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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 **KRISTIN M. PERRY, et al.,**
 15
 Plaintiffs,
 16 **CITY AND COUNTY OF SAN**
 17 **FRANCISCO,**
 18 Plaintiff-Intervenor,
 19 **v.**
 20 **ARNOLD SCHWARZENEGGER, et al.,**
 21 Defendants,
 22 **DENNIS HOLLINGSWORTH, et al.,**
 23 Defendant-Intervenors.
 24

3:09-cv-02292-VRW
**ATTORNEY GENERAL'S
 MEMORANDUM IN RESPONSE TO
 COURT'S INQUIRY [DOC #413] INTO
 THE ATTORNEY GENERAL'S ROLE IN
 THE INITIATIVE PROCESS**
 Judge: Hon. Vaughn R. Walker, Chief Judge
 Trial Date: January 11, 2010
 Action Filed: May 27, 2009

1 Attorney General responds to the Court's Order of January 12, 2010 (Doc. #413) as
2 follows:

3 INTRODUCTION

4 The California Constitution and the California Elections Code establish the duties and
5 authority of the Attorney General in the state's initiative and referendum process. These laws and
6 a long-standing decision of the California Supreme Court make clear that the Attorney General's
7 duties in the pre-election process are ministerial, and that the Attorney General cannot refuse to
8 provide a title and summary for a proposed measure because he judges the proposed measure
9 unconstitutional. *Schmitz v. Younger*, 21 Cal.3d 90, 92-93 (1978). California law simply does
10 not give the Attorney General the authority unilaterally to prevent a proposed ballot measure from
11 being submitted to the voters. The authority to prevent a duly qualified initiative from reaching
12 the ballot rests exclusively with the state courts. *Id.* at 93. Of course, the Attorney General may
13 petition the state courts to prevent an initiative from reaching the ballot. *Id.* This, however, is a
14 discretionary act. And the likelihood of success of a petition to withhold a proposed measure
15 from the voters is limited by California's well-established presumption against the pre-election
16 review of substantive constitutional questions. See *Independent Energy Producers Ass'n v.*
17 *McPherson*, 38 Cal.4th 1020, 1029 (2006). As the California Supreme Court has repeatedly
18 stated, "it is usually more appropriate to review constitutional and other challenges to ballot
19 propositions or initiative measures after an election rather than to disrupt the electoral process by
20 preventing the exercise of the people's franchise, in the absence of some clear showing of
21 invalidity." *Id.* (quoting *Brosnahan v. Eu*, 31 Cal.3d 1, 4 (1982)).

22 ANALYSIS

23 As set forth in the California Constitution, "[t]he initiative is the power of the electors to
24 propose statutes and amendment to the Constitution and to adopt or reject them." Cal. Const., art.
25 II, § 8(a). Article II, section 10(d) of the California Constitution provides that the Attorney
26 General shall, consistent with statute, prepare a title and summary of proposed measures:
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1 Prior to the circulation of an initiative or referendum petition for signatures, a copy
2 shall be submitted to the Attorney General who shall prepare a title and summary
3 of the measure as provided by law.

4 The California Elections Code provides more detail. Before circulating any initiative
5 petition for signatures, a proponent must submit the text of the proposed measure to the Attorney
6 General along with a written request for a title and summary. Cal. Elec. Code § 9001(a). Upon
7 receipt of the text, the Attorney General “shall prepare a circulating title and summary of the chief
8 purposes and points of the proposed measure.” *Id.*, § 9004(b). The circulating title and summary
9 prepared by the Attorney General must be printed on each page of the petition to be signed by
10 voters. *Id.*, § 9008(b).

11 The Attorney General “shall, in boldface print, include in the circulating title and summary
12 either the estimate of the amount of any increase or decrease in revenues or costs to the state or
13 local government, or an opinion as to whether or not a substantial net change in state or local
14 finances would result if the proposed initiative is adopted.” Cal. Elec. Code § 9005(a). The
15 required estimate “shall be made jointly by the Department of Finance and the Joint Legislative
16 Budget Committee, who shall deliver the estimate to the Attorney General so that he or she may
17 include the estimate in the circulating title and summary prepared by him or her.” *Id.*, § 9005(b).
18 In preparation of the fiscal estimate or opinion, the Department of Finance and the Joint
19 Legislative Budget Committee may use any statement of fiscal impact prepared by the Legislative
20 Analyst under Government Code section 12172, subdivision (b). *Id.*, § 9005(d).

21 The circulating title and summary prepared by the Attorney General “shall not exceed 100
22 words.” Cal. Elec. Code § 9004(a). The fiscal estimate or opinion prepared by the Department of
23 Finance and the Joint Legislative Budget Committee, however, is not included in this 100-word
24 limit. *Holmes v. Jones*, 83 Cal.App.4th 882, 888 (2000). Instead, it is included in the title and
25 summary “in the sense that it should be printed along with the title and summary and be placed
26 before voters deciding whether to sign a circulating petition for a proposed ballot initiative.” *Id.*
27 at 889.

