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## Augmenting Transparency in the Ballot Initiative Process: Impacts of the 2014 Reforms on the 2016 Election Cycle

Chris Chambers Goodman  
*Pepperdine University*

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## Augmenting Transparency in the Ballot Initiative Process: Impacts of the 2014 Reforms on the 2016 Election Cycle

Chris Chambers Goodman\*

### INTRODUCTION

The State of California recently revised its Elections Code to update and improve the ballot initiative process.<sup>1</sup> This Article discusses the recent changes in the laws governing initiative measures in California under the Ballot Initiative Transparency Act of 2014 (“BITA”). It begins with a description of the reforms and the purposes behind them. The next section analyzes the benefits to direct democracy, including enhancing voter information and providing a more detailed record of voter intent, as well as the potential burdens, such as a chilling effect on initiative proponents, and diminishing voter interest. The final section discusses the impact that BITA is having thus far on ballot initiatives in the current election cycle.

### I. THE BALLOT INITIATIVE TRANSPARENCY ACT OF 2014

In a 2010 article, this author analyzed the factors that impact voter support for initiative measures, and suggested reforms.<sup>2</sup> Some of the issues included the impact of financial contributions on initiative campaigns,<sup>3</sup> the voters’ lack of substantial knowledge about initiative measures, their confusion with ballot language, the impact of competing ballot measures,<sup>4</sup>

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\* Professor of Law, Pepperdine University School of Law; J.D. Stanford, A.B. *cum laude* Harvard College. I want to thank Samuel Gilkeson for his excellent research assistance and editorial comments, as well as Fhanysha Clark for sharing her knowledge of the initiative process from a public policy perspective. I appreciate the diligent work of the editors of the *Chapman Law Review*.

<sup>1</sup> S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

<sup>2</sup> See Chris Chambers Goodman, *(M)Admen: Using Persuasion Factors in Media Advertisements to Prevent Tyranny of the Majority on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247, 247–302 (2010) (examining the use of direct democracy to restrict the rights of political minorities, enumerating the persuasion factors in media designed to sway voting on bills, and proposing possible reforms to the direct democracy process to prevent political majorities from restricting the rights of political minorities).

<sup>3</sup> *Id.* at 255.

<sup>4</sup> *Id.* at 256–59.

the volume of initiatives placed on ballots,<sup>5</sup> and the influence of special interests.<sup>6</sup> The proposed reforms suggested in the article included simplifying the language in both the ballot initiatives and the legislative analyst summaries;<sup>7</sup> providing additional information on supporters and opponents, including their financial contributions;<sup>8</sup> and providing advanced judicial review of proposed ballot measures.<sup>9</sup> Introduced as Senate Bill 1253, BITA addressed a number of the suggestions made in the 2010 article in the areas of voter clarity, voter information, initiative donor transparency, and modifications to initiative language.<sup>10</sup> BITA was signed into law in the fall of 2014, updating the more than century-old initiative process.<sup>11</sup> The legislative intent behind BITA is expressly stated as: (1) “[p]roviding voters with more useful information so that they are able to make an informed decision about an initiative measure”; (2) “[p]roviding a voter-friendly explanation of each initiative measure”; and (3) “[i]dentifying and correcting flaws in an initiative measure before it appears on the ballot.”<sup>12</sup> These purposes are illustrated in several major modifications to existing law, described below.

#### A. Providing More Useful Voter Information

##### 1. Plain Language

BITA requires the Secretary of State to give one-stop access to information about the initiative measures through an Internet website.<sup>13</sup> The website must include a plain language, short, and understandable summary of the measure, including the identities of individuals and groups supporting and opposing it.<sup>14</sup>

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<sup>5</sup> *Id.* at 259–60.

<sup>6</sup> *Id.* at 262.

<sup>7</sup> *Id.* at 299–300.

<sup>8</sup> *Id.* at 296–97.

<sup>9</sup> *Id.* at 301.

<sup>10</sup> S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

<sup>11</sup> *Id.* § 2(b) (Cal. 2014) (“It is the intent of the Legislature in enacting this act to update the initiative process, which is more than 100 years old . . . .”); *Governor Brown Signs Ballot Reform Measure*, OFF. OF GOVERNOR EDMUND G. BROWN JR., (Sept. 27, 2014), <https://www.gov.ca.gov/news.php?id=18735> [<https://perma.cc/25N6-P7CQ>].

<sup>12</sup> S.B. 1253, 2013–2014 Leg., Reg. Sess. § 2(b)(1)–(3) (Cal. 2014).

<sup>13</sup> Compare CAL. ELEC. CODE § 9082.7(b)(1) (West 2015) (requiring the California Secretary of State to post a summary of the ballot measures), with CAL. ELEC. CODE § 9082.7 (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for additional content).

<sup>14</sup> Compare CAL. ELEC. CODE § 9082.7(b)(2) (West 2015) (requiring summary of ballot measures to include the total amount of reported contribution in support and in opposition of the measure), with CAL. ELEC. CODE § 9082.7 (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for additional content).

To enhance voter friendliness, the legislation requires the Attorney General to consider public comments when drafting the ballot titles and summaries.<sup>15</sup>

## 2. Enhancing Financial Disclosures

Financial information is another important component of voter information, and the website must give voters easy access to information about how an initiative measure is being financed, including the total amount of contributions<sup>16</sup> and the top ten contributors on each side.<sup>17</sup> To further enhance voter accessibility, the website must consolidate the summary and financial information in an easy to find, and easy to understand, manner.<sup>18</sup>

## 3. Earlier Public Hearings

Requiring public hearings on the subject of the proposed ballot initiative earlier in the process is another significant modification. Prior law required the Secretary of State to give the initiative information to the Legislature *after* the measure was certified, while the new legislation requires this transmission to occur *prior to* certification.<sup>19</sup> The Legislature must assign the measure to the appropriate committees and hold joint public hearings on the subject of the ballot measure.<sup>20</sup> BITA requires this transmission from the Secretary of State much earlier in the process, namely after the initiative proponents have certified that they have collected 25% of the number of signatures needed

<sup>15</sup> Compare CAL. ELEC. CODE § 9051(d) (West 2015) (requiring the Attorney General to “invite and consider public comment in preparing each ballot title and summary”), with CAL. ELEC. CODE § 9051 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 13(d) (Cal. 2014) (having no requirement for public comments to be considered).

<sup>16</sup> CAL. ELEC. CODE § 9082.7(b)(2)(A) (West 2015).

<sup>17</sup> *Id.* § 9082.7(b)(3).

<sup>18</sup> Compare *id.* § 9082.7(b)(1)–(4) (requiring summary of ballot measures to include the total amount of reported contribution in support and in opposition of the measure and a list of committees that support or oppose the measure along with links to access information about those committees), with CAL. ELEC. CODE § 9082.7 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for financing for support or opposition of ballot initiatives).

