Case No. S279622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR CASTELLANOS, JOSEPH DELGADO, SAORI OKAWA, MICHAEL ROBINSON, SERVICE EMPLOYEES INTERNATIONAL UNION CALIFORNIA STATE COUNCIL, and SERVICE EMPLOYEES INTERNATIONAL UNION,
Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, and KATIE HAGEN, in her official capacity as Director of the California Department of Industrial Relations,
Defendants and Appellants,

PROTECT APP-BASED DRIVERS AND SERVICES, DAVIS WHITE, and KEITH YANDELL,
Intervenors and Appellants.

First Appellate District, No. A163655
Alameda County Superior Court, No. RG21088725
Hon. Frank Roesch, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION[1]

Intervenors insist that the initiative power is co-extensive with the Legislature's power and, therefore, that an initiative statute can absolve app-based companies of their statutory duty to provide California's 1.3 million app-based drivers with workers' compensation protections. This is the rare situation, however, in which our Constitution expressly vests "the Legislature"—the deliberative body consisting of the Senate and Assembly—with lawmaking power "unlimited by any provision of th[e] Constitution." (Cal. Const., art. XIV, § 4.)

Because the Constitution grants the Legislature unlimited power to enforce a complete workers' compensation system, the Legislature's exercise of that power can be withdrawn only by a constitutional amendment. That being so, Business and Professions Code section 7451[2] cannot be applied to deprive app-based drivers of workers' compensation or occupational safety and health protections. Intervenors do not dispute that, under their theory, an initiative statute could entirely withdraw the Legislature's article XIV power and leave all workers without the protections of a complete workers' compensation system. The text, structure, and history of the relevant constitutional provisions cannot be squared with that interpretation.

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[1] This Reply addresses the Answer Briefs filed by Proposition 22's proponents ("Intervenors Br.") and by the State of California et al. ("State Br."). Unless otherwise indicated, Intervenors and the State are referred to collectively as "Defendants."

[2] All undesignated statutory references are to the Business and Professions Code.

The State essentially concedes that an initiative statute cannot limit the Legislature's article XIV "authority to provide app-based drivers with workers' compensation coverage through its normal process for enacting statutes." (State Br. at p. 12.) The State gamely attempts to save Proposition 22 by suggesting ways that the Court can avoid holding that the initiative is invalid in its entirety. Its arguments are unpersuasive.

First, there is no logic to the State's argument that the Legislature must enact additional legislation to create a conflict with section 7451. The Legislature already exercised its article XIV power by adopting statutes that provide workers' compensation protections to 1.3 million app-based drivers. (See Lab. Code, §§ 2775, 3351, subd. (i).) Section 7451 conflicts with those statutes, and the Court cannot avoid deciding which statute prevails. Because the Legislature has power unlimited by the other provisions of the Constitution to "enforce" workers' compensation protections, section 7451 must give way as applied to workers' compensation.

Second, the Court cannot vindicate the Legislature's unlimited power to provide workers' compensation protections without invalidating Proposition 22 in its entirety. The initiative's non-severability provision explicitly informed voters that the entire initiative would be invalid if "any … application of Section 7451 … is for any reason held to be invalid." (§ 7467, subd. (b).) Proposition 22's proponents wished to avoid a situation in which app-based companies could be required to provide their drivers with both employee benefits, such as workers'

compensation, and Proposition 22's inferior substitute benefits, such as accident insurance. The Court cannot re-write their initiative.

ARGUMENT

I. Section 7451 Impermissibly Conflicts with the Legislature's Article XIV Power to Protect Workers.

Contrary to Defendants' arguments, the "plain text," "constitutional structure," and article XIV's "history" (Intervenors Br. at p. 29) all support the conclusion that an initiative statute cannot limit the Legislature's unlimited article XIV lawmaking power. As such, section 7451 cannot be applied to prevent the Legislature from providing app-based drivers with workers' compensation and occupational health and safety protections. This conclusion does not "lead to an absurd result." (Intervenors Br. at p. 37.) It is required by the plain language of the Constitution itself.

A. The Constitution's text is clear.

1. Article XIV vests the Legislature with power "unlimited by any provision of th[e] Constitution" to create and enforce a complete system of workers' compensation. Defendants offer no citations to dictionaries that define the word "unlimited" to mean limited or that define the term "any provision" to mean only some provisions. This language is not ambiguous, and it elevates the Legislature's power with respect to workers' compensation over and above its ordinary lawmaking power as to other subjects.

