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-Interveners.

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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 DEFENDANTS-INTERVENERS.

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## QUESTION PRESENTED

Whether the constitutional amendment proposed by Intervener-Defendants' citizen petition is obviously improper under the provision in Article 48, Section 2 of the Massachusetts Constitution that requires exclusion of a measure if it relates to "the reversal of a judicial decision," as that phrase has been interpreted by this Court in *Mazzone* and *Albano*?

## STATEMENT OF THE CASE

The Intervener-Defendants adopt the Attorney General's statement of the case.

## SUMMARY OF THE ARGUMENT

In determining whether the Attorney General properly certified the citizen-initiated measure, this Court must follow the "firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws." *Yankee Atomic Elec. Co. v. Sec'y of the Comm.*, 403 Mass. 203, 211 (1988)("*Yankee II*"). (pp. 3-6)

The effect of the proposed constitutional amendment if ratified would not be "reversal of a judicial decision," as Article 48 prohibits. It would change the text of the Massachusetts Constitution

which commonwealth courts construe and apply in cases before them. Far from being a "novel" proposition, the Attorney General's interpretation of Article 48 is consistent with its plain language, history, and the decisions of this Court. Initiative 05-02 ("marriage initiative") complies with Article 48 for one simple reason: it does not purport to substitute the Court's judgment of what the constitution required in *Goodridge v. Dep't of Public Health*, 440 Mass. 309 (2003). This Court has already unanimously acknowledged that changing the constitution, while it may have the effect of nullifying a decision by this Court, does not "reverse" the decision. (pp. 6-9)

Plaintiff argues that this Court should look no further than the plain meaning of Article 48's text, but then ignores what this Court has already held "reversal of a judicial decision" plainly means. (pp. 9-11) She argues that Article 48 should be interpreted to accomplish its purpose of keeping the judiciary independent, but fails to offer any argument about how changing the state's organic law would impact the independence of the judiciary. (pp. 12-14) Moreover, Plaintiff ignores that the debates

surrounding the adoption of Article 48 show that the delegates and ratifiers were excluding a very specific proposal—Teddy Roosevelt's controversial plan for the "recall of judicial decisions" that had already been adopted in Colorado. (pp. 14-23). The change from the term "recall" to "reversal" was most likely an effort to more accurately reflect that the exclusion meant to prevent the people from legally "reversing" a court's interpretation of the constitution. (pp.23-25)

Plaintiff advocates an interpretation of Article 48 that 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 v. Attorney General*, 432 Mass. 515, 528 (2000).(pp.25-26)

It is this Court's recent and well-grounded interpretation of Art. 48 that the marriage amendment sponsors and supporters relied upon when they endeavored on the arduous initiative process. Based on the doctrine of stare decisis, this Court should follow its decisions in *Mazzone* and *Albano*. (pp.27-31)

## ARGUMENT

### I. The Standard That Should Guide This Court's Interpretation of Article 48 Is Whether the Initiative Is "Obviously Improper."

This Court's interpretation of Article 48 "must be 'the one most consonant with the general design and purpose of the Initiative.'" *Citizens for a Competitive Mass. v. Sec'y of the Comm.*, 413 Mass. 25, 30–31 (1992), citing *Brooks v. Sec'y of the Comm.*, 257 Mass. 91, 99 (1926). The end that Article 48 was "designed to accomplish" was (to the voters that approved it), no doubt, very clear: "that the people of this Commonwealth may have such laws and may have such a Constitution as they see fit themselves to adopt." 2 Debates in the Massachusetts Constitutional Convention 16 (1918). Indeed, "[t]here can be no doubt that [Article 48] created a people's process" to propose changes to both the statutory law and to the underlying organic law. *Buckley v. Sec'y of the Comm.*, 371 Mass. 195, 199 (1976); *Bates v. Dir. of the Office of Campaign & Political Fin.*, 436 Mass. 144, 154–55 (2002) ("We are mindful that art. 48 establishes a "people's process"); *Hurst v. State Ballot Law Comm'n.*, 427 Mass. 825 (1998) ("[W]e must

keep uppermost in mind" that art. 48 created "a people's process") (Greaney, J., dissenting); *Hilsinger v. Sec'y of Comm.*, 388 Mass. 1, 6 (1983).