<sup>19</sup> In section 9034 of the current California Elections Code, the proponents of a measure are required to submit a signed certification to the Secretary of State immediately upon collecting 25% of the required signatures. The Secretary of State must then send the initiative measures, title, and summary to the Legislature. The Legislature must hold committee hearings no later than 131 days before the election in which the measure will be voted on. The pre-BITA section 9034 required the Secretary of State to submit a ballot measure to the Legislature after it was certified. The Legislature was required to then hold joint public hearings no later than thirty days prior to the date of the election. Compare CAL. ELEC. CODE § 9034 (West 2015), with CAL. ELEC. CODE § 9034 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 12 (Cal. 2014).

<sup>20</sup> CAL. ELEC. CODE § 9034 (West 2015).

to qualify the initiative for the ballot.<sup>21</sup> In addition, the Legislature is now required to hold its joint public hearing on the subject no later than 131 days prior to the date of election,<sup>22</sup> which is the same date by which the Secretary of State must issue the certificate of qualification for the ballot.<sup>23</sup> Thus, the hearings will be completed on or before the date of certification (which is more than four months prior to the election).

#### B. Addressing Initiative Flaws Prior to the Election

In an effort to correct initiative flaws prior to the printing of the ballots, BITA implements a new thirty-day public review process with an opportunity for proponents to incorporate the public comments and amend the initiative language during this period.<sup>24</sup> The Attorney General's office initiates the public comment period when it posts the text of the initiative on the Attorney General's website, with a link for the public to provide comments about the proposed initiative.<sup>25</sup> Comments are sent to the initiative proponents periodically, who then have an opportunity to amend the language, unless the initiative does not effect a substantive change in the law.<sup>26</sup> The required public comment period is designed to help satisfy the third purpose: to "address perceived errors in the drafting of, or perceived unintended consequence of, the proposed initiative measure."<sup>27</sup>

To make the most effective use of any public comments received, proponents are permitted to amend the language of the ballot initiative during the comment period.<sup>28</sup> Once the comment

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<sup>21</sup> *Id.* § 9034(a); *see also* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 12 (Cal. 2014).

<sup>22</sup> *Compare* CAL. ELEC. CODE § 9034 (West 2015) (requiring the Legislature to hold committee hearings no later than 131 days before the election where the measure will be voted on), *with* CAL. ELEC. CODE § 9034 (West 2013), *amended by* S.B. 1253, 2014 Leg., Reg. Sess. § 12 (Cal. 2014) (requiring the Legislature to hold joint public hearings no later than thirty days prior to the date of the election).

<sup>23</sup> CAL. ELEC. CODE § 9034(b) (West 2015); *Id.* § 9033(b)(2).

<sup>24</sup> *Compare* CAL. ELEC. CODE § 9002(a)–(b) (West 2015) (providing for a thirty day public review period), *with* CAL. ELEC. CODE § 9002 (West 2013), *amended by* S.B. 1253, 2014 Leg., Reg. Sess. § 5 (Cal. 2014) (having no provision for public review); *see also* CAL. ELEC. CODE § 9004 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 6 (Cal. 2014) (requiring only for the Attorney General to give the proposed initiative a title and summary and submit it to the Secretary of State within fifteen days of receiving either: the final version of the initiative, any amendments on the initiative, or a fiscal estimate or opinion).

<sup>25</sup> CAL. ELEC. CODE § 9002(a)(1)–(2) (West 2015). We have contacted the Attorney General's office to obtain additional information about how often comments are forwarded, but have not yet received any response.

<sup>26</sup> *Id.* § 9002(a)(2)–(b).

<sup>27</sup> S.B. 1253, 2013–2014 Leg., Reg. Sess. § 2(b)(3) (Cal. 2014).

<sup>28</sup> CAL. ELEC. CODE § 9002(b) (West 2015) (“[P]roponents of the proposed initiative measure may submit amendments to the measure that are reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed,” and the amendments must also “effect a substantive change in law.”).

period closes, the proponents have five days to consider the rest of the comments received and submit any further amendments.<sup>29</sup> The scope of the permissible amendments is limited to those “reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed.”<sup>30</sup> All amendments must be signed and jointly submitted by all proponents of the ballot initiative.<sup>31</sup> In some cases, for instance when comments reveal that an initiative suffers from fatal constitutional flaws, the most effective use of comments may be to withdraw the initiative before obtaining a Summary and Ballot Title, and before circulating petitions.

BITA also helps to address potential flaws by extending the time for proponents to withdraw the initiative. Former law allowed withdrawal up until the time that the completed signature petitions were filed seeking certification of the measure, but current law extends the withdrawal period to any time before the measure is certified as qualifying for the ballot.<sup>32</sup> The earlier legislative hearings may reveal significant flaws in an initiative. The hearings may also prompt the Legislature to enact its own statutes, which may render an initiative moot. Thus, this extended deadline to withdraw serves the public interest in avoiding wasting election official resources, voter time, and space on the ballot.

### C. Increasing the Length of Time from Filing to Ballot Certification

BITA also lengthens the period of time between when an initiative measure is submitted and the time it is certified for the ballot in two ways. First, the legislation adds twenty-five days to the final date upon which the fiscal report is due to the Attorney General.<sup>33</sup> The second extension adds thirty days to the time for filing the completed signature petitions with the county elections officials.<sup>34</sup>

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<sup>29</sup> *Id.* § 9002(b)(4).

<sup>30</sup> *Id.* § 9002(b).

<sup>31</sup> *Id.* § 9002(b)(1).

<sup>32</sup> *Id.* § 9604(b).

<sup>33</sup> Compare CAL. ELEC. CODE § 9005(c) (West 2015) (requiring a fiscal impact report from the Legislative Analyst’s Office to be prepared within fifty days of receipt of the final version of an initiative from the Attorney General, or an opinion on net fiscal impact if the report cannot be made within fifty days), with CAL. ELEC. CODE § 9005(c) (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 7 (Cal. 2014) (requiring the fiscal impact report to be made within twenty-five days).

<sup>34</sup> CAL. ELEC. CODE § 9014(b) (West 2015) (increasing the signature-gathering deadline from 150 days after the official summary date to 180 days after).

The additional twenty-five days may help alleviate the workload in the offices of the Legislative Analyst and Department of Finance, if they wait until after the expiration of the thirty-day comment period to review the measure. The extra time will give them the opportunity to incorporate those comments or any amendments and responses into their consideration of the fiscal estimate. It also will avoid duplication of work that might result if the measure was amended after the Attorney General had received the fiscal report.

The Attorney General must submit a Summary and Ballot Title to the Secretary of State within fifteen days after receiving the fiscal report.<sup>35</sup> Once the Summary and Ballot Title have been sent to the initiative proponents, the signature-gathering phase can begin.<sup>36</sup> The additional month for signature gathering may allow proponents to spend more time engaging and educating the public about the initiative.

Once the completed signature petitions are filed, the signature verification process begins.<sup>37</sup> When adequate signatures have been verified, the Secretary of State must notify counties and cities that they may suspend verification of signatures once the threshold of qualified voters has been reached.<sup>38</sup> If the signature verification threshold has been met, the Secretary of State must issue a certificate of qualification of that ballot measure for the next election no later than 131 days prior to the election.<sup>39</sup>

From this point forward, until the election, the proponents may not withdraw the initiative from the ballot.<sup>40</sup> In most cases, more than six months will have elapsed since the petition was first posted on the Attorney General's website for public comment.

