COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK COUNTY NO. SJC-09684

JOHANNA SCHULMAN,
Plaintiff-Appellant,

v.

ATTORNEY GENERAL AND
SECRETARY OF THE COMMONWELATH,
Defendants-Appellees.

ON RESERVATION AND REPORT FROM THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

**BRIEF OF STATE DEFENDANTS-APPELLEES
ATTORNEY GENERAL AND
SECRETARY OF THE COMMONWEALTH**

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QUESTION PRESENTED

Whether an initiative petition to alter prospectively a rule of constitutional, statutory, or common law established in a court decision, is a petition relating to "the reversal of a judicial decision," as that phrase was used, and intended by the drafters to be understood, in the "judicial exclusions" that were added to Mass. Const. amend. art. 48 in order to protect the independence of the judiciary.

STATEMENT OF THE CASE

Introduction

Plaintiff challenges the Attorney General's certification of an initiative petition to amend the Constitution to provide, prospectively, that only marriages between a man and a woman would be recognized or permitted, without affecting existing same-sex marriages. Plaintiff claims that the proposed amendment, which seeks to alter the rule of constitutional law announced in Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003), constitutes the "reversal of a judicial decision" and therefore is excluded from the initiative process by art. 48, Init., pt. 2, § 2. Plaintiff's argument should be rejected because:

- The plain meaning of "reversal of a judicial decision" does not extend to the essentially legislative act (a constitutional amendment)

of prospectively changing the rule of law announced by that decision.

- Plaintiff's "plain meaning" argument cannot textually be confined to constitutional amendments, and thus would vastly reduce the scope of the initiative process--in a way the drafters never envisioned--by placing off-limits any interpretation of a state statute or common law rule adopted by this Court or any other court, as well as sharply limiting the constitutional initiative itself.

- A principal purpose of the constitutional initiative was to enable the people to respond to decisions of this Court on social welfare legislation, and plaintiff's reading would completely negate that purpose.

- The Debates in the Constitutional Convention of 1917-18 make crystal clear that, as this Court recognized in Mazzone v. Attorney General, 432 Mass. 515, 527-28 (2000), the "reversal of a judicial decision" exclusion was actually aimed at excluding one narrow type of petition--one relating to the "recall of judicial decisions," a Progressive-era proposal for the people to directly vote on the correctness of court decisions striking down social welfare laws, which is much different than amending the constitution itself in response to such decisions.

Prior Proceedings

On January 3, 2006, plaintiff, a registered voter in the Commonwealth, filed this action in the county court, challenging the certification of Initiative Petition No. 05-02 ("the Petition") and seeking certiorari, mandamus, and declaratory relief against the Attorney General and Secretary of the Commonwealth. RA 4, 7. Twelve original signers of the Petition

intervened as defendants. RA 5. The case was reserved and reported on a statement of agreed facts, RA 6, 25-36, 335-36, with argument set for May, 2006.[1] RA 336.

Statement of Facts

On or before the first Wednesday in August, 2005, an initiative petition proposing "A Constitutional Amendment to Define Marriage" was filed with the Attorney General. RA 26, 38. The proposed amendment provides as follows (RA 38):

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

On September 7, 2005, the Attorney General certified that the proposed amendment contains only matters that are not excluded from the initiative process by art. 48, Init., pt. 2, § 2, and met the other certification requirements of art. 48. RA 29. The Attorney General sent a lengthy letter to the opponents of certification, explaining his conclusion that the petition was not barred by art. 48's "reversal of a judicial decision" exclusion. RA 29-30, 139-53.

[1] This year, all formal business of the Legislature must end by July 31. See Joint Rule 12A (http://www.state.ma.us/legis/jtrules.htm). Under art. 48, Init., pt. 4, § 4, an initiative amendment must receive the affirmative votes of at least one-fourth of the members of the Legislature, meeting in joint session, in order to advance in the initiative process.

The Attorney General issued the "fair, concise summary" of the Petition as required by art. 48. RA 9. The summary reads:

> This proposed constitutional amendment would require the state and local and county governments to license and recognize only those marriages that are between a man and a woman. It would prohibit future same-sex marriages, but would allow continued recognition of those entered into before the adoption of the proposed amendment.

RA 155.

The petitioners timely filed sufficient additional signatures to require transmission of the Petition to the Legislature, and the Secretary did so. RA 30-31.

SUMMARY OF ARGUMENT

The "plain meaning" of "reversal of a judicial decision" does not extend to the essentially legislative act of amending the constitution (i.e., the fundamental law) to prospectively change a rule adopted in a judicial decision. "Reversal" is judicial in character, implying that the court's decision was wrong; amendment carries no implied criticism of the court's declaration of the law as then in effect, and respects judicial independence, while merely changing the law for the future. The drafters meant to protect the judicial field, while leaving the legislative field open to the people. Reversal would threaten judicial

independence, but amendment does not. (pp. 7-18.)

The distinction between reversing a judicial decision and responding to a court decision by legislating for the future had long been recognized in the Commonwealth and was well-established at the time of the Convention. (pp. 18-21.) Court decisions prior to the Convention show that prospectively changing a rule adopted in a court decision was not usually termed a "reversal of a judicial decision." (pp. 22-25.)

Plaintiff's "plain meaning" argument cannot be textually confined to constitutional amendments, and thus would sharply constrict the scope of the entire initiative process, by barring initiatives in response to any interpretation of Massachusetts statutory or common law, by any court. This would contravene the principle that art. 48 should be construed to protect the "people's process" for enacting laws. (pp. 25-29.) Plaintiff's argument would also place a large area of constitutional law beyond the reach of the initiative. This Court should hesitate before adopting such a restrictive interpretation of art. 48. (pp. 30-32.)

The Debates show that a main purpose of the "constitutional initiative" was to enable the people to respond to decisions of this Court on social welfare legislation, and plaintiff's interpretation would

completely negate that purpose. The debates before, during, and after the adoption of the "reversal of a judicial decision" exclusion are clear: the drafters specifically intended to allow the people to propose constitutional amendments to alter, prospectively, constitutional rules adopted in court decisions. (pp. 33-41.)

As this Court recognized in Mazzone, the judicial-decision exclusion was actually intended to bar only petitions relating to the "recall of judicial decisions"--a controversial process by which the people could vote directly on whether a statute should remain in effect notwithstanding a court's determination of its invalidity. There are important differences between "recall" and a constitutional amendment: "recall" is faster and less deliberative; is less subject to legislative control; directly criticizes the courts and their reasoning; and only validates a particular statute, rather than changing the words of the constitution, which change may go well beyond the statute and thus cause voters to be more cautious about adopting the amendment. (pp. 42-49.) The drafters clearly recognized that "recall" was distinct from the constitutional initiative; they meant to prohibit the former while allowing the latter, even in response to

court decisions. (pp. 49-53.)

The third-reading change from "recall" to "reversal" is understandable as merely clarifying art. 48. The phrase "recall of judicial decisions" was acknowledged by its supporters to be a confusing misnomer, whereas the term "reversal" was contemporaneously used to describe the effect of such a "recall." The Debates leave no doubt that the substitution of "reversal" for "recall" made no change in meaning. (pp. 53-58.)

There is nothing "novel" about the Attorney General's interpretation of the exclusion as allowing initiatives that prospectively alter rules of constitutional or statutory law in response to court decisions. This interpretation has been articulated on numerous past occasions. (pp. 59-60.)

ARGUMENT

I. THE PLAIN MEANING OF "REVERSAL OF A JUDICIAL DECISION" DOES NOT EXTEND TO THE ESSENTIALLY LEGISLATIVE ACT OF AMENDING THE CONSTITUTION (THE FUNDAMENTAL LAW) TO PROSPECTIVELY CHANGE A RULE OF LAW UNDERLYING A JUDICIAL DECISION.

Plaintiff errs in insisting that the "plain meaning" of "reversal of a judicial decision" extends to the quintessentially legislative act of prospectively changing the rule of law underlying that decision. "Reversal of a judicial decision" means a

direct determination, judicial in character, that a subordinate court's decision was wrong on the law as it then stood and has no further effect. Amending the law so that, if a similar case arose in the future, the result would be different, is legislative in character and implies nothing about whether the court erred in interpreting the prior law. The drafters, in their effort to protect judicial independence, understood these distinctions. An initiative petition "revers[ing] a judicial decision" would threaten judicial independence; a petition amending for the future the law underlying the decision would not.

These and other defects in plaintiff's "plain meaning" argument will be discussed in detail infra. At the outset, however, it is worth remembering that this Court has already recognized that the "reversal of a judicial decision" exclusion originally referred to the "recall of judicial decisions," and was edited by the Convention's Committee on Form and Phraseology to refer to "reversal" while making "no change in meaning." Mazzone, 432 Mass. at 527 & n.12. The Court has also recognized that the exclusion of "recall of judicial decisions" had a meaning far narrower than what plaintiff argues here--a meaning that would not exclude a petition for a constitutional amendment in

response to a decision of this Court. Id. at 527-28.