Given this purpose, at the certification stage it is a "firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws." *Yankee Atomic Elec. Co. v. Sec'y of the Comm.*, 403 Mass. 203, 211 (1988). The "people should be allowed to speak and act freely through the initiative process." *Id*.

Applying this deferential standard to the initiative process, this Court has held (based on "the debate concerning the Attorney General's certification responsibilities" at the constitutional convention of 1917-18) that it is the role of the Attorney General "to ferret out *obviously improper* initiative petitions. *Yankee Atomic Electric Co. v Sec'y of the Comm.*, 402 Mass. 750, 757-758 (1988)(emphasis added). Thus,

> [u]nless it is reasonably clear that a proposal contains an excluded matter, neither the Attorney General nor this court on review should prevent the proposal from appearing on the ballot. A challenge to a decision to allow a proposed initiative on the ballot is only the first opportunity to mount constitution-based attacks on the law.

*Associated Industries of Mass. v. Attorney General*, 418 Mass. 279, 286–87 (1994) (initiative proposal not "obviously improper" under Article 48 simply because it may have placed some restrictions on free speech, free press, or the right of peaceable assembly).

As elaborated in the following sections, the proposed measure at issue is not, "obviously improper," and the Attorney General's certification should therefore be upheld.

## II. This Court's Decisions in *Mazzone* and *Albano* Control This Case.

The question presented in this case was settled by this Court in *Mazzone v. Attorney General*, 432 Mass. 515 (2000). In *Mazzone*, this Court analyzed the plain language of Amendment Article 48 of the Massachusetts Constitution ("Article 48") to conclude that an initiative did not violate Article 48 even though it might reverse a trial judge's final order.[1] *Id.* at 525; *see also Albano v. Atty. Gen'l*, 437 Mass.

[1] Amendment Article 48 of the Massachusetts Constitution ("Article 48") states in relevant part: "No measure that relates . . . to the appointment, qualification, tenure, removal, recall or compensation of judges; or of 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.

156, 160 (2002). The Court looked at the plain meaning or Art. 48 by giving a reasonable construction to the words used and interpreting the article "in the light of the conditions under which it was framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy." *Id.* at 526 (*quoting General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 158 (1935).

Plaintiff, however, urges this Court to essentially disregard *Mazzone*, asserting that *Mazzone's* holding regarding the scope of Article 48 is dicta. It is not.

Dicta is "'language which was unnecessary' in an earlier decision 'and which passed upon an issue not really presented.'" *Commonwealth v. Rahm*, 441 Mass. 273, 284, 805 N.E.2d 1321-22 (2004) (citing *Old Colony Trust Co. v. Commissioner of Corps. Taxation*, 346 Mass. 667, 676, 195 N.E.2d 332 (1964). "When a court decides an issue that has not been argued by any party, it makes its decision without the benefit of the vigorous advocacy on which the adversary process relies." *Id.* at 284.

The judicial exclusion question in *Mazzone* was argued by both parties and was given full treatment by the Court. Indeed, this Court investigated the scope of the judicial decision exclusion in detail, stating:

> 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 petition that 'relate[] . . . to the reversal of . . . judicial decisions,' 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."

*Id.* at 528.

Although the Court's precise statement that "[c]itizens could, effectively, overrule a decision based on State constitutional grounds, but they could do so only by constitutional amendment," may not have been necessary for resolution of the case, establishing the scope of the "judicial decision" exclusion was necessary. That was the question before the Court, to which the Court gave far more than a mere cursory review. So even though the Court was not deciding whether Article 48 would prohibit the

particular measure at issue in this litigation, if the Court were to adopt Plaintiff's interpretation of Article 48, it would necessarily be overruling its holdings in *Mazzone* and *Albano.*

**III. The Unambiguous Language of Article 48 Confirms that the Marriage Amendment is Not Excluded.**

Plaintiff advocates an absurdly broad reading of Art. 48. Even bare of context, the term "reversal of a judicial decision" has a very specific meaning, as Plaintiff surprisingly details in her brief. Plaintiff notes that "reversal" means "an annulling or setting aside; rendering void; as the reversal of a judgment or order of a court." Pls. Br. 17 (quoting Standard Dictionary of the English Language 1527 (1895)); *see also* Black, Law Dictionary 1034 (2nd 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"); The Century Dictionary and Cyclopedia (1895) ("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"; Oxford

Dictionary Online (2nd ed. 1989) ("1. Law. the act of reversing or annulling a decree, sentence, punishment, etc.; the fact of being reversed or annulled").