While BITA made other substantive changes, those described above are germane to this Article.<sup>41</sup> As more empirical information becomes available, other revisions may become significant as well.

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<sup>35</sup> *Id.* § 9004(b).

<sup>36</sup> *See id.* § 9004(c).

<sup>37</sup> *Id.* § 9030(d).

<sup>38</sup> *Id.* § 9031(c)(1) (requiring elections officials or voter registrars to prepare reports for the Secretary of State detailing how many signatures are verified by the date of the report); *see also id.* § 9033(a) (requiring the Secretary of State to "notify the proponents and immediately transmit to the elections official or registrar of voters of every county or city and county in the state a notice directing that signature verification be terminated" once the Secretary receives one or more petitions from voter registrars or county elections officials).

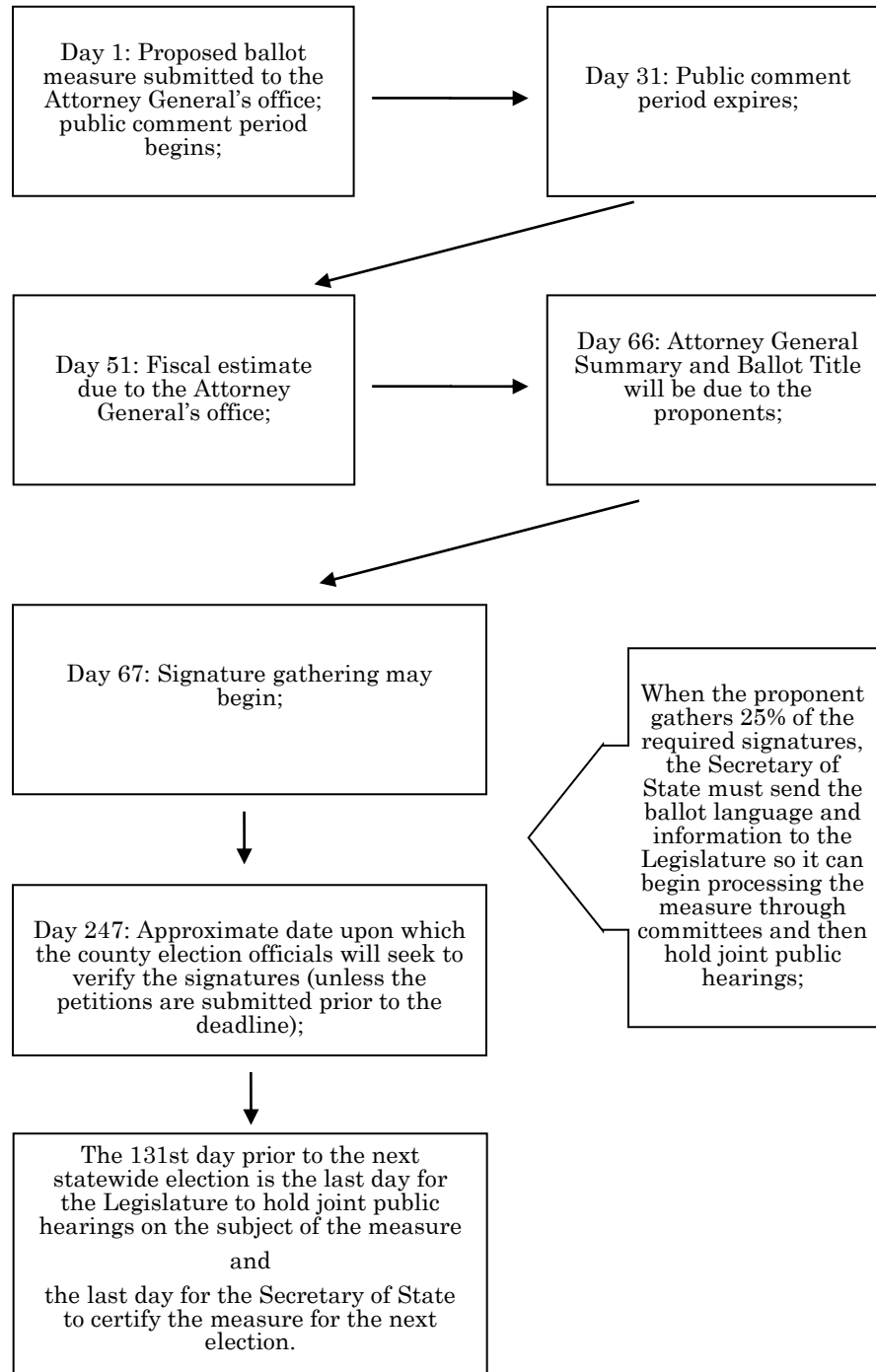
<sup>39</sup> *Id.* § 9033(b)(2); *see also Qualified Statewide Ballot Measures*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/> [http://perma.cc/F7K2-ZL4D].

<sup>40</sup> CAL. ELEC. CODE § 9604(b) (West 2015).

<sup>41</sup> *See generally* S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

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The following timeline puts this process into context:





## II. ANALYZING BITA

### A. The Thirty-Day Review

The thirty-day public comment period was designed in large part to provide an opportunity to address perceived errors in the drafting of proposed initiative measures, as well as to flesh out potential unintended consequences of the measures. The public comment period assists not only the proponents, but also the public at large in three ways.

First, the comment period provides a valuable opportunity for feedback so that ambiguous language can be explained or changed. Several initiatives have been amended during the public comment period this election cycle.<sup>42</sup> Second, consequences and potential effects of the measure can be identified earlier in the process, thus reducing the chance of unintended, unpalatable, or unacceptable consequences. Third, and perhaps most importantly, by providing a record of issues that were raised by opponents, proponents, and the general public, it gives a basis for analyzing and understanding the proponents or voters' intent behind the proposed initiative if it is later challenged, as the example of Proposition 209 shows.<sup>43</sup>

By permitting proponents to amend the measure after receiving some comments, BITA provides a good opportunity for them to take into account public reactions. However, the comment period may have the effect of chilling some initiative proponents and perhaps even of encouraging them to withdraw their petitions. This thirty-day period also provides a greater opportunity for media exposure about the measure and the time for public sentiment to influence the process. Consider the ballot initiative filed earlier this year entitled "The Sodomite Suppression Act" (hereinafter "SSA").<sup>44</sup> The Attorney General sought a court order permitting her to decline to prepare a summary of the proposed ballot initiative.<sup>45</sup> During the initial

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<sup>42</sup> *Initiatives - Active Measures*, ST. CAL. DEP'T JUST. OFF. ATT'Y GEN., <https://oag.ca.gov/initiatives/active-measures> [<https://perma.cc/K474-HXQC>].

<sup>43</sup> See Chris Chambers Goodman, *Examining "Voter Intent" Behind Proposition 209: Why Recruitment, Retention and Scholarship Privileges Should be Permissible Under Article I, Section 31*, 27 CHICANO-LATINO L. REV. 59, 63–71 (2008) (ascertaining voter intent on a ballot initiative post-election).