Though the phrase "recall of judicial decisions" was "not heavily debated," the Convention meant:

> to refer to Theodore Roosevelt's controversial 1912 proposal by that name. See [2 Debates in the Constitutional Convention of 1917-1918 (1918)] at 191, 228, 229. As used by Mr. Roosevelt, the phrase described the situation in which a State court sets aside a statute as unconstitutional and the people are given the opportunity to reinstate the same law, notwithstanding the court's declaration of its unconstitutionality.

Id. at 527-28. This "recall of decisions" process was opposed by most members of the Convention, who were "joined in their desire to protect the Supreme Judicial Court's power to declare statutes unconstitutional[.]" Id. at 527. But at the same time, proponents of the initiative process for constitutional amendments--the "constitutional initiative"--"saw the petition as a way to give the people a mechanism to respond to such decisions." Id.

> By way of example, proponents repeatedly cited New York's Workmen's Compensation Act which had been struck down as unconstitutional by that State's highest court. On the people's urging, the New York Legislature submitted a constitutional amendment that permitted a workers' compensation law to become effective. Proponents argued that if our Legislature were, in similar circumstances, to decline to pass a constitutional amendment, art. 48 would enable the people both to propose such amendment on their own and, if successful, to

> enact the desired statute. See [2 Debates] at 413-414, 739 (remarks of Mr. Walker).

Mazzone, id. at 427. Accordingly although Mazzone itself did not involve a proposed constitutional amendment, the Court concluded that the "reversal of a judicial decision" exclusion did not bar a constitutional amendment altering the basis for a prior decision of this Court:

> The grave concerns of the delegates for the independence of the judiciary, the origin of the phrase, the lack of debate on the phrase itself, and the purposes of art. 48 as a whole lead us to agree with the Attorney General's position on this matter. By excluding from the initiative process those petitions that "relate[ ] ... to the reversal of ... judicial decision[s]," the constitutional convention intended no more than to prevent a statute, declared unconstitutional by a State court, from being submitted to the people directly and thereby reenacted notwithstanding the court's decision. Citizens could, effectively, overrule a decision based on State constitutional grounds, but they could do so only by constitutional amendment. The overly broad reading urged by the plaintiffs ignores the historical context of the article and would effectively eviscerate the popular initiative by excluding all petitions relating to statutes that a court had already applied if enactment might result in a different decision.

Mazzone, 432 Mass. at 528.

Even more recently, this Court said: "The initiative process permits the people to petition for a constitutional amendment that overrules a court

decision when the court has declared a statute to be in violation of our Constitution." Albano v. Atty. Gen'l, 437 Mass. 156, 160 (2002) (citing Mazzone; ruling that petition for amendment to prevent courts from adopting a particular interpretation of constitution did not impermissibly relate to "powers of courts").

Indeed, Mr. Cummings, who chaired the Convention's Committee on Initiative and Referendum (2 Debates at 2) and who proposed the exclusion for the "recall of judicial decisions," nevertheless made clear, in his speech advocating the judicial exclusions, that:

> Under the initiative and referendum, if the courts declare a law unconstitutional we have the power to expand the Constitution and reenact the law and make it constitutional. If the law that is invoked does not fit the case we have the power under the initiative and referendum to pass a new law that will fit the case.

2 Debates at 791.

The Petition at issue here plainly does not relate to the "recall of judicial decisions," as that phrase was construed in Mazzone. See Part III infra. Nevertheless, plaintiff asks this Court to ignore these passages of the Debates, treat the above-quoted passages of Mazzone and Albano as erroneous dicta, and hold that the "plain meaning" of "reversal of a judicial exclusion" bars petitions that prospectively

change the law in response to court decisions.

The Attorney General will therefore respond to plaintiff's argument by explaining--without relying on the third-reading change from "recall" to "reversal"--why the Petition is not within the "plain meaning" of the "reversal of a judicial decision" exclusion.

A. "Reversal" Is Judicial in Character, Implying That the Prior Judicial Decision Was Wrong; Amendment Is Legislative in Character, Changing the Law Prospectively Without Implying That the Judicial Decision Was Wrong.

"Reversal of a judicial decision" has the character of a judicial act, implying that the judicial decision was erroneous, and "reversal" by a non-judicial body would invade judicial independence. Prospectively changing the constitution or law, in contrast, has the character of a legislative act and neither implies judicial error nor invades judicial independence. A court decides that the constitution or law as then in effect requires a particular result. Changing the constitution or law to require a different result in a future case in no way necessarily implies that the court was wrong about the constitution or law as it stood at the time of the decision.

The Supreme Court has recognized this distinction in the context of "Congress' decision to alter the rule

of law established in one of our cases--as petitioners put it, to "legislatively overrul[e][.]" Rivers v. Roadway Exp., Inc., 511 U.S. 298, 304-05 (1994) (citing petitioners' brief). As the Court recognized,

> A legislative response does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law--or it may be altogether indifferent to the decision's technical merits--but may nevertheless decide that the old law should be amended, but only for the future.

Id. (emphasis added).[2]

Thus, amending the constitution to prohibit same-sex marriage prospectively would not imply that Goodridge was wrongly decided; it would not "reverse" Goodridge as the term "reverse" was used by the drafters of art. 48. The amendment would be an act of lawmaking, not adjudication. The amendment might be viewed as "legislatively overruling" Goodridge, i.e., prospectively adopting a new constitutional rule in place of the one announced in that case. But art. 48 does not use the term "legislatively overrule" or even "overrule"; it does not exclude petitions that "overrule" judicial decisions, as it could have if the

[2] Rivers recognized that Congress could also make such amendments apply retroactively, raising separate issues. Id. Those issues are not relevant here.

drafters had meant to prevent such petitions. Rather, art. 48 excludes petitions that relate to the "reversal of a judicial decision," a much narrower category.

Indeed, the early-20th-century definitions of "reversal" relied on by plaintiff here, Br. at 17 & n.8, refer to "an annulling or setting aside," or "making void a judgment on account of some irregularity[, u]sually spoken of the action of an appellate court"; "vacat[ing]"; or "the reversal of a judgment, which amounts to an official declaration that it is erroneous and rendered void or terminated." Barring initiatives relating to the "reversal of a judicial decision" certainly bars the people from constituting themselves a super-appellate court. But a prospective legislative change in the rule underlying a judicial decision does not annul, set aside, vacate, or render void that decision, or "amount to an official declaration that it is erroneous." The Petition here would do none of these things to Goodridge. At most it would legislatively or constitutionally "overrule" Goodridge--yet that term is conspicuously absent from plaintiff's proffered definitions of "reversal."

The voters in 1918 would not have understood the "reversal of a judicial decision" exclusion to prohibit initiatives that made prospective changes in the

constitution or laws as interpreted by the courts. In short, the "plain meaning" of "reversal of a judicial decision" does not encompass this Petition.

1. The drafters meant to protect the "judicial field" while leaving the legislative field, including amending the constitution or laws in response to court decisions, open to the people.

The distinctions between "reversal" (a judicial act) and amending the constitution or laws (a legislative act) are critical because, as is obvious on the face of the "judicial exclusions,"[3] and as the Debates confirm, the main purpose of the exclusions was to protect the independence and integrity of the judiciary. See Mazzone, 432 Mass. at 527 (citing 2 Debates at 789-97). Mr. Cummings, chairman of the Committee on Initiative and Referendum and the proponent of the judicial exclusions, stood "firmly for the initiative and referendum" but felt "compelled . . . to exclude the judicial field from the operation of that principle." 2 Debates at 789 (emphasis added). "Judges should not be drawn into politics to defend

[3] The "judicial exclusions" provide, "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[.]" Art. 48, Init., pt. 2, § 2.

themselves or their decisions." Id. at 790. Mr. Cummings further explained the distinction he was drawing, and the "judicial field" he meant to protect, as follows:

> The justices here will not be exposed to criticism, unjust as it may be, to which they frequently are exposed. Under the initiative and referendum, if the courts declare a law unconstitutional we have the power to expand the Constitution and reenact the law and make it constitutional. If the law that is invoked does not fit the case we have the power under the initiative and referendum to pass a new law that will fit the case. In brief, the principle of the initiative and referendum is restricted so that it shall not invade this field.

Id. at 791; see id. at 795-96 (Mr. Cummings referring to court's power to declare statutes unconstitutional as "the judicial field" he meant to protect).

The courts' role was to "declare[] the law," id. at 793, and Mr. Cummings did not think the people distrusted the courts' role or decisions. Id. at 793, 795, 597-98. Rather, the people were growing to distrust the Legislature, which had failed to take effective action in response to judicial decisions adverse to, in particular, the interests of the working class. See id. The problem was not only the potential of adverse constitutional decisions;[4] Mr. Cummings gave

[4] The critical importance of using the initiative to respond to constitutional decisions was identified (continued...)

concrete examples of both common law[5] and statutory[6]

[4](...continued)
not only by Mr. Cummings, id. at 791, but by numerous other members, as discussed infra. Of particular interest on the issue of attitudes towards the courts were the remarks of Mr. Whipple, id. at 48-49 (asserting that if constitutional initiative were adopted, people would have a remedy for decisions invalidating social welfare legislation, and would thus have no cause to criticize courts for such decisions); id. at 57-58; and Mr. Harriman, id. at 250 (asserting that problem was not court's interpretation of constitution, but Legislature's failure to propose amendments in response).