Therefore, the word "reversal" shows that Article 48 prohibits the voters of Massachusetts from using the initiative process to constitute themselves as an ad hoc, temporary, super-appellate court empowered to reverse a decision of the "lower" state court - - the Massachusetts Supreme Judicial Court. The voters could not use the initiative process to rule, for example, that a statute declared unconstitutional by a commonwealth court is indeed constitutional. Article 48 prohibits the people from using the initiative process to exercise judicial power rather than the legislative power.

When the people actually change the text of the constitution, they are functioning legislatively to alter the underlying law applied to cases by the courts. The legislative function cannot reasonably be considered in a legal sense to "reverse" a judicial decision. The continuing effect of the Court's decision may no longer be relevant, but the decision itself is intact. The marriage initiative makes clear

that it is prospective only. It is equally clear that it is not an effort to substitute the people's interpretation of the constitution for the Court's. Instead, the people are merely attempting to change the underlying law that the Court applies. It is in no reasonable sense of the term "reversing" the decision.[1]

[1] To understand the difference between reversing a judicial decision and enacting a new statute or constitutional provision for the courts to construe and apply, it may be helpful to contrast an appellate court's actions reversing a lower court decision and overruling a precedent. Both can happen in the same case and they are not the same thing. For example, the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruled its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) stating that *Bowers* misinterpreted the Due Process Clause, 539 U.S. at 578. The Supreme Court then went on to reverse the judgment of the Texas Court of Appeals in that case, 539 U.S. at 579, because it had relied on *Bowers*. By analogy to this case, when the people of Massachusetts or the Legislature change the state Constitution or a state statute, they may in effect "overrule" a court decision because they have changed the underlying law the court construed and applied to render its decision. But the people or the Legislature have not "reversed" the judicial decision, in the sense that the parties that won the case below have now lost. The actions by the people or the Legislature may render a judicial decision obsolete or inoperative by changing the underlying law relied on in the judicial decision, but their actions do not "reverse" a specific court decision.

## IV. The Purpose of Article 48 Is To Protect Judicial Independence In *Interpreting* the Constitution.

It is well-established that this Court is the final arbiter of what the constitution means. "It is the 'imperative duty' of the judicial branch of government to say what the Constitution requires, when the question is properly presented." *Bates v. Director of Office of Campaign and Political Finance*, 436 Mass. 144, 168 (2002) (citing *Horton v. Attorney Gen.*, 269 Mass. 503, 507 (1929); *Marbury v. Madison*, 5 U.S. (1 Cranch137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). Intrusion into the Court's province of determining what the constitution *means* would certainly infringe on judicial independence. That is exactly what Article 48's judicial decision exclusion was meant to prevent.

But it is equally well-established that it is the province of the legislature and the people to determine what the Constitution actually *says*. The courts do not determine the text of the commonwealth's constitution or statutes. They construe and apply the law enacted by the people or through their elected representatives in the Legislature. The only

interpretation of Article 48 that is consistent with its language and purpose, as well as the convention debates, is that Article 48 was meant to prevent the people from usurping the Court's role in interpreting what the current text of the Constitution *means*.

It is undisputed that the purpose of the judicial decision exclusion was to protect the independence of the judiciary. *Mazzone*, 432 Mass. at 527. Although Plaintiff has mentioned that purpose in her brief, she has not even hinted how changing the text of the constitution would affect judicial independence. Indeed, the people are not attempting to challenge this Court's interpretation of the constitution. Instead, they are changing what the constitution says. That is a critical difference. The former would certainly intrude on the independence of the judiciary, but the latter is exercising a legislative function, not judicial.