<sup>44</sup> Sodomite Suppression Act, Initiative 15-0008 (Cal. 2015), [http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29\\_0.pdf](http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29_0.pdf)? [<http://perma.cc/38RE-5SM3>]. See generally Hailey Branson-Potts, *Judge Strikes Down Proposed "Sodomite Suppression Act" Calling for Killing of Gays*, L.A. TIMES (June 23, 2015, 4:21 PM), <http://www.latimes.com/local/lanow/la-me-ln-antigay-sodomite-suppression-act-struck-down-20150623-story.html> [<http://perma.cc/CZJ4-QXUJ>].

<sup>45</sup> Complaint for Declaratory Relief at 5, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. California Attorney General

days of the public comment period, over 125 comments were logged onto the website.<sup>46</sup> The initiative proponents did not challenge the Attorney General's court filing and the judge ruled that there was no need for her to prepare a Summary and Ballot Title because the proposition was obviously unconstitutional.<sup>47</sup>

Anyone with an email address can input comments on the Attorney General's website;<sup>48</sup> the comments are then forwarded to the proponent. The comments will be public records available for inspection, upon request, and "shall not be displayed to the public on the Attorney General's Internet Web site during the public review period."<sup>49</sup> This language does not address whether the written comments would or could be displayed at some other point—such as during the election cycle, once the measure has been placed on the ballot<sup>50</sup>—nor did the legislative hearing address this point.<sup>51</sup>

It may turn out that positive comments are made public by the proponents and negative comments are not revealed at all. The proponent has copies of the comments and may have an incentive to make the positive comments public in press releases, blogs, and other media as the initiative goes through the signature-gathering process. There is no requirement that the Attorney General simultaneously transmit the comments to any opponents of the proposed initiative, so the initiative opponents would not have the negative comments to publicize during the signature-gathering phase unless they submitted a Freedom of Information Act ("FOIA") request, which can take some time and requires paying a fee. Opponents and the media may wait until the initiative is certified for the ballot before making the FOIA

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Kamala D. Harris filed for declaratory relief with the Sacramento County Superior Court on March 25, 2015, to relieve her of the duty to give the Sodomite Suppression Act an official title and summary, claiming the measure was unconstitutional and against public policy. *Id.*

<sup>46</sup> Christopher Cadelago, *California Proposal to Legalize Killing Gays Hard to Stop*, SACRAMENTO BEE (Mar. 19, 2015, 3:19 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article15394181.html> [https://perma.cc/XML5-H2XT].

<sup>47</sup> Default Judgment by Court in Favor of Plaintiff, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283 (calling the measure "patently unconstitutional on its face"); *Sacramento Judge Agrees to Dismiss Kill-Gays Ballot Measure*, ORANGE COUNTY REG. (June 23, 2015, 4:38 PM), <http://www.ocregister.com/articles/judge-668136-attorney-ballot.html> [https://perma.cc/Z8UR-VJ4D].

<sup>48</sup> *Initiatives - Active Measures*, *supra* note 42.

<sup>49</sup> CAL. ELEC. CODE § 9002(a)(2) (West 2015).

<sup>50</sup> S.B. 1253, 2014 Leg., Reg. Sess. § 5 (Cal. 2014). The May 27, 2014 amendments to Senate Bill 1253 added language to section 9002(a)(2) of the California Elections Code making all public comments on ballot measures available as public records. *Id.*

<sup>51</sup> *Senate Elections and Constitutional Amendments Committee - Part 1*, Apr. 22, 2014, CAL. ST. SENATE, [http://senate.ca.gov/vod/20140422\\_1330\\_Elections\\_DVD1](http://senate.ca.gov/vod/20140422_1330_Elections_DVD1) [http://perma.cc/8LEP-NF2W].

request, and if so, the members of the public who are considering signing the petition would not have realistic access to negative comments about the measure. If opponents wait until certification to file a FOIA request, it is not clear whether they would obtain the documents in a timely manner to be usefully disseminated prior to the election.<sup>52</sup> Efforts to obtain public comments from initiative proponents directly have been largely unsuccessful, with only two responding, one who received no public comments, and another who reports receiving “about ten.”<sup>53</sup> Thus, the “public comment” period may not yet be enhancing “transparency” in any significant way.

### B. The Amendment Opportunity

Permitting proponents the opportunity to amend at any time during the comment period, and presumably in response to the comments, is a useful modification. Amendments can result in refinements of the proposed initiative that would make it less subject to litigation or confusion later. Only a few amendments have been submitted during the 2016 election cycle, as noted above.<sup>54</sup> On the other hand, crafty proponents could use the

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<sup>52</sup> STATE OF CAL. OFFICE OF THE ATTORNEY GEN., CALIFORNIA DEPARTMENT OF JUSTICE GUIDELINES FOR ACCESS TO PUBLIC RECORDS (Mar. 2012), [http://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/pra\\_guidelines.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/pra_guidelines.pdf) [<http://perma.cc/4FL8-AKVB>]. The Attorney General’s office designated a Public Records Coordinator to process public records requests. Members of the public who want to inspect or obtain copies of records can submit requests electronically on the Attorney General’s website or through the mail. Members of the public may also make requests over the phone; however, records “maintained by the Department [of Justice] for the purpose of immediate public inspection” must be requested in writing. *Id.*

Public records are generally available for inspection any time during the Department of Justice’s normal business hours. However, if a request requires “retrieval, review or redaction of records,” then a mutually agreeable time to inspect the records must be set up with the Department of Justice. *Id.*

Requests for copies of records can take up to twenty-four days to process, depending on the records requested and the amount of work needed for the Department of Justice to comply with the request. If immediate disclosure of records is not possible, the Department of Justice will provide an estimated date when the records will be available, which must be “within a reasonable period of time.” Copies of paper records will require the requester to pay a “direct cost of duplication” at ten cents per page. Copies of electronic records or data may require the requester to pay the full costs of duplication, including “the staff person’s time in researching, retrieving, redacting and mailing the record.” *Id.*

<sup>53</sup> Charlotte Laws, the proponent of Initiative 15-0014, stated that she received around ten comments. Of the ten comments, she received “a handful of positive responses,” while “one or two people . . . said that they did not like my initiative because it infringed on free speech.” In the end, she stated that the comments did not lead to any amendments of Initiative 15-0014. E-mail from Charlotte Laws, proponent of Initiative 15-0014, to Chris Chambers Goodman (Aug. 8, 2015, 10:08 AM) (on file with author). Ben Davis, the proponent of Initiatives 15-0001 and 15-0002, received no comments on either of his propositions. E-mail from Ben Davis, proponent of Initiatives 15-0001 and 15-0002, to Chris Chambers Goodman (Aug. 11, 2015, 1:39 PM) (on file with author).

<sup>54</sup> See *Initiatives - Active Measures*, *supra* note 42.

comments to amend the proposition in a way that will enhance signature-gathering efforts, without necessarily making the legislation substantively better.