[5] He cited Farwell v. Boston & Worcester Railroad Co., 4 Metc. (45 Mass.) 49, 60 (1842), adopting the "fellow-servant" doctrine, which the Legislature did not alter until 1887. 2 Debates at 597. Thus labor "began to distrust the Legislature. They did not distrust the courts. They seemed to take it for granted that they should accept the law as they found it, but they wondered why in all that long period no attempt was made to relieve them." Id.; see id. at 795 (Mr. Cummings repeating these remarks during debate on his proposed judicial exclusions); id. at 793 (problem exemplified by Farwell was "not that the court had not declared the law, but that the Legislature remained forty years without doing anything to amend the law"); id. at 245-46 (Mr. Harriman).

[6] He cited (id. at 598) a series of statutes prohibiting employers from imposing fines on weavers, the first of which was held unconstitutional [Commonwealth v. Perry, 155 Mass. 117 (1891)], and the last of which was narrowly construed by this Court so as to deny substantial protection to weavers. [Commonwealth v. Lancaster Mills, 212 Mass. 315 (1912).] Thus "when labor came looking for relief the Legislature failed to pass an adequate enforceable law." Id. at 598. Mr. Cummings was likely familiar with this issue because he had represented a weaver in an appeal to this Court involving a fine imposed by an employer under one version of the statute. Gallagher v. Hathaway Mfg. Co., 172 Mass. 230 (1898). See also 2 Debates at 598 (Mr. Cummings describing how Legislature failed to take steps to give relief to labor in response to other court decisions). "Do you wonder
(continued...)

decisions, the Legislature's lack of response to which caused the people to become frustrated and caused Mr. Cummings to support the initiative. This explains his remark: "If the law that is invoked does not fit the case we have the power under the initiative and referendum to pass a new law that will fit the case." In sum, Mr. Cummings and others wanted to prohibit use of the initiative process to challenge the correctness of court decisions--which would invade the judicial field of interpreting and applying the law as it stood--but wanted to allow its use to change the constitution or laws underlying those decisions--a use that would not invade the judicial field, subject the judiciary to criticism, or draw judges into defending the correctness of their decisions. Prohibiting initiatives relating to the "reversal of a judicial decision" achieves that balance.

2. The distinction between reversing a judicial decision and legislating for the future was well-established at the time of the Convention.

Long before the Convention of 1917-18, and in cases and opinions around the time of the Convention and afterwards, this Court and the Justices repeatedly recognized, in the article 30 separation-of-powers

[6](...continued)
that labor distrusted the Legislature?" Id.

context, the distinction between impermissible legislative reversal of a judicial decision and permissible prospective legislation in response to judicial decisions. This reflected the principle stated by Alexander Hamilton concerning the federal judiciary: "A legislature without exceeding its province cannot reverse a determination once made, in a particular case, though it may prescribe a new rule for future cases." The Federalist No. 81, at 545 (A. Hamilton) (J. Cooke ed. 1961), quoted in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995). See also Thomas M. Cooley, A Treatise on Constitutional Limitations 135-36 (7th ed. 1903) (to same effect).

Decisions and opinions recognizing that the Legislature may not interfere with vested rights under final judgments, but may alter the governing law prospectively, include Sparhawk v. Sparhawk, 116 Mass. 315, 318-20 (1874); Sawyer v. Davis, 136 Mass. 239, 245-46 (1884)(citing similar ruling in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1855)); and Opinion of the Justices, 234 Mass. 612, 621-22 (1920). More recent cases, including several holding that the Legislature may enact laws

that affect pending cases, are cited in the margin.[7]

Thus it does not invade the judicial field to enact a statutory or constitutional amendment that responds to a completed case and would produce a different result in a future case. This distinction did not and could not have escaped the drafters of art. 48. Their exclusion of petitions relating to the "reversal of a judicial decision," intended to preserve judicial independence, could not have been meant to prohibit petitions making prospective changes to the constitution and laws in response to court decisions.

This Court disposed of a closely related claim, based on another of the "judicial exclusions," in Albano, 437 Mass. 156. In that case, decided while Goodridge was making its way to this Court (id. at 160 n.5), an initiative petition would have amended the constitution to prohibit same-sex marriage, effectively barring this Court from ruling as it ultimately did in Goodridge. Opponents therefore argued that the petition violated art. 48's "powers of courts" exclusion. This Court disagreed, reasoning that

[7] Carleton v. Town of Framingham, 418 Mass. 623, 634-35 (1994); Clean Harbors of Braintree v. Bd. of Health of Braintree, 415 Mass. 876, 880 (1993); Boston v. Keene Corp., 406 Mass. 301, 313-14 (1989); Spinelli v. Comm., 393 Mass. 240, 242-43 (1984); New England Trust Co. v. Paine, 317 Mass. 542, 545-47 (1945). The federal rule is the same. Plaut, 514 U.S. at 226-27.

"[e]ven assuming that the main purpose of the petition is to prevent the courts from adopting a certain interpretation of our substantive law, this purpose is not excluded by art. 48." Albano, 437 Mass. at 160. The Court thus did not see an initiative amendment prospectively changing the constitutional rule courts must apply as interfering with the "powers of courts." As that exclusion (like the "reversal of a judicial decision" exclusion) is concerned with the independence of the judiciary, and yet the amendment in Albano did not infringe on judicial independence so as to trigger the exclusion, the same type of amendment cannot interfere with judicial independence merely because here, it follows, rather than precedes (as in Albano), a judicial decision.

In sum, the "reversal of a judicial decision" exclusion respects a well-defined and long-recognized distinction. It protects the judicial field of interpreting and applying the current law, while leaving the legislative field--the field of deciding what the constitution and laws shall be in the future--open to the people.

3. Court decisions from before the Convention confirm that prospectively altering the rule adopted in a court decision was not usually termed a "reversal of a judicial decision."

Plaintiff's "plain meaning" argument does not accord with the ordinary usage of language at the time of the Convention. Courts of that period and earlier eras did not usually refer to a prospective legislative alteration of a rule adopted in a court decision as having "reversed" that court decision. Instead, the courts spoke of decisions as stating rules that might then be reversed by statute,[8] or occasionally of decisions or doctrines being overruled by statute,[9] but not of decisions themselves being "reversed" by statute, or by a legislature or Congress. With one exception,[10] the Attorney General can find no state or

[8] See Fay v. Taylor, 68 Mass. 154, 157-58 (1854); Miller v. Donovan, 92 P. 991, 993 (Idaho 1907); State v. Long, 57 S.E. 349, 350 (N.C. 1907), overruled on other grounds, State v. Ray, 66 S.E. 204, 205 (N.C. 1909), State v. Batdorf, 238 S.E.2d 497, 502 (N.C. 1977); In re Lent's Estate, 22 N.Y.S. 917, 919 (N.Y. Sur. 1892); and Bilderback v. Boyce, 14 S.C. 528, 1881 WL 5856, *1 (S.C. 1881).

[9] See Harrington v. Butte Miner Co., 139 P. 451, 452 (Mont. 1914); Patteson v. Chesapeake & O. Ry. Co., 26 S.E. 393, 394 (Va. 1896); Darrigan v. N.Y. & N. E. R. Co., 52 Conn. 285, 1885 WL 8742, *14 (Conn. 1885).

[10] In Hans v. Louisiana, 134 U.S. 1,11 (1890), the Court referred to the Eleventh Amendment as having "reversed the decision" in Chisholm v. Georgia, 2 Dall. 419 (1793), but also said that the Eleventh Amendment (continued...)

federal case prior to or at the time of the Convention that used the phrase "reversal of a judicial decision" in the sense that plaintiff argues for here.

When the phrase was used, it was used in very different sense. Sometimes it was used to refer to action that could be taken by a court.[11] Sometimes it was used to refer to action that could not be taken by a legislature.[12] Rarely was it used to refer to a prospective legislative change in the constitution or laws.[13]

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[10](...continued)
had "overruled" Chisholm. This usage of the term "reversed" may have been influenced by the opinion of the lower federal court in Hans, which, alluding to Chisholm's construction of U.S. Const. art. III, § 2, stated that "that construction had been reversed" by the Eleventh Amendment. Hans v. Louisiana, 24 F.55, 65 (C.C. E.D. La. 1885) (emphasis added). Reversing a judicial "construction" of the constitution is not the same as reversing the decision itself. In any event, in other cases of that era the Supreme Court avoided the term "reverse" as used in its Hans opinion. E.g., Brushaber v. Union Pac. R. Co., 240 U.S. 1, 18 (1916) (Sixteenth Amendment, regarding Congress' power to levy income taxes, "was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided", citing Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895)).