Every factor the Court uses to interpret constitutional provisions like Article 48 point to the same conclusion–the delegates and ratifiers of Article 48 wanted to prevent the People from sitting as a super-appellate court to be the final word on the

*meaning* of the constitution. That is exactly what Teddy Roosevelt was proposing in 1912, and that is exactly what the state of Colorado adopted. Both the Roosevelt proposal and Colorado's initiative dealing with the reversal of judicial decisions were reference points in the convention debates about Art. 48's exclusions.

### A. The Delegates were clearly Aiming to Prevent Interference With the Court's Role in Interpreting the Constitution.

There is no question that what the delegates meant to proscribe was Teddy Roosevelt's controversial plan for the "recall of judicial decisions." *Mazzone*, 432 Mass. at 527-28 ("the delegates understood the phrase to refer to Theodore Roosevelt's controversial 1912 proposal by that name") (citing 2 Debates in the Massachusetts Constitutional Convention 191, 228, 229 (1918)). Roosevelt proposed that after the state's high court struck down a statute as unconstitutional, the people would have a period of time in which they could re-enact the statute notwithstanding the high court's decision that it was unconstitutional. *Id.* Roosevelt was unambiguous about the philosophy behind his plan:

> My proposal is for the exercise of the referendum, or **right of review**, by the people themselves in a certain class of decisions of constitutional questions in which the courts decide against the power of the people to do elementary justice. When under the 'police power' or 'general welfare' powers of government the legislature of a given State passes an act to do social or industrial justice, and the State court declares that the law is unconstitutional, then I propose that the people themselves, the masters of both legislature and court, shall, after due deliberation, decide which of their servants is to be sustained, so far as the particular act is concerned.

William L. Ransom, Majority Rule and the Judiciary 10 (1912)(emphasis added); *see also id.* at 6 (from Roosevelt's Introduction)("It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office– any other theory is incompatible with the foundation principles of our government").

It is clear that Roosevelt's plan meant to give the people the power to interpret the constitution. As he noted in the introduction to Ransom's book, "[t]he safe way to prevent popular discontent with the courts from becoming acute and chronic, is to provide the people with the simple, direct, effective, and yet

limited power to secure **the interpretation of their own constitution** in accordance with their own deliberate judgment . . . . Ransom at 23-24 (emphasis added); *see also* Ransom at 20 ("under the plan I propose, after due deliberation, [the people] would have an opportunity to decide from themselves whether the constitution, which they themselves made, should or should not be so construed as to prevent their doing elementary justice . . . .").

It is equally clear that Roosevelt's proposal was not envisioning the "general amendment method." In fact, Ransom took great pains to distinguish the "general amendment method" from Roosevelt's proposal. *See, e.g.,* Ransom at 106, 99; *see also* William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937 146 (1994) ("Proponents likewise agreed with Roosevelt that the [recall of judicial decisions] plan was preferable to the enactment of constitutional amendments . . . ."). Instead, it envisioned a method that permitted "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 at 114-115 (emphasis in original). "The procedure by which this would be accomplished would probably be more simple and understandable than the usual processes of constitutional amendment. A suitable provision for a referendum in this class of cases would be embodied in the State constitution." Ransom at 115. Ransom gave an example of what Roosevelt's proposal would look like by using the controversial Workingmen's Compensation Act from New York:

> Shall the act of June 25, 1910, commonly known as the Wainwright Workingmen's Compensation Law, entitled "an Act to amend the Labor Law, in relation to workingmen's compensation in certain dangerous employments," and providing, in substance (taking in, perhaps, a very brief resume of the essential provisions of the act) be reinstated and continued in full force and effect as law, the decision of the Court of Appeals in *Ives v. South Buffalo Ry. Co.* (201 N.Y. Reports at page 271) to the contrary notwithstanding? Yes. No.

Ransom at 117. This is the exact model that Colorado followed, as noted below. It is also exactly what the Convention delegates sought to proscribe because it gives the people the ability to place their

interpretation of the constitution above that of the state supreme court's, with no change in the actual text of the constitution.

