in quoting Chief Justice Rugg's succinct summary of the standard:

An amendment to the Constitution is a solemn and important declaration of fundamental principles of government. It is characterized by terse statements of clear significance. Its words were employed in a plain meaning to express general ideas. It was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language.

Id. at 199 (quoting Yont, supra at 366-367).<sup>7</sup>

Applying this standard in the instant case leads to the clear conclusion that the Attorney General erred in certifying Petition 05-02.

2. The plain meaning of the "reversal of judicial decision" language in Article 48 forbids certification of Petition 05-02.

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<sup>7</sup> In certain circumstances, this Court has used other tools of interpretation. With respect to Constitutional Convention debates, this Court clearly recognizes examination of debates as "permissible ... although the plain meaning of the words used in the amendment cannot be thereby controlled." Yont, supra at 369; Opinion of the Justices, 308 Mass. 601, 611 (1941); Loring, supra at 368 (debates "may be examined, not for the purpose of controlling the plain meaning of words ... but of understanding conditions under which [a provision] came into existence ...").

Similarly, this Court has occasionally examined the circumstances under which [an amendment] was framed, the causes leading to its adoption, the imperfections hoped to be remedied, and the ends designed to be accomplished.

In re Opinion of the Justices, 324 Mass. 746, 749 (1949) (quoting Gen. Outdoor Advert. Co., supra at 158); Mazzone, supra at 526 (similar statement).

However, everything concerning context, including the debates, serve simply as "one avenue only for construing the words of the amendment `in such a way to carry into effect what seems to be the reasonable purpose of the people in adopting (it)'." Buckley, supra at 198 (quoting Raymer v. Tax Comm'r, 239 Mass. 410, 412 (1921)).

Among the exclusions from the initiative that the people adopted "for their own protection," Bowe, supra at 247, is the exclusion of any measure relating to the "reversal of a judicial decision." Article 48, The Initiative, II, §2.

The words "reversal of a judicial decision" have an obvious and clear meaning which would have been understood by the voters in 1918 and, indeed, at any time. "Reversal" means, "An annulling or setting aside; rendering void; as the reversal of a judgment or order of a court." Standard Dictionary of the English Language 1527 (1895);<sup>8</sup> see also Black, Law Dictionary 1034 (2<sup>nd</sup> ed. 1910)("reversal" means "The annulling or making void a judgment on account of some error or irregularity. Usually spoken of the action of an appellate court"; "reverse" means "to set aside; to annul; to vacate").

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<sup>8</sup> Similarly, "reversal" means "3. The act of repealing, revoking or annulling; a change or overthrowing: as, the reversal of a judgment, which amounts to an official declaration that it is erroneous and rendered void or terminated." The Century Dictionary and Cyclopedia (1895); see also Oxford Dictionary Online (2<sup>nd</sup> ed. 1989)("reversal" means: "1. Law. The act of reversing or annulling a decree, sentence, punishment, etc.; the fact of being reversed or annulled"; noting also usage from 1884: "The Queen's Bench Division reversed his decision, and the present case is an appeal from that reversal").

"Judicial decisions" are "The opinions or determinations of the judges in causes before them, particularly in appellate courts ..." Black, supra at 669; Black's Law Dictionary 985 (rev. 4<sup>th</sup> ed. 1968)(same); Oxford English Dictionary Online (2<sup>nd</sup> ed. 1989)("decision" means "b. The final and definite result of examining a question; a conclusion; a judgment: esp. one formally pronounced in a court of law"; noting usage from 1827: "I have not been able to discover more than one dictum and one decision in favour of the distinction").

As such, the meaning of "reversal of a judicial decision" would be obvious to the common intelligence of the Massachusetts voters who ratified Article 48, i.e., they were expressly deciding to exclude from the initiative any measure that would set aside or vacate a court's opinion.<sup>9</sup>

This Court in Goodridge v. Dep't of Pub. Health,

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<sup>9</sup> See Lawrence B. Evans in The American Political Science Review, Vol. XV, No. 2, May 1921, at 214, 218 (technical Advisor to the Convention; " ... [the Initiative & Referendum's] distinguishing feature as compared with similar measures in other states may be said to be its exemptions. Neither the judiciary nor judicial decisions, nor the anti-aid amendment, nor any of the great safeguards of liberty set forth in the bill of rights may be made the subject of an initiative petition").

440 Mass. 309 (2003), ruled that insofar as Massachusetts state law excluded same-sex couples as same-sex couples from access to the civil institution of marriage, that law violated the Massachusetts constitution. See also In re Opinions of the Justices, 440 Mass. 1201 (2004). There is no dispute that Petition 05-02 is intended to, and would have, one effect, i.e., to set aside the constitutional ruling in Goodridge and return the law of marriage eligibility in Massachusetts to its pre-Goodridge state.