[11] Marshall v. Silliman, 61 Ill. 218, 1871 WL 8235, *2 (Ill. 1871); Taylor v. Commonwealth, 26 Ky. 401, 1830 WL 2143, *6 (Ky. 1830).

[12] Gibson v. Sherman County, 149 N.W. 107, 107 (Neb. 1914) (court's syllabus); id. at 108-09; see also Booten v. Pinson, 89 S.E. 985, 992 (W. Va. 1915).

[13] If non-judicial sources are examined for the purpose of determining contemporaneous usage, it may be (continued...)

Given the prevalent usage of the time, if the drafters of art. 48 had intended to prevent the people from making such changes in response to a court decision, the drafters more likely would have chosen another phrase. The phrase they did choose, "reversal of a judicial decision" was used almost exclusively to refer to actions that could be taken by judicial tribunals, and thus was intended only to prevent the people from exercising judicial, not legislative power.[14]

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[13](...continued)
relevant that one of the leading exponents of the "recall of judicial decisions," in his book on the subject, referred in places to constitutional amendments "reversing" judicial decisions--but in many instances he put the term "reverse" in quotation marks, implicitly recognizing the awkwardness of the usage. Wm. L. Ransom, Majority Rule and the Judiciary (1912) at, e.g., 77 n.1, 78, 162 (reproduced at RA 217-317). It should also be acknowledged for the sake of completeness that, at the Convention, one opponent of the constitutional initiative referred to those who wanted the people to have the power to amend the constitution in response to a decision of this Court as wanting "the authority to change the Constitution and thereby reverse the decisions of the Supreme Judicial Court." 2 Debates at 228 (Mr. Kinney). But, as plaintiff has argued that the meaning of "reversal of a judicial decision" is "plain" and should be resolved without reference to the Debates (Br. at 7-8, 30), this remark will not be discussed here. Once the "plain meaning" argument is disposed of and the Debates are examined, see Parts II and III infra, it becomes even clearer that the phrase "reversal of a judicial decision" was meant not to bar prospective constitutional amendments, but instead to bar petitions relating to the "recall of judicial decisions."

[14] The earliest post-Convention judicial usage of (continued...)

Even if plaintiff were able to discover any substantial contemporaneous usage of "reversal of a judicial decision" that accords with her own, the most that would do is show that the phrase was susceptible of more than one meaning. In that case, as plaintiff acknowledges (Br. at 16 n.7), it would be proper to consult the Debates to determine what the drafters meant. As will be shown in Parts II and III infra, the Debates establish beyond doubt that plaintiff's interpretation is not what the drafters intended.

B. Plaintiff's "Plain Meaning" Argument Cannot Textually Be Confined to Constitutional Amendments, and Thus Would Vastly Reduce the Scope of the Initiative Process by Placing Off-Limits Any Interpretation of a Statute, or Any Common Law Rule, Adopted by Any Court.

Plaintiff's insistence that the "plain meaning" of "reversal of a judicial decision" extends to prospective changes in response to judicial decisions, coupled with plaintiff's insistence that "the Court

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[14](...continued)
"reversal of a judicial decision" known to the Attorney General that comes close to plaintiff's claimed meaning is from 1955. Revere Camera Co. v. Masters Mail Order Co. of Washington, D.C., 128 F.Supp. 457, 461 (D. Md. 1955). The next such decision--the first to squarely use the phrase as plaintiff does--is from 1962. Killough v. United States, 315 F.2d 241, 247 (D.C. Cir. 1962). Whatever the merits of such usage, the fact that it did not appear until forty years after the voters ratified art. 48 is additional evidence that those voters did not read "reversal of a judicial decision" as plaintiff now claims.

need not--and should not--consult the Debates of 1917-18 to resolve this case," Br. at 7-8, 30--would give the "reversal of a judicial decision" exclusion extraordinary sweep. Nothing in the text of the exclusion limits its application to constitutional amendments, and if the Debates are off-limits for purposes of understanding the exclusion, then there is no basis for so limiting it. The result of plaintiff's theory would be a prohibition of any initiative petition seeking to prospectively change the law in response to a statutory or common law, as well as a constitutional, decision. As this Court has said, "[t]he overly broad reading urged by the plaintiffs ignores the historical context of the article and would effectively eviscerate the popular initiative by excluding all petitions relating to statutes that a court had already applied if enactment might result in a different decision." Mazzone, 432 Mass. at 528.

A concrete example is the initiative law enacted as St. 1994, c. 231, which amended G.L. c. 90, § 34, to prohibit transfers from the state highway fund to other state funds--a direct response to the holding of Mitchell v. Sec'y of Admin., 413 Mass. 330 (1992), that such transfers were lawful. See Sec'y of the Comm., Information for Voters: The 1994 Ballot Questions

(1994) at 27, 29, 30 (argument against measure, and legislative committee reports, recognizing that initiative petition was a response to Mitchell). If plaintiff's "plain meaning" theory were accepted, then this law could not have been proposed by initiative petition, and its enactment would be invalid.

The people would also be precluded from amending laws they themselves had previously enacted by initiative petition, if such laws had received a judicial construction that did not accord with the people's wishes. For example, if this Court had held (contrary to its actual holding) in Bates v. Director of Office of Campaign and Political Finance, 436 Mass. 144, 169-73 (2002), that the Clean Elections law did not waive sovereign immunity, thus leaving certified candidates without a judicial remedy despite their having performed their side of the Clean Elections "bargain," id. at 169, 172, under plaintiff's theory the people would be barred from proposing by initiative petition an amendment to the Clean Elections law to allow certified candidates to sue the Commonwealth in contract to obtain the moneys due them.[15]

[15] The people might also wish to alter the strict construction of the phrase "exact copies" in G.L. c. 53, § 22A, adopted in Hurst v. State Ballot Law Comm'n, 427 Mass. 825, 830 (1998) and Walsh v. Sec'y of the (continued...)

Moreover, there is no textual basis for confining the "reversal of a judicial decision" exclusion to decisions of this Court. The Debates suggest that the main concern was with protecting decisions of this Court, but if, as plaintiff says, the Debates must be ignored, then the decision of any court--state or federal, trial or appellate--on any matter of Massachusetts statutory or common law (or for that matter constitutional law), would place that issue forever beyond the reach of the initiative process.[16]

In addition, the term "reversal," if it could not be interpreted in light of the Debates, would lead to numerous disputes. Would the exclusion apply to an initiative petition that, while not proposing a rule opposite to that adopted in a court decision, would extend, modify, or limit the rule set forth in the decision? If a decision held some governmental action unauthorized, then what would be a "reversal" of that

[15](...continued)
Comm., 430 Mass. 103 (1999). The phrase "exact copies" was inserted by an initiative law, St. 1990, c. 269, to ease ballot access. Under plaintiff's interpretation, the people would be barred from amending their own 1990 enactment to change the Hurst/Walsh rule.

[16] Adopting such an approach would also create the potential for mischief by opponents of initiative petitions: to head off an anticipated petition proposing to adopt or change a particular statutory rule, opponents could simply bring a lawsuit and obtain a decision adopting or recognizing and enforcing a conflicting rule, as a matter of statute or common law.

decision: a petition for a law authorizing the action, a petition for a law requiring the action, or both? Where a decision had held a statute constitutionally valid and enforceable, would the exclusion bar an initiative petition effectively negating that law, as successful initiative petitions have sometimes done?[17]

It is hard to believe the drafters would have used the phrase "reversal of a judicial decision" in a sense that would be so malleable, leave so many questions open, and potentially lead to the exclusion of so many initiative petitions for laws. This would risk contravening the established principle that art. 48 creates, and should be construed to protect, a "people's process" for enacting laws.[18]

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[17] See, e.g., St. 1994, c. 193 (inserting G.L. c. 136, § 15), an initiative law that allowed retail stores to open at any time on Sundays, even though in Zayre Corp. v. Attorney General, 372 Mass. 423 (1977) and Commonwealth v. Franklin Fruit Co., 388 Mass. 228 (1983), this Court upheld the constitutionality of other provisions of G.L. c. 136 that generally prohibited such Sunday retail store openings.

[18] Art. 48 "establishes a 'people's process'" for enacting laws. Bates, 436 Mass. at 154 (quoting Buckley v. Sec'y of the Comm., 371 Mass. 195, 199 (1976)); see Citizens for a Competitive Mass. v. Sec'y of the Comm., 413 Mass. 25, 30-31 (1992). It is a "firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws"; the "people should be allowed to speak and act freely through the initiative process." Yankee Atomic Elec. Co. v. Sec'y of the Comm., 403 Mass. 203, 211 (1988); Buckley, 371 Mass. at 199, 202-03.

C. Plaintiff's "Plain Meaning" Argument Would Also Place A Large Area of Constitutional Law Beyond the Reach of the Initiative Process.