The problems are legion with using the initiative process to create a temporary super-appellate court made up of the voters in the Commonwealth. The voters would have the power to reverse a judicial decision, but would do so without examining a court record assembled in accord with the rules of evidence. The voters would not follow the rules of civil procedure or other due process safeguards in determining the rights of the parties before a court in a lawsuit. The voters would issue no opinion explaining why they are reversing the "lower" appellate court. This would create an obvious tension in the law because a state statute would remain in effect "notwithstanding" the decision of the court that it is unconstitutional, but with no explanation as to why the people conclude that it is constitutional. The delegates wanted to avoid this violation of separation of powers by prohibiting the people's initiative process, which is foundationally legislative, to function in a judicial manner.

### B. The Delegates Meant To Prevent the Initiative Being Used As it Had Been in Colorado.

Delegates at the debate were leery of the initiative power, partly because of what had been enacted by initiative in Colorado concerning the recall of judicial decisions. Mr. Powers stated that:

> I wonder how many of you gentlemen have ever made a study of how that works out in the western States where they have the initiative and referendum. Let me give you one illustration . . . . I will take the State of Colorado. In 1912 there was a presidential election, and the people of Colorado cast for presidential electors 265,000 votes. There was submitted to the people that very year on the initiative an amendment to the Constitution providing for the recall of judicial decisions. I think you will agree with me that that was a very important question,–the recall of judicial decisions.”

2 debates, Mr. Walker, at 259.

After another delegate, Mr. Webster, tried to reassure Mr. Walker that he would be opposed to an initiative like Colorado’s that tried to put into the constitution a system for the recall of judges or judicial decisions (2 Debates, Mr. Webster at 267), Mr. Walker responded by stating:

> I confess that I do not understand what the gentleman means when he says that there is no sentiment in Massachusetts in favor of the recall of judges or the recall of

> judicial decisions. Those were about the earliest matters that came up under the initiative and referendum in the western States. What is there about Massachusetts that is going to protect us against the consideration of those measures in a different way than they were in the western States? I would like to know why voters of Massachusetts will act differently on this subject than they have acted in the States where they have had the initiative and referendum.

2 debates, Mr. Powers, at 267. Mr. Walker was obviously not referring to changing the constitution by initiative in response to a court decision. He was referring to the people passing an initiative, as they did in Colorado, that gives them the power to reverse decisions with which they disagree.

Colorado had enacted by initiative the precise thing that the delegates sought to prevent in Massachusetts. Colorado amended its constitution to make the people the ultimate umpire on what the State constitution means. Notwithstanding the Supreme Court of Colorado's determination that a statute was unconstitutional, the people could, by referendum, come to an opposite conclusion. Their interpretation was supreme. If a statute was ruled unconstitutional by the state supreme court, it was automatically held in abeyance for sixty days. *People v. Western Union*

*Telegraph, Co.*, 70 Colo. 90, 97 (1921). The people then had a certain amount of time to petition for a referendum on the decision. *Id.* If five percent of the electorate petitioned to have the decision put to a referendum, then the law was put to the people for their final determination. *Id.* The initiative qualified the Court's power of judicial review by providing for a popular reversal of the Court's opinion. The petition provision provided that even though a law was declared unconstitutional by the state supreme court, "when approved by a majority of the votes cast thereon at such election [the law] shall become the law of this state notwithstanding the decision of the Supreme Court." *Id*.[2]

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[2] The Colorado initiative amendment read: "Provided that before such decision shall be binding it shall be subject to approval or disapproval by the people as follows: Such decision shall be filed in the office of the clerk of the Supreme Court within ten days after it is finally made. If it concerns a state law it shall not be biding until sixty days after such date. Within said sixty days a referendum petition, signed by not less than five per cent. of the qualified electors, addressed to and filed with the Secretary of State, may request that such law be submitted to the people of this state for adoption or rejection at an election to be held in compliance herewith. The Secretary of State shall cause to be published the text of such law or part thereof, as constitutional amendments are published, as near as may be and he shall submit the same to the people at the fist

The delegates at the Convention were clearly concerned that Massachusetts citizens would try to become the constitutional "umpire," as they had in Colorado. As delegate Youngman stated: "[w]hen a written set of rules for the conduct of government is adopted, and a tribunal or umpire is asked to interpret those rules the thing to do is to abide by the rules and by the decision of the umpire until the rules can be changed in a proper and orderly manner." 2 Debates, Mr. Youngman, at 193. The Roosevelt proposal, and indeed the Colorado provision, sought to make the people a judicial umpire instead of a legislative rule-maker. If the people or the legislature decide that they do not like a decision by this Court, they can change the rules by following the proper procedure. But after this Court has ruled that a statute is unconstitutional, the governing body cannot say that it is constitutional without