If the words "reversal of a judicial decision" meaning anything in their common, ordinary sense, they must refer to such a direct attempt to explicitly overturn a decision of this Court.<sup>10</sup>

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<sup>10</sup> The proponents of Petition 05-02 submit that the exclusion does not apply because Petition 05-02 does not seek to reverse the judgment in Goodridge. (A. 133). This is incorrect for several reasons. Most important, as noted in the text, "judicial decision" is a different and broader term than "judgment." (See also A. 74-76). Second, to the extent the exclusion is read in light of Theodore Roosevelt's "recall of judicial decisions" proposal, as argued by the Attorney General and the Petition proponents (A. 132, 137-152), that proposal specifically disavows reversing the judgment in any case. (A. 282). Third, it is unreasonable to assume that the framers of article 48 crafted an exclusion to focus on something that, as a baseline, was outside the legislative power of both the General Court and the people as violative of Article 30. See, e.g., In re Opinion of the Justices, 234 Mass. 612, 621 (1920) (it is an exercise of judicial

In certifying Petition 05-02, the Attorney General evaded this straightforward argument by simply changing the subject. Instead of addressing the actual language of Article 48 presented to and adopted by the people, the Attorney General turned the focus solely to the Constitutional Convention and the originally proposed language that spoke of "the recall of judges or judicial decisions." (A. 140). The Attorney General then said that "[t]he question is what the members of the Convention understood the term 'recall of judicial decisions' to mean." (A. 140-141).

As discussed below in Section I.C.4., the Attorney General's analysis is incorrect even if the proper primary focus is the Constitutional Convention and its members. However, more fundamentally, by simply ignoring the actual language voted on by the people, the Attorney General's analysis fails to follow this Court's guidance in ensuring that "the will of the people may prevail." In re Opinion of the Justices, supra, 324 Mass. at 748; see Robert F. Williams, The Brennan Lecture: Interpreting State

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power to reverse, annul or effect the judgment of a court); Spinelli v. Commonwealth, 393 Mass. 240 (1984).

Constitutions As Unique Legal Documents, 27 Okla. City U.L. Rev. 189, 194 (2002) ("State constitutions owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions ... [They] ... are therefore characterized by state courts as the 'voice of the people'."). That approach means finding the common understanding of a constitutional provision which, as in Massachusetts, "support[s] a strong preference for ordinary or plain meaning interpretation." Id. at 195; e.g., Loring, supra at 368.<sup>11,12</sup>

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<sup>11</sup> By contrast, the Attorney General's position, tied to the proposition that the exclusion relates solely and totally to the precise proposal popularized by Theodore Roosevelt in his 1912 presidential campaign and that Roosevelt dubbed the "recall of judicial decisions," would require this Court to hold that the "reversal of a judicial decision" language means - and was understood by the people voting to mean : "No [amendment] that relates [to the establishment of a Roosevelt-style "recall of judicial decisions" mechanism] ... shall be proposed by an initiative petition."

<sup>12</sup> It is also worth noting that "reversal" and "recall" are contained in the same sentence. It is a time-honored principle of construction that "when the Legislature, in the same sentence, uses different words, the courts of law will presume that they were used in order to express different ideas." Parkinson v. State, 14 Md. 184, 197, 74 Am.Dec. 522 (1859); see also Ginter v. Comm'r of Ins., 427 Mass. 319, 324 (1998)(different language in different paragraphs intends different meanings); Tamulevich v. Robie, 426 Mass. 712, 713-714 (1998)(with different phrases in

In sum, in ratifying an exclusion of any citizen-initiated constitutional amendment that relates to the "reversal of a judicial decision," the most obvious sense of those words to the voters in 1918 would have meant that there could not be a popular initiative designed expressly to reverse a Supreme Judicial Court decision.<sup>13</sup> This Court need go no further to decide the present case and reverse the Attorney General's certification decision.<sup>14</sup>

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two clauses, legislature "must have intended different meanings").

<sup>13</sup> The rules of grammar also support this interpretation. Article 48 speaks of the "reversal of a judicial decision," expressly using the singular rather than the plural and thereby envisioning (and excluding) a popular initiative amendment to reverse a specific SJC decision. The Attorney General's interpretation of the exclusion characterizes it as forbidding only an amendment that would create a mechanism to respond to a class of judicial decisions as opposed to individual decisions themselves. (A. 139-152).