The short deadlines for submitting amendments could present problems where the comments are numerous, detailed, and require more time to assess properly.<sup>55</sup> The language of the legislation suggests that the preferred method would be to propose a new initiative, with the revised language, at a later period.<sup>56</sup> At least one proponent has submitted four slightly different versions of the same basic proposition on abortion access.<sup>57</sup> The second was submitted two days after the first, so it may be that the comments were not even up yet. The third was submitted about four months later, so it may be that it is a reaction to the comment periods on the other two and the proponent missed the five-day deadline. All are still listed as active. Because the proponent has not responded to our requests for information about the comments, it is unclear whether the comments impacted his decision to file modified versions of the same proposition.<sup>58</sup>

### C. Extending the Time Period for Signature Gathering

The impact of the extension of time for gathering signatures is not yet known. At this stage in the 2016 election cycle, the public comment period has expired for a number of initiatives.<sup>59</sup> The first circulation deadline was set for August 17, 2015, with two others before the end of that month.<sup>60</sup> Approximately five additional initiatives have circulation deadlines in September, one in October, eight in November, ten in December and thus far, six in January of 2016.<sup>61</sup>

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<sup>55</sup> CAL. ELEC. CODE § 9002(b)(4) (West 2015) (“An amendment shall not be accepted more than five days after the public review period is concluded.”).

<sup>56</sup> *Id.* (“However, a proponent shall not be prohibited from proposing a new initiative measure and requesting that a circulating title and summary be prepared for that measure pursuant to Section 9001.”).

<sup>57</sup> *See infra* Part III.

<sup>58</sup> *See infra* note 107 and accompanying text. In the first footnote for the abortion access laws below, one sentence was added in the final version of the law. It is possible this was in response to the amendment period passing. However, because the latest version was submitted four months after the previous version (Initiative 15-0025 received a title June 29, 2015 while Initiative 14-0014 received a title on February 24, 2015), we can assume the proponent missed the deadline. The latest version, four, was filed on August 12, 2015, and makes no changes.

<sup>59</sup> *Initiatives - Active Measures*, *supra* note 42.

<sup>60</sup> *Initiatives and Referenda Cleared for Circulation*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation/> [<http://perma.cc/HF2H-9GMN>].

<sup>61</sup> *Id.*

Until the signature verification process is well underway, there is no evidence about the effect of the additional circulation time.<sup>62</sup> It may turn out that more signatures are collected, but until they are actually verified, the effect of this additional time will be unclear. It is likely that some people may sign a petition for a particular initiative more than once, forgetting that they had already signed it, resulting in an overabundance of duplicate signatures. Diminishing voter interest is another potential negative consequence of the extended time.

Another impact of the additional time for the gathering of signatures may be that it causes the Legislature to delay assigning the proposition to a committee and conducting any legislative hearings until the signature verification process is well under way. However, waiting could lead to a substantial time crunch because the Legislature can no longer wait until after a measure is certified to hold its hearings.<sup>63</sup> Recall that the Attorney General is not required to issue the certificate of qualification until 131 days prior to the election,<sup>64</sup> which is the same last day for the Senate and Assembly to hold joint public hearings on the subject of the measure.<sup>65</sup> Therefore, in many cases, the Legislature would have to schedule the hearing prior to certification, unless the Secretary of State certifies the measure earlier than required. While the Secretary of State does not need to wait until the last day (and in fact has already certified several measures from 2014 for the 2016 ballot as of this writing),<sup>66</sup> BITA gives the Secretary of State an incentive to wait until that last day to allow initiative proponents the maximum amount of time to withdraw their initiatives, which they can now do at any time prior to that certification.

#### D. The Earlier Pre-election Deadline for Joint Legislative Hearings

The statute requires the public hearings be held at some point prior to that 131st day. One benefit of having this earlier deadline is that the Legislature may choose to act in a way that makes the initiative no longer necessary. While the legislation

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<sup>62</sup> A recent attempt by Washington state to increase the signature-gathering time frame was defeated, and no other states have made such a change in recent years. *Proposed Initiatives to the Legislature 2012*, SECRETARY ST.: ELECTIONS & VOTING, <http://www.sos.wa.gov/elections/initiatives/Initiatives.aspx?y=2012&t=1> [<http://perma.cc/A3LQ-FK5A>].

<sup>63</sup> CAL. ELEC. CODE § 9034 (West 2015).

<sup>64</sup> *Id.* § 9031(c).

<sup>65</sup> *Id.* § 9034(b).

<sup>66</sup> *Initiatives - Qualified for Ballot*, ST. CAL. DEP'T JUST. OFF. ATT'Y GEN., <https://oag.ca.gov/initiatives/qualified-for-ballot> [<http://perma.cc/5E7J-V4B4>].

specifically states that it is not to be construed as granting authority for “the Legislature to alter the initiative measure or prevent it from appearing on the ballot,”<sup>67</sup> as a practical matter, the Legislature can choose to enact a statute that has the same effect as the proposed initiative, thus rendering the initiative unnecessary in terms of modifying existing law. While it is too early to tell how this requirement will play out in this election cycle, the Legislature will be required to hold hearings on anything that reaches the 25% threshold. Several measures for the 2016 election cycle have already reached that threshold, but no legislative hearings have yet been scheduled. Proponents of legislative action may applaud this requirement as an opportunity for a more reasoned debate and a deeper investigation into the policies behind the proposed initiative measure.

It will be interesting to see whether legislative resources become overly burdened by this change in the law. The pre-certification hearing requirement could result in a hijacking of the legislative process in June, the fifth month prior to the election, potentially impacting the timing of the July recess of the Legislature if a significant number of initiatives attain a mere 25% of signatures.<sup>68</sup> Measures that may not ever obtain the necessary signatures may still be set for public hearings because the 131-day pre-election deadline will have to be met.<sup>69</sup> For those measures that do meet the signature threshold numerically, the Legislature will have to spend time on committee review and a joint hearing, while awaiting news of whether or not sufficient signatures are verified. In effect, BITA now requires the Legislature to consider issues and propositions in which they may have little or no interest whenever the 25% threshold is met, including those that are patently unconstitutional.

### III. APPLYING BITA TO SOME 2015 PROPOSED INITIATIVE MEASURES

There are a significant number of potential initiative measures being presented during the current 2016 election cycle. Taking a sampling of some of these measures, this Article next provides an illustration of the burdens and benefits of BITA in

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<sup>67</sup> CAL. ELEC. CODE § 9034(c) (West 2015).

<sup>68</sup> The July 2016 recess is currently set for July 17, if the budget is timely approved. 2015 *Tentative Legislative Schedule*, OFF. SECRETARY SENATE, (Jan. 26, 2015), [http://senate.ca.gov/sites/senate.ca.gov/files/agreedcalendar2015\\_0.pdf](http://senate.ca.gov/sites/senate.ca.gov/files/agreedcalendar2015_0.pdf) [<http://perma.cc/3V6X-7CDG>]; see also *Legislative Deadlines*, CAL. ST. ASSEMBLY (Oct. 7, 2015), <http://assembly.ca.gov/legislativedeadlines> [<http://perma.cc/W6RS-XXMX>].

<sup>69</sup> See *infra* Part III.

action by evaluating the little information we have thus far about the impact of the public comments period, the potential impacts of the increased time for signature gathering, and the earlier legislative hearing requirements.