Plaintiff's interpretation, even if it could be confined to constitutional amendments, would place a large area of constitutional law off-limits to the petition process, in a way it is hard to believe the drafters intended.[19]

Plaintiff's interpretation would have barred the initiative amendment to require a graduated income tax, which was certified by the Attorney General and appeared on the 1994 ballot, because the amendment would have "reversed" Mass. Taxpayers Found. v. Sec'y of Admin. and Fin., 398 Mass. 40, 46-48 (1986) (ruling that amend. art. 44 prohibited such a graduated tax).[20]

Plaintiff's interpretation would also have barred amend. art. 104, an initiative amendment approved by the voters to allow mass-transportation spending[21]--

[19] Again, the Debates clearly show that the drafters did not intend this result, see infra; but for now this discussion proceeds on plaintiff's premise that the Court "need not--and should not--consult the Debates" to determine what "reversal of a judicial decision" means. Br. at 7-8.

[20] See Sec'y of the Comm., Massachusetts Election Statistics 1994 (Pub. Doc. No. 43) at 504 (Question 6). The proposal was defeated by the voters. Id.

[21] In Opinion of the Justices, 324 Mass. 746 (1949), the Justices concluded that under amend. art. 78 as then in force, the authority to use gasoline tax (continued...)

but for the fortuity that the amendment responded to an Opinion of the Justices rather than a decision in a litigated case.[22] Had the constitutional question been decided in litigation, as could easily have occurred, this voter-initiated amendment would have been barred.

Other initiative amendments that would clearly or arguably be barred under plaintiff's interpretation include:

- the pending initiative amendment regarding health care insurance, which, in requiring the legislative and executive branches to ensure that all state residents have insurance covering, inter alia, "mental health care services,"[23] arguably "reverses" Williams v. Sec'y of EOHS, 414 Mass.

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[21](...continued)
revenues and motor vehicle fee and tax revenues for "highways" and "bridges" did not allow such revenues to be spent for mass transportation purposes. In 1974, an initiative amendment, amend. art. 104, changed amend. art. 78 to allow use of such revenues for mass transportation purposes. Amend. art. 104; see 1974 Acts and Resolves at pp. 1050-51, 1057-58.

[22] Opinions of the Justices are not usually considered "judicial decisions," Bowe v. Sec'y of the Comm., 320 Mass. 230, 245 n.1 (1946), although such Opinions might fit within plaintiff's expansive definitions of that term. Br. at 17-18. If plaintiff's interpretation of the exclusion were correct, an opponent of amend. art. 104 could have argued (or an opponent of a future petition could argue) that the threat to judicial independence is just as great from an initiative amendment altering a rule underlying an Opinion as it is from an amendment altering a rule underlying a litigated decision.

[23] If the proposed amendment receives the requisite approval from a joint session of the current Legislature, it will appear on the ballot this fall. See http://www.mass.gov/legis/senate/jtcalendar.htm (last visited April 3, 2006)(giving text of amendment).

551, 565 (1993) (no state constitutional fundamental right to mental health services);

- the recently proposed initiative amendment to alter the redistricting requirements of amend. art. 101 to include, inter alia, a requirement that legislative districts be "compact,"[24] which would "reverse" Town of Brookline v. Sec'y of the Comm., 417 Mass. 406, 421 n.13 (1994) (amend. art. 101 does not require districts to be "compact");

- an initiative amendment to tighten the requirements of the Education Clause as interpreted in Hancock v. Comm'r of Educ., 443 Mass. 428, 454-57 (2005)(plurality opinion), or to establish a "fundamental right" to education (held not to exist in Doe v. Sup't of Schools of Worcester, 421 Mass. 117, 129 (1995));

- an initiative amendment to add to the list of "suspect classifications," as this would "reverse" Powers v. Wilkinson, 399 Mass. 650, 657 n.11 (1987) (under state constitution, suspect classifications are only those of sex, race, color, creed, or national origin); and

- an initiative amendment to prohibit the enactment of "outside sections" not directly related to appropriations, as this would "reverse" First Justice of Bristol Div. of Juv. Court Dept. v. Clerk-Magistrate of Bristol Div. of Juv. Court Dept., 438 Mass. 387, 408 (2003).

In sum, the Court should hesitate to adopt a "plain meaning" interpretation of "reversal of a judicial decision" that would have such far-reaching consequences.

[24] See Petition 05-14, § 5, sponsored by Common Cause, available at http://www.ago.state.ma.us/filelibrary/petition05-14.rtf (last visited April 3, 2006). The petition was certified but failed to secure enough signatures to proceed in the art. 48 process.

II. PLAINTIFF'S INTERPRETATION WOULD NULLIFY A PRINCIPAL PURPOSE OF THE "CONSTITUTIONAL INITIATIVE": TO ENABLE THE PEOPLE TO RESPOND TO DECISIONS OF THIS COURT ON SOCIAL WELFARE LEGISLATION.

Even without examining the Debates to see how the phrase "reversal of a judicial decision" was simply a non-substantive rephrasing of the limited concept of "recall of judicial decisions," it is plain that plaintiff's interpretation of "reversal" would nullify a principal purpose of the "constitutional initiative": to enable the people to respond to decisions of this Court on social welfare legislation. The debates before, during, and after adoption of the "judicial decision" exclusion make this clear.

The Attorney General does not disagree with plaintiff's general description (Br. at 30-37) of the debates on whether to have a constitutional initiative, and whether to exclude from its operation the judiciary and all or part of the Declaration of Rights. The disagreement centers, rather, on whether the particular exclusion of petitions relating to the "reversal" of judicial decisions was meant to bar initiatives amending the constitution in response to court decisions.[25] The Debates clearly show no intention to

[25] The Attorney General particularly disagrees, as discussed in Part III infra, with plaintiff's (continued...)

prohibit such petitions.

A. Debates Before Adoption of the Judicial Exclusions.

From the outset of the Convention, proponents of the "constitutional initiative" argued that it was needed in order to remedy the possibility that some progressive social welfare law favored by the people (perhaps one that the people themselves might have enacted via initiative petition) was invalidated by the courts, particularly under clauses of the Declaration of Rights protecting "liberty" or certain aspects of "property." In such a case, proponents argued, the people should have the power to amend the constitution in order to change or limit the language underlying the court's decision, so that the statute in question (or

[25](...continued)
assertion (Br. at 33) that the proposed constitutional initiative was viewed as "a way for people to directly attack court decisions" and therefore was essentially the same as the "recall of judicial decisions." The Attorney General also disagrees with plaintiff's implicit suggestion (Br. at 36) that the judicial decision exclusion should be interpreted broadly because it was supposedly adopted as part of the compromise that made it easier for the Legislature (to which the exclusion did not apply), but harder for the people, to propose constitutional amendments. Plaintiff cites nothing in the Debates suggesting that the exclusions were deemed more acceptable, or should be interpreted broadly, or were in any similar way linked to the ultimately-successful "Loring proposal" (2 Debates at 678-80), under which the barriers to legislative amendments were lowered and the barriers to initiative amendments raised higher than in the initial draft of art. 48.

one like it) would be upheld in any future challenge.

Mr. Walker, the leading proponent of the initiative, argued this point vigorously. 2 Debates at 26, 27, 29, 413-14. He feared that state constitutional protections for "property" and "liberty" would cause the courts to strike down workers' compensation, maximum-hour, anti-sweat-shop, and similar laws. Id. at 737-38. "[I]t may be necessary in order to make such laws constitutional to amend the Declaration of Rights as interpreted by the court." Id. at 738; see id. at 739; id. at 48-49, 57-58 (Mr. Whipple); 250 (Mr. Harriman);[26] 577 (Mr. Walsh).

Mr. Walker (and indeed the whole Convention) knew from the beginning that Mr. Cummings would be proposing his "judicial exclusions," including the one addressing "judicial decisions," in order to limit the constitutional (and statutory) initiative.[27] Mr.

[26] Mr. Harriman referred to the Justices' conclusion that the Legislature had no constitutional power to authorize cities and towns to provide coal and fuel for their residents. Opinion of the Justices, 182 Mass. 605 (1903); Opinion of the Justices, 155 Mass. 598 (1892). Mr. Harriman did "not criticize the court," only the Legislature's failure to propose a constitutional amendment in response. 2 Debates at 250. Ultimately, amend. art. 47 was adopted in 1917.

[27] Evidently the matter had been discussed in the Committee on Initiative and Referendum, which Mr. Cummings chaired and on which Messrs. Walker and Youngman sat. See id. at 36 (Mr. Walker's first speech in favor of initiative); id. at 188 (Mr. Youngman, (continued...)

Walker opposed these exclusions--but only on the general principle that the scope of the initiative should not be limited, not out of any fear that the exclusion relating to judicial decisions would negate a central purpose of the constitutional initiative he so forcefully advocated. Id. at 36.[28] Indeed, Mr. Walker pledged to support the initiative even if Mr. Cummings' proposed exclusions were approved. Id. at 37. He would not have done so had he viewed the exclusion for judicial decisions as barring the people from amending the Constitution in response to this Court's decisions.

B. Debates During Adoption of the Judicial Exclusions.

Mr. Cummings, in his speech advocating his proposed judicial exclusions, recognized that still, "[u]nder the initiative and referendum, if the courts declare a law unconstitutional we have the power to expand the Constitution and reenact the law and make it constitutional." Id. at 791. Plainly Mr. Cummings did

[27](...continued)
quoting Cummings' proposal); id. at 2 (showing membership of Committee); Pl. Br. at 25.