<sup>14</sup> In addition to the text of the amendments, the convention ordered the "Explanatory Address" by the President of the Convention, John L. Bates, "be printed and sent to the registered voters of the Commonwealth." (Addendum B, internal page 15). As to the Initiative & Referendum, President Bates stated:

One of the longest debates in American political history took place in this Convention over this measure. It may well be doubted if the principles of the measure were ever before so thoroughly discussed by any body of men. I refrain from commenting on it. The fires may smoulder but they still burn, and I think it wise not to risk the stirring of the embers of twelve weeks of discussion. If adopted by the people, may

Moreover, in enforcing the plain meaning of Article 48, this Court is not, in any way, thwarting the will of the people. Rather, it is enforcing the judgment of the people in 1918 who put clear limits on their own use of the initiative. " ... [W]hat the judicial decision applies was first a political decision that others deemed worthy of constitutional magnitude." Hans A. Linde, Without Due Process: Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 131 (1970); see also Hurst v. State Ballot Law Comm'n, 427 Mass. 825, 828 (1998)(the Convention of 1917-1918 "sought a balance between competing impulses toward direct versus representative democracy").

3. The obvious and plain meaning of "reversal of a judicial decision" carries into effect the dominant purpose of the "judiciary" exclusions in Article 48.

As this Court has noted, the people have

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its results justify the fond hopes of its advocates. If rejected, may the future history of our representative form of Government show that its adoption was not necessary for the people's protection.

(Addendum B, internal page 16).

The reluctance of the President to comment for the people's benefit suggests that the people were left to their own understanding of the words presented. That certainly again supports a plain meaning interpretation.

"solemnly declared" in Article 48 that there are some measures "they would not consider." Bowe, supra at 247. These include the "judiciary" exclusions set forth in Section I.B., above.

The roots of the "judiciary" exclusions run deep. Indeed, in his inaugural address on January 6, 1916, when Governor McCall recommended the calling of a constitutional convention, he "advised excluding the judiciary and the Bill of Rights from the consideration of the convention." Augustus Loring, A Short Account of the Massachusetts Constitutional Convention 1917-1919, Supp. To the New England Quarterly, vol VI, No. 1, pp. 11-12 (1933).

Subsequently, at the convention, the Committee on the Initiative & Referendum, comprised of fifteen members, ultimately reported favorably - on a vote of 8 to 7 - on a proposed form of the Initiative & Referendum that became the basis for general convention debate. Debates in the Mass. Convention 1917-1918, vol. 2 [hereinafter "[vol.] Debates"] at 3-6; see also Raymond Bridgman, The Massachusetts Constitutional Convention of 1917, 46 (1923). The Chair of the Committee, Mr. John Cummings, provided the eighth vote for the majority by reserving the

right to offer three specific amendments, including one to exclude "any amendment relating to the judiciary." Bridgman, supra, p. 48; 2 Debates at 188 (noting a draft of Cummings' exclusions); see also Boston Evening Transcript, August 17, 1917 (describing Cummings' reservation of right to offer these amendments and then his joining seven other committee members to vote the "Walker Resolution" favorably).

Ultimately, once the convention had essentially settled on a compromise that accepted the concept of the constitutional side of the citizen initiative as well as a new, more accessible form of legislative initiative - the so-called "Loring Amendment," 2 Debates at 678-692; Bridgman, supra at 49-51, debate turned to amendments to safeguard and restrict the initiative and referendum process. See generally 2 Debates at 704-1062.

On October 23, 1917, Mr. Cummings introduced his "judiciary" exclusions, recognizing "the fact that under this amendment one department of government is removed entirely from the scope of the initiative." 2 Debates at 765, 789. He explained to the convention why he was "compelled, although I stand firmly for the initiative and referendum, to exclude the judicial

field from the operation of that principle." Id. at 789. His fundamental reason was clear, echoing sentiment throughout the convention:

We choose instead to make certain men our representatives, our judicial representatives, and we have transferred to them and have intrusted to them our judicial authority; but they have not the freedom of ordinary representatives; they cannot compromise; and that fact is borne in mind when we speak about the independence and integrity of the judiciary, and no man wants to sacrifice either. The independent judge is free to follow the law as he finds it, free to decide the facts as he finds them, and he is obliged, as he is honest, to decide according to the law and the facts. It is the most trying position that a public servant occupies; he must adhere strictly to the law, and he may not compromise. When a judge compromises, he enters on the way of tyranny, because he denies the law in a government of laws, and turns his back upon the administration of justice. If we wish to preserve the integrity of the judge, if we intend to make him independent so that he may resist the temptation to compromise, it is absolutely essential to remove his office as far as possible from the pressure of politics and politicians. Judges should not be drawn into politics to defend themselves or their decisions.

2 Debates at 790; see also id. at 231-232, 258, 396.

Mr. McAnarney spoke next emphasizing the "wisdom of protecting the courts and their decisions" and thus of this amendment "covering the entire judicial field." 2 Debates at 794-795. Speaking for the opposition, Mr. Walsh similarly understood the import

of the amendment, i.e., "to exclude from review by the people, one class, one branch of the Government." Id. at 796. He referred to it also as "the exclusion of judicial questions." Id. at 796.