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general election held not less than ninety days after such petition shall have been filed; provided that provision may be made by law for also submitting such laws or parts thereof at a special election. All such laws or parts thereof submitted as herein provided when approved by a majority of the votes cast thereon at such election shall be an become the law of this state notwithstanding the decision of the Supreme Court." *Western Union Telegraph*, 70 Colo. at 96-97.

unabashedly intruding into the province of the courts. That is precisely what the Roosevelt and Colorado plans meant to achieve, and precisely what the Convention delegates wanted to avoid.

### C. The Change from "Recall" to "Reverse" More Accurately Reflects What the Delegates Were Rejecting.

Regarding the term "recall," there should be no controversy that what the delegates were rejecting was Roosevelt's plan for the "recall of judicial decisions." The drafters used the more accurate term, "reversal" instead of "recall." In legal parlance, government officials are "recalled" and court decisions are "reversed."

The use of the word "recall" was, according to Roosevelt, "unfortunate." Ross at 142-43. The usual and common understanding of the "recall" process involved removing officials from their governmental office, not the reversal of the judicial decisions. Roosevelt explained that he had used the word "recall" "'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.' He

later more accurately referred to his proposed procedure as a referendum." *Id.* Moreover, in describing the procedure Roosevelt noted that the people should be allowed to determine "whether or not the judges' interpretation of the Constitution is to be sustained. If sustained, well and good. If not, then the popular verdict is to be accepted as final, the decision is to be **treated as reversed**, and the construction of the Constitution definitely decided." Ross, at 135 (quoting Roosevelt) (emphasis added).

The Committee on Form and Phraseology may have concluded that while the term "recall" was an appropriate for judges and other public officials, judicial decisions that were put up for a popular vote were not "recalled." Under the Roosevelt plan, they were reversed because the people had the final determination on what the constitution meant and were therefore sitting in judgment of the state supreme court's opinion.

What is clear is that the change from recall to "reverse" was not meant to change the meaning of the provision, as it was debated by the delegates. *Mazzone*, 432 Mass. at 527, n.12 ("The change from

'recall' to 'reversal' was a matter of editing that was deemed to have made 'no change in meaning'") (quoting 2 Debates at 959). Likely, the Committee on Form and Phraseology changed the term to "reverse" because it more accurately reflected Roosevelt's proposal. In any event, it is undisputed that what they were excluding was Roosevelt's proposal to put the interpretation of the state constitution up for a popular vote.

### D. Plaintiff's Interpretation of Article 48 means that the People Can Never Alter Any Statute or Constitutional Provision that State Courts Have Construed.

Plaintiff's interpretation of Article 48 vastly expands judicial authority and shrinks the operation of the initiative process. Under her interpretation, any judicial decision construing a state statute or provision of the state constitution puts them "off limits" for any change by the initiative process, because that would "reverse" a judicial decision. Plaintiff improperly confuses the reversing of a judicial decision with the legislative act of altering the law that the courts apply

For example, this Court in *Cote-Whitacre v. Department of Public Health*, ___Mass. ___, 2006 WL

786227 (2006) recently upheld a 1913 state law that prohibits nonresidents from getting married in Massachusetts if their home state would not legally recognize their marriage. Under the Plaintiff's interpretation of Article 48, the people could not use the initiative process to repeal or change that 1913 statute, because that would "reverse" the *Cote-Whitacre* decision. This extreme example of Plaintiff's interpretation of Article 48 demonstrates that it is incorrect.

## V. The Marriage Initiative Does Not "Reverse" *Goodridge*.

It is clear that the marriage initiative does not violate Article 48 because it is not an attempt to submit the law declared unconstitutional in *Goodridge* to a vote of the people. Indeed, the amendment says nothing about the way *Goodridge* was decided. The amendment is prospective only, and does not change the judgment or decision in *Goodridge*. The parties in Goodridge retain the benefit of the judgment they won in the case. The text of the proposed constitutional amendment on marriage shows that it does not reverse *Goodridge*.