1 When the Secretary of State determines that a measure will appear on the ballot, the
2 Attorney General prepares a ballot title and summary and ballot label. Cal. Elec. Code § 9050.
3 “In providing the ballot title and summary, the Attorney General shall give a true and impartial
4 statement of the purpose of the measure in such language that the ballot title and summary shall
5 neither be an argument, nor be likely to create prejudice, for or against the proposed measure.”
6 *Id.* § 9051(c). This standard of neutrality for the content of the ballot title and summary applies
7 equally to the preparation of the circulating title and summary. *Id.* § 9004(a).

8 Since 1978, when the California Supreme Court decided *Schmitz v. Younger*, it has been
9 clear that the Attorney General has no authority to withhold issuance of a title and summary
10 because in judges that a proposed initiative is unconstitutional. In that case, the petitioner
11 submitted a proposed initiative to the Attorney General for a circulating title and summary. 21
12 Cal.3d at 92. The measure would have (a) made it unlawful for any teacher to strike, (b)
13 prohibited campaign contributions by teacher’s organizations, and (c) prevented tax revenues
14 from being used to provide transportation for purposes of racially balancing the public schools.
15 *Id.* Attorney General Evelle J. Younger refused to issue the title and summary because he judged
16 it to be in violation of the single-subject rule, Cal. Const., art. II, § 8(b). *Id.* The proponent filed
17 an original petition for writ of mandate in the California Supreme Court, *id.* at 92, which issued a
18 peremptory writ ordering Attorney General Younger to issue the circulating title and summary,
19 *id.* at 93, over the dissent of one Justice, *id.* at 93-102.¹

20 The majority held that the people’s right of initiative must be fully preserved by preventing
21 it from becoming bogged down in litigation. 21 Cal.3d at 92. It noted that in furtherance of this
22 goal, in other contexts the courts “have narrowly circumscribed the rights of ministerial officials
23 to impede or delay the initiative process.” *Id.* The majority affirmed that, similarly:

24 The duty of the Attorney General to prepare title and summary for a proposed
25 initiative measure is a ministerial one and mandate will lie to compel him to act

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27 ¹ The dissenter, Justice Manuel, argued that the Attorney General had both the
28 constitutional authority and the duty to withhold title and summary. 21 Cal.3d at 94. The
majority rejected his analysis. *Id.*

1 when the proposal is in proper form and complies with statutory and constitutional
2 procedural requirements.

3 *Id.* at 92-93. The majority found that the question of whether the proposed measure violated the
4 Constitution “involves difficult questions that only a court may resolve.” *Id.* at 93.

5 Absent judicial authorization, the Attorney General may not urge violation of the
6 single subject requirement to justify refusal to title and prepare summary of a
7 proposed measure.

8 This does not mean that the Attorney General may not challenge the validity of the
9 proposed measure by timely and appropriate legal action. We hold only that
10 without prior judicial authorization he may not delay or impede the initiative
11 process while claims of the measure's invalidity are determined.

12 *Id.* The Supreme Court expressly recognized the Attorney General’s discretionary right to
13 challenge the validity of a proposed measure by bringing timely and appropriate legal action,² but
14 was clear that the Attorney General has no authority to withhold issuance of title and summary
15 without prior judicial authorization. *Id.*

16 The Attorney General’s duty to issue a ballot title and summary is similarly ministerial.
17 *Compare* Cal. Elec. Code §§ 9000-9009 (governing circulating title and summary for an
18 initiative) *with* Cal. Elec. Code §§ 9050-9054 (governing ballot title and summary for an
19 initiative). Although there is no case precisely on point, it is plain that the reasoning of *Schmitz v.*
20 *Younger* would govern any attempt by the Attorney General to withhold a ballot title and
21 summary if he judged that the measure was unconstitutional.

22 CONCLUSION

23 Proposition 8 was not placed on the ballot “despite the Attorney General’s position that
24 Proposition 8 is unconstitutional.” Doc. #413 at 2:2-4. The Attorney General’s position on the
25 constitutionality of Proposition 8 was irrelevant to whether the measure would appear on the

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27 ² However, as discussed at the outset, the pre-election review of substantive constitutional
28 challenges is disfavored “absent some clear showing of invalidity.” *Independent Energy
Producers Ass’n v. McPherson*, 38 Cal.4th at 1029.

1 ballot because under California law the Attorney General has no authority to prevent the
2 submission of a qualified initiative to the voters.

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4 Dated: January 14, 2010

Respectfully submitted,

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