The "judiciary" exclusions passed by a vote of 142 to 111, which, as Bridgman noted, "was an exceptionally large margin." Bridgman, supra at 58; 2 Debates at 797.<sup>15</sup>

It should be clear that the "general idea" behind the "judiciary" exclusions, and their intended effect, was to entirely remove the judicial branch of government from the initiative and referendum in order

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<sup>15</sup> The "judiciary" exclusions came before the convention four more times. First, two days after adoption, on October 25, 1917, Mr. Harriman moved to reconsider. 2 Debates at 797, 809. Mr. Cummings "beg[ged] this Convention to leave the courts alone." Id. at 811. The motion for reconsideration was defeated by a vote of 72 to 121. Id. at 812. Second, on November 14, 1917, Mr. O'Connell moved to strike the exclusions; and that motion was defeated by a vote of 66 to 140. Id. at 952. Third, a week later, on November 21, 1917, now working on the penultimate version of the Initiative & Referendum as produced by the Committee on Form and Phraseology, Mr. O'Connell again moved to strike the exclusions emphasizing in his remarks, id. at 970-980, the judicial appointment process and tenure while objecting to "find[ing] the judiciary and everything connected with it, exempted from the operation of the initiative and referendum." Id. at 971. Mr. O'Connell's motion was rejected by a vote of 98 to 159. Id. at 1044. Finally, Mr. Cummings himself sought to amend the exclusion language, believing it removed more from the process than he intended. Id. at 989-991. The Convention rejected Mr. Cummings' motion by a vote of 123 to 155. Id. at 991.

to remove courts and judges from the influence of politics and compromise. As this Court noted in Mazzone, “[i]t was largely this concern for the independence of the judiciary that informed the adoption of this general exclusion”; and the “reversal of a judicial decision” language was part of “this broad exclusion designed to protect the integrity of the judiciary.” Mazzone, supra at 527.<sup>16</sup>

Just as clearly, any power granted in the popular initiative that would allow the people to put to a vote whether a constitutional decision of the Supreme Judicial Court should be overturned - regardless of the means by which that is done, e.g., by introducing a direct constitutional amendment to overturn the ruling or by crafting a constitutional amendment that would create a mechanism whereby the people could then have a referendum-like vote on overturning high court decisions or otherwise - would intrude on judicial independence and draw the courts closer to politics and “temporary popular clamor.”

Petition 05-02 runs afoul of this dominant

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<sup>16</sup> Bridgman puts the issue in the reverse while making the same point. He notes that various efforts at amendments relating to the courts, judges and judicial decisions were intended “to make the judiciary less independent of temporary popular clamor ...” Bridgman, supra at v.

purpose and intended effect of the "judiciary" exclusions to protect the courts and their decisions from direct attack by popular plebiscite.

4. The convention debates and the historical context support the obvious and plain meaning of "reversal of a judicial decision."

As a permissible, secondary source, this Court has always recognized that the convention debates can assist in the interpretation of the Constitution. See, e.g., Yont, supra at 369. At the same time, the debates cannot control against plain meaning. Id.; Loring, supra at 368. Therefore, because the plain meaning of the words "reversal of a judicial decision" is crystal clear as applied to the specific question of the certification of Petition 05-02, see Section I.C.2., above, this Court need not - and, indeed, should not - consult the 1917-1918 Debates to resolve the present case.

Nonetheless, the long and complicated debates on the Initiative & Referendum, as well as the debates on various other amendments relating to the judiciary, support the plain meaning of the exclusion and, even if viewed with the most skeptical eye toward excluding

matters from the initiative, are at best equivocal and less than dispositive on the issue of certification in a case such as the present one. See Buckley, supra at 198-199 (debates serve a limited purpose particularly "where the language of the Debates is, by itself, less than dispositive of the issue").

- a. The convention debates tell a story of political principles and practical compromise.

It is fair to say that reform of the judiciary was a major theme of the 1917-1918 Constitutional Convention. It is equally fair to say that, on the whole, the convention was finally of a mind to "leave the judiciary alone" and, indeed, protect its independence as a cherished Massachusetts constitutional value.

During the Progressive Era, judicial reform was in the air because it was perceived that government was not responsive to people's needs - that necessary social welfare legislation was being thwarted either because the legislatures would not pass the bills or, if the new laws were declared unconstitutional by the courts, the legislatures would not advance the necessary constitutional amendments to cure the

constitutional flaw. Reform on the judicial side focused on proposals in several areas: (1) judicial review; (2) judges themselves, e.g., selection, tenure, recall, removal; and (3) the people's role in saying what governing law should be. See William L. Ransom, Majority Rule and the Judiciary (1912), pp. 70-78 (A. 261-265).