#### A. The Sodomite Suppression Act and Related Initiatives

The SSA sought to criminalize two actions: touching a person of the same gender “for the purpose of sexual gratification” and distributing so-called “sodomistic propaganda” to people under the age of eighteen.<sup>70</sup> Sodomistic propaganda is defined in the initiative as “anything aimed at creating an interest in or acceptance of human sexual relations other than between a man and woman.”<sup>71</sup> The measure opens with an appeal to religious morals to suppress a “monstrous evil,” then states the penalties as follows: “the People of California wisely command, in the fear of God, that any person who willingly touches another person of the same gender for purposes of sexual gratification be put to death by bullets to the head or by any other convenient method.”<sup>72</sup> The penalty for distribution is less harsh: a prison term of up to ten years and fines of up to one million dollars.<sup>73</sup>

Further, it denies public benefit, public office, and public employment to people who violate the provisions of the initiative.<sup>74</sup> It gives the Attorney General an affirmative duty to defend the measure, and if the Attorney General does not act in a timely manner, the general public will be deputized to defend the measure.<sup>75</sup> In addition, it contains a provision that the law cannot be invalidated until heard by a quorum of California Supreme Court justices who are not eligible to be disqualified under the terms of the proposition.<sup>76</sup>

The public comment period as discussed above, produced over 125 comments and significant public backlash. The Attorney General sought court relief to avoid having to give the measure a Summary and Ballot Title. This measure was inactivated after a

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<sup>70</sup> Sodomite Suppression Act, Initiative 15-0008, § 39(b)–(c) (Cal. 2015), [http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29\\_0.pdf?](http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29_0.pdf?) [http://perma.cc/38RE-5SM3].

<sup>71</sup> *Id.* § 39(c).

<sup>72</sup> *Id.* § 39(b).

<sup>73</sup> *Id.* § 39(c).

<sup>74</sup> *Id.* § 39(d).

<sup>75</sup> *Id.* § 39(f). This type of clause is a reaction to the Attorney General’s refusal to defend Proposition 8 a few years ago, which amended the California Constitution to define marriage as between one man and one woman. Pete Williams, *Prop 8 Backers Refuse to Give Up*, NBC NEWS (July 23, 2013, 10:52 PM), <http://www.nbcnews.com/news/other/prop-8-backers-refuse-give-f6C10727461> [http://perma.cc/PML7-BLGH].

<sup>76</sup> Sodomite Suppression Act § 39(e).

court ruling,<sup>77</sup> but not before motivating several other proposed ballot initiatives which remain active and have entered the signature-gathering phase.<sup>78</sup> If the “Intolerant Jackass Act” and/or the “Shellfish Suppression Act” reach the 25% threshold, then the Legislature will need to schedule joint public hearings on those topics.

The Intolerant Jackass Act (hereinafter “IJA”) was filed in reaction to the SSA, and follows a similar format of declaring an evil and proposing a significant penalty.<sup>79</sup> It requires attendance in bi-monthly sensitivity training for one year and a donation of \$5000 to a pro-gay or pro-lesbian organization for anyone who brings forward a ballot measure that “suggests the killing of gays and lesbians.”<sup>80</sup> It also contains a provision that the state has “an affirmative duty to defend and enforce this law as written.”<sup>81</sup> The Legislative Analyst’s report notes a negligible fiscal effect and that some provisions could violate the First Amendment.<sup>82</sup>

The author of the IJA, Charlotte Laws, told the Los Angeles Times that “[the Intolerant Jackass Act] was done as a statement to make fun of [the proponent of the SSA].”<sup>83</sup> Laws received a “handful of positive comments” and a “few negative comments

<sup>77</sup> Branson-Potts, *supra* note 44. California Attorney General Kamala D. Harris filed for declaratory relief with the Sacramento County Superior Court on March 25, 2015, to relieve her of the duty to give Initiative 15-0008 an official title and summary. Complaint for Declaratory Relief, Harris v. McLaughlin, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. Judge Raymond Cadei granted declaratory relief in favor of California Attorney General Kamala D. Harris on June 22, 2015, stopping the “Sodomite Suppression Act” from ever reaching the signature phase of the ballot initiative process, because the initiative was “patently unconstitutional on its face” and “would be inappropriate, waste public resources, generate unnecessary divisions among the public and tend to mislead the electorate.” Default Judgment by Court in Favor of Plaintiff at 2, Harris v. McLaughlin, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. Judge Cadei’s granting of declaratory relief came several days before the United States Supreme Court decision in *Obergefell v. Hodges* allowed same-sex couples to marry and have marriages recognized in all states. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>78</sup> See generally Hailey Branson-Potts, “Intolerant Jackass Act” Author May Collect Signatures for Ballot Proposal, L.A. TIMES (June 3, 2015, 3:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-intolerant-jackass-act-20150603-story.html> [<http://perma.cc/2SYH-42KC>]. Several individuals contacted the proponent of the “Intolerant Jackass Act” indicating that they wished to collect signatures. The proponent stated that, while she would not personally pursue signature gathering, she would not stop others who wanted to collect signatures. *Id.*

<sup>79</sup> Hailey Branson-Potts, “Intolerant Jackass Act” Proposed as Response to Anti-gay Initiative, L.A. TIMES, (Apr. 20, 2015, 2:43 PM), <http://www.latimes.com/local/lanow/la-me-ln-intolerant-jackass-proposal-20150420-story.html> [<http://perma.cc/9XHU-FQZX>].

<sup>80</sup> Intolerant Jackass Act, Initiative 15-0014, § (c) (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0014%20\(Intolerant%20Jackass\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0014%20(Intolerant%20Jackass).pdf) [<https://perma.cc/37X8-669W>].

<sup>81</sup> *Id.* § (e).

<sup>82</sup> Letter from Mac Taylor, Legislative Analyst, Cal. Legislative Analyst’s Office, to Kamala D. Harris, Attorney Gen., Cal. Attorney Gen.’s Office (May 14, 2015) (on file with Cal. Attorney Gen.’s Office).

<sup>83</sup> Branson-Potts, *supra* note 79.



and letters,”<sup>84</sup> and she stated that she does not intend to move forward to the signature phase of the initiative process, admitting that the Intolerant Jackass Act “isn’t constitutional either.”<sup>85</sup> If others pursue the signature gathering for her, the measure could proceed.

The Shellfish Suppression Act also appears to have been modeled after the SSA and follows the same format.<sup>86</sup> It also begins with an assertion of evil to be eradicated: “Shellfish are a monstrous evil,” that, making an appeal to religion, “Almighty God, giver of freedom and liberty, commands us in Leviticus to suppress.”<sup>87</sup> It prohibits the sale or consumption of shellfish, broadly defined, categorizing a violation as a “serious felony,”<sup>88</sup> punishable by a fine of \$666,000 per occurrence, and/or up to six years, six months, and six days in prison.<sup>89</sup>

While the Legislature might not wish to waste its time and resources taking either of the above initiative seriously, even if the 25% threshold is met, the next two initiatives could provide a better forum for testing the efficacy of the earlier joint legislative hearing deadline to flesh out the issues between personal privacy and gender identity in public restroom and locker facilities, and safer sex in the adult film industry.