Nor is article XIV ambiguous when it refers to "the Legislature." Defendants do not dispute that "the Constitution defines the 'Legislature' as … the 'Senate and the Assembly' "

rather than "as the People" exercising the initiative power. (Intervenors Br. at p. 32, quoting Cal. Const., art. IV, § 1; see State Br. at p. 42.) "Our … constitution … could not be more explicit than it is" in distinguishing between "the Legislature" and the electorate (*Barlotti v. Lyons* (1920) 182 Cal. 575, 578–579 (*Barlotti*); see OBM at p. 28), and it is to the Legislature that article XIV gives power "unlimited" by any other constitutional "provision."

One of the "provision[s] of th[e] Constitution" authorizes initiative statutes. (See Cal. Const., art. II, § 8, subd. (a).) Initiative statutes are subordinate to the Constitution. The initiative power is "no greater with respect to the nature and attributes of the statutes that may be enacted" than the Legislature's power to adopt ordinary legislation. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673.) Because the Legislature's article XIV power is "unlimited by any provision of th[e] constitution," the Legislature's exercise of its article XIV power cannot be limited by a statutory initiative adopted pursuant to article II, section 8. It can only be limited by a constitutional amendment.

This Court already recognized in *County of Los Angeles v. Superior Court* (1987) 43 Cal.3d 46 (*County of Los Angeles*), that a limitation on the Legislature's power to increase workers' compensation benefits would conflict with article XIV. (See OBM at pp. 21–22.) Defendants do not offer a meaningful response to *County of Los Angeles* or a reasonable alternative interpretation of the Constitution's plain text.

2. Intervenors insist that this Court "held in *McPherson* that a grant of 'plenary' and 'unlimited' power to the Legislature does not displace the initiative power." (Intervenors Br. at p. 30; capitalization omitted, citing *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020 (*McPherson*).) The Court's holding in *McPherson*, however, was expressly limited to an initiative statute that did *not* "conflict[] with the Legislature's exercise of *its* authority." (*McPherson*, at p. 1044, fn. 9, emphasis in original). In the absence of a conflict, it was possible to uphold the initiative statute without doing violence to the plain text of the Constitution. The *McPherson* Court explained that, if a conflict with the Legislature's exercise of unlimited power arises—as it has here—the conflict must be "resolved through application of the relevant constitutional provision … to the terms of the specific legislation." (*Ibid.*; see also OBM at pp. 25–26.)

According to Intervenors, "this case does not present the [conflict] situation described in" *McPherson* footnote 9 because the constitutional provision in *McPherson* vests the California Public Utilities Commission (PUC) "with a floor of constitutional powers." (Intervenors Br. at pp. 35–36.) Intervenors suggest that footnote 9 merely clarified that an initiative statute could not withdraw those constitutionally defined "baseline" powers from the PUC. (*Ibid.*) But Intervenors' reading of *McPherson* reflects the same "misunderstanding" the Court sought to "avoid" by including footnote 9. (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9.)

The *McPherson* Court "emphasize[d]" in footnote 9 that it was not holding that an initiative statute could "*limit[]* the PUC's authority" *or* that an initiative statute could "conflict[] with the Legislature's exercise of *its* authority to expand the PUC's jurisdiction." (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9, emphases in original.) Thus, this case *does* present the conflict situation described in *McPherson* footnote 9. Moreover, article XIV vests the Legislature with a "floor of constitutional powers" (Intervenors Br. at pp. 35–36) to adopt workers' compensation legislation, and section 7451 withdraws part of that power.

The State recognizes that *McPherson* "merely held that 'plenary' does not mean 'exclusive.' " (State Br. at p. 43, fn. 13.) Yet the State posits that footnote 9 only "reserved judgment on a hypothetical voter initiative purporting to freeze the Legislature out of *future* policymaking." (*Id.* at p. 33, emphasis changed.) This Court stated in footnote 9, however, that it was not deciding whether an initiative statute could "*conflict[]*" with the Legislature's exercise of its authority (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9, emphasis added), not merely reserving the issue of whether an initiative could "freeze out" future legislatures. Here the Legislature exercised its authority when it enacted Assembly Bill 5 (AB 5), and section 7451 conflicts with that exercise of authority.

Defendants argue that *McPherson* did resolve a conflict between an initiative statute and the Legislature's exercise of a constitutionally unlimited power because the initiative statute in *McPherson* purportedly conflicted with the Legislature's decision

to withhold from the PUC the authority to regulate electrical providers' rates and terms of service. (See Intervenors Br. at p. 35; State Br. at pp. 32–33.) That purported conflict was not raised or addressed in *McPherson*, nor was there any evidence presented to the Court that the Legislature had rejected any attempt at that kind of enlargement. In any event, the constitutional provision in *McPherson* vests the Legislature with unlimited power to "confer additional authority" on the PUC—not unlimited power to withhold authority from the PUC. (See OBM at pp. 24–25.) The initiative statute in *McPherson* therefore could not have conflicted with the Legislature's exercise of its unlimited power to do exactly what the Constitution granted the Legislature unlimited power to do.

By contrast, section 7451 unquestionably conflicts with the Legislature's exercise of its unlimited article XIV power "to create, and enforce a complete system of workers' compensation." The Legislature exercised that power to provide full workers' compensation benefits to app-based drivers if they meet the test established by AB 5. (See Lab. Code, §§ 2775, 3351 subd. (i).) Yet section 7451 provides that, "[n]otwithstanding" the statutes adopted by the Legislature pursuant to its unlimited article XIV power, the drivers are not entitled to those protections. (§ 7451.) Section 7451 cannot be applied to restrict eligibility for workers' compensation without doing violence to the plain text of the Constitution.

B. The Constitution's structure is clear.

1. The creation of the initiative process in California was, as Intervenors point out, an " 'outstanding achievement[] of the

progressive movement.' " (Intervenors Br. at p. 14.) The 1911 constitutional amendment that authorized initiatives made a structural change to the Constitution by providing that, although the Constitution vests legislative power in the Legislature, "the people reserve to themselves the power[] of initiative." (Cal. Const., art. IV, § 1.) That 1911 constitutional amendment, however, authorized both initiative statutes and initiative constitutional amendments. (*Id.*, art. II, § 8, subd. (a).) Initiative statutes are subordinate to the provisions of the Constitution. (*Legislature v. Deukmejian*, *supra*, 34 Cal.3d at p. 674.)

The State's complete workers' compensation system was also an outstanding achievement of the progressive movement. Intervenors fail to recognize that the 1918 constitutional amendment that added the language now in article XIV, section 4 also made a structural change to the Constitution. The 1918 amendment granted the Legislature a power "unlimited by any other provision of th[e] Constitution" to enforce a complete system of workers' compensation for any or all workers. By making the Legislature's power to enforce workers' compensation legislation "unlimited" in this way, the 1918 amendment distinguished that power from other grants of lawmaking power to the Legislature.

Under the constitutional structure, the unlimited lawmaking power granted by the 1918 constitutional amendment can be withdrawn, in whole or in part, only by another constitutional amendment. Indeed, the very case that Intervenors cite for the point that no " 'section or segment of the state

Constitution [is] off-limits to the initiative process' " upheld an initiative *constitutional amendment* that barred same-sex marriage after the Court previously had struck down a similar initiative statute as in conflict with the Constitution. (Intervenors Br. at p. 28, quoting *Strauss v. Horton* (2009) 46 Cal.4th 364, 456, abrogated on other grounds by *Obergefell v. Hodges* (2015) 576 U.S. 644.)

2. Contrary to Intervenors' claim, the conclusion that an initiative statute cannot limit the Legislature's unlimited article XIV power does not mean that the Constitution is "at war with itself." (Intervenors Br. at p. 43.) It only means that *statutes* cannot amend the Constitution. Intervenors provide no response to Plaintiffs' point that their interpretation "would allow a provision in an initiative statute to excuse *all* businesses from providing workers' compensation benefits and require the Legislature to seek voter approval to provide *any* workers with the protections of a complete workers' compensation system"—and thereby "entirely nullify the 1918 constitutional amendment." (OBM at p. 31, emphasis in original; see also State Br. at pp. 43–44 [conceding that Intervenors' interpretation conflicts with "the constitutional text"].)

Intervenors similarly miss the mark when they observe that, to the extent reasonably possible, constitutional provisions should not be interpreted to effect an "implied repeal" of other constitutional provisions. (Intervenors Br. at pp. 48–51.) There is no implied repeal here. To the extent that there is a conflict between the Legislature's exercise of its article XIV power and

any another constitutional provision, article XIV *expressly* provides that the exercise of article XIV power must prevail. This Court has long recognized that article XIV operates as a pro tanto repeal of any constitutional provision that would prevent the Legislature from providing workers with a complete workers' compensation system. (See OBM at p. 21.)

Intervenors place inappropriate weight upon caselaw adopting a presumption that references in the Constitution to the Legislature's power to adopt statutes addressing a certain subject, e.g., "the Legislature may," are not meant to preclude the adoption of initiative statutes on the same subject. (*State Comp. Ins. Fund. v. State Bd. of Equalization* (1993) 14 Cal.App.4th 1295, 1300; see also *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 248–251 (*Kennedy Wholesale*) [holding that a reference in the Constitution to the authority of "the Legislature" to increase taxes does not "implicitly" preclude an initiative statute that raises taxes].)

Those cases merely recognize that the Constitution provides for both legislative enactments and statutory initiatives, such that "the legislative power in California is shared by the Legislature and the electorate." (*Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 587.) None of the case Intervenors cite addresses a situation in which the Constitution grants the Legislature power unlimited by the other provisions of the Constitution, and an initiative statute conflicts with the Legislature's exercise of its unlimited power.

Intervenors also err in relying on a line of cases adopting a presumption that the Constitution's "procedural requirements" addressed to legislative bodies are not intended to apply to initiative statutes. (*Kennedy Wholesale*, *supra*, 53 Cal.3d at p. 252; see Intervenors Br. at pp. 44–45.) Under that caselaw, a constitutional provision that allows "the Legislature" to raise taxes only by two-thirds vote does not "implicitly" apply to the initiative process. (*Kennedy Wholesale*, at pp. 251–252.) Similarly, a constitutional provision that requires tax increases proposed by a "local government" to be placed on general election ballots does not apply to initiatives because "the common understanding of local government does not readily lend itself to include the electorate." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 937 (*Cal. Cannabis Coalition*).)

These "procedural requirement" cases do not support Intervenors' position here for two reasons. First, article XIV provides the Legislature with a grant of unlimited, substantive power; it does not impose a procedural requirement on the exercise of legislative power. Second, the "procedural requirement" cases themselves recognize that the Constitution differentiates between governmental bodies and the electorate. (See, e.g., *Cal. Cannabis Coalition*, *supra*, 3 Cal.5th at pp. 936–938 [rejecting argument "that the terms 'local government' and 'electorate' are equivalent"].) Article XIV grants unlimited power over workers' compensation to "the Legislature," not to the electorate.

Finally, Intervenors are wrong that this Court has adopted a universally applicable "clear-statement rule" by which a grant of lawmaking power to a legislative body can always be restrained by an initiative statute unless the grant of authority refers explicitly to initiatives. (Intervenors Br. at pp. 28, 33–34.) The Court has never adopted such a rule. (See, e.g., *Comm. of Seven Thousand v. Superior Ct.* (1988) 45 Cal.3d 491, 501–509 [concluding that the Legislature's grant of power to local legislative bodies meant that the power could not be exercised by initiative].) Moreover, the voters who adopted the 1918 constitutional amendment that vested "the Legislature" with power "unlimited" by "any provision" of the Constitution would have been wholly unaware that, according to Intervenors, the terms "unlimited" and "any provision" do not mean what they say.

3. The federal Elections Clause cases that Intervenors rely on for their "structural" approach (Intervenors Br. at pp. 46–48) shed no light on what California voters understood the term "the Legislature" in the California Constitution to mean when they adopted the 1918 constitutional amendment. This Court's contemporaneous 1920 decision in *Barlotti* already recognized that the California Constitution "could not be more explicit than it is" in distinguishing between "the Legislature" and the people acting through the initiative power. (*Barlotti*, *supra,* 182 Cal. at pp. 578–579.) Contrary to Intervenors' contention, *Barlotti*'s reasoning was not based on a distinction between the California Legislature's " 'ratifying function' " and its " 'traditional

lawmaking' " function (Intervenor Br. at p. 48), but on the fact that "over and over again, wherever in the [California] constitution the legislature is referred to, it obviously and necessarily means th[e] representative body provided for therein, which is made up of the senate and assembly." (*Barlotti*, at p. 579.)

The language and history of the federal Constitution's Elections Clause does not parallel the language and history of article XIV. The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." (U.S. Const., art. I, § 4.) The U.S. Supreme Court has emphasized that the Elections Clause was adopted long before the "modern initiative process" and therefore did not distinguish between legislative bodies and the initiative process. (*Arizona State Legislature v. Arizona Independent Redistricting Com'n* (2015) 576 U.S. 787, 819; but see *id.* at pp. 824–850 (dis. opn. of Roberts, C.J.).) By contrast, California's initiative process was part of our state Constitution when the 1918 constitutional amendment was adopted, and 1918 voters would have understood that "the Legislature" means the deliberative body consisting of the Senate and the Assembly rather than the electorate exercising the initiative power.

The federal Elections Clause also does not grant power to state legislatures that is "unlimited by the other provisions of" state constitutions. (Cal. Const., art. IV, § 4.) Thus, it is not surprising that the U.S. Supreme Court concluded in *Moore v.*

Harper (2023) 600 U.S. 1, that "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause." (*Id.* at p. 32.) Nor is it surprising that the Elections Clause does not provide state legislatures with power to adopt laws bypassing gubernatorial veto provisions that are part of the normal process of legislating. (See *Smiley v. Holm* (1932) 285 U.S. 355, 368.) No party in this case disputes that article XIV, which states that the California Legislature's "unlimited" power may be exercised "by appropriate legislation," also requires bicameralism and presentment. (Cal. Const., art. XIV, § 4; see, e.g., OBM at pp. 30–31; State Br. at pp. 44–45.)[3]

All that being so, consideration of the California Constitution's structure reinforces the conclusion that the Legislature's unlimited article XIV power can be limited only by a constitutional amendment.

C. Article XIV's history is consistent with its plain text and the Constitution's structure.

Article XIV's history provides no basis for departing from the conclusion dictated by the Constitution's text and structure. Intervenors' argument to the contrary relies on the presumption that the power to adopt initiative statutes is superior to the Legislature's article XIV power, when the Constitution's text supports the opposite conclusion. (See Intervenors Br. at pp. 38–42.) Once Intervenors' erroneous starting presumption is set

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[3] "While engaged in considering bills which have passed both houses of the legislature and which are presented to him for approval or disapproval, [the Governor] is acting in a legislative capacity and not as an executive." (*Lukens v. Nye* (1909) 156 Cal. 498, 501.)

aside, their argument about article XIV's history collapses. Intervenors point to nothing in the history of the 1918 constitutional amendment that addresses initiative statutes or that is in any way inconsistent with article XIV's broad and unqualified language. (See *ibid.*)

Intervenors posit that the impetus for the 1918 constitutional amendment was the Legislature's concern about *Lochner*-era legal challenges to the 1917 workers' compensation law, and Intervenors assert that the amendment should be interpreted as limited to that context. (See Intervenors Br. at p. 15.) But the language of the amendment that appeared on the ballot does more than immunize the existing workers' compensation law from such challenges. The amendment also declares the provision of a complete workers' compensation system to be the "social public policy of this State" and vests the Legislature with power unlimited by the other provisions of the Constitution to implement that policy in the future. (See State Br. at p. 26 [recognizing that the Legislature is vested with unlimited power to shape the workers' compensation system "in response to future developments"].) Intervenors have no response to the settled authority holding that the particular impetus for an enactment does not limit its scope if—as is commonplace—the language is framed in broad and comprehensive terms. (See OBM at pp. 33–34.)

Moreover, this Court already recognized in *County of Los Angeles* that an initiative constitutional amendment would conflict with article XIV if the amendment were interpreted to

preclude the Legislature from increasing workers' compensation benefits by majority vote. (See OBM at pp. 21–22.) The constitutional amendment in *County of Los Angeles* had nothing to do with *Lochner*-era legal challenges.

The short ballot arguments in favor of the 1918 constitutional amendment (Intervenors Br. at p. 39) are also entirely consistent with the amendment's grant of unlimited power to the Legislature. (See AA 796.) The ballot arguments inform voters that "[t]his amendment is a necessary *amplification … of the power of the Legislature*" and that "the proposed amendment would express full authority for legislation." (*Ibid.* [statement of Sen. Luce], emphasis added.)

The "press coverage" cited by Intervenors (Intervenors Br. at p. 40) is not properly considered in interpreting article XIV because there is no way to know what was read by voters. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904–905 [emphasizing that materials " 'not directly presented to the voters … are not relevant to our inquiry' " (omission in original)]; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857–858 [similar]; see also Plaintiffs' Opposition to Intervenors' Motion for Judicial Notice.) In any event, the press coverage is silent about the issue presented here.

Intervenors point out that, as a general historical matter, the initiative power was borne out of dissatisfaction with elected officials. (Intervenors Br. at p. 41.) Intervenors suggest, therefore, that "it would have made no sense" for Progressive Era voters to approve a constitutional amendment that prevented workers

from being removed from the workers' compensation system by an initiative statute. (*Ibid.*) The 1918 constitutional amendment, however, was placed on the ballot by the Legislature itself, and the proposed amendment asked voters to declare that the provision of a complete workers' compensation system is the "social public policy of this State." The ballot arguments informed voters that the workers' compensation system "has proved to be beneficent, humane and just" and that the amendment would "amplif[y]" the power of the Legislature to protect workers. (See AA 796 [statement of Sen. Luce].) The voters who approved the 1918 amendment would not have feared that a future Legislature would provide workers with the protections of a complete system of workers' compensation. That was their intent.

In sum, there is nothing in the history of the 1918 constitutional amendment that provides a basis for disregarding article XIV's text.

D. There is no parade of horribles.

Defendants greatly exaggerate the practical consequences of reading article XIV to mean what it says. Defendants do not dispute that there are only two constitutional provisions that grant "unlimited" power to the Legislature and that those grants of power encompass specific issues. (See State Br. at pp. 43–44.)

The app-based companies could have proposed an initiative constitutional amendment that asked voters to make an exception to the Legislature's unlimited article XIV power to provide workers' compensation protections. Contrary to Intervenors' contention that the app-based companies would have been required to "turn the Constitution into a codebook"

(Intervenors Br. at p. 63), a proposed amendment could have been coupled with statutory provisions in a single measure. (See, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1024–1025 [discussing Proposition 35 (2000), which combined a constitutional amendment with statutes].) Instead, the app-based companies chose to present only an initiative statute; to include a repeal of workers' compensation protections within that statute; and to add an unusual non-severability provision to their initiative. The companies' choices in these regards do not show a problem with the Constitution.

A decision that section 7451 cannot be applied to limit workers' compensation eligibility would not "eliminate the initiative power over an entire subject matter," or preclude "an initiative statute that has any conceivable effect on workers' compensation" (Intervenors Br. at pp. 33, 37), or "require the courts to strike down virtually all initiatives related to workers' compensation" (State Br. at p. 45). Under *McPherson*, a statutory initiative would run afoul of article XIV only if it conflicted with the Legislature's exercise of its article XIV power to protect workers. Defendants do not point to any initiative statutes adopted since 1918, aside from Proposition 22, that conflict with the Legislature's exercise of its article XIV power. In the ordinary case, moreover, an initiative statute would be invalid only to the extent of the conflict with the Legislature's power to enforce a workers' compensation system. That flaw affects the entire initiative in this case only because the app-based companies

chose to include an unusual non-severability provision in Proposition 22.

The State asserts that if an initiative statute cannot remove workers from the workers' compensation system, then an initiative statute cannot expand the scope of coverage. (State Br. at p. 33, fn. 9, p. 45, fn. 14; see also Intervenors Br. at p. 36 [arguing that article XIV cannot be a "one-way ratchet"].) That issue is not before the Court now, but the State's assertion appears to be incorrect. Article XIV grants the Legislature unlimited power to achieve a certain end—the creation and enforcement of a complete system of workers' compensation. That is what article XIV declares to be the "social public policy of this State." An initiative statute that does not prevent the Legislature from enforcing workers' compensation protections would not conflict with article XIV, just as *McPherson* reasoned that an initiative statute that granted additional authority to the PUC did not conflict with the Legislature's exercise of its power to grant additional authority to the PUC.

II. Because Section 7451 Cannot be Applied to Workers' Compensation, the Court Must Invalidate Proposition 22 in its Entirety.

The app-based companies that drafted Proposition 22 sought to ensure that they could shed their obligations under the initiative if they were required to provide any type of worker benefits or protections to their drivers other than those specified in the measure. Accordingly, Proposition 22 states that "if *any* … application of Section 7451 … is *for any reason* held to be

invalid," then "*no* provision of [Proposition 22] shall be deemed valid." (§ 7467, emphases added.)

Section 7451 cannot be applied to deny workers' compensation benefits to app-based drivers, because such application conflicts squarely with the Legislature's exercise of its article XIV power. (See *ante*, at p. 13; OBM at pp. 22–23.) As applied to workers' compensation, therefore, section 7451 is invalid, and Proposition 22 as a whole must also be declared invalid.

Despite the plain language of Proposition 22's non-severability provision, the State urges the Court to ignore or sever any " 'invalid application[s]' " of section 7451 and largely uphold Proposition 22. (State Br. at p. 46.) None of the State's newly raised arguments is persuasive.

A. The Court must resolve the current conflict between section 7451 and the Legislature's article XIV power.

The State acknowledges that it "may be constitutionally problematic" to "block the Legislature from providing app-based drivers with workers' compensation coverage." (State Br. at p. 46.) Nevertheless, the State argues that this constitutional concern arises only where "the Legislature's *prospective* authority to provide workers' compensation to app-based drivers" is restricted, and that "[i]t would be premature to address any questions about the Legislature's power to enact [such] future legislation" here. (State Br. at pp. 38–39, emphasis added.)

The State's emphasis on "the Legislature's prospective authority" is misplaced. The Legislature *already* exercised its

power to provide app-based drivers with full workers' compensation benefits. But for section 7451—which the app-based companies drafted in direct response to the Legislature's exercise of its power—app-based drivers are protected by the State's complete workers' compensation system. Thus, by its very terms, section 7451 "block[s]" the Legislature's exercise of its article XIV power and is invalid on that basis.

There is no need for the Legislature to enact legislation to *restore* workers' compensation benefits for app-based drivers. The Legislature's exercise of article XIV power—AB 5—remains in the statute books. AB 5 added a provision to the workers' compensation law to expand the law's coverage. (Stats. 2019, ch. 296, § 3, adding Lab. Code, § 3351, subd. (i).) The Legislature's intent in expanding coverage was, in part, to ensure that app-based drivers would be covered. (See, e.g., *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 297–298 ["we have little doubt the Legislature contemplated that those who drive for Uber and Lyft would be treated as employees"]; Assem. Com. on Labor & Employment, Rep. on Assem. Bill No. 5 (2019–2020 Reg. Sess.) as amended Sept. 6, 2019, p. 2 [citing specific concern with worker misclassification in "app-based 'on demand' sector"].) No party disputes that under AB 5, the app-based drivers are entitled to workers' compensation protections. If the Court concludes that section 7451 is invalid as applied to workers' compensation, then app-based drivers will continue to be entitled to full workers' compensation benefits, as the Legislature undeniably intended.

Moreover, even if a subsequent legislative enactment were somehow necessary, the Legislature amended Labor Code section 3351, subdivision (i) after the adoption of Proposition 22 to update an obsolete cross-reference and reaffirm that "any individual who is an employee pursuant to [Labor Code] Section 2775" (which codifies the ABC test) is covered by the workers' compensation system. (Stats. 2023, ch. 133, § 1 (Assem. Bill No. 1766), effective Jan. 1, 2024.) Thus, there is already a direct and irreconcilable conflict between section 7451 and a statute adopted by the Legislature *after* Proposition 22 was enacted.

The State is also mistaken in arguing that the enactment of section 7451 does not limit the power of future Legislatures. (See State Br. at pp. 38–39.) Section 7451 would plainly bar the Legislature from enforcing future legislation providing workers' compensation benefits to app-based drivers, because any such legislation would constitute an impermissible amendment of section 7451.[4]

The State contends that it is section 7465 (which addresses amendments to Proposition 22), and not section 7451, that precludes future legislative action in this area. (State Br. at p. 38.) The State's theory is apparently that the Court could invalidate section 7465 without triggering Proposition 22's non-severability provision. But section 7465 *grants* authority to the

[4] This Court has explained that an impermissible legislative amendment to an initiative statute is one that "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*People v. Superior Ct.* (*Pearson*) (2010) 48 Cal. 4th 564, 571.)

Legislature—albeit sharply limited authority, which is effectively impossible to exercise—for certain amendments to Proposition 22. If section 7465 did not exist in the first place, or if the Court were to strike down section 7465, then the Legislature would have *no* authority to amend Proposition 22 at all. (See *People v. Kelley* (2010) 47 Cal.4th 1008, 1032–1042 (*Kelley*).) By contrast, if section 7451 never existed, or if the Court were to invalidate section 7451 as applied to workers' compensation, then there would be no need for any further legislation, because the Legislature's exercise of its article XIV power would remain unencumbered.

The State further posits that the Legislature could provide workers' compensation benefits to app-based drivers without characterizing the drivers as employees. But a law that restores workers' compensation benefits to app-based drivers would unquestionably constitute an impermissible amendment of section 7451, which purposefully takes away those benefits. (See, e.g., *Kelley*, *supra,* 47 Cal.4th at p. 1014 [legislation need "not literally amend [an initiative] statute" to constitute an impermissible amendment]; *Pearson*, *supra*, 48 Cal.4th at p. 571 ["We have described an amendment as 'a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.' "].)

There can be no dispute that section 7451 is concerned not with the precise nomenclature used to describe app-based drivers, but rather with, in the words of the measure itself, denying drivers the protections afforded to them by "the Labor

Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations." (§ 7451.) Accordingly, there can also be no dispute that a law restoring some or all of those protections to app-drivers—but not using the word "employee"—would nevertheless constitute an impermissible amendment of section 7451. If the rule were otherwise, the Legislature could restore all employee protections to app-based drivers by using a word other than "employee" to describe them, and amend every other statutory initiative by using clever wording.

Finally, the State suggests that, although article II, section 10, subdivision (c) of the Constitution grants the Legislature authority to seek voter approval to amend an initiative statute, the Court could simply issue a "judicial declaration" that the Legislature may provide workers' compensation benefits to app-based drivers "without voter approval." (State Br. at pp. 42, 45.) But the Legislature already adopted statutes providing workers' compensation protections to app-based drivers, and section 7451 conflicts with those statutes. The State does not offer any logical reason why future Legislatures would have more article XIV power than the Legislatures that adopted the existing statutes.

In sum, there is no need for the Legislature to enact additional legislation for there to be a conflict between section 7451 and article XIV. That conflict already exists, and the Court should address that conflict here.

B. The Court can properly consider the interplay between section 7451, other provisions of Proposition 22, and the California Constitution.

The State also places great weight on the terms of the Court's order granting review as a basis for denying relief. (See, e.g., State Br. at pp. 30, 34, 37–38.) That order describes the issue presented as the following: "Does Business and Professions Code section 7451, which was enacted by Proposition 22 (the 'Protect App-Based Drivers and Services Act'), conflict with article XIV, section 4 of the California Constitution and therefore require that Proposition 22, by its own terms, be deemed invalid in its entirety?" The State argues that this language somehow precludes the Court from considering "whether section 7465 is constitutional or how to resolve any tension between article II, section 10(c) and article XIV, section 4," and also from answering "*any* questions about the Legislature's power to enact future legislation that defines app-based drivers as workers entitled to workers' compensation." (State Br. at pp. 38, 38–39, emphasis added.)

Again, the State is mistaken. As an initial matter, the State's contention that section 7451 and article XIV must be viewed in a vacuum is contrary to settled principles of constitutional and statutory interpretation. It is well established that the Court " 'do[es] not … consider the … language in isolation,' " but rather looks to " 'the various parts of the enactment[]" and "consider[s] them in the context of the statutory [framework] as a whole.' " (*Skidgel v. California Unemployment*

Ins. Appeals Bd. (2021) 12 Cal.5th 1, 14, final alteration in original.)

The State's argument also runs counter to longstanding rules governing the Court's operation. Irrespective of the language used in granting review, the Court retains broad "discretion to consider … purely legal issues raised in a petition for review or answer" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 215, citing, e.g., Cal. Rules of Court, rule 8.516(b)(1)), especially where those issues are "directly pertinent" to the issue or issues expressly before the Court (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 389, abrogated in part on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, citing Cal. Rules of Court, rule 8.516(b)(1), (2)).

Here, Plaintiffs' Petition for Review expressly defined the issue presented as "[w]hether the initiative statute known as Proposition 22 (2020) conflicts with article XIV, section 4 of the California Constitution and therefore, according to the initiative's own terms, is invalid in its entirety." Plaintiffs are making the same legal arguments that were raised in and addressed by the superior court and the Court of Appeal and that were presented in the petition for review. Thus, even if there were a problem with the Court's phrasing of the issue presented for review—and there is not—the Court is not constrained from considering all of the relevant legal issues.

C. The text of Proposition 22 requires that the Court invalidate the initiative as a whole.

Finally, the State urges the Court not to invalidate the entirety of Proposition 22 even if the Court concludes, as it should, that the Legislature's article XIV power has been encumbered. (See State Br. at p. 40.) But that relief is required by the plain text of Proposition 22, which was intentionally drafted to avoid a situation in which app-based companies might have to provide drivers with employee protections and Proposition 22's alternative benefits. (See *ante*, at p. 25.) Thus, it would be "improper" and "far-reaching" for the Court to *decline* to invalidate Proposition 22 (State Br. at p. 44), not the other way around. (See, e.g., *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ["Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."].)

The State's proffered remedies are otherwise illogical, ineffectual, or both. The State contends that the Court can merely "sever" section 7465 as it applies to workers' compensation (State Br. at p. 46), and issue "a judicial declaration that … the Legislature retains authority to define app-based drivers as workers covered under the workers' compensation system" (*id.* at p. 45; see also *id.* at p. 42 [urging the Court to "allow the Legislature to amend initiative statutes without voter approval … where it acts pursuant to its plenary

authority under article XIV, section 4"]). This contention suffers from two flaws.

First, as demonstrated above, the Legislature has already exercised its article XIV authority in AB 5, and AB 5 remains in effect and applicable to workers' compensation except as prohibited by section 7451. (See Lab. Code, §§ 2775, 3351, subd. (i).) Not only would it make little sense for the Legislature to enact duplicate legislation, but doing so would not address the underlying conflict with the Legislature's article XIV authority, i.e., section 7451. (See also *ante*, at pp. 26–30.)

Second, this Court has made clear that it will only rewrite a statute to save its constitutionality "if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute." (*Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 614–615.) Neither prong of that test can be met here. Although subdivision (a) of section 7467 contains standard severability language, subdivision (b) very clearly says the opposite about section 7451: if even "*any* … word … or application" of section 7451 is held invalid "for *any* reason," then "that decision shall apply to the entirety of the remaining provisions of this chapter, and no provision of this chapter shall be deemed valid or given force of law." (§ 7467, subd. (b), emphases added.) The non-severability language could not be more explicit, and it cannot be ignored here.

The State seems to suggest that some kind of duplicate legislation is necessary to establish " ' "the final legislative word" ' over workers' compensation," which the State concedes belongs to the Legislature, and not the electorate acting by statutory initiative. (State Br. at p. 43; see also *id.* at p. 33.) But taking that approach could turn workers' compensation into a game of ping pong between the Legislature and ballot-initiative proponents, with California workers caught in the middle. The State's approach also finds no support in the text of the Constitution, which vested full article XIV power in the Legislatures that adopted the existing statutes that guarantee workers' compensation protections to app-based drivers.

Rather than leave 1.3 million app-based drivers in limbo for years to come, the Court should decline the State's invitation to sidestep the conflict between section 7451 and the Legislature's exercise of article XIV power, and squarely address that conflict here. And because that conflict may only be resolved by invalidating section 7451 as applied to workers' compensation, Proposition 22 as a whole is also invalid.

CONCLUSION

This Court should hold that Proposition 22 is invalid in its entirety.

Dated: February 1, 2024

Respectfully submitted,

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Dated: February 1, 2024 By: */s/* Scott A. Kronland

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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