The 1917-1918 Convention considered all three. In July and August, 1917, before the Initiative & Referendum debate, the Convention rejected all attempts to change or eliminate judicial review. 1 Debates at 453-541. Similarly, in a debate that began in August 1917 but concluded in June 1918, the Convention rejected both election of, and limited tenure for, judges. Id. at 874-1027.<sup>17</sup>

As Ransom noted, the people's role in saying what the governing law should be - a question arising from disliked court constitutional rulings - raised three different questions: (1) the effectiveness of the traditional legislative method of amending a state constitution; (2) potentially creating a "constitutional initiative" to allow the people to

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<sup>17</sup> The Convention did approve an amendment for the retirement of judges that went out to the people and was adopted. See Article 58 (superseded by Article 98).

directly propose and vote on amendments to the constitution; and (3) potentially creating a mechanism whereby the people could have a referendum on a court's determination that a particular law was unconstitutional. Ransom, supra at 71-79, 99. (A. 261-266, 275). The last of these three was Ransom's reason for writing, i.e., to support Theodore Roosevelt's proposal for such a mechanism that Roosevelt called the "recall of judicial decisions."

Although Roosevelt's "recall" proposal, as carefully detailed by Ransom, id. at 107-118 (A. 279-285), was "abandoned as dead" by 1917, 2 Debates at 191-192; see William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937, 152-153 (1994)(A. 332), all three of Ransom's questions were in the minds of the convention delegates during the debates in 1917.

Most obviously, as this Court noted in Mazzone, supra at 526-527, the great debate of the convention concerned the creation of the people's constitutional initiative. See, e.g., 2 Debates 6-9, 14-15 (minority report in opposition) and (A. 46). That debate, by definition, brought in the other two issues. The proponents were animated by the specter of an

unresponsive legislature and the perceived difficulty of the existing legislative process for amending the constitution. See, e.g., 2 Debates at 49, 57, 681, 688, 998. The opponents worried about the courts and sensed that the proponents had nothing more in mind than finding a way for the people to directly attack court decisions, whether by creating a version of Roosevelt's "recall" mechanism or by simply using the proposed constitutional initiative to the same end. See, e.g., 2 Debates at 49-57, 187-192, 229, 560.

Out of this mix, the convention crafted a complex compromise. The proponents maintained the constitutional initiative, but they accepted restrictions, such as the indirect feature providing a gatekeeping role for the legislature. In exchange for a scaled-back initiative, the proponents also received a significantly loosened legislative amendment process. No longer could "twenty-one `wilful Senators'," or one-third of the House (see id. at 42 and 577), block an amendment.

On the other hand, the opponents of the constitutional side of the initiative obtained a role for the legislature in the process as well as major concessions on significant exclusions from the

people's initiative, in particular, protection for the courts and their decisions in the "judiciary" exclusions. As the debates make clear, Mr. Walker, as the leader of the proponents, and his committee majority did not approve of these exclusions; but he essentially allowed a conscience vote on them.

2 Debates at 796, 945.

The final piece of the compromise concerned the Declaration of Rights. The opponents of the initiative wanted it off the table completely, and they succeeded on two votes to exclude it from the initiative. 2 Debates at 739, 740. The proponents saw the Declaration of Rights as the central focus of the key legal questions of the day regarding the constitutionality of social welfare legislation. They were determined that the people have the right to amend the Declaration of Rights as necessary; and they ultimately won a close vote to delete the exclusion. 2 Debates at 948. In the end, a compromise exclusion removed much of the Declaration from the initiative but preserved - as open to the initiative - those parts seen as relevant to "any social welfare program." 2 Debates at 1001 (Mr. Walker).

One result of this largely compromised Initiative

& Referendum amendment, as well as other workings of the convention, was that the judiciary and judicial reform were entirely excluded. To the extent judicial review had been a focus, no separate amendment was approved (1 Debates at 453-541); and the court's power of judicial review, as well as the method of such review, was excluded from the initiative (see 2 Debates at 989-991).

To the extent the judges themselves were a focus, as to selection, tenure, recall, or removal, no separate amendment was approved (1 Debates at 874-1027); and these issues were excluded from the initiative.

To the extent that the ability to respond to disfavored court decisions was the question, the convention took the major step of proposing the annulment of the existing amendment process in Article 9 and the creation a new, and easier, legislative amendment process. Otherwise, aware that the initiative could be used to attack specific court decisions, whether by the creation of a Roosevelt-like mechanism or by single, separate, popular initiatives directed at individual decisions (that were clearly conceived of under the initial Initiative & Referendum

proposal), the convention excluded all possibility of "recalling" or "reversing" court decisions.<sup>18</sup>

On this last point, and put another way, the convention saw, and crafted an exclusion in response to, a danger in allowing the people to effectively hold a referendum on a Supreme Judicial Court decision by asking them to vote on whether they wanted a certain law regardless of what the court opined as to its constitutionality.