## B. The Personal Privacy Protection Act

The Personal Privacy Protection Act would amend the Health and Safety Code to require people to use facilities in accordance “with their biological sex in all government buildings.”<sup>90</sup> It provides a simple civil claim for violation of privacy against the government entity or person who willfully

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<sup>84</sup> E-mail from Charlotte Laws to Chris Chambers Goodman, *supra* note 53.

<sup>85</sup> Branson-Potts, *supra* note 79.

<sup>86</sup> Shellfish Suppression Act, Initiative 15-0016 (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0016%20\(Shellfish\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0016%20(Shellfish).pdf) [<https://perma.cc/HA9J-UQ7G>].

<sup>87</sup> *Id.* § (a). See generally Jennifer Wadsworth, *Broken Initiative System Attracts Lunatics, Pranksters and Reform*, SAN JOSE INSIDE (Apr. 15, 2015), <http://www.sanjoinside.com/2015/04/15/broken-initiative-system-attracts-lunatics-pranksters-and-reform> [<http://perma.cc/DDL2-C5N3>] (describing the Shellfish Suppression Act as a satirical spin-off of the Sodomite Suppression Act).

<sup>88</sup> Shellfish Suppression Act § (d).

<sup>89</sup> *Id.* § (c).

<sup>90</sup> Personal Privacy Protection Act, Initiative 15-0019, § (a) (Cal. 2015), [https://oag.ca.gov/system/files/initiatives/pdfs/15-0019%20\(Privacy\)\\_0.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/15-0019%20(Privacy)_0.pdf) [<https://perma.cc/83RR-8KP3>]. See generally Hailey Branson-Potts, *California Initiative Would Bar Transgender People from Bathrooms*, L.A. TIMES (Apr. 21, 2015, 6:17 AM), <http://www.latimes.com/local/lanow/la-me-ln-transgender-bathrooms-20150420-story.html> [<http://perma.cc/5X7Y-LRG6>]. Gina Gleason, a proponent for the measure stated: “We have great compassion for any person that is uncomfortable in traditional, sex-separated facilities . . . . But we also want to protect the privacy that most of us expect when we are in public restrooms, showers and dressing areas.” *Id.*

violates this section.<sup>91</sup> Only those people whose privacy was actually violated while using the facilities, or who refrain from using the facilities, would be eligible for equitable relief and damages.<sup>92</sup> The initiative specifically exempts business establishments from any criminal, civil, or administrative sanctions or lawsuits when they require “employees, patrons, students, or other people to use facilities” that match their biological sex.<sup>93</sup>

The proposed initiative defines biological sex as follows: “the biological condition of being male or female as determined at or near the time of birth or through medical examination or as modified by” the Health and Safety Code provisions permitting transgender people to apply for a revised birth certificate if certain conditions are met.<sup>94</sup> Facilities are defined as “restrooms, showers, dressing rooms, and locker rooms.”<sup>95</sup> The general definition for government entity and government buildings applies. The exceptions to the proposed act are for single use facilities, family restrooms, and where the assistance of another is required.<sup>96</sup> The initiative also has an enforceability provision, granting the initiative proponents the right to defend the initiative against legal challenge if the Attorney General fails to do so, or to appoint a special Attorney General to do so.<sup>97</sup>

The Legislative Analyst’s Office report notes that state law prohibits discrimination based on gender identity and gender expression, and that students in public schools currently are “permitted to use facilities consistent with their gender identity, regardless of what sex is listed on the student’s record.”<sup>98</sup> The report concludes that the fiscal effect “could vary considerably depending on (1) how it is interpreted by the courts, (2) how state and local governments implement the measure, and (3) how the federal government responds to the measure’s implementation.”<sup>99</sup> For instance, informing the public and employees about a policy change in restroom facility use could be relatively inexpensive,

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<sup>91</sup> Personal Privacy Protection Act § (b).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § (c).

<sup>94</sup> *Id.* § (d)(1); CAL. HEALTH & SAFETY CODE § 103425(a) (West 2015) (“Whenever a person has undergone clinically appropriate treatment for the purpose of gender transition, the person may file a petition with the superior court in any county seeking a judgment recognizing the change of gender.”).

<sup>95</sup> Personal Privacy Protection Act § (d)(3).

<sup>96</sup> *Id.* § (e).

<sup>97</sup> *Id.* § (f).

<sup>98</sup> MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, FISCAL IMPACT ESTIMATE REPORT ON AG 15-0019, at 2 (2015), [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0019\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0019).pdf) [<https://perma.cc/CM3J-J5NU>].

<sup>99</sup> *Id.* at 3.

but renovating existing facilities into single individual facilities would be very expensive.<sup>100</sup> In addition, some federal funds could be lost to the extent that the measure conflicts with the July 2014 executive order prohibiting contractors and subcontractors from discriminating based on gender identity.<sup>101</sup>

### C. The California Safer Sex in the Adult Film Industry Act

The California Safer Sex in the Adult Film Industry Act would codify existing workplace safety regulations into state statutes to require adult film performers to wear condoms.<sup>102</sup> It was amended under the provisions of BITA, presumably in response to public comments during the public comment period.

This initiative was the second to reach the 25% signature threshold during the 2016 election cycle that can trigger legislative hearings on the measure, and since then, several others have met that threshold.<sup>103</sup> Under BITA, the legislative hearings must be held no later than 131 days prior to the date of the election, or approximately June 30, 2016. These hearings can provide more information to the public and provide an opportunity to explore the success of a similar successful proposal in Los Angeles County.

### D. Abortion Access Act(s)

There are four almost identical ballot initiatives designed to constrict access to abortions for unemancipated minors.<sup>104</sup> Ballot

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<sup>100</sup> *See id.*

<sup>101</sup> Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014), *amending* Exec. Order No. 11246 § 202(1) (adding “sexual orientation, gender identity,” to the list of factors that federal contractors on contracts over \$10,000 may not discriminate against in hiring practices).

<sup>102</sup> The California Safer Sex in the Adult Film Industry Act, Initiative 15-0004 (Cal. 2015), [https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20\(Safer%20Sex\)\\_8.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20(Safer%20Sex)_8.pdf) [<https://perma.cc/GE3L-5X9V>].

<sup>103</sup> *Initiatives and Referenda Cleared for Circulation*, *supra* note 60. Initiative 15-0009, the State Prescription Drug Purchases, Pricing Standards, Initiative Statute, met the 25% mark on June 25, 2015. The measure prohibits California agencies from paying a higher price for drugs than the U.S. Department of Veterans Affairs. *Id.*

<sup>104</sup> Few differences exist between the first three bills and no difference at all between the third and fourth. Initiative 14-0013 defines “Physician” as “any person authorized under the statutes and regulations of the State of California to perform an abortion upon an unemancipated minor.” Initiatives 14-0014 and 15-0025 changed the definition of “Physician” to “any person who has a valid, unrevoked, and unsuspended license to practice as a physician and surgeon under the statutes and regulations of the State of California.” Initiative 15-0025 also added “and shall ensure that it is brought to the attention of the appropriate law enforcement or public child protective agency” at the end of section (e). Initiative 15-0047 appears to be completely identical to the 15-0025, with no changes or amendments at all. *See* Abortion Access Restriction. Parental Notification and Waiting Period for Females Under 18. Initiative Constitutional Amendment, Attorney General Ballot Proposition 14-0013 (2014); Sexual Orientation Prejudice. Initiative Statute, Attorney General Ballot Proposition 14-0014 (2014). *See generally* Abortion

initiative 15-0047 is the most recent of these initiatives.<sup>105</sup> The initiatives are written to add a new section, section thirty-two, to Article I of the California Constitution, including new provisions that make it mandatory for unmarried females under the age of eighteen to provide notice to their parents before getting an abortion.<sup>106</sup>