[28] Mr. Walker opposed all of the exclusions to be proposed by Mr. Cummings, because "I believe it is wise not to make exceptions. I believe that it is wise to go frankly before the people, and put the Constitution and the laws in the hands of the people, and the minute we make exceptions we weaken our argument and our opponents will take advantage of that fact; you may be sure of that." Id. at 36.

not read his judicial-decisions exclusion as plaintiff does here.

Nor did Mr. Walker. As the leader of the pro-initiative forces, and as an experienced legislator and three-time Speaker of the House of Representatives (id. at 23, 481), Mr. Walker was unlikely to have been hoodwinked on such an important issue. To be sure, Mr. Walker and six other members of the Committee on Initiative and Referendum opposed, without argument, the judicial exclusions in their entirety. Id. at 796. But Mr. Walker expressed no fear that any of those exclusions would limit the people's power to amend the Constitution or laws in response to a court decision. Instead his opposition was apparently based on the general principle, discussed above, that the scope of the initiative ought not to be limited. Id. at 36. Another initiative supporter opposed the exclusions on these same general grounds. Id. at 796 (Mr. Walsh).

It defies belief to suggest that Mr. Walker and others would have stood mute had they seen the judicial exclusions as barring use of the initiative to respond to court decisions. As the Justices said in another context, "The language of the Amendment requires no such interpretation. And the proceedings of the Constitutional Convention show no such intention. So

important a matter would hardly have been passed over in silence." Opinion of the Justices, 308 Mass. 601, 613 (1941) (interpreting amend. art. 63).

C. Debates After Adoption of the Judicial Exclusions.

That the drafters intended the people to have this power is confirmed by the debate that occurred after the adoption of the "judicial exclusions." The Convention at various times had discussed and voted on whether to exclude the entire Declaration of Rights from the operation of the constitutional initiative process, with varying results. After adoption of the judicial exclusions, id. at 797, another attempt was made to exclude the entire Declaration of Rights. Id. at 992-96. The effort failed, due largely to the objection that such an exclusion would interfere with the people's power to amend the constitution in response to court decisions invalidating social welfare legislation. Id. at 995-96 (Mr. Walker, stating "the whole social welfare program would be in danger if this amendment goes through"; Mr. Pelletier, and Mr. Washburn). The Convention evidently was not reassured by the argument that there was no reason to fear the Court would even make such decisions. Id. at 994 (Mr. Lummus).

At that point, Mr. Merriam proposed a compromise: to exclude only specified individual rights as declared in the Declaration of Rights from the initiative, not including the protections for "liberty" and "property" that initiative supporters feared might be used to invalidate social welfare legislation. Id. at 1000. Mr. Walker, while opposed in principle to excluding even the specified rights, did not strongly oppose it, because "I suppose if we excluded these matters we could do so without endangering any social welfare program, and that is the point in which it differs from the exclusion of the [Declaration] of Rights as a whole." Id. at 1001.

Thus Mr. Walker, the leading proponent of the initiative, announced himself satisfied--apparently notwithstanding the earlier-adopted exclusion concerning judicial decisions--that the more limited Declaration-of-Rights exclusion would still leave the people free through the initiative to address court decisions holding legislation unconstitutional under the Declaration of Rights' protections for individual "liberty" or "property." The more limited exclusion was adopted, id. at 1003, finally settling this contentious matter, and the limited exclusion survived

into the final version of article 48.[29]

This leaves no doubt that the exclusion relating to judicial decisions was not viewed as limiting the power of the people to amend the constitution, including the Declaration of Rights, to remove the basis for a court decision invalidating a statute. Otherwise, the strong objections to excluding the entire Declaration of Rights from the initiative, id. at 995-96, and Mr. Walker's subsequent acquiescence in excluding those particular parts of the Declaration of Rights that would not interfere with the people's power to obtain social welfare legislation, id. at 1001,

[29] "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly." Art. 48, Init. pt. 2, § 2. To avoid confusion, it should be noted that the first listed right, the right to "compensation for private property appropriated to public use," was not one of the constitutional "property" protections that was viewed as a potential threat to social welfare legislation. See, e.g., Bogni v. Perotti, 224 Mass. 152, 154-56 (1916) (invalidating statute because it interfered with laborer's constitutional "property right" to sell his labor, but not doing so based on "compensation for private property appropriated to public use" provision of art. 10). Thus Mr. Walker did not strongly oppose excluding that particular right from the scope of the initiative.

would have made absolutely no sense.[30]

Goodridge was based on the liberty and equality principles of articles 1 and 10 of the Declaration of Rights as well as the "due process" principles understood to exist there. The drafters of art. 48, in protecting individual rights, struck a balance, one that did not include these particular protections among the parts of the Declaration of Rights excluded from the initiative process.[31] See supra n.29. Thus, the Convention understood that, even under the judicial decisions exclusion, the effect of a court decision invalidating a statute on those particular grounds could be prospectively altered by an initiative amendment.

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[30] Plaintiff gains nothing from noting that the judicial exclusions came before the Convention four more times after their initial adoption. Br. at 27; 2 Debates at 809-12; 951-52; 970-80, 1044; 989-92. None of those passages contains any hint that the exclusions barred use of the constitutional initiative to respond to a court decision. Rather, the focus was either on the general argument that the courts needed no special protections, or on Mr. Cummings' specific concern that the "powers of the courts" exclusion might be read more broadly than he had intended. Id. at 989-91. In contrast, Mr. Cummings expressed no such second thoughts about his judicial-decisions exclusion.

[31] The amicus brief of the Former Attorneys General et al., focusing on the drafters' protection of individual or minority rights, is fundamentally flawed in overlooking this point. E.g., id. at 4, 7-12, 30.

III. THE DRAFTERS INTENDED TO EXCLUDE ONLY PETITIONS RELATING TO THE "RECALL OF JUDICIAL DECISIONS," AND THE THIRD-READING CHANGE TO "REVERSAL OF A JUDICIAL DECISION" DID NOT ALTER THIS MEANING.

As this Court recognized in Mazzone, the drafters intended to exclude only petitions relating to the "recall of judicial decisions," a controversial 1912 proposal by Theodore Roosevelt under which, when "a State court sets aside a statute as unconstitutional[,] the people are given the opportunity to reinstate the same law, notwithstanding the court's declaration of its unconstitutionality." 432 Mass. at 727-28. The Committee on Form and Phraseology's change of this phrase to "reversal of a judicial decision", 2 Debates at 952-53, "was a matter of editing that was deemed to have made 'no change in meaning.'" Mazzone, 432 Mass. at 527 & n.12 (citing 2 Debates at 959).

As shown infra, there are important differences between the "recall" of a judicial decision and a prospective constitutional amendment altering the constitutional basis for that decision, and reasons why the drafters prohibited the former while allowing the latter. Moreover, there are good reasons why the Committee on Form and Phraseology might have found the word "reversal" preferable to "recall" in describing the limited category of petitions they intended to

prevent--those allowing direct votes on the correctness of judicial decisions--which does not include the Petition here.

A. There Are Important Differences Between the "Recall" of a Judicial Decision and a Prospective Constitutional Amendment Altering the Basis for That Decision, and the Drafters Meant to Prohibit the Former While Allowing the Latter.

1. "Recall of judicial decisions" differed from prospectively amending the constitution.

Roosevelt's proposal for the "recall of judicial decisions" was a response to Lochner-era state court decisions that invalidated progressive social legislation (maximum hour, workers' compensation, and other labor-protection laws) under state constitutional due process clauses. The "recall" process was intended as a quick and easy method to give "to the people the ultimate determination whether a particular act comes within the scope of the 'police powers' of the State, and accordingly, whether the 'due process' clause as interpreted by the court shall, or shall not, stand permanently in the way of desirable 'welfare legislation[.]'" Wm. L. Ransom, Majority Rule and the Judiciary 98 (1912) (reproduced at RA 217-317). See Mazzone, 432 Mass. at 528 n.13 (citing Ransom's discussion of "recall"). Ransom's book, with an

introduction by Roosevelt, strongly advocated and thoroughly explained the case for "recall."

Ransom agreed with the Supreme Court's then-recent ruling that the 14th amendment's due process clause left room for states to use their "police power" to enact laws to address "all the great public needs . . . held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Majority Rule at 63-64 (quoting Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (Holmes. J.) (upholding state's regulation of banks to protect depositors)). The problem was that some state courts refused to interpret state due process clauses the same way; instead, they insisted on viewing due process as a question of law, controlled by precedent from past eras, and this led to invalidation of Progressive-era laws enacted under the police power. Id. at 64-69. Ransom took as a given that those state courts should follow the federal approach and focus instead on "broad question[s] of policy and fact under the particular conditions disclosed" concerning the 'prevailing morality' and the 'strong and preponderant opinion' of the people as to what should be done." Id. at 65 (emphasis in original); see id. at 64-69.