This was the general idea that everyone agrees animated the exclusion for the "reversal of a judicial decision," regardless of whether one focuses on the word "recall" or "reversal." In either case, Petition 05-02 comes within the exclusion's meaning as understood from the debates.<sup>19</sup>

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<sup>18</sup> It is worth noting that the legislative amendment process - wholly acceptable to the opponents of the popular constitutional initiative - remained, and remains, available to seek to overturn a judicial decision. Indeed, legislative amendments to overturn Goodridge were debated in a constitutional convention in early 2004 that ultimately approved an amendment. In the summer of 2005, the proponents of Petition 05-02 abandoned support for that 2004 amendment. (See A. 97-99). The amendment died at the September 2005 constitutional convention. Moreover, it was also clear, as a result of the compromise on the Declaration of Rights exclusion, that the people could anticipate existing constitutional dangers to social welfare legislation and propose "corrective" constitutional amendments in advance.

<sup>19</sup> Assuming for the sake of argument alone, that the debates identify an intent of the framers that differs

- b. The language "reversal of a judicial decision" expresses the intent of the convention.

The Attorney General's entire position hinges on his premise that "reversal of a judicial decision" is different from "recall of judicial decisions" and that "recall" must govern. However, there is good reason to believe that the convention used "reversal" deliberately.<sup>20</sup>

As the Attorney General notes (A. 140), the words "recall of judges or judicial decisions" first became separated to read "recall of judges; or to the reversal of a judicial decision," in the Committee on Form and Phraseology, see 2 Debates at 789, 953. Likewise, everyone agrees that the Committee intended "[n]o change ... in the document that affects its meaning one way or the other." Id. at 959 (Mr.

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from the ordinary meaning of the constitutional wording as ratified by the people, choosing between the drafters' intent and plain meaning would present a question of first impression in the Commonwealth. Other courts, seeking to affirm the will of the people, as does Massachusetts, have favored plain meaning over constitutional history. See Williams, supra at 200-201 (discussing case law).

<sup>20</sup> For the reasons set forth in Section I.C.4.c., infra, Petition 05-02 is excluded whether the rubric is "reversal" or "recall."

Loring).

The Attorney General assumes that this means that the amendment language must be read as if "recall of judicial decisions" still existed in Article 48. Putting aside the fact that the ultimate goal is determining what the people understood and voted for ("reversal of a judicial decision") and the fact that "recall" most directly modified "judges" and not "judicial decisions" in the original Convention document, the Attorney General simply ignores the more logical possibility, i.e., that the Committee did, in fact, make no change but was simply accurately capturing the Convention's meaning. Indeed, as the United States Supreme Court stated in Nixon v. United States, 506 U.S. 224 (1993), in discussing the U.S. Constitution and the Committee of Style which had no authority to alter meaning:

we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. That is, we must presume that the Committee did its job. (Citation omitted).

Id. at 231.

Here, there are additional reasons to assume that the Committee just "did its job" by splitting "judges"

from "judicial decisions," using both "recall" and "reversal" and changing the plural to the singular.

As Mr. Loring advised the convention,

[The Committee] has redrafted the document so that the committee believes it means precisely what it meant when it came into its hands. There is no change in meaning.

...

Unnecessary words were cut out, though not in every case. Where there seemed any possibility of the two words describing, not more accurately, but more plainly, what was the intended meaning, the two words were used rather than the one word, because the committee wished the document to be perfectly plain in every statement that was made, even at the sacrifice of brevity.

2 Debates at 959-960.

The leaders on both sides of the debate, Mr. Walker and Mr. Churchill, assisted the Committee in its work; and Mr. Walker expressly congratulated the committee, noting the measure was "well worded" and "clear." Id. at 960, 985.

Moreover, the committee's document became the subject of significant debate and received numerous amendments. 2 Debates at 961-1050. Although the "judiciary" exclusions were expressly debated on two more occasions, see fn. 13, above, including Mr. Cummings' effort at a specific language change, no one challenged the language of "reversal of a judicial decision." And one would presumably expect such a

challenge for lack of clarity if, as the Attorney General argues, the convention was thinking solely of Roosevelt's proposal for the "recall of judicial decisions" and intended to signal that very specific meaning to the voters.<sup>21</sup>

In the end, the presumption that the committee simply did its job "is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of [Form and Phraseology's] linguistic version." Nixon, supra at 231.

- c. Assuming that the meaning of "reversal of a judicial decision" is informed by Roosevelt's "recall" proposal, Petition 05-02 would still be squarely excluded by Article 48.

As this Court indicated in Mazzone, the phrase "recall of judicial decisions" was a reference "to Theodore Roosevelt's controversial 1912 proposal by that name." Mazzone, supra at 527. Assuming that, despite the alteration in language, the convention understood the "reversal of a judicial decision" exclusion to be closely informed by the Roosevelt proposal, Petition 05-02 is the very type of citizen

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<sup>21</sup> The Committee on Form and Phraseology was not immune from challenges to its work. See 1 Debates at 1022, 1027.

action Roosevelt envisioned with his proposal.