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

It is clear that the marriage amendment is not trying to trump this Court's interpretation of the Massachusetts constitution. It changes the ground rules that the Court now applies by specifically amending the text of the Constitution. *See Commonwealth v. Harriman*, 134 Mass. 314, 326 (1883) ("when we find that the general statements of the Declaration of Rights are qualified and limited by more specific provisions upon the same subject in the Frame of Government, the latter must control and govern"). Amending the constitution to change the underlying provisions is a legislative act, not judicial. If *Goodridge* were decided after the marriage initiative were passed, the result would necessarily be different. But that would not be because the people decided that the constitution *means* something different. It would be because the constitution *says* something different.

Consistent with the plain meaning of Article 48, as well as the debates and historical context, it is

clear that the marriage initiative is well within the people's initiative power.

## VI. This Court Should Be Circumspect to Overturn Precedent That Has Been Justifiably Relied Upon By Initiative Proponents.

As a final matter, Defendant-Interveners urge this Court, in fulfillment of its obligation to afford considerable deference to the "people's process," to also examine this case from an equitable perspective. When the Initiative Petitioners set out on this effort more than a year ago, and more specifically when they drafted the proposed constitutional amendment, they did so in reliance upon this Court's interpretation of Article 48 as set forth in *Mazzone* and *Albano*.

If nothing else, this Court should be guided in this case by the doctrine of *stare decisis*. This doctrine provides stability in the law and encourages reliance upon the principles enunciated in previous cases. Indeed, it "is vital that there be stability in the courts in adhering to decisions made after ample consideration." *Mabardy v. McHugh*, 202 Mass. 148, 152 (1909). For "[l]iberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992).

No doubt the Court had this principle in mind when it decided *Hurst v. State Ballot Law Comm'n*, 427 Mass. 825 (1998). In *Hurst*, this Court examined a challenge to a decision by the Commission which validated defendant's initiative effort despite technical irregularities on the face of the petitions. On appeal, the Court concluded that certain irregularities should not be ignored, as they presented significant constitutional and statutory defects. However, the *Hurst* Court overlooked other defects, and it is the reasoning behind this decision that is pertinent to this instant matter. The Court stated:

> In this case, however, we apply this holding only to those petition forms to which the defendants added the printed box, and not to those forms on which the defendants hand stamped a name and return address. These stamps were generally perpendicular to the printing on the ballot and in red or blue ink. The Secretary warned the defendants against the printed box but not the stamps (a distinction to which the dissent does not advert), and the defendants relied on the commission's prior decision in *Ann Marie Johnnene vs. Robert Chip Ford*, SBLC 96-1, which held that such stamps are permissible. *We take very seriously the invalidation of over 17,600 signatures of voters in the Commonwealth who desire a referendum on Chapter 164, and because the defendants, and those voters, had reason to believe that the stamps complied with § 22A, we do not apply*

> *the rule announced today to the stamped petition forms. As to such hand stamps, this decision is prospective only.*

427 Mass. at 12–13 (emphasis added).

Thus, in *Hurst*, this Court yielded to equitable considerations—that the initiative proponents had acted in reliance upon a prior decision by the Commission. The Court acknowledged that given the factual circumstances, equity demanded that a decision departing from the holding of the Commission be applied prospectively only. In other words, the Court refused to set aside 17,600 signatures of voters who, along with the referendum proponents, had good reason to believe at the time their signatures were being gathered that the petitions complied with the law.

Here, likewise, this Court should be circumspect to set aside the expressed will of the more than 120,000 Massachusetts' voters who signed the initiative petition asking the measure be put to a vote. Thus, if this Court determines to depart from its holdings in *Mazzone* and *Albano*, its decision should have prospective application only. The Attorney General's certification was not (and indeed

could not have been) "obviously improper" in light of this Court's decisions in those cases.

## CONCLUSION

For the foregoing reasons, Defendant-Intervenors request that this Court declare that Petition 05-02 does not fall within Article 48's "reversal of a judicial decision" exclusion and remand the case to the county court for dismissal of Plaintiff's claims.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of the foregoing Brief of Defendants-Interveners was served upon the following counsel by First Class mail this 7th day of April, 2006:

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