The question Ransom addressed was by what method

to respond when state courts rejected this approach. How should the "prevailing morality" and "strong and preponderant opinion" of the people be determined and implemented, so that the courts would not block government from "carry[ing] out the popular will on matters of regulative policy and social justice[?]" Id. at 68-69.

Ransom described two different methods for the people to respond to a state court decision invalidating an act of a state legislature: "(1) The method of constitutional amendment [and] (2) The method of referring directly to the people the determination whether the particular act is, in fact, within 'the great public needs,' and within the sanction of the 'prevailing morality' and 'strong and preponderant opinion,' and so not in conflict with the 'due process' clause." Id. at 98-99 (emphasis in original). The second method was called ("miscalled," in Ransom's view) the "recall of judicial decisions." Id. at 99-100. The essential question to be put to a popular vote under this method would be: whether a particular statute should be "reinstated and continued in full force and effect as law, the decision of the [state's highest court in a specified case] to the contrary notwithstanding." Id. at 117.

In distinguishing between a "constitutional amendment" and the "recall of judicial decisions," Ransom explained that "[u]nder the first method, the people declare that 'due process' shall not prevent the legislation in question; under the second method, they merely declare that 'due process' does not prevent it." Id. at 99 (emphasis in original). In other words, the "constitutional amendment" method was forward-looking, changing the words of the constitution so that if the same or similar legislation was challenged in court in the future, the court would have to find it constitutional. The "recall" method, in contrast, directly substituted the people's view of the need and justification for a particular law for the view of the court. See id. at 100 ("[a] more accurate characterization of the proposal . . . would be as 'direct popular re-definition of the scope of the 'police' or regulative powers of the State'").

Thus, the constitutional amendment method would not necessarily imply that the court had misinterpreted due process requirements, but would merely change those requirements for the future. The "recall" method, in contrast, would constitute the people's judgment that the court had misinterpreted due process, and would reinstate the very law struck down by the court.

Ransom recognized that the two methods were quite different, and in his view the differences made the "recall" approach more desirable. In particular, the "recall" mechanism was faster and more subject to popular control than state constitutional-amendment mechanisms, which required the approval of two successive legislatures (creating delays and opportunities for special interests to block amendments). Id. at 100-01. Also,

> Ransom argued that the "recall" mechanism was actually more limited and conservative--it merely validated a particular statute, rather than adding words to the constitution, which might have more far-reaching effects in the future. Id. at 140-48.

Another difference between the two mechanisms (only partly recognized by Ransom, id. at 152) is that "recall," in restoring the validity of a particular statute, would leave the legislature free to amend or repeal that statute in the future. A constitutional amendment, however, could go further. It could not only authorize a legislature to pass a statute embodying a particular rule, but could actually require that rule, by writing it directly into the constitution, where it would be beyond the

legislature's power to amend or repeal. (The Petition at issue here does exactly that.) The force and permanence of such an amendment (as compared to a mere validation of a particular statute) would likely make some voters more cautious about supporting it.

Thus, although some "recall" advocates described the "recall" process as a particular method of altering or amending a constitution,[32] there are clear and important distinctions between "recall" and amending the words of the constitution. That supporters tried to legitimize "recall" by presenting it as merely another, "more conservative" way of amending the constitution, does not mean that it was generally agreed to be a method of constitutional amendment or in any way equivalent to the usual method.

One could thus oppose "recall" of court decisions and yet still favor the people's having the power to amend the words of the constitution to overrule, prospectively, the effect of a court decision. "Recall" (1) was faster and less deliberative, a matter of particular significance on volatile social issues

[32] E.g., id. at 123. Roosevelt, who expressed great impatience with "mere legalism," id. at 3-5, went so far as to say that whether "recall" was a method of "construing" or "applying" the constitution or "a quicker method of getting the constitution amended" was "a matter of mere terminology[.]" Id. at 14.

such as the one involved here;[33] (2) was less subject to legislative control; (3) was directly critical of the courts and their reasoning; and (4) could only validate a particular statute--not amend the words of the constitution to do something more, and more permanent (as does this Petition), which might make voters more cautious about supporting the amendment.

2. The drafters of art. 48 understood the distinction between "recall" and amending the constitution.

In Massachusetts, shortly before the 1917-18 Convention, the Legislature considered two proposals--one sponsored by the American Federation of Labor--for constitutional amendments setting up a process allowing the "recall" of decisions of this Court holding state statutes unconstitutional. 1914 House Nos. 186, 1106 (copies in Addendum B hereto). Under those proposals, the people would vote on the question, "Shall the proposed act [here would follow a description of the law declared unconstitutional by the Supreme Judicial Court] have the force and effect of law?" Id. § 6.

[33] Had a process for "recall of judicial decisions" been adopted in the form submitted to the Legislature in 1914, see 1914 House Nos. 186, 1106 (Addendum B hereto), a vote on whether to "recall" the Goodridge decision could have appeared on the November 2004 ballot. The constitutional amendment proposed by the Petition at issue here could not appear on the ballot until November 2008.

Voters would actually be furnished with a copy of this Court's decision, and the law itself, before voting. Id. § 5. If the law were approved by the voters it would be "engrossed and bound under direction of the secretary of the commonwealth in the same manner as may be provided by law with reference to acts and resolves of the general court." Id. § 7. This was plainly not a method of amending the constitution but instead a method for the people to decide that this Court had wrongly applied the words of existing constitution and that the statute struck down by the Court should therefore remain in effect.

Although the nationwide interest in "recall of judicial decisions" had waned by the time of the Convention,[34] a few members nevertheless expressed some support for the idea. E.g. 1 Debates at 478-83 (Mr. Kenny).[35] There was considerable discussion of both (1) whether the initiative process should extend to constitutional amendments at all; and (2) if so, the prospect that it might be used to amend the constitution to establish a process for the "recall of

[34] See Wm. G. Ross, A Muted Fury 152-54 (1994) (relevant chapter reproduced at RA 319-33); see also 2 Debates at 191-92 (Mr. Youngman).

[35] Later, in opposing the judicial exclusions, Mr. Kenny read from Roosevelt's introduction to Ransom's book advocating "recall." 2 Debates at 793.

judicial decisions."

On the first issue, as discussed supra, Mr. Walker and other proponents of the "constitutional initiative" argued that it was needed in order to remedy the possibility that this Court might invalidate some progressive social welfare law. On the second issue, however, many members of the Convention, including Mr. Walker himself, spoke out against the possible use of the constitutional initiative to "recall judicial decisions." 2 Debates at 9 (minority report opposing creation of initiative), 190-93 (Mr. Youngman), 228, 229 (Mr. Kinney), 229 (Mr. Walker), 259, 267, 268, 269 (Mr. Powers), 401 (Mr. Hibbard).

These members--both supporters and opponents of the constitutional initiative--were clearly concerned about establishing a process for "recall of judicial decisions," but they recognized, to varying degrees, that the constitutional initiative itself was distinct from that process of "recall." The constitutional initiative, if adopted, might be used, among other ways, to pass an amendment setting up a "recall" process, but it was not itself a "recall" process. E.g., id. at 269 (Mr. Walker). The one exception was Mr. Youngman, who opposed the constitutional initiative entirely, id. at 15, and thus attempted to discredit it

by arguing that it was no different from the largely-discredited idea of "recall." Id. at 190-93. Even Mr. Kinney, however--another opponent of the constitutional initiative, id. at 226--argued not that the constitutional initiative was synonymous with, but merely that it was "in effect" the same as, "recall."[36]

Mr. Kilbon, in contrast, sharply disputed this comparison, calling it "not an argument, but a shriek." Id. at 560 (disagreeing with the "[t]wo gentleman from Boston," Mr. Youngman and Mr. Kinney). Mr. Walker, who strongly favored the constitutional initiative, expressly opposed "recall of judicial decisions" and objected to being characterized as supporting it. Id. at 228-29. He consistently distinguished the two concepts, as did Mr. Powers and Mr. Hibbard.[37]

Finally, Mr. Cummings recognized the distinction, when he proposed the exclusion of petitions relating to

[36] It is not surprising that two members who opposed the constitutional initiative in its entirety, would seek to discredit it by rhetorically identifying it with "recall." This was simply the mirror image of the tactic used a few years earlier by supporters of "recall", who sought to legitimize it (see supra) as a "more conservative" form of constitutional amendment.

[37] See id. at 269 (Mr. Walker recognizing, in response to Mr. Powers, that under constitutional initiative, an amendment providing for the "recall of judicial decisions" could be proposed and adopted). Mr. Powers opposed the constitutional initiative not because it was a "recall" process, but because it could be used to set up such a process. Id. at 259, 267, 268. Mr. Hibbard did likewise. Id. at 401.

the "recall of judicial decisions" while at the same time expressly recognizing and lauding the idea (in a passage already quoted above) that the initiative could be used to amend the Constitution and laws in response to court decisions. Id. at 791. Mr. Cummings stressed that nothing in this power would invade the judicial field or imply criticism of the Court's decisions as "wrong"--rather, the power was essentially legislative, and necessary because the Legislature could not be trusted to take prompt action to change the constitution or laws in response to such court decisions. Id. at 793, 795; see id. at 597-98.