As the leading spokesperson for Roosevelt's proposal, Ransom provided this summary:

In other words, the proposal is that the direct expression of the popular will be made the ultimate guide in determining what the States may do in the exercise of their "police" or regulative powers, and that this shall be accomplished by permitting the people, at a proper interval after a State statute has been held by the State courts to be "unconstitutional" as not within the "police power," to vote directly and decisively upon the question whether *they* consider it within the scope of *their* constitution as *they* made it.

Ransom, supra, pp. 114-115 (A. 283).

Ransom also made clear that Roosevelt's proposal would only follow a determination of the "highest appellate court of a State," would not seek to amend the due process clause and would concern the "underlying law" and not the judgment of any particular lawsuit. Id., pp. 111-114 (A. 281-283).

Petition 05-02 tracks the Roosevelt proposal. As Roosevelt's proposal looked to decisions of the highest state appellate court declaring a law unconstitutional under the State constitution, that, of course, is exactly what the Goodridge decision did. The goal of Roosevelt's proposal was then to substitute, as to that particular ruling, a

determination that the law affected was, in fact, constitutional and that, of course, is exactly what Petition 05-02 seeks to do. Like Roosevelt's proposal, Petition 05-02 does not seek to amend the state due process clause but only to substitute a particular view as to a constitutional decision. In addition, like Roosevelt's proposal, Petition 05-02 does not seek to affect the actual judgment in any case but only the underlying constitutional rule, i.e., it expressly leaves the judgment for the Goodridge plaintiffs intact as they will remain married even if Petition 05-02 were ultimately adopted. In short, Petition 05-02 looks exactly like the type of action envisioned by Roosevelt's proposal and which, in any view, article 48 excludes from the popular initiative.

In sum, as Roosevelt imagined a people's referendum on the validity of a particular law declared unconstitutional, Petition 05-02 is nothing more or less than a voter-initiated referendum on the law of marriage eligibility as declared unconstitutional in Goodridge. Therefore, for this additional reason, Petition 05-02 cannot be certified.

5. The Attorney General's interpretation is novel and implausible.

The Attorney General's certification decision was entirely premised on a single proposition, i.e., that "reversal of a judicial decision" must be read as "recall of judicial decisions" which can mean only the exclusion of the people's ability to propose a constitutional amendment to create the mechanism propounded by Teddy Roosevelt in his 1912 presidential campaign. (See generally A. 139-152). If the Attorney General's premise fails, certification of Petition 05-02 was in error. For all of the affirmative reasons set forth above, Article 48 requires an interpretation different from that of the Attorney General. In addition, it is worth noting why the Attorney General's analysis falls short on its own terms.

First, it bears noting that since Article 48 took effect in 1918, there is no record that any Attorney General has ever previously adopted this particular narrow view of this exclusion in making a certification decision. (A. 31-33, 159-216).

More important, the Attorney General's narrow view is simply implausible. In support of the notion

that the delegates were excluding one very specific thing and nothing more - a constitutional amendment to create a Roosevelt mechanism that had very specific parameters - the Attorney General has not pointed to a single, express reference in the debates to the idea that that is what they were proposing and intending. (A. 139-152).

The debate - and there was a lot of it - concerned whether the people should be allowed to use the constitutional initiative to respond to constitutional rulings of this Court. Although the Attorney General spent considerable effort to demonstrate at length the technical difference between the Roosevelt recall and an amendment to the constitution (A. 143-150) - something the plaintiff does not dispute - he does not explain why the delegates would exclude the creation of the Roosevelt process (which would then allow the people to collect signatures to have a vote on any decision of this Court they disliked) but would leave wholly untouched the people's ability to do exactly the same things as to any individual decision of this Court without having to create the "Roosevelt" mechanism itself because they have the popular initiative mechanism.

Since it is clear that the proponents of the popular constitutional initiative were motivated by the same concerns that motivated Roosevelt, i.e., the people's ability to get and keep the social welfare legislation they demanded, Roosevelt's recall and the popular constitutional initiative work as two alternative methods to the same end. Conversely, an exclusion that, on its face, speaks to that singular end, requires considerable explication to reasonably be limited to only one of the two alternative methods.

Put another way, after elaborate debates in which the subjects included the use of the constitutional initiative to undo an SJC decision and where such an action was on a number of occasions discussed as producing the same result as Roosevelt's "recall" proposal, see, e.g., 2 Debates at 191-192, 228-229, 261, 560, it is implausible that an exclusion addressed to overturning judicial decisions would be limited to a Roosevelt mechanism.

6. This Court's decisions in Mazzone and Albano did not address the question presently before the Court.

This Court has on one occasion addressed the

"reversal of a judicial decision" exclusion. Mazzone v. Attorney Gen., 432 Mass. 515 (2000). However, it did so in the context of a proposed initiated law and not a constitutional amendment. Moreover, the proposed law was not drawn to reverse a Supreme Judicial Court decision or, indeed, any court's decision.<sup>22</sup> Id. at 525-528. As such, Mazzone never presented the question at issue in the instant case, i.e., the application of the exclusion where a constitutional ruling of this Court is in issue and where a popular constitutional initiative has been proposed to overturn that decision.