The initiative would make it illegal for anyone other than a physician to perform an abortion on an unemancipated minor.<sup>107</sup> A physician must wait “until at least forty-eight (48) hours has elapsed after the physician or the physician’s agent has delivered written notice . . . or has received a copy of a waiver of notification from the court.”<sup>108</sup> The written notice must either be personally delivered “by the physician or the physician’s agent to the parent,” or be delivered by certified mail with an additional copy sent by first class mail.<sup>109</sup> A parent may waive the notification requirement, and the initiative requires the California Department of Public Health to create a waiver form.<sup>110</sup>

There are a few exceptions to the requirement for notification. Notice is not required if “the unemancipated minor is the victim of physical or sexual abuse committed by one or both of the minor’s parents,” and the abuse must be documented by a relative of the minor who is over twenty-one years old, or by a law enforcement officer or agent of a public child protective agency.<sup>111</sup> Notice is not required if the physician, in “good-faith clinical judgment,” decides that the abortion is necessary because of a medical emergency.<sup>112</sup> Finally, an unemancipated minor may petition the juvenile court to waive the notice requirement.<sup>113</sup> The minor must personally appear before the court, though she

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Access Restriction. Parental Notification and Waiting Period for Females Under 18, Attorney General Ballot Proposition 15-0025 (2015); Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Attorney General Ballot Proposition 15-0047 (2015).

<sup>105</sup> Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0047 (Cal. 2015).

<sup>106</sup> Abortion Access Restriction. Parental Notification and Waiting Period for Females under 18, Attorney General Ballot Proposition 15-0025; *see also* CAL. CONST. art. I, § 31.

<sup>107</sup> *See* Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0025, § 32(a)(2) (Cal. 2015) The initiative defines “unemancipated minor” as “a female under the age of 18 years who has not entered into a valid marriage and is not on active duty with the armed services of the United States and has not received a declaration of emancipation under state law. For the purposes of this Section, pregnancy does not emancipate a female under the age of 18 years.” *Id.*

<sup>108</sup> *See id.* § 32(b).

<sup>109</sup> *Id.* § 32(c).

<sup>110</sup> *Id.* § 32(d).

<sup>111</sup> *Id.* § 32(e).

<sup>112</sup> *Id.* § 32(f).

<sup>113</sup> *Id.* § 32(g).

may elect to have legal counsel with her.<sup>114</sup> If a judge finds “by clear and convincing evidence” that the minor is (1) “both sufficiently mature and well-informed to decide whether to have an abortion” or (2) “that notice to a parent is not in the best interests of the unemancipated minor,” then the judge may waive the notification requirement.<sup>115</sup> The notice requirement is also waived if a judge fails to rule within two days after the petition is filed and the minor did not file a request for an extension.<sup>116</sup> If the minor is denied a waiver, she may appeal the judgment of the juvenile court.<sup>117</sup>

The initiative also requires the California Department of Public Health to create a reporting form for physicians to document all abortions performed on unemancipated minors.<sup>118</sup> The physician must file a report within one month after performing an abortion on an unemancipated minor.<sup>119</sup> The data on these forms will be used by the Department of Public Health to compile an annual report based on the statistical information required in the initiative.<sup>120</sup>

Failure by any person to abide by this law will render that individual “liable for damages in a civil action brought by the unemancipated minor, her legal representative, or by a parent wrongfully denied notification.”<sup>121</sup> While performing the abortion carries a civil penalty, anyone, including an unemancipated minor or her treating physician, who “knowingly provides false information to a physician”—to make the physician believe that notice was given to the minor’s parent, or that notice was waived—“is guilty of a misdemeanor punishable by a fine up to \$10,000.”<sup>122</sup>

The Legislative Analyst’s Office estimates that the cost of this initiative would be relatively low, with administrative costs of “at least \$1 million, and potentially several million dollars,

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<sup>114</sup> *See id.*

<sup>115</sup> *See id.* § 32(h)(1)–(2).

<sup>116</sup> *Id.* § 32(i).

<sup>117</sup> *Id.* § 32(j) (stating that the hearing must be within three court days of the filing, but allowing the Judicial Council to define the procedure for appeal).

<sup>118</sup> *Id.* § 32(l) (“The forms shall include the date of the procedure and the unemancipated minor’s month and year of birth, the duration of the pregnancy, the type of abortion procedure, the numbers of the unemancipated minor’s previous 6 abortions and deliveries if known, and the facility where the abortion was performed. The forms shall also indicate whether the abortion was performed pursuant to subdivision (c); or (d); or (e); or (f); or (h), (i), or (j).”).

<sup>119</sup> *Id.* § 32(m) (“The identity of the physician shall be kept confidential and shall not be subject to disclosure under the California Public Records Act.”).

<sup>120</sup> *Id.* § 32(o).

<sup>121</sup> *Id.* § 32(p).

<sup>122</sup> *Id.* § 32(q).

annually.”<sup>123</sup> The Office reports that “nurse practitioners, certified nurse-midwives, and physician assistants, who under current law may perform an aspiration abortion during the first trimester of a pregnancy, would no longer be able to perform this procedure on an unemancipated minor.”<sup>124</sup>

The public comment process may have led to some of the minor changes in the various versions of the measure as noted above. The impact of the additional signature-gathering time is not yet clear. A joint legislative hearing process may also be useful to reconcile the minor differences in the various versions and to flesh out the potential costs and benefits of the measure.

### CONCLUSION

BITA made some notable modifications to the initiative process in the State of California. It has codified a public comment period, which can provide useful information to inform the Attorney General’s ballot title and summary, as well as to inform the initiative proponents about ambiguities and errors that can be fixed before the signature petitions begin. While numerous measures have been subject to public comments, those comments have not actually been made public, and continuing efforts are needed to determine the impact of the public comment period on the various initiatives. Several measures have been amended, and others have been submitted with modifications, suggesting that the comment period had some effect.

Other effects of BITA are not yet manifest. For instance, only a few signature-gathering deadlines have passed, and it will take some time to determine whether the additional month for gathering signatures has helped those initiative proponents. Several petitions have also met the 25% threshold to trigger legislative hearings. Once some of those hearings are held, we will have more information to assess the usefulness, or not, of the pre-certification hearing requirement. Also, as financial contribution reporting deadlines approach, we will be able to examine the impact of the BITA provisions requiring more accessible public information about supporters and opponents of the initiatives.

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<sup>123</sup> MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, FISCAL IMPACT ESTIMATE REPORT ON AG 15-0025, at 5 (2015), [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0025\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0025).pdf) [<https://perma.cc/D5A5-Q4W8>].

<sup>124</sup> *See id.* at 3.