Thus there is no reason to conclude that the Convention as a whole equated "recall of judicial decisions" with amending the constitution by initiative petition in response to a court decision, or that, in rejecting the former, the Convention meant to prohibit the latter.

B. The Change from "Recall of Judicial Decisions" to "Reversal of a Judicial Decision" Is Understandable and Made No Change in Meaning.

The Committee on Form and Phraseology's change of "recall of judicial decisions" to "reversal of a judicial decision" is understandable as a change that might be clearer to the voters but did not affect the

meaning of the exclusion. See Mazzone, 432 Mass. at 527 & n.12.

The phrase "recall of judicial decisions" was contemporaneously recognized as a confusing misnomer. Roosevelt himself said as much to Ransom:

> Roosevelt confided to the New York attorney William L. Ransom in April [1912] that the use of the term *recall* was "unfortunate." He explained that he had used the word "as an argument to show men who wanted to recall judges that what they really meant nine times out of ten was that they wanted to change the decision of the judges on a certain constitutional question."

Ross, A Muted Fury 142-43 (RA 327) (emphasis in original; citing letter from Roosevelt to Ransom); see Majority Rule at 107. Publicly, Roosevelt "later more accurately referred to his proposed procedure as a referendum." A Muted Fury at 143 (citing Roosevelt's introduction to Majority Rule at 10).

Ransom, in Majority Rule, agreed that the proposal had been "miscalled the 'recall of judicial decisions,'" and argued that a more accurate characterization would be a "'direct popular re-definition of the scope of the 'police' or regulative powers of the State[.]" Majority Rule at 99, 100; see id. at 107-09, 113 ("recall" was a "catch-phrase" that "unfortunately lent itself to ... misrepresentation"). However, neither Roosevelt's term "referendum" (which

had a particular and very separate meaning elsewhere in art. 48), nor Ransom's lengthier phrase, would have fit well into the excluded matters section of art. 48.

On the other hand, the term "reversal" was also used widely in describing Roosevelt's proposal. Roosevelt himself, in a 1912 speech that "created a greater political sensation than his entry into the presidential race," stated that under his proposal, if the people voted that "the judges' interpretation of the Constitution is [not] to be sustained," then "the decision is to be treated as reversed . . . ." A Muted Fury 135 (RA 323) (emphasis added). President Taft (an opponent of recall, whom Roosevelt sought to unseat in the 1912 presidential election) declared in a 1912 speech that Roosevelt' "proposed method of reversing judicial decisions . . . lays the ax at the foot of the tree of well-ordered freedom[.]" Id. at 130 (RA 321) (emphasis added). Indeed, Webster's 1913 dictionary, in its "Department of New Words," used the term "reversal" to explain "recall of judicial decisions":

> **Recall**, n. (*Political Science*) (a) The right or procedure by which a public official, commonly a legislative or executive official, may be removed from office, before the end of his term of office, by a vote of the people . . . .
>
> (b) Short for **recall of judicial decisions**, the right or procedure by which the decision

> of a court may be directly reversed or annulled by popular vote, as was advocated, in 1912, in the platform of the Progressive party for certain cases involving the police power of the state.

Webster's Revised Unabridged Dictionary at p. 2007 (1913) (emphasis added).

Given the acknowledged inaptness of the term "recall"--a term more usually applied to government officials, as it was elsewhere in the judicial exclusions themselves--and given the high-profile use of the term "reversal" as an alternative, it is not surprising that the Committee on Form and Phraseology changed "recall" to "reversal." The Committee could easily have seen the term "reversal" as more comprehensible and less confusing to the average voter.

That this change did not signal any attempt to prohibit initiatives responding to court decisions is clear not only from the Committee chair's statement that the redraft made no change in meaning, 2 Debates at 959, but also from the subsequent remarks of Messrs. Walker and Cummings. The Committee chair acknowledged Mr. Walker as one of the members who "ha[d] helped the committee so much in its work." 2 Debates at 960. Mr. Walker congratulated the committee "for the excellent work that committee has done. This measure is consistent; it is well-worded; it is clear . . . ."

Id. at 985. Plainly Mr. Walker would not have said so if he viewed the change from "recall" to "reversal" as in any way imperiling what was to him a critical feature of the constitutional initiative.

Similarly, Mr. Cummings, to whom that feature was also essential, found no fault with the change from "recall" to "reversal." Notably, Mr. Cummings was not perfectly satisfied with the draft as reported by the Committee--he was still concerned that the "powers of courts" exclusion was too broad, and he attempted unsuccessfully to narrow it. Id. at 989-91. But he expressed no concern about the Committee's slight rephrasing of his "judicial decisions" exclusion. Surely he would have done so had he thought that the rephrasing narrowed the scope of the constitutional initiative in such an important and controversial way.

Finally, the change from the plural to the singular--from "recall of judicial decisions" to "reversal of a judicial decision"--signaled no intent to adopt the meaning advocated by plaintiff here (Br. at 22 n.13). The singular formulation could have been seen as preferable in that it more clearly prohibited an initiative to reverse a particular decision[38] as

[38] Thus it prohibited an initiative for a law providing, e.g., "Notwithstanding the decision of the (continued...)

well as an initiative to amend the constitution to establish a general process for the reversal (or recall) of decisions.[39]

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[38](...continued)
court in X v. Y declaring unconstitutional chapter ### of the acts of 19##, such statute shall remain in full force and effect." The Attorney General interprets the exclusion as barring such laws to reverse (or recall) individual decisions. See RA 141 & n.1. Such an exclusion is not made superfluous by art. 30, because, although art. 30 could be used to invalidate such a law if it appeared on the ballot and were approved by the people, see art. 48, Init., pt. 2, § 2 ("The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder"), measures that violate art. 30 are not per se excluded from the initiative process at the outset. Thus, absent the "reversal of a judicial decision" exclusion, a law such as the one described above could be proposed by initiative petition and could create the very type of political debate about the correctness of a court decision that the drafters sought to avoid.

[39] The singular formulation still prohibited an amendment establishing such a process. The full text bars any measure that "relates to . . . the reversal of a judicial decision." An initiative amendment to set up a reversal-(or recall-)of-decisions process would still "relate to" the reversal of a judicial decision, because it would enable the reversal of any judicial decision that fell within the scope of the process. This aspect of the exclusion is not in any way made superfluous by art. 30 (contrary to plaintiff's argument, Br. at 19 n.10), because art. 30 (1) does not prevent a reversal/"recall" initiative amendment from going on the ballot and generating criticism of the courts; and (2) could not be used to invalidate, post-adoption, an amendment inserting constitutional provisions (such as a reversal/"recall" process), on the ground that those provisions were in tension or conflict with art. 30 principles. If two provisions of the constitution conflict, the later-adopted controls.

C. The Attorney General's Interpretation of the Exclusion is Hardly "Novel."

There is nothing "novel" about the Attorney General's interpretation of the exclusion as not barring prospective changes in the constitution or laws in response to court decisions. Pl. Br. at 43-44. As to changes in the constitution, in 1991, an internal Attorney General's Office memorandum recommending certification of the proposed constitutional amendment for a graduated income tax referred to the views of Mr. Cummings, as the proponent of the exclusion, to the effect that the people would retain the power to "amend the Constitution or the laws upon which a decision is based so as to lead to a different result in the future." See Addendum C hereto.[40] As discussed supra, the proposed amendment would have overturned the prohibition on a graduated income tax recognized in Mass. Taxpayers Found., 398 Mass. at 46-48; nevertheless, the Attorney General certified it.

As for initiatives aimed at prospectively changing the laws underlying court decisions, internal Attorney General's Office memos have repeatedly interpreted the "judicial decision" exclusion as not barring such

[40] This Addendum is included pursuant to a Stipulation (or in the alternative a Motion) dated March 30, 2006 and filed with this Court.

petitions. RA 179 n.6 (from 1989), RA 186 n.1 (from 1989), RA 191-92, 194-95, 198-99 (from 2002).[41] See also RA 161.

CONCLUSION

For the foregoing reasons, the Court should conclude that Petition 05-02 is not barred by the "reversal of a judicial decision" exclusion and should remand the case to the county court for dismissal of plaintiff's claims.

Respectfully submitted,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16, 20.

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[41] The sole example of a certification recommendation memo not setting forth this interpretation is from 1999. RA 213 n.3. The parties have stipulated that the author and recipients of that memorandum were not, at the time, aware of the prior memos on the judicial decision exclusion, which referred to Mr. Cummings' views. RA 33-34 ¶¶ 13(d), 14, 15. In any event, such memos are for discussion purposes and do not always set forth the complete or final analysis used by the Attorney General in deciding whether to certify a petition. RA 34 ¶ 15.

A D D E N D U M

A. Mass. Const. amend. art. 48, Init., pt. 2, § 2

B. 1914 House Nos. 186, 1106

C. Certification Memo for Initiative Petition No. 91-22 (Graduated Income Tax)