However, in dicta, Mazzone states,

Citizens could, effectively, overrule a decision based on State constitutional grounds, but they could do so only by constitutional amendment.

Mazzone, supra at 528.<sup>23</sup>

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<sup>22</sup> The narrowness of the question presented, and the Attorney General's position on the question with which the Court agreed, Mazzone, supra at 528, is succinctly captured in the Attorney General's brief to this Court. See A. 64 and Addendum C (internal pages 28-29). In sum, the specific holding of Mazzone is as follows: an initiated law to amend a current statute is not excluded by Article 48 simply because some court had previously applied the statute. Mazzone, supra at 528.

<sup>23</sup> The Court repeated this dicta in Albano v. Attorney Gen., 437 Mass. 156, 160 (2002). However, Albano, unlike Mazzone, did not raise any question concerning the "reversal of a judicial decision" exclusion.

Plaintiff respectfully submits that after full briefing focused on the exclusion, which was not available in Mazzone, and for all of the reasons set forth in this brief, the Court should determine that this is not a correct statement of the law. While it is correct and important that citizens can, through their representatives via a legislative amendment, seek to overrule a constitutional decision, and while it is also correct that citizens can initiate constitutional amendments in many circumstances, including in potential anticipation of, or concern for, constitutional decisions<sup>24</sup>, citizens cannot initiate a constitutional amendment to effectively ask the people to vote on whether they accept or reject a constitutional ruling of this Court.

Finally, in Mazzone, the Court was properly concerned that the proffered interpretation of the exclusion, suggesting that it operated whenever "a court had already applied" a statute, "would effectively eviscerate the popular initiative."

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<sup>24</sup> This, of course, was the situation in Albano, supra, where citizens proposed, among other things, to constitutionalize a definition of marriage when this Court had not yet addressed the question. Therefore, there was no basis for raising the "reversal of a judicial decision" exclusion in Albano.

Mazzone, supra at 528. That concern is not raised by the instant case, where the Court need not define the entire parameters of the exclusion, see Cohen v. Attorney Gen., 357 Mass. 564, 569-570 (1970), and where Petition 05-02 presents a narrow interpretation at the very core of the exclusion.<sup>25</sup>

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<sup>25</sup> As evidenced by the paucity of instances in which the exclusion has been raised to the Attorney General at the certification stage (A. 31-33) and by the fact that this litigation presents a question of first impression, the interpretation urged by the plaintiff raises no similar danger.

It is worth noting that the plaintiff is not aware of any attempt, prior to Petition 05-02 and since 1918, to use the popular initiative to reverse a constitutional ruling of this Court or, indeed, of any court.

According to records maintained by the Secretary of the Commonwealth, only six popular initiatives (one in 1938, one in 1974, three in 1980 and one in 1994) for constitutional amendments have gone to the ballot in Massachusetts since 1918, with four being adopted. (See Statewide Ballot Measures 1919 Through 2004 at [www.sec.state.ma.us/ele/elebalm/balmidx.htm](http://www.sec.state.ma.us/ele/elebalm/balmidx.htm), which provides both a chart of all ballot measures by type and an enumeration of ballot measures by year). None sought to reverse a judicial decision.

Looking more broadly, the Attorney General's 1918-1953 archived records at the State Archives indicate that there were only 13 proposed popular initiatives for constitutional amendments in that period. Of these, six did not survive Attorney General screening; two were excluded by this Court; and four died in the legislature, leaving one, in 1938, that went to the ballot and was approved. See State Archives, AGI, AG, Main Office, Series 1681, Initiative Petition Files, 1919-1953, 1 box. None of the 13 raised the "reversal of a judicial decision" exclusion, and there is no indication that any sought to reverse a court decision. (Id. and A. 31).

Conclusion

For all of the foregoing reasons, the plaintiff requests that this Court enter a judgment declaring that the Attorney General erred in certifying Petition 05-02; that the Secretary of the Commonwealth take no further steps to advance Petition 05-02 to the ballot; and that Petition 05-02 is excluded from the initiative process by the terms of Amendment Article 48 of the Massachusetts Constitution.

Respectfully submitted

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By her attorneys,

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With the Attorney General's initiative records from 1953 to 1991 misplaced (A. 31), it is impossible to know the number of popular initiatives for constitutional amendments that might have at least begun the process at the Attorney General's gatekeeping level in that period. However, assuming that a proposal to reverse a court decision would have raised an inquiry under the "reversal of a judicial decision" exclusion, the work of two former Assistant Attorneys General in 1991 (and who were writing before the historical files were misplaced) provides a reasonably good inference that no such popular initiatives were filed between 1953 and 1991 as well. (See A. 159-